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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 88-127]

7 CFR Part 301

Mediterranean Fruit Fly

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are quarantining an area in Los Angeles County in California because of the Mediterranean fruit fly and restricting the interstate movement of regulated articles from the quarantined area. This action is necessary on an emergency basis to prevent spread of the Mediterranean fruit fly into noninfested areas of the United States.

DATES: Interim rule effective August 2, 1988. Consideration will be given only to comments postmarked or received on or before October 7, 1988.

ADDRESSES: Send an original and three copies of written comments to APHIS, USDA, Room 1143, South Building, P.O. Box 96464, Washington, DC 20090-6464. Please state that your comments refer to Docket Number 88-127. Comments received may be inspected at Room 1141 of the South Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Eddie Elder, Chief Operations Officer, Domestic and Emergency Operations, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-6365.

SUPPLEMENTARY INFORMATION:

Background

We are amending the "Domestic Quarantine Notices" by adding a new § 301.78, "Mediterranean Fruit Fly" (referred to below as the regulations). These regulations quarantine an area in Los Angeles County, California, because of the Mediterranean fruit fly and restrict the interstate movement of regulated articles from the quarantined area.

The Mediterranean fruit fly, *Ceratitis capitata* (Wiedemann), is one of the world's most destructive pests of numerous fruits and vegetables, especially citrus fruits. The Mediterranean fruit fly can cause serious economic losses. Heavy infestations can cause complete loss of crops, and losses of 25 to 50 percent are not uncommon. The short life cycle of this pest permits the rapid development of serious outbreaks.

Recent trapping surveys by inspectors of California state and county agencies and by inspectors of Plant Protection and Quarantine (PPQ), a unit within the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), reveal that portions of Los Angeles County, California are infested with the Mediterranean fruit fly. Specifically, inspectors collected two female Mediterranean fruit flies in traps in the Northridge area of Los Angeles County on July 20, 1988. Since that time, one additional male and one additional female Mediterranean fruit flies have been collected in the same area. The Mediterranean fruit fly is not known to occur anywhere else in the United States, except in Hawaii.

Officials of state agencies of California have begun an intensive Mediterranean fruit fly eradication program in the quarantined area in California. Also, as explained below, California has taken action to restrict the intrastate movement of certain articles from the quarantined area to prevent the artificial spread of the Mediterranean fruit fly within California. However, it is also necessary to restrict the interstate movement of certain articles from the quarantined area to prevent the artificial spread of the Mediterranean fruit fly to noninfested areas in other states. Accordingly, to prevent spread of the Mediterranean fruit fly, this document establishes Federal regulations, which are described below by section.

Restrictions on Interstate Movement of Regulated Articles (§ 301.78)

Section 301.78 prohibits any person from moving any regulated article interstate from any quarantined area except in accordance with conditions prescribed in the regulations. For informational purposes, a footnote (footnote 1) has been added to reference the authority of an employee to stop and inspect persons and means of conveyance, and to seize, quarantine, treat, apply remedial measures to, or otherwise dispose of regulated articles as provided in section 10 of the Plant Quarantine Act (7 U.S.C. 164a) and sections 105 and 107 of the Federal Plant Pest Act (7 U.S.C. 150dd, 150ff).

Definitions (§ 301.78-1)

Section 301.78-1 contains, for informational purposes, definitions of the following terms: "Certificate," "Compliance Agreement," "Administrator," "Infestation," "Inspector," "Interstate," "Limited permit," "Mediterranean fruit fly," "Moved," "Person," "Plant Protection and Quarantine," "Quarantined Area," "Regulated article" and "State."

Regulated Articles (§ 301.78-2)

The regulations impose conditions on the interstate movement of those articles that present a significant risk of spreading Mediterranean fruit fly if moved without restrictions from quarantined areas into or through noninfested areas. These articles, which are designated as regulated articles, may not be moved interstate from quarantined areas except in accordance with conditions specified in §§ 301.78-4 through 301.78-10.

Section 301.78-2 designates as regulated articles a number of fruits, nuts, vegetables, and berries, and soil within the drip line of plants that produce the fruits, nuts, vegetables, or berries. Based on research and experience, the articles listed in § 301.78-2 (a) and (b) as regulated articles are articles that are likely to cause spread of the Mediterranean fruit fly. In addition, § 301.78-2(c) allows designation of any other product, article, or means of conveyance as a regulated article if an inspector determines that it presents a risk of spreading the Mediterranean fruit fly and notifies the person in possession of the product,

article, or means of conveyance that it is subject to the restrictions in the regulations. This provision for "any other product, article, or means of conveyance" allows an inspector who discovers a risk of spreading Mediterranean fruit fly (e.g., a truck with Medfly pupae in cracks in the floorboards) to regulate the affected articles immediately, by informing the person in possession of the product, article, or means of conveyance that it is being regulated.

Fruits, nuts, vegetables, or berries that are canned, dried, or frozen below −17.8°C. (0°F.) are not included as regulated articles since the Mediterranean fruit fly could not survive under those conditions.

Quarantined Areas (§ 301.78–3)

As stated in § 301.78–3(a), it is necessary to quarantine areas in which the Mediterranean fruit fly has been found by an inspector, areas in which the Administrator has reason to believe the Mediterranean fruit fly is present, and areas the Administrator considers necessary to quarantine because of their proximity to the Mediterranean fruit fly or their inseparability for quarantine enforcement purposes from localities where Mediterranean fruit flies have been found.

Section 301.78–3(a) further provides that less than an entire state will be designated as a quarantined area only if the Administrator determines that (1) the state has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are equivalent to those that are imposed by our regulations with respect to the interstate movement of these articles; and (2) quarantining less than the entire state will prevent the interstate spread of the Mediterranean fruit fly. These determinations would indicate that infestations are confined to the quarantined areas and eliminate the need for designating an entire state as a quarantined area.

In accordance with these criteria, we are designating as a quarantined area an area in Los Angeles County in California. This area is as follows:

Los Angeles County

That portion of the county bounded by a line beginning at the intersection of Highway 118 and De Soto Avenue, then south along De Soto Avenue to its intersection with Vanowen Street, then east along Vanowen Street to its intersection with Corbin Avenue, then south along Corbin Avenue to its intersection with Highway 101, then east along Highway 101 to its intersection with Burbank Boulevard, then east along Burbank Boulevard to its intersection with Balboa Boulevard, then north along Balboa Boulevard to its intersection with Victory Boulevard, then east along Victory Boulevard to its intersection with Woodman Avenue, then north along Woodman Avenue to its intersection with Highway 118, then west along Highway 118 to its intersection with Sepulveda Boulevard, then north along Sepulveda Boulevard to its intersection with Rinaldi Street, then west along Rinaldi Street to its intersection with Tampa Avenue, then south along Tampa Avenue to its intersection with Highway 118, then west along Highway 118 to the point of beginning.

It is necessary to designate this portion of Los Angeles County as a quarantined area because it is an area in which the Mediterranean fruit fly has been found, or in which the Administrator has reason to believe the Mediterranean fruit fly is present, or an area necessary to regulate because of its proximity to the Mediterranean fruit fly or its inseparability for quarantine enforcement purposes from localities where Mediterranean fruit fly has been found.

There does not appear to be any reason to designate any other quarantined areas in California other than those areas specified above. California has adopted and is enforcing regulations imposing restrictions on the intrastate movement of the regulated articles that are equivalent to those imposed on the interstate movement of regulated articles under this subpart.

Section 301.78–3(b) provides that the Administrator or an inspector may designate an area as a quarantined area without publication in the **Federal Register** if there is a basis for listing the area as a quarantined area under § 301.78–3(a) and if the owner or person in possession of the area to be quarantined is given written notice of this action. This is necessary in order to prevent spread of the Mediterranean fruit fly before restrictions can be published in the **Federal Register** concerning the interstate movement of regulated articles from the designated area.

Conditions Governing the Interstate Movement of Regulated Articles From Quarantined Areas (§§ 301.78–4 Through 301.78–10)

Section 301.78–4

Section 301.78–4(a) requires regulated articles moved interstate from quarantined areas to be accompanied by a certificate or limited permit issued and attached as prescribed by §§ 301.78–5 through 301.78–10, unless moved as prescribed in § 301.78–4(b).

Section 301.78–4(b) allows a regulated article to move interstate without a certificate or limited permit if the article originates outside of a quarantined area, if it is moved through the quarantined area without stopping except for refueling or for traffic conditions such as traffic lights and stop signs, if it is shipped in an enclosed vehicle or is completely covered so as to prevent access by Mediterranean fruit flies, if the point of origin is clearly indicated on shipping documents, and if the enclosed vehicle or the enclosure which contains the regulated article is not opened, unpacked, or unloaded in the quarantined area.

Also, § 301.78–4(c) allows the Department to move interstate regulated articles without a certificate or limited permit for experimental or scientific purposes. However, they must be moved in accordance with a permit issued by the Administrator, under conditions that prevent the spread of Mediterranean fruit fly.

Section 301.78–4 contains a footnote (number 2) to remind persons of other applicable domestic plant quarantine and regulation requirements that need to be met for interstate movement.

Section 301.78–5

Under Federal domestic plant quarantine programs, there is a difference between the use of certificates and limited permits. Certificates are issued for regulated articles upon a finding by an inspector that, because of certain conditions (e.g., the article is free of Mediterranean fruit fly), there is an absence of a pest risk prior to movement. Regulated articles accompanied by a certificate can be moved interstate without further restrictions being imposed. Limited permits are issued for regulated articles when an inspector has determined that, because of a possible pest risk, such articles may be safely moved interstate only subject to further restrictions, such as movement to limited areas and movement for limited purposes. Section 301.78–5 explains the conditions for issuing a certificate or limited permit.

Specifically, § 301.78–5(a) provides that a certificate shall be issued by an inspector for the movement of a regulated article if the inspector determines that the article: (1) Is free of Mediterranean fruit fly, has been treated under direction of an inspector in accordance with § 301.78–10, or comes from a premise of origin which is free from Mediterranean fruit fly and has not been exposed to Mediterranean fruit fly; (2) will be moved in compliance with any additional emergency conditions deemed necessary to prevent the spread of Mediterranean fruit fly pursuant to section 105 of the Federal Plant Pest Act; and (3) is eligible for unrestricted

movement under all other federal domestic plant quarantines and regulations applicable to that article.

Section 301.78–5(b) provides for the issuance of a limited permit (in lieu of a certificate) by an inspector for movement of a regulated article if the inspector determines that the article is to be moved to a specific destination for specified handling, utilization or processing, and that the movement will not result in the spread of Mediterranean fruit fly.

Section 301.78–5(c) allows any person who has entered into and is operating under a compliance agreement to execute a certificate or limited permit for the interstate movement of a regulated article after an inspection has made a determination that the article is eligible for a certificate or limited permit in accordance with § 301.78–5 (a) or (b).

Also, § 301.78–5(d) contains provisions for the withdrawal of a certificate or limited permit by an inspector upon a determination by the inspector that the holder of the certificate or limited permit has not complied with conditions for the use of the document. This section also contains provisons for notifying the holder of the reasons for the withdrawal and for holding a hearing if there is any conflict concerning any material fact.

Section 301.78–6

Section 301.78–6 provides for the issuance and cancellation of compliance agreements. Specifically, compliance agreements can be entered into by any person engaged in growing, handling, or moving regulated articles who agrees in writing to comply with the provisions of § 301.78. Compliance agreements are provided for the convenience of persons who are involved in frequent shipments of regulated articles from quarantined areas; they are written to ensure that persons issuing certificates or limited permits are knowledgeable with respect to the requirements of § 301.78 and have agreed to comply with them.

Section 301.78–6 also provides that an inspector supervising enforcement of a compliance agreement may cancel the agreement upon finding that a person who has entered into the agreement has failed to comply with any of the provisions of the regulations. The inspector will notify the holder of the compliance agreement of the reasons for cancellation and offer an opportunity for a hearing to resolve any conflicts of material fact. This section contains a footnote (number 4) to explain where compliance agreement forms can be obtained.

Sections 301.78–7, 301.78–8 and 301.78–9

Section 301.78–7 provides that any person who desires a certificate or limited permit to move regulated articles should request that an inspector issue a certificate or limited permit as far in advance of movement as possible (no less than 48 hours before the desired movement). A footnote (number 3) is added for informational purposes to indicate how to contact the inspectors for inspection or how to obtain additional information from offices of Plant Protection and Quarantine.

Section 301.78–8 requires the certificate or limited permit issued for the movement of the regulated article to be attached to the regulated article, or to a container carrying the regulated article, or to the accompanying waybill or other shipping document during the interstate movement.

These provisions are necessary for enforcement purposes and to ensure that persons desiring inspection services can obtain them before the intended movement date.

Section 301.78–9 explains the APHIS policy that services of an inspector that are needed to comply with the provisions of the quarantine and regulations in § 301.78 are provided without cost during normal business hours, but that will not be responsible for any other costs or charges.

Section 301.78–10

Section 301.78–10 identifies as authorized treatments those treatments for the Mediterranean fruit fly that are contained in the Plant Protection and Quarantine Treatment Manual. Research has determined that these treatments would be adequate to destroy the Mediterranean fruit fly. Treatment schedules have not been developed for all regulated articles; however, an individual may obtain a certificate or limited permit for the interstate movement of some regulated articles by complying with the inspection provisions of § 301.78–5 (a), (b) or (c), as an alternative to treatment of those articles. The treatment schedule for tomato, and bell pepper and tomato in § 301.78–10 are as follows:

(a) *Tomato:* Fumigation with methyl bromide at normal atmosphere pressure with 32 g/m^3 for 3½ hours at 21°C. (70°F.) or above.

(b) *Bell pepper and tomato:* Heat the article by saturated water vapor at 44.44°C. (112°F.) until approximate center of article reaches 44.44°C. (112°F.) and maintain at 44.44°C. (112°F.) for 8¾ hours, then immediately cool.

Note.—Commodities should be tested by the shipper at the 44.44°C. (112°F.) temperature to determine each commodity's tolerance to the treatment before commercial treatments are attempted. Pretreatment conditioning is optional. Such conditioning is the responsibility of the shipper and would be conducted in accordance with procedures the shipper believes necessary. It is common to perform pretreatment conditioning.

Emergency Action

James W. Glosser, Administrator of the Animal and Plant Health Inspection Service, has determined that an emergency situation exists, which warrants publication of this interim rule without prior opportunity for public comment. Because the Mediterranean fruit fly could be spread artifically to noninfested areas of the United States, it is necessary to act immediately to control its spread.

Since prior notice and other public procedures with respect to this interim rule are impracticable and contrary to the public interest under these emergency conditions, there is good cause under 5 U.S.C. 553(d)(3) for making this interim rule effective upon signature. We will consider comments postmarked or received within 60 days of publication of this interim rule in the **Federal Register.** Any amendments we make to this interim rule as a result of these comments will be published in the **Federal Register** as soon as possible following the close of the comment period.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

This regulation affects the interstate movement of regulated articles from a portion of Los Angeles County, California. It appears that there is very little commercial activity that may be affected by this rule in the quarantined area. Specifically, the quarantined area is comprised of private residences and

small wholesale dealers and shops. The small entities that may be affected by this regulation appear to consist of approximately 80 nurseries, 5 open fruit stands, 2 community gardens, two regularly scheduled swap meets (flea markets), 3 caterers who send lunch "chuckwagons" to job sites in the quarantined area, 1 airport with no scheduled passenger flights, 1 tomato and pepper grower with approximately 4000 plants on a ½-acre field, and 1 tomato grower with a 3 acre field, both of whom sell their products locally at roadside stands.

Although these are small entities, they sell regulated articles primarily for local intrastate, not interstate, movement. Also, many of the retail shops and nurseries sell other items in addition to the regulated articles so that the effect, if any, of this regulation on these entities appears to be minimal. Further, the number of affected entities is small compared with the thousands of small entities that move these articles interstate from nonquarantined areas in California and other states.

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

Paperwork Reduction Act

The regulations in this subpart contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507 *et seq.*).

Executive Order 12372

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

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation, Mediterranean fruit fly, Incorporation by reference.

PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, 7 CFR Part 301 is amended to read as follows:

1. The authority citation for Part 301 continues to read as follows:

Authority: 7 U.S.C. 150dd, 150ee, 150ff; 161, 162, and 167; 7 CFR 2.17, 2 51, and 371.2.

2. Part 301 is amended by adding a new "Subpart—Mediterranean Fruit Fly" to read as follows:

Subpart—Mediterranean Fruit Fly

Sec.

Subpart—Mediterranean Fruit Fly

§ 301.78 Restrictions on interstate movement of regulated articles.

No person shall move interstate from any quarantined area any regulated article except in accordance with this subpart.[1]

§ 301.78–1 Definitions.

In this subpart the following definitions apply:

Administrator. The Administrator of the Animal and Plant Health Inspection Service, or any officer or employee of the United States Department of Agriculture to whom the Administrator has delegated authority to act in his or her stead.

Certificate. A document in which an inspector or person operating under a compliance agreement affirms that a specified regulated article is free of Mediterranean fruit fly and may be moved interstate to any destination.

Compliance agreement. A written agreement between Plant Protection and Quarantine and a person engaged in growing, handling, or moving regulated articles, wherein the person agrees to comply with the provisions of this subpart and any conditions imposed pursuant to it.

Infestation. The presence of the Mediterranean fruit fly or the existence of circumstances that make it reasonable to believe that the Mediterranean fruit fly is present.

Inspector. Any employee of Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or other person authorized by the Administrator to enforce this subpart.

Interstate. From any state into or through any other state.

Limited permit. A document in which an inspector or person operating under a compliance agreement affirms that the regulated article identified on the document is eligible for interstate movement in accordance with § 301.78–5(b) of this subpart only to a specified destination and only in accordance with specified conditions.

Mediterranean fruit fly. The insect known as Mediterranean fruit fly (*Ceratitis capitata* (Wiedemann)) in any stage of development.

Moved (Move, Movement). Shipped, offered for shipment to a common carrier, received for transportation or transported by a common carrier, or carried, transported, moved, or allowed to be moved.

Person. Any association, company, corporation, firm, individual, joint stock company, partnership, society, or any other legal entity.

Plant Protection and Quarantine. Plant Protection and Quarantine, Animal and Plant Health Inspection Service, United States Department of Agriculture.

Quarantined area. Any state, or any portion of a state, listed in § 301.78–3(c) of this subpart or otherwise designated as a quarantined area in accordance with § 301.78–3(b) of this subpart.

Regulated article. Any article listed in § 301.78–2 (a) or (b) of this subpart or otherwise designated as a regulated article in accordance with § 301.78–2(c) of this subpart.

State. The District of Columbia, Puerto Rico, the Northern Mariana Islands, or any state, territory or possession of the United States.

§ 301.78–2 Regulated articles.

The following are regulated articles:

(a) The following fruits, nuts, vegetables and berries:

Almond with husk (*Prunus dulcis* (P. amygdalus))
Apple (*Malus sylvestris*)
Apricot (*Prunus armeniaca*)
Avocado (*Persea americana*)
Black Myrobalan (*Terminalia cherbula*)
Cherries (sweet and sour) (*Prunus avium, P. cerasus*)
Citrus citron (*Citrus medica*)
Date (*Phoenix dactylifera*)
Fig (*Ficus carica*)
Grape (*Vitis* spp.)
Grapefruit (*Citrus paradisi*)
Guava (*Psidium guajava*)

[1] Any properly identified employee is authorized to stop and inspecct persons and means of conveyance, and to seize, quarantine, treat, apply other remedial measures to destroy, or otherwise dispose of regulated articles as provided in section 10 of the Plant Quarantine Act (7 U.S.C. 164a) and sections 105 and 107 of the Federal Plant Pest Act (7 U.S.C. 150dd, 150ff).

Japanese persimmon (*Diospyros kaki*)
Japanese plum (*Prunus salicina*)
Kiwi (*Actinidia chinensis*)
Kumquat (*Fortunella japonica*)
Lemon (*Citrus limon*) (smooth-skinned lemon of commerce that is cleaned and waxed)
Lime, sweet (*Citrus aurantiifolia*)
Loquat (*Eriobotrya japonica*)
Mandarin orange (*Citrus reticulata*) (tangerine)
Mango (*Mangifera indica*)
Mock orange (*Murraya* exotica)
Mountain apple (*Syzigium malaccense* (*Eugenia malaccensis*)
Natal plum (*Carissa macrocarpa*)
Nectarine (*Prunus persica* var. *nectarina*)
Olive (*Olea europea*)
Opuntia cactus (*Opuntia* spp.)
Orange, calamondin (*Citrus riticulata* x. *Fortunella*)
Orange, Chinese (*Fortunella japonica*)
Orange, king (*Citrus reticulata* x. *C. sinensis*)
Orange, sweet (*Citrus sinensis*)
Orange, Unshu (*Citrus reticulata* var. *Unshu*)
Papaya (*Carica papaya*)
Peach (*Prunus persica*)
Pear (*Pyrus communis*)
Pepper (*Capsicum frutescens, C. annuum*)
Pineapple guava (*Feijoa sellowiana*)
Plum (*Prunus americana*)
Pomegranate (*Punica granatum*)
Pomiform guajava (*Psidium guajava Pomiferum*)
Prune (*Prunus domestica*)
Pummelo (*Citrus grandis*)
Pyriform guajava (*Psidium guajava Pyriform*)
Quince (*Cydonia oblonga*)
Rose apple (*Eugenia jambos*)
Sour orange (*Citrus aurantium*)
Spanish cherry (Brazilian plum) (*Eugenia dombeyi* (*E. brasiliensis*))
Strawberry guava (*Psidium cattleianum*)
Surinam cherry (*Eugenia uniflora*)
Tomato (pink and red ripe) (*Lycopersicon esculentum*)
Walnut with husk (*Juglans* spp.)
White sapote (*Casimiroa edulis*)
Yellow oleander (Bestill) (*Thevetia peruviana*)

Any fruits, nuts, vegetables, or berries which are canned or dried or frozen below −17.8°C. (0°F.) are not regulated articles.

(b) Soil within the drip area of plants that are producing or have produced the fruits, nuts, vegetables, or berries listed in paragraph (a).

(c) Any other product, article, or means of conveyance, not covered by paragraph (a) or (b) of this section, that an inspector determines presents a risk of spread of the Mediterranean fruit fly and notifies the person in possession of it that the product, article or means of conveyance is subject to the restrictions of this subpart.

§ 301.78–3 Quarantined areas.

(a) Except as otherwise provided in paragraph (b) of this section, the Administrator shall list as a quarantined area in paragraph (c) of this section, each state, or each portion of a state, in which the Mediterranean fruit fly has been found by an inspector, in which the Administrator has reason to believe that the Mediterranean fruit fly is present, or that the Administrator considers necessary to regulate because of its proximity to the Mediterranean fruit fly or its inseparability for quarantine enforcement purposes from localities in which the Mediterranean fruit fly has been found. Less than an entire state will be designated as a quarantined area only if the Administrator determines that:

(1) The state has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are equivalent to those imposed by this subpart on the interstate movement of regulated articles; and

(2) The designation of less than the entire state as a quarantined area will prevent the interstate spread of the Mediterranean fruit fly.

(b) The Administrator or an inspector may temporarily designate any nonquarantined area in a state as a quarantined area in accordance with the criteria specified in paragraph (a) of this section for listing such area. The Administrator will give written notice of this temporary designation to the owner or person in possession of the nonquarantined area; thereafter, the interstate movement of any regulated article from an area temporarily designated as a quarantined area is subject to this subpart. As soon as practicable, this area will be added to the list in paragraph (c) of this section or the designation shall be terminated by the Administrator or an inspector. The owner or person in possession of an area for which designation is terminated will be given notice of the termination as soon as practicable.

(c) The areas described below are designated as quarantined areas:

California

Los Angeles County

That portion of the county bounded by a line beginning at the intersection of Highway 118 and De Soto Avenue, then south along De Soto Avenue to its intersection with Vanowen Street, then east along Vanowen Street to its intersection with Corbin Avenue, then south along Corbin Avenue to its intersection with Highway 101, then east along Highway 101 to its intersection with Burbank Boulevard, then east along Burbank Boulevard to its intersection with Balboa Boulevard, then north along Balboa Boulevard to its intersection with Victory Boulevard, then east along Victory Boulevard to its intersection with Woodman Avenue, then north along Woodman Avenue to its intersection with Highway 118, then west along Highway 118 to its intersection with Sepulveda Boulevard, then north along Sepulveda Boulevard to its intersection with Rinaldi Street, then west along Rinaldi Street to its intersection with Tampa Avenue, then south along Tampa Avenue to its intersection with Highway 118, then west along Highway 118 to the point of beginning.

§ 301.78–4 Conditions governing the interstate movement of regulated articles from quarantined areas.[2]

Any regulated article may be moved interstate from a quarantined area only if moved under the following conditions:

(a) With a certificate or limited permit issued and attached in accordance with §§ 301.78–5 and 301.78–8 of this subpart;

(b) Without a certificate or limited permit, if:

(1) The regulated article originated outside of any quarantined area and is moved through (without stopping except for refueling, or for traffic conditions, such as traffic lights or stop signs) the quarantined area in an enclosed vehicle or is completely enclosed by a covering adequate to prevent access by Mediterranean fruit flies (such as canvas, plastic, or closely woven cloth) while moving through the quarantined area, and

(2) The point of origin of the regulated article is indicated by shipping documents and the enclosed vehicle or the enclosure which contains the regulated article is not opened, unpacked, or unloaded in the quarantined area.

(c) Without a certificate or limited permit, if the regulated article is moved:

(1) By the United States Department of Agriculture for experimental or scientific purposes;

(2) Pursuant to a permit issued by the Administrator for the regulated article;

(3) Under conditions specified on the permit and found by the Administrator to be adequate to prevent the spread of Mediterranean fruit fly; and,

(4) With a tag or label bearing the number of the permit issued for the regulated article attached to the outside of the container of the regulated article or attached to the regulated article itself if not in a container.

§ 301.78–5 Issuance and cancellation of certificates and limited permits.

(a) A certificate shall be issued by an inspector for the interstate movement of a regulated article if the inspector:

(1)(i) Determines that the regulated article has been treated under the direction of an inspector in accordance with § 301.78–10 of this subpart; or

[2] Requirements under all other applicable federal domestic plant quarantines and regulations must also be met.

(ii) Determines, based on inspection of the premises of origin, that the premises of origin are free from Mediterranean fruit flies and the regulated article has not been exposed to Mediterranean fruit fly; or

(iii) Determines, based on inspection of the regulated article, that it is free of Mediterranean fruit fly; and

(2) Determines that the regulated article is to be moved in compliance with any additional emergency conditions the Administrator may impose under the Federal Plant Pest Act to prevent the spread of the Mediterranean fruit fly; and

(3) Determines that the regulated article is eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to such articles.

(b) An inspector [3] will issue a limited permit for the interstate movement of a regulated article if the inspector determines that:

(1) The regulated article is to be moved interstate to a specified destination for specified handling, utilization, or processing (the destination and other conditions to be listed in the limited permit), and this interstate movement will not result in the spread of the Mediterranean fruit fly because life stages of the Mediterranean fruit fly will be destroyed by the specified handling, utilization, or processing;

(2) The regulated article is to be moved interstate in compliance with any additional emergency conditions necessary to prevent the spread of the Mediterranean fruit fly pursuant to section 105 of the Federal Plant Pest Act (7 U.S.C. 150dd); and

(3) The regulated article is eligible for interstate movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

(c) Certificates and limited permits for use for interstate movement of regulated articles may be issued by an inspector or person operating under a compliance agreement. A person operating under a compliance agreement may issue a certificate for the interstate movement of a regulated article if the inspector has made the determination that the regulated article is otherwise eligible for a certificate in accordance with paragraph (a) of this section. A person operating under a compliance agreement may issue a limited permit for interstate movement of a regulated article when the inspector has made the determination that the regulated article is eligible for a limited permit in accordance with paragraph (b) of this section.

(d) Any certificate or limited permit that has been issued may be withdrawn by an inspector orally or in writing, if he or she determines that the holder of the certificate or limited permit has not complied with all conditions under this subpart for the use of the certificate or limited permit. If the withdrawal is oral, the withdrawal and the reasons for the withdrawal shall be confirmed in writing as promptly as circumstances allow. Any person whose certificate or limited permit has been withdrawn may appeal the decision in writing to the Administrator within ten days after receiving the written notification of the withdrawal. The appeal must state all of the facts and reasons upon which the person relies to show that the certificate or limited permit was wrongfully withdrawn. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

§ 301.78–6 Compliance agreement and cancellation.

(a) Any person who moves regulated articles may enter into a compliance agreement when an inspector determines that the person understands this subpart.[4]

(b) Any compliance agreement may be cancelled orally or in writing by an inspector whenever the inspector finds that the person who has entered into the compliance agreement has failed to comply with this subpart or any conditions imposed pursuant to this subpart. If the cancellation is oral, the cancellation and the reasons for the cancellation shall be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been cancelled may appeal the decision, in writing, within ten days after receiving written notification of the cancellation. The appeal must state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully cancelled. As promptly as circumstances allow, the Administrator shall grant or deny the appeal, in writing, stating the reasons for the decision. A hearing shall be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

§ 301.78–7 Assembly and inspection of regulated articles.

(a) Any person (other than a person authorized to issue certificates or limited permits under § 301.78–5(c) of this subpart), who desires to move interstate a regulated article accompanied by a certificate or limited permit shall, as far in advance of the desired interstate movement as possible (no less than 48 hours before the desired interstate movement), request an inspector [5] to issue the certificate or limited permit.

(b) The regulated article shall be assembled at the place and in the manner the inspector designates as necessary to comply with this subpart.

§ 301.78–8 Attachment and disposition of certificates and limited permits.

(a) A certificate or limited permit required for the interstate movement of a regulated article, at all times during the interstate movement, must be securely attached to the outside of the container containing the regulated article, securely attached to the regulated article itself if not in a container, or securely attached to the consignee's copy of the accompanying waybill or other shipping document: *Provided*, however, that the requirements of this section may be met by attaching the certificate or limited permit to the consignee's copy of the waybill or other shipping document only if the regulated article is sufficiently described on the certificate, limited permit, or shipping document to identify the regulated article.

(b) The certificate or limited permit for the interstate movement of a regulated article must be furnished by the carrier to the consignee at the destination of the regulated article.

§ 301.78–9 Costs and charges.

The services of the inspector during normal business hours will be furnished without cost. The United States Department of Agriculture will not be responsible for any other costs or charges.

[3] Services of an inspector may be requested by contacting local offices of Plant Protection and Quarantine which are listed in telephone directories. The addresses and telephone numbers of local offices may also be obtained from the Administrator, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, Federal Building, Hyattsville, Maryland, 20782.

[4] Compliance agreement forms are available without charge from the Permits Unit, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, Federal Building, Hyattsville, MD 20782, and from local offices of the Plant Protection and Quarantine, which are listed in telephone directories.

[5] See footnote 3 to § 301.78–5 paragraph (b).

§ 301.78-10 Treatments.

Treatment schedules listed in the Plant Protection and Quarantine Treatment Manual to destroy Mediterranean fruit fly on regulated articles are authorized treatments. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, "Materials incorporated by reference." The following treatments are also authorized:

(a) *Tomato:* Fumigation with methyl bromide at normal atmospheric pressure with 32 g/m³ for 3½ hours at 21 °C. (70 °F.) or above.

(b) *Bell pepper and tomato:* Heat the article by saturated water vapor at 44.44 °C. (112 °F.) until approximate center of article reaches 44.44 °C. (112 °F.) and maintain at 44.44 °C. (112 °F.) for 8¾ hours, then immediately cool.

Note.—Commodities should be tested by the shipper at the 44.44 °C. (112 °F.) temperature to determine each commodity's tolerance to the treatment before commercial treatments are attempted. Pretreatment conditioning is optional. Such conditioning is the responsibility of the shipper and would be conducted in accordance with procedures the shipper believes necessary. It is common to perform pretreatment conditioning.

Done at Washington, DC, this 2nd day of August, 1988.

W.F. Helms,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 88-17789 Filed 8-5-88; 8:45 am]

BILLING CODE 3410-34-M

Agricultural Marketing Service

7 CFR Part 948

Irish Potatoes Grown in Colorado Area II; Expenses and Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule, regarding Irish potatoes grown in Colorado Area II, authorizes expenses and establishes an assessment rate under Marketing Order No. 948 for the 1988–89 fiscal period. Authorization of this budget will allow the San Luis Valley Potato Administrative Committee Area II to incur expenses reasonable and necessary to administer the program. Funds to cover these expenses will be derived from assessments on handlers.

EFFECTIVE DATE: September 1, 1988 through August 31, 1989.

FOR FURTHER INFORMATION CONTACT: Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456, telephone 202-447-5331.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order No. 948 [7 CFR Part 948] regulating the handling of potatoes grown in Colorado. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 125 handlers of Colorado Area II potatoes under this marketing order and approximately 290 potato producers. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of the handlers and producers may be classified as small entities.

The marketing order requires that the assessment rate for a particular fiscal period shall apply to all assessable potatoes handled from the beginning of such period. An annual budget of expenses is prepared by the committee and submitted to the Secretary for approval. The members of the committee are handlers and producers of potatoes. They are familiar with the committee's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate an appropriate budget. The budget was formulated and discussed in a public meeting. Thus, all directly affected persons have had an opportunity to participate and provide input.

The assessment rate recommended by the committee is derived by dividing anticipated expenses by expected shipments of potatoes. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses. A recommended budget and rate of assessment is usually acted upon by the committee before the season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approval must be expedited so that the committee will have funds to pay its expenses.

The San Luis Valley Potato Administrative Committee Area II met on June 16, 1988, and unanimously recommended 1988-89 expenditures of $43,552. The budget is $1,350 more than last year's due to salary increases for the committee manager and office personnel and added insurance costs. The committee also recommended an assessment rate of $0.0035 per hundredweight (cwt.) up from last season's rate of $.0034. This rate, when applied to anticipated shipments of 11,800,000 hundredweight, will yield $41,300 in assessment revenue which, when added to interest income and reserve funds, will be adequate to cover budgeted expenses.

While this action will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

A proposed rule was published in the **Federal Register** [53 FR 27525, July 21, 1988]. That document contained a proposal to add § 948.297 to establish expenses and an assessment rate for the San Luis Valley Potato Administrative Committee Area II. That rule provided that interested persons could file comments through August 1, 1988. No comments were received.

It is found that the specified expenses are reasonable and likely to be incurred, and that such expenses and the specified assessment rate to cover such expenses will tend to effectuate the declared policy of the Act.

This budget and assessment rate should be expedited because the committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis. In addition, handlers are aware of this action which was recommended by the

committee at a public meeting. Therefore, the Secretary also finds that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553).

List of Subjects in 7 CFR Part 948

Marketing agreements and orders, Potatoes (Colorado).

For the reasons set forth in the preamble, 7 CFR Part 948 is amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

1. The authority citation for 7 CFR Part 948 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 948.297 is added to read as follows:

Note.—This section prescribes the annual assessment rate and will not be published in the Code of Federal Regulations.

§ 948.297 Expenses and assessment rate.

Expenses of $43,552 by the San Luis Valley Potato Administrative Committee Area II are authorized, and an assessment rate of $0.0035 per hundredweight of assessable potatoes is established for the fiscal period ending August 31, 1989. Unexpended funds may be carried over as a reserve.

Dated: August 3, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 88–17790 Filed 8–5–88; 8:45 am]

BILLING CODE 3410–02–M

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Organization and Operations of Federal Credit Unions; Compensation of Officials

AGENCY: National Credit Union Administration ("NCUA").

ACTION: Final rule.

SUMMARY: This amendment to § 701.33 of NCUA's Rules and Regulations: (1) Provides guidance for FCU indemnification of officials and employees; and (2) conforms the regulation to a recent change in section 112 of the Federal Credit Union ("FCU") Act (12 U.S.C. 1761a), permitting an FCU board of directors to compensate one board officer of its choosing. The regulation has also been given a new title which more accurately reflects the content of the regulation: "Reimbursement, Insurance, and Indemnification of Officials and Employees."

EFFECTIVE DATE: September 7, 1988.

ADDRESS: National Credit Union Administration, 1776 G Street NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Allan Meltzer, Assistant General Counsel, or Julie Tamuleviz, Staff Attorney, Office of General Counsel, at the above address or telephone: (202) 357–1030.

SUPPLEMENTARY INFORMATION:

Background

On February 10, 1988, the NCUA Board issued a proposal to amend § 701.33 of NCUA's Rules and Regulations ("Compensation of Officials"). 53 FR 4992 (Feb. 19, 1988). The proposal had three parts:

1. To amend § 701.33(a) to provide that an FCU's board of directors may determine, and specify in their bylaws, which board officer may be compensated as such. This change was recommended to conform the regulation to section 112 of the FCU Act (12 U.S.C. 1761a), which was amended in 1982. Prior to that time, the treasurer was the only board officer who could be compensated as an FCU official.

2. To amend § 701.33 to permit an FCU to reimburse its officials for pay or leave (e.g., annual leave, leave without pay) actually lost while attending a meeting of the board of directors or of the supervisory or credit committees.

3. To amend § 701.33 to provide regulatory guidance to FCU's on indemnification and the purchase of insurance to provide for indemnification of its officials and employees. In the past, NCUA had interpreted section 107(2) (the authority to sue and be sued) and section 107(16) (the incidental powers clause) of the FCU Act (12 U.S.C. 1757(2), 1757(16)) as providing an FCU with the authority to indemnify its officials and employees under limited circumstances. However, no specific guidance had been given.

Public Comment

The NCUA Board received 86 comments: 73 from FCU's; 2 from state-chartered credit unions: 6 from credit union leagues; 3 from trade associations; and 2 from individuals.

A. Proposal To Amend Section 701.33 To Conform With Section 112 of the FCU Act (12 U.S.C. 1761a)

Few of the commenters addressed the first proposal. Those that did favored the change. The Board is amending § 701.33(a) to conform it to section 112 of the FCU Act.

Article VIII, Section 1 of the current FCU Bylaws permits an FCU's board of directors to designate the board officer, if any, that will be compensated. Some FCU's may be operating under older versions of the FCU Bylaws which either do not permit compensation of any board officer, or limit compensation to the financial officer (treasurer). These FCU's will have to adopt Article VIII, Section 1 of the FCU Bylaws if they want to compensate a board officer, or if they want to compensate an officer other than the treasurer.

B. Proposal To Reimburse Officials for Pay or Leave Lost While Attending Board of Directors or Committee Meetings

All 86 commenters addressed the suggestion to authorize reimbursing officials for pay or leave actually lost while attending board or committee meetings: 62 were opposed; 22 were in favor; and 2 opposed the proposal, but favored reimbursing officials for pay or leave lost while attending credit union conferences and seminars. (Sixteen of the 22 commenters favoring the proposal also favored permitting officials to be reimbursed for pay or leave lost while attending credit union conferences and seminars.)

The primary reasons given for opposing the proposal concerned the credit union volunteer spirit—that reimbursement was contrary to that philosophy; that voluntarism is what makes credit unions different from other financial institutions; and that easing the reimbursement restriction further could endanger the tax-exempt status of credit unions. Commenters were also concerned about the possible effects of implementing such an authorization: Dissension among board members where some might receive more reimbursement than others; reluctance by some officials to publicly disclose their salaries; additional IRS reporting requirements for FCU's; difficulty with verifying officials' claims of lost pay or leave; and creation of an incentive to officials to hold meetings during working hours.

Commenters favoring the proposal to reimburse officials for lost pay or leave generally noted that the proposal would assist FCU's in obtaining and keeping qualified officials. Most of these commenters also asked that the proposed reimbursement be extended to credit union conferences and seminars. Many of those favoring the proposal stated their assumption that it is currently permissible to reimburse

officials for pay or leave actually lost while attending credit union conferences and seminars.

NCUA staff had recommended this proposal to the NCUA Board in response to FCU's expressing a need for reimbursement for lost pay and leave to attract and retain qualified volunteers. The comments received on the proposal, however, indicate the vast majority of FCU's feel such reimbursement is unnecessary and may be harmful to the credit union spirit. The NCUA Board has decided not to go forward with this proposal. The Board also hereby clarifies that under NCUA's current Rules and Regulations reimbursement of officials for lost pay or leave is not permitted.

C. Proposal To Permit Indemnification of FCU Officials and Employees

The NCUA Board's third proposed change to § 701.33 was also designed to encourage voluntary service: Establishment of guidelines for indemnification and the purchase of insurance to provide for indemnification. Thirty-five of the commenters addressed this proposal: 34 supported it and one opposed. In general, the commenters agreed that indemnification protection would enhance the ability of an FCU to attract volunteers, and many expressed the belief that such protection was a necessity in today's litigious society.

As to the proposed scope of the amendment, two commenters suggested that the definition of "official" be expanded to include *all* volunteers serving on FCU committees—the proposal had included only members of the credit and supervisory committees. Because the primary purpose of the indemnification provision is to encourage voluntarism, the NCUA Board concurs and is expanding the definition of "official" in the final amendment to read as follows: "An 'official' is a person who is or was a member of the board of directors, credit committee, supervisory committee, or other volunteer committee established by the board of directors."

Two commenters believed that NCUA should set the standards for indemnification rather than allow FCU's to elect to apply the standards of state law or the Model Business Corporation Act. The NCUA Board considered a range of possibilities—from imposing the clear Federal standard suggested to allowing state law to control entirely. A middle position has been found appropriate.

Under the final amendment, an FCU will be free to choose one of three options: No indemnification; indemnification under the state enabling law applicable to its neighboring state-chartered credit unions; or indemnification under the Model Business Corporation Act. The only caveat is that any FCU bylaw or charter amendment relating to indemnification, like all other such amendments, must be approved by NCUA.

This approach maximizes FCU flexibility (particularly in states which have not enacted an indemnification-enabling statute applicable to credit unions), limits the instances where an FCU or NCUA must determine which state indemnification law is applicable, and accommodates state and local interests.

One commenter suggested that an FCU be authorized to combine provisions of state law and the Model Business Corporation Act in formulating its indemnification standards. An FCU should be able to elect to follow either state law or the Model Act, but not both, since each represents a unified whole. This option should provide adequate flexibility. Permitting an FCU to select portions of state law and the Model Act would likely lead to inconsistency and confusion.

The proposal provided that an FCU which elects to provide indemnification shall specify whether it will follow state law or the Model Act, and further provided that failure to make an election would be deemed a decision not to provide indemnification. Several commenters objected to this portion of the proposal, stating that an FCU should have the flexibility to provide indemnification on a case-by-case basis if appropriate, and that only an affirmative decision not to provide indemnification should be binding on an FCU. The NCUA Board agrees, and the language treating a failure to make an election as an affirmative decision not to provide indemnification has been deleted.

Several commenters objected to the language prohibiting indemnification "for expenses, penalties, or other payments incurred in an administrative proceeding brought by the National Credit Union Administration unless the official or employee substantially prevails on the merits." These commenters were concerned that NCUA could prevail in an administrative proceeding even though an official or employee acted in good faith. One commenter was concerned that this provision might have an inhibiting effect on officials or employees.

Under most state provisions and under the Model Business Corporation Act, indemnification is not available for an employee or official who acts recklessly, wantonly, fraudulently, or in bad faith, receives an improper personal benefit, or does not have reason to believe that his actions are in the best interests of the FCU. This would generally be the case when NCUA prevails in an administrative action; the limitation on indemnification contained in the proposed regulation would therefore affect few, if any, cases. NCUA's interests are therefore adequately protected, and this provision has been deleted from the final rule.

As noted in the proposed amendment, the power to provide for indemnification does not relieve an FCU of its responsibility to determine whether indemnification is appropriate under the circumstances. NCUA will monitor indemnification provisions for consistency with the indemnification standards chosen, for the safety and soundness implications for the institution, and for their application in a given case.

Lastly, the final rule clarifies, as did the proposal, that the purchase of liability insurance is an acceptable method of providing indemnification protection to officials and employees.

D. Change in Title of the Regulation

Section 701.33 was previously entitled "Compensation of Officials." Based on certain of the comments received on the proposal, it appears that this title may have contributed to a misimpression that the regulation authorizes FCU's to compensate board and committee members. The regulation has been retitled "Reimbursement, Insurance, and Indemnification of Officials and Employees." This title more accurately reflects the intent of the regulation.

Regulatory Procedures

Regulatory Flexibility Act

The NCUA Board has determined and certifies that these amendments will not have a significant economic impact on a substantial number of small credit unions. The changes are directed at clarification and reduction of regulatory confusion and interpretive burdens, rather than creation of new regulatory restrictions. Therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The amendments do not impose any paperwork requirements.

Executive Order 12612

The NCUA Board has determined that this amendment does not have significant federalism implications. The amendment has no effect on federally-insured, state-chartered credit unions.

The amendment attempts to put FCU's in virtually the same position as their state-chartered credit union neighbors. The sole differences are that an FCU will have the option of following the Model Business Corporation Act, and that any FCU bylaw or charter amendment relating to indemnification must be approved by NCUA. Thus the effect on state interests is likely to be minimal. The first difference is needed to accommodate FCU's in states without indemnification-enabling statutes and to ease the need on the part of FCU's and NCUA to determine what state law is appropriate. The second merely maintains NCUA's general oversight of FCU charters and bylaws.

List of Subjects in 12 CFR Part 701

Credit unions, Indemnification.

By the National Credit Union Administration Board on July 27, 1988.

Becky Baker,

Secretary, NCUA Board.

Accordingly, NCUA amends 12 CFR Part 701 as follows:

PART 701—[AMENDED]

1. The authority citation for Part 701 continues to read as follows:

Authority: 12 U.S.C. 1755, 12 U.S.C. 1756, 12 U.S.C. 1757, 12 U.S.C. 1759, 12 U.S.C. 1761a, U.S.C. 1761b, 12 U.S.C. 1766, 12 U.S.C. 1767, 12 U.S.C. 1782, 12 U.S.C. 1784, 12 U.S.C. 1787, 12 U.S.C. 1789, and 12 U.S.C. 1798.

Section 701.31 is also authorized by 15 U.S.C. 1601 et seq., 42 U.S.C. 1981 and 42 U.S.C. 3601–3610.

2. Section 701.33 is revised to read as follows:

§ 701.33 Reimbursement, insurance, and indemnification of officials and employees.

(a) *Official.* An "official" is a person who is or was a member of the board of directors, credit committee or supervisory committee, or other volunteer committee established by the board of directors.

(b) *Compensation.* (1) Only one board officer, if any, may be compensated as an officer of the board. The bylaws must specify the officer to be compensated, if any, as well as the specific duties of each of the board officers. No other official may receive compensation for performing the duties or responsibilities of the board or committee position to which the person has been elected or appointed.

(2) For purposes of this section, the term "compensation" specifically excludes:

(i) Payment (by reimbursement to an official or direct credit union payment to a third party) for reasonable and proper costs incurred by an official in carrying out the responsibilities of the position to which that person has been elected or appointed;

(ii) Provision of reasonable health, accident and related types of personal insurance protection, supplied for officials at the expense of the credit union: *Provided,* that such insurance protection must exclude life insurance; must be limited to areas of risk, including accidental death and dismemberment, to which the official is exposed by reason of carrying out the duties or responsibilities of the official's credit union position; must cease immediately upon the insured person's leaving office, without providing residual benefits other than from pending claims, if any; and

(iii) Indemnification and related insurance consistent with paragraph (c) of this section.

(c) *Indemnification.* (1) A Federal credit union may indemnify its officials and current and former employees for expenses reasonably incurred in connection with judicial or administrative proceedings to which they are or may become parties by reason of the performance of their official duties.

(2) Indemnification shall be consistent either with the standards applicable to credit unions generally in the state in which the principal or home office of the credit union is located, or with the relevant provisions of the Model Business Corporation Act. A Federal credit union that elects to provide indemnification shall specify whether it will follow the relevant state law or the Model Business Corporation Act. Indemnification and the method of indemnification may be provided for by charter or bylaw amendment, contract or board resolution, consistent with the procedural requirements of the applicable state law or the Model Business Corporation Act, as specified. A charter or bylaw amendment must be approved by the National Credit Union Administration.

(3) A Federal credit union may purchase and maintain insurance on behalf of its officials and employees against any liability asserted against them and expenses incurred by them in their official capacities and arising out of the performance of their official duties to the extent such insurance is permitted by the applicable state law or the Model Business Corporation Act.

[FR Doc. 88–17692 Filed 8–5–88; 8:45 am]

BILLING CODE 7535–01–M

12 CFR Part 701

Loan Interest Rates

AGENCY: National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The current 18 percent per year Federal credit union loan rate ceiling was scheduled to revert to 15 percent on September 10, 1988, unless otherwise provided by the NCUA Board. A 15 percent ceiling would restrict certain categories of credit and adversely affect the financial condition of a number of Federal credit unions. At the same time prevailing market rates and economic conditions do not justify a rate higher than the current 18 percent ceiling. Accordingly, the NCUA Board has established an 18 percent Federal credit union loan rate ceiling for the period from September 10, 1988 through March 9, 1990. Loans and line of credit balances existing prior to May 15, 1987 may continue to bear their contractual rate of interest, not to exceed 21 percent. Further, the NCUA Board is prepared to reconsider the 18 percent ceiling at any time should changes in economic conditions warrant.

EFFECTIVE DATE: September 10, 1988.

ADDRESS: National Credit Union Administration, 1776 G Street NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Charles H. Bradford, Chief Economist or Timothy P. McCollum, Assistant General Counsel, at the above address. Telephone numbers: (202) 357–1100 (Mr. Bradford); (202) 357–1030 (Mr. McCollum).

SUPPLEMENTARY INFORMATION:

Background

Public Law 96–221, enacted in 1979, raised the loan interest rate ceiling for Federal credit unions from 1 percent per month (12 percent per year) to 15 percent per year. It also authorized the NCUA Board to set a higher limit, after consultation with Congress, the Department of the Treasury, and other Federal financial agencies, for a period not to exceed 18 months, if the Board should determine that: (i) Money market interest rates have risen over the preceding six months; and (ii) prevailing interest rate levels threaten the safey and soundness of individual credit unions as evidenced by adverse trends in liquidity, capital, earnings, and growth.

On December 3, 1980, the NCUA Board met and determined that the foregoing conditions had been met.

Accordingly, the Board raised the loan ceiling for 9 months to 21 percent. In the unstable environment of the first half of the 1980's, the NCUA extended the 21 percent ceiling four additional times. On March 11, 1987 the NCUA Board lowered the loan rate ceiling from 21 percent to 18 percent effective May 15, 1987. This action was taken in an environment of a long period of falling market interest rates. The Board felt the 18 percent ceiling would fully accommodate an inflow of liquidity into the system, preserve flexibility in the system so that credit unions could react to any adverse economic developments, and would ensure that any increase in the cost of funds would not impinge on earnings of Federal credit unions.

The NCUA Board would prefer not to set loan interest rate ceilings for Federal credit unions. In the final analysis the market sets the rates. The Board supports free lending markets and the ability of Federal credit union boards of directors to establish loan rates that reflect current market conditions and the interests of credit union members. Congress has, however, imposed loan rate ceilings since 1934. In 1979 Congress raised the loan rate ceilings from 12 percent to 15 percent and required the Board to set and justify any ceiling in excess of 15 percent. The following analysis justifies a ceiling above 15 percent, but at the same time does not support a ceiling above the current 18 percent. The Board is prepared to reconsider this action at any time should changes in economic conditions warrant.

Justification for a Ceiling Above 15 Percent

Current economic conditions necessitate a loan ceiling above 15 percent. First, short term interest rates have risen nearly 70 basis points over the past six months. See Table 1.

TABLE 1.—3-MONTH TREASURY BILL RATE MARKET YIELD

[Averages of daily figures]

1987:	
December	5.77
1988:	
January	5.81
February	5.66
March	5.70
April	5.91
May	6.26
June	6.46

Second, earnings of Federal credit unions have deteriorated over the past several years. For example:

• While the cost of funds for credit unions has declined in recent years, gross spreads have steadily declined by 73 basis points and net spreads by 15 basis points the past four years, since 1984. See Table 2.

TABLE 2.—FEDERAL CREDIT UNION SPREADS, 1984–1987

	1984	1985	1986	1987
Return on:				
Loans	13.80%	13.52%	12.68%	11.58%
Investments	10.94%	9.47%	7.94%	7.67%
Earning Assets	12.85%	12.18%	10.91%	10.11%
Gross Return on Total Assets	12.26%	11.60%	10.39%	9.64%
– Cost of Funds	7.54	7.23	6.37	5.65
= Gross spread	472 bp	437 bp	402 bp	399 bp
– Operating expenses	355 bp	337 bp	315 bp	308 bp
+ Other income	36 bp	48 bp	55 bp	46 bp
= Net spread [1]	152 bp	148 bp	142 bp	137 bp

[1] Before reserve allocation.

• Credit union losses represent a significant and growing problem that must be weighed in setting a loan rate ceiling. In 1987, a total of 1,481 Federal credit unions, 15.6 percent of all Federal credit unions, registered losses, up from 1,360 in 1986 and 1,178 in 1985. Table 3 shows the number of Federal credit unions experiencing losses in 1987, by size. Most credit unions with negative earnings are small, less than $10 million in assets. These credit unions would be among those most adversely affected by a reduction in the interest rate ceiling to 15 percent.

TABLE 3.—FEDERAL CREDIT UNIONS EXPERIENCING LOSSES IN 1987

Asset Size	No. of FCU's
Less than $1 million	646
$1–2 million	229
$2–5 million	248
$5–10 million	150
$10–20 million	98
$20–50 million	71
$50 million and over	39
Total	1481

Declining spreads in the past four years and increasing credit union losses should raise a warning flag against setting the loan rate ceiling too low, thus threatening the safety and soundness of many credit unions by reducing their flexibility. The major stipulations set forth in Pub. L. 96–221 for the NCUA Board to set a loan ceiling above 15 percent are evident.

Moreover, many credit unions must continue to charge over 15 percent interest on loans to maintain earnings. Over half of the Federal credit unions that offer unsecured personal loans charge 15 percent or more for these loans. See Table 4.

TABLE 4.—DISTRIBUTION OF FEDERAL CREDIT UNION INTEREST RATES FOR DECEMBER 1987

Rate	Unsecured loans [1]	New auto loans	First mortgage	Other real estate
0 to 9.9%	47	2,998	479	344
10 to 14.9	3,827	5,115	1,914	3,003

TABLE 4.—DISTRIBUTION OF FEDERAL CREDIT UNION INTEREST RATES FOR DECEMBER 1987—Continued

Rate	Unsecured loans [1]	New auto loans	First mortgage	Other real estate
15 to 15.9	2,716	136	69	108
16 to 16.9	806	3	5	6
17 to 17.9	270	0	0	0
18 to 18.9 [2]	842	8	3	9
19 to 19.9	4	0	0	2
20 to 20.9	0	1	0	0
21 and over	2	3	0	1
	Agricultural loans	Commercial loans	Other loans to members	Lines of credit
0 to 9.9%	6	29	583	20
10 to 14.9	205	343	5,672	895
15 to 15.9	57	52	1,076	654
16 to 16.9	6	11	133	272
17 to 17.9	3	1	43	71
18 to 18.9	6	5	105	150
19 to 19.9 [2]	0	0	1	1
20 to 20.9	0	1	0	1
21 and over	0	0	0	0

[1] The number of credit unions reporting rates charged. Some did not report rates; accordingly the total will be less than the number of Federal credit unions.
[2] NOTE: All loan rates in the 18 to 18.9 bracket were exactly 18 percent except for 1 credit union's commercial loan rate.

Unsecured personal loans (including credit card lines) account for 23 percent of total credit union loan volume and are an important part of credit union loan operations. While loan rates are generally lower for other types of loans, a sizeable number of credit unions are charging rates above 15 percent for some of these other loans as well and would be adversely affected by a 15 percent ceiling.

The cost of handling unsecured loans, particularly the credit card loan, is very high. Delinquency ratios and losses are higher than for other credits. Also, efficiency of operations is an important determinant in setting a loan rate. Unfortunately, some inefficient credit unions could be forced into insolvency with a loan ceiling as low as 15 percent. To drop the loan ceiling to 15 percent would place severe strains on a large segment of the credit union movement.

Justification for Maintaining the Current Ceiling at 18 Percent

While a loan ceiling above 15 percent is justified, the NCUA Board cannot justify a rate above the current 18 percent ceiling, in light of current market conditions. Market interest rates have fallen dramatically since 1980. Current rates are anywhere from less than half to less than three fourths those of the peak years 1980–1981 when a 21 percent ceiling was first imposed and subsequently extended until May 15, 1987. See Table 5.

TABLE 5.—MARKET INTEREST RATES ON SELECTED INSTRUMENTS

December [1] of—	Treasury Securities			
	Prime rate	3-month	2-year	30-year
1980	21.50	15.66	14.08	12.40
1981	15.75	10.93	13.29	13.45
1982	11.50	8.01	9.66	10.54
1983	11.00	8.96	10.84	11.88
1984	10.75	8.16	10.18	11.52
1985	9.50	7.07	8.15	9.54
1986	7.50	5.49	6.27	7.37
1987	8.75	5.77	7.86	9.12
July 15, 1988	9.50	6.72	8.31	9.16

[1] Monthly average.

Economic conditions warranting an interest rate ceiling above 18 percent, such as high inflation and high interest rates, are unlikely in the next 18 months. Rates have been rising for about six months now as the economy has grown quite rapidly for two quarters, and there will be some further edging up of inflation and interest rates over the next year as the economy reaches full employment of the labor force, high utilization of manufacturing capacity, and the drought in the farm belt raises farm commodity prices.

But dramatic price and interest rate increases, which could put a squeeze on credit unions under an 18 percent ceiling, are not expected. The staff expects short term interest rates to rise about 1 percentage point more and long term rates about ½ to ¾ percentage point more over the next year and a half. Most of this rise will come in 1989. These are not major increases.

Any rise at all in rates is an argument for not permitting the Federal credit union loan ceiling to revert to 15 percent. On the other hand, the interest rate increases the staff foresees for the next year and a half are modest and do not offer a case for raising the loan rate ceiling above its current 18 percent level.

An 18 percent ceiling will provide adequate flexibility to adjust to foreseeable changing economic conditions and should accommodate modest increases in the cost of funds. Less than 10 credit unions currently charge any rates above 18 percent. Presumably these loans are contracts that existed prior to May 15, 1987.

Accordingly, the NCUA Board has continued the Federal credit union loan interest rate ceiling of 18 percent per year for the period from September 10, 1988 through March 9, 1990. As previously indicated, loans and line of credit balances existing on or before May 15, 1987 may continue to bear their contractual rate, not to exceed 21 percent. Finally, the Board is prepared to reconsider the 18 percent ceiling at any time during the extension period, should changes in economic conditions warrant it.

Regulatory Procedures

Administrative Procedures Act

The NCUA Board has determined that notice and public comment on this rule are impractical and not in the public interest, 5 U.S.C. 553(b)(B). Due to the need for a planning period and the

threat to the safety and soundness of individual credit unions with insufficient flexibility to determine loan rates, final action on the loan rate ceiling is necessary.

Regulatory Flexibility Act

For the same reasons, a regulatory flexibility analysis is not required, 5 U.S.C. 604(a). However, the NCUA Board has considered the need for this rule, and the alternatives, as set forth above.

Executive Order 12612

This Final rule does not affect state regulation of credit unions. It implements provisions of the Federal Credit Union Act applying only to Federal Credit Unions.

This final rule takes effect on September 10, 1988. Such action is necessary in order to prevent a reversion to a 15 percent loan rate ceiling.

List of Subjects in 12 CFR Part 701

Credit unions, Loan interest rates.

By the National Credit Union Administration Board July 27, 1988.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA has amended its regulations as follows:

PART 701—[AMENDED]

1. The authority citation for Part 701 continues to read as follows:

Authority: 12 U.S.C. 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789 and 1798. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq., 42 U.S.C. 1981 and 42 U.S.C. 3601–3610.

2. Section 701.21(c)(7) is revised to read as follows:

§ 701.21 Loans to members and lines of credit to members.

* * * * *

(c) * * *

(7) *Loan interest rates—(i) General.* Except when a higher maximum rate is provided for in § 701.21(c)(7)(ii), a Federal credit union may extend credit to its members at rates not to exceed 15 percent per year on the unpaid balance inclusive of all finance charges. Variable rates are permitted on the condition that the effective rate over the term of the loan (or line of credit) does not exceed the maximum permissible rate.

(ii) *Temporary rates.* (A) *21 percent maximum rate.* Effective from December 3, 1980 through May 14, 1987, a Federal credit union may extend credit to its members at rates not to exceed 21 percent per year on the unpaid balance inclusive of all finance charges. Loans and line of credit balances existing on or before May 14, 1987, may continue to bear rates of interest of up to 21 percent per year after May 14, 1987.

(B) *18 percent maximum rate.* Effective May 15, 1987, a Federal credit union may extend credit to its members at rates not to exceed 18 percent per year on the unpaid balance inclusive of all finance charges.

(C) *Expiration.* After March 9, 1990, or as otherwise ordered by the NCUA Board, the maximum rate on Federal credit union extensions of credit to members shall revert to 15 percent per year. Higher rates may, however, be charged, in accordance with paragraph (c)(7)(ii) (A) and (B) of this section, on loans and line of credit balances existing on or before March 9, 1990.

* * * * *

[FR Doc. 88–17691 Filed 8–5–88; 8:45 am]

BILLING CODE 7535-01-M

12 CFR Part 761

Operational Procedures for Share Draft Programs; Federally Insured State-Chartered Credit Unions

AGENCY: National Credit Union Administration ("NCUA").

ACTION: Final rule.

SUMMARY: This amendment repeals Part 761 of NCUA's Rules and Regulations. Part 761 concerned the offering of share draft accounts by federally-insured, state-chartered credit unions ("FISCU's"). It placed FISCU's under the same guidelines as Federal credit unions ("FCU's") unless state law conflicted. Since NCUA has removed FCU share draft regulations, Part 761 is no longer needed.

EFFECTIVE DATE: August 8, 1988.

ADDRESS: National Credit Union Administration, 1776 G Street NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Hattie Ulan, Staff Attorney, Office of General Counsel, at the above address, or telephone (202) 357–1030.

SUPPLEMENTARY INFORMATION:

Background

In 1980, Congress amended section 205 of the FCU Act (12 U.S.C. 1785) to grant federally-insured credit unions (both Federal and state charters), the authority to offer share draft accounts. Later that year, the NCUA Board modified its Rules and Regulations by amending § 701.35 and adding Part 761. (*See* 45 FR 75169 (Nov. 14, 1980).) The amendments to § 701.35 set forth requirements for FCU's offering share draft accounts. Part 761 made those requirements applicable to FISCU's to the extent that they did not conflict with state law.

Section 701.35 has been amended several times since November, 1980. The requirements addressing share draft accounts have now been deleted from the regulation. Since 701.35 no longer imposes restrictions on share draft accounts, the NCUA Board, in February, 1988, proposed deleting Part 761. 53 FR 4856 (Feb. 18, 1988).

Comments

Five comments were received on the proposal: Two from national credit union trade associations; two from state credit union leagues; and one from an FCU. All supported the Board's suggestion that Part 761 was no longer necessary. One commenter suggested reminding credit unions of the need to comply with other Federal law on share drafts—particularly the Federal Reserve Board's Regulation CC implementing the Expedited Funds Availability Act. The NCUA Board has, in the interim, done this for FCU's (*see* 53 FR 19747 (May 31, 1988)); state regulators and trade associations will no doubt take steps as needed to provide similar reminders for state-chartered credit unions.

Conclusion

Since the NCUA Board has deregulated share drafts, FISCU's are now in effect governed only by state law and other Federal law—particularly Federal Reserve Regulation CC (checkholds). Part 761 is therefore no longer needed. Since the change has no substantive effect on credit unions, the deletion is effective immediately upon publication in the **Federal Register**, rather than 30 days after publication.

Regulatory Procedures

Regulatory Flexibility and Paperwork Reduction Acts

Since this is a repeal of a regulation, the requirements of the Regulatory Flexibility Act and the Paperwork Reduction Act are not applicable.

Executive Order 12612

The repeal of Part 761 has no practical effect on FISCU's because there are no longer any specific requirements placed on share draft accounts in § 701.35. FISCU's continue to have the authority to offer share draft accounts pursuant to section 205(f) of the FCU Act.

List of Subjects in 12 CFR Part 761

Federally insured state-chartered credit unions, Share draft accounts.

By the National Credit Union Administration Board on July 27, 1988.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA amends its regulations as follows:

PART 761—[REMOVED]

Part 761 is removed.

[FR Doc. 88-17694 Filed 8-5-88; 8:45 am]

BILLING CODE 7535-01-M

12 CFR Parts 790 and 791

Description of Office, Disclosure of Official Records, Availability of Information, Promulgation of Regulations; Rules of Board Procedure

AGENCY: National Credit Union Administration ("NCUA").

ACTION: Final rule.

SUMMARY: Part 790 of NCUA's regulations describes NCUA's offices and addresses NCUA implementation of Federal information and privacy laws. Part 791 contains rules of NCUA Board procedure. These amendments: (1) Update and clarify provisions concerning issuance of NCUA rules and regulations, and transfer those provisions from Part 790 to Part 791; (2) streamline and clarify NCUA Board procedures; and (3) transfer provisions regarding public observation of Board meetings from Part 790 to Part 791.

EFFECTIVE DATE: August 8, 1988.

ADDRESS: National Credit Union Administration, 1776 G Street, NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Becky Baker, Board Secretary, or Julie Tamuleviz, Staff Attorney, at the above address or telephone: (202) 357-1100 (Ms. Baker) or (202) 357-1030 (Ms. Tamuleviz).

SUPPLEMENTARY INFORMATION:

Background

On February 10, 1988, the NCUA Board issued a proposal to revise Parts 790 and 791 of NCUA's Rules and Regulations (53 FR 4996, February 19, 1988). The proposed revisions were in two areas.

First, several changes were proposed to update and clarify the rules concerning issuance of NCUA regulations, and it was suggested that these rules be moved from Part 790 (the other provisions of which address NCUA implementation of information and privacy laws) to Part 791 covering "Rules of Board Procedure." The Board also proposed to delete Appendix A to Part 790 entitled "Final Report in Response to Executive Order No. 12044: Improving Government Regulations." The Appendix has been superseded by NCUA Policy Statement Number 87-2, which contains current procedures for reviewing and developing regulations.

Second, the Board proposed several changes to existing Part 791 that would streamline NCUA Board procedure.

Public Comment

The NCUA Board received three comments: two from credit union trade associations and one from a state credit union league.

Proposals to Update and Transfer Provisions Concerning Issuance of Regulations

None of the commenters addressed the proposal to move the provisions concerning issuance of regulations. The Board is therefore amending Part 790 by deleting § 790.10 and Appendix A. Part 791 is being amended to include a Subpart B addressing issuance of NCUA's rules and regulations. The scope and title of Parts 790 and 791 are being amended to reflect these changes.

One commenter suggested that proposed § 791.8(b), which lists items to be included in a notice of proposed rulemaking, be amended by adding a new paragraph (b)(4) which would state that NCUA will include a discussion of the impact a proposed rule will have on state-chartered, federally-insured credit unions in the notice of proposed rulemaking. NCUA has been including this discussion in its proposed rules. The Board is amending § 791.8 as suggested by the commenter.

One commenter asked for clarification on whether Interpretive Rulings and Policy Statements (IRPS's) are issued for comment. Proposed § 791.8(d) sets forth matters, including IRPS's, for which public notice and comment are not required. This section is in conformance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). As in the past, the Board will make a case-by-case determination on whether an IRPS should be issued for public comment.

One commenter asked for an explanation on the difference between "requests for comments" and "notices of proposed rulemaking." The commenter also asked how NCUA classifies "Letters to Credit Unions." Generally, under the Federal Administrative Procedure Act, the first required step in rulemaking is to issue a "notice of proposed rulemaking," in order to provide interested parties an opportunity to present their views. (*See*, 5 U.S.C. 553.) Depending on the circumstances, NCUA may identify this notice as a "request for comments," a "notice of proposed rulemaking," or a "proposed rule." A sentence to this effect has been added to § 791.8(b) of the final rule. A request for comments is more likely to be used to set forth a range of options without expressing an initial preference or recommendation by NCUA. A notice of proposed rulemaking is typically less specific than a proposed rule, and may describe the substance of a proposal without setting forth specific rule language. In any case, following a review of comments, a final rule change may be issued, or further proposals and public comment may be required.

Letters to Credit Unions are issued by NCUA to provide guidance to credit unions; they are not regulations and are not subject to the regulatory procedures set forth in proposed § 791.8. Requests for comments, notices of proposed rulemaking, final rules, and Letters to Credit Unions are distributed by NCUA to all affected credit unions.

Proposal to Streamline and Clarify Rules of Board Procedure

Two of the commenters raised several specific issues regarding the proposed changes to the rules of Board procedure.

One commenter asked that proposed § 791.4(b) be amended by deleting the word "normally." This section provides that "[n]otation voting may be used only for routine matters, which normally will not include decisions on proposed and final rules, adjudications, and formal Board interpretations and policy statements." The Board believes that this provision may be misleading as it could be read to imply that notation voting will be used to make substantive decisions on proposed and final rules, adjudications, and IRPS's. The Board is therefore amending this section to provide that "notation voting may be used only for routine matters." This would include technical revisions, such as grammatical changes, to rules and regulations, adjudications, IRPS's, and notices, but would not include substantive decisions of significant impact on credit unions.

The proposal would have deleted current § 791.5(b), which permits a Board member to attend a special meeting solely for the purpose of objecting to lack of proper notice. The Board has reconsidered this issue and is reinstating it in the final rule.

The current rule provides that a Board member's failure to respond to a notation vote is an indication that the member wants the matter considered at a Board meeting. The proposal would have deleted this provision, in that a Board member's failure to respond to a notation vote has generally been due to

the member being on travel or otherwise unavailable. One commenter asked that this provision be reinstated or that it be amended to clarify what happens when a Board member fails to respond. The Board does not believe that an amendment to this section is necessary. If a member fails to respond, it is the responsibility of the Board secretary to check with the Board member or the member's office to determine the reason for failure to respond. If a Board member wants a matter included at a Board meeting, the procedures set forth in § 791.4(b)(3) or § 791.6 will be followed.

Proposed § 791.5(a) provided that NCUA would hold regular meetings each month unless there were no business or a quorum could not be obtained. One commenter correctly pointed out that open meetings have not typically been scheduled for the month of August. However, since the Board would like the freedom to hold an August meeting, if business requires it, the final provision will be as proposed.

Finally, some concern has been expressed regarding the notice that will be given to Board members when an emergency meeting is called.

Section 791.5(b)(2) is being amended to clarify that there must be a statement and vote on the record of the determination that an emergency exists, rendering it necessary to call a special meeting, or schedule a matter for a regular meeting, without following the normal notice requirements.

Public Observation of Board Meetings

Subpart C of Part 790 (Public Observation of Board Meetings) contains regulations implementing provisions of the Government in the Sunshine Act (5 U.S.C. 552b) ("Sunshine Act"). NCUA's regulations implementing the Sunshine Act (§§ 790.40–790.49 of NCUA's Rules and Regulations [12 CFR 790.40–790.49] are intended to "provide the public with the fullest access, authorized by law, to the deliberations and decisions of the Board while protecting the rights of individuals and preserving the ability of the agency to carry out its responsibilities." (*See* § 790.40 of NCUA's Rules and Regulations. [12 CFR 790.40]).

The Board believes that Subpart C would be more appropriately placed in Part 791. The Board is therefore moving Subpart C to Part 791, where it will become Subpart C of Part 791 consisting of § 791.9 through 791.18. The scope sections of Parts 790 and 791 are being amended to reflect this change. While this change was not part of the original proposal, it is merely technical in nature and does not involve substantive amendments to the current regulations. Therefore, public comment and notice is unnecessary.

Effective Date

The Board has determined not to delay the effective date of these amendments since they pertain solely to rules of Board practice and procedure.

Regulatory Procedures

Regulatory Flexibility Act

The NCUA Board has determined and hereby certifies that the amendments do not have a significant impact on a substantial number of small credit unions. Accordingly, the Board has determined that a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

This amendment does not contain any paperwork requirements.

Executive Order 12612

This amendment does not affect state regulation of credit unions.

List of Subjects in 12 CFR Part 791

Procedures, NCUA Board meetings, Promulgation of NCUA rules and regulations, Sunshine Act.

By the National Credit Union Administration Board on July 27, 1988.

Becky Baker,

Secretary, NCUA Board.

Accordingly, NCUA is amending its regulations as follows:

1. The authority section for Part 790 is revised to read as follows:

Authority: 12 U.S.C. 1766, 1789, 1795f. Subpart A is also issued under 5 U.S.C. 552 and Subpart B is issued under 5 U.S.C. 552a.

2. The heading of Part 790 is revised to read as follows:

PART 790—DESCRIPTION OF OFFICE, DISCLOSURE OF OFFICIAL RECORDS, AVAILABILITY OF INFORMATION

3. Section 790.1(b) is revised to read as follows:

§ 790.1 Scope and application.

* * * * *

(b) The rules contained in this part are promulgated pursuant to the Federal Administrative Procedure Act (5 U.S.C. 551 *et seq.*). This part includes a description of NCUA's offices and the places and method of obtaining information from NCUA. This part contains rules relating to types of information available to the public, fee schedules, and determinations on requests by the Administration, as provided by the Freedom of Information Act (5 U.S.C. 552). Regulations relating to rules of procedure, promulgation of NCUA Rules and Regulations, and the Sunshine Act are contained in Part 791.

4. Section 790.10 and Appendix A to Part 790 are removed.

§ 790.10 [Removed]

Appendix A to Part 790—[Removed]

5. Part 791 is revised to read as follows:

PART 791—RULES OF NCUA BOARD PROCEDURE; PROMULGATION OF NCUA RULES AND REGULATIONS; PUBLIC OBSERVATION OF NCUA BOARD MEETINGS

Subpart A—Rules of NCUA Board Procedure

Subpart B—Promulgation of NCUA Rules and Regulations

Subpart C—Public Observation of NCUA Board Meetings Under the Sunshine Act

Subpart A—Rules of NCUA Board Procedure

§ 791.1 Scope.

The rules contained in this Subpart are the rules of procedure governing how the Board conducts its business. These rules concern the Board's exercise of its authority to act on behalf of NCUA; the conduct, scheduling and subject matter of Board meetings; and the recording of Board action.

§ 791.2 Number of votes required for board action.

The agreement of at least two of the three Board members is required for any action by the Board.

§ 791.3 Voting by proxy.

Proxy voting shall not be allowed for any action by the Board.

§ 791.4 Methods of acting.

(a) *Board meetings*—(1) *Applicability of the Sunshine Act.* The Government in the Sunshine Act (5 U.S.C. 552b, "Sunshine Act") requires that joint deliberations of the Board be held in accordance with its open meetings provisions (5 U.S.C. 552b (b)–(f)). (Subpart C of this part contains NCUA's regulations implementing the Sunshine Act.)

(2) *Presiding officer.* The Chairman is the presiding officer, and in the Chairman's absence, the designated Vice Chairman shall preside. The presiding officer shall make procedural rulings with the right of the objector to request a board ruling.

(b) *Notation voting.* Notation voting is the circulation of written memoranda and voting sheets to the office of each Board member and the tabulation of responses.

(1) *Matters that may be decided by notation voting.* Notation voting may be used only for routine matters.

(2) *Notation vote sheets.* Notation vote sheets will be used to record the vote tally on a notation vote. The Secretary of the Board has administrative responsibility over notation voting, including the authority to establish deadlines for voting, receive notation vote sheets, count votes, and determine whether further action is required.

(3) *Veto of notation voting.* In view of public policy for openness reflected in the Sunshine Act, each Board member is authorized to veto the use of notation voting for the consideration of any particular matter, and thus require that the matter be placed on the agenda of a Board meeting.

(4) *Disclosure of result.* A record is to be maintained of Board transactions by use of the notation voting procedure. Public disclosure of this record is determined by the provisions of the Freedom of Information Act (5 U.S.C. 552).

§ 791.5 Scheduling of board meetings.

(a) *Meeting calls*—(1) *Regular meetings.* The Board will hold regular meetings each month unless there is no business or a quorum is not available. The Secretary of the Board will coordinate the dates for meetings.

(2) *Special meetings.* The Chairman shall call special meetings either on the Chairman's own initiative or at the request of any Board member.

(b) *Notice of meetings*—(1) *Notifying the public.* The Sunshine Act and Subpart C set forth the procedures for notifying the public of Board meetings.

(2) *Notifying board members*—(i) *Special meetings.* Except in cases of emergency as determined by a majority of the Board, each Board member is entitled to receive notice of any special meeting at least twenty-four hours in advance of such meeting. The notice shall set forth the place, day, hour, and nature of business to be transacted at the meeting. In cases of emergency a record of the vote, including a statement explaining the decision that an emergency exists, will be maintained.

(ii) *Regular meetings.* Each Board member is entitled to receive notice of the agenda and/or notice of any changes in the subject matter of such meetings concurrent with the public release of such notices under the Sunshine Act. Each Board member shall be entitled to at least twenty-four hours advance notice of the consideration of a particular subject matter, except in cases of emergency as determined by a majority of the Board. In cases of emergency, a record of the vote, including a statement explaining the decision that an emergency exists, will be maintained.

§ 791.6 Subject matter of a meeting.

(a) *Agenda.* The Chairman is responsible for the final determination of each meeting agenda.

(b) *Submission of agenda items.* Agenda items may be submitted to the Secretary of the Board by each Board member, the Executive Staff (which includes all Office Directors and President of the Central Liquidity Facility), and Regional Directors.

Subpart B—Promulgation of NCUA Rules and Regulations

§ 791.7 Scope.

The rules contained in this Subpart B pertain to the promulgation of NCUA rules and regulations.

§ 791.8 Promulgation of NCUA rules and regulations.

(a) NCUA's procedures for developing regulations are governed by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and NCUA's policies for the promulgation of rules and regulations as set forth in its Interpretive Ruling and Policy Statement 87–2.

(b) *Proposed rulemaking.* Notices of proposed rulemaking are published in the **Federal Register** except as specified in paragraph (d) of this section or as otherwise provided by law. A notice of proposed rulemaking may also be identified as a "request for comments" or as a "proposed rule." The notice will include:

(1) A statement of the nature of the rulemaking proceedings;

(2) Reference to the authority under which the rule is proposed;

(3) Either the terms or substance of the proposed rule or a description of the subjects and issues involved; and

(4) A statement of the effect of the proposed rule on state-chartered federally-insured credit unions.

(c) *Public participation.* After publication of notice of proposed rulemaking, interested persons will be afforded the opportunity to participate in the making of the rule through the submission of written data, views, or arguments, delivered within the time prescribed in the notice of proposed rulemaking, to the Secretary, NCUA Board, 1776 G Street NW., Washington, DC 20456. Interested persons may also petition the Board for the issuance, amendment, or repeal of any rule by mailing such petition to the Secretary of the Board at the address given in this section.

(d) *Exceptions to notice.* The following are not subject to the notice requirement contained in paragraph (b) of this section:

(1) Matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts;

(2) When persons subject to the proposed rule are named and either personally served or otherwise have actual notice thereof in accordance with law;

(3) Interpretive rules, general statements of policy, or rules of agency organization, procedure or practice, unless notice or hearing is required by statute; and

(4) If the Board, for good cause, finds (and incorporates the finding and a brief statement therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, unless notice or hearing is required by statute.

(e) *Effective dates.* No substantive rule issued by NCUA shall be effective less than 30 days after its publication in the **Federal Register**, except that this requirement may not apply to:

(1) Rules which grant or recognize an exemption or relieve a restriction;

(2) Interpretive rules and statements of policy; or

(3) Any substantive rule which the Board makes effective at an earlier date upon good cause found and published with such rule.

Subpart C—Public Observation of NCUA Board Meetings Under the Sunshine Act

§ 791.9 Scope.

This subpart contains regulations implementing subsections (b) through (f) of the "Government in the Sunshine Act" [5 U.S.C. 552b]. The primary purpose of these regulations is to provide the public with the fullest access authorized by law to the deliberations and decisions of the Board, while protecting the rights of individuals and preserving the ability of the agency to carry out its responsibilities.

§ 791.10 Definitions.

For the purpose of this subpart:

(a) "Agency" means the National Credit Union Administration;

(b) "Board" means the National Credit Union Administration Board, whose members were appointed by the President with the advice and consent of the Senate;

(c) "Subdivision of the Board" means a group composed of two Board members authorized by the Board to act on behalf of the agency;

(d) "Meeting" means any deliberations by two or more members of the Board or any subdivision of the Board that determine or result in the joint conduct or disposition of official agency business with the exception of: (1) Deliberations to determine whether a meeting or a portion thereof will be open or closed to public observation and whether information regarding closed meetings will be withheld from public disclosure; (2) deliberations to determine whether or when to schedule a meeting; and (3) infrequent dispositions of official agency business by sequential circulation of written recommendations to individual Board members ("notation voting procedure"), provided the votes of each Board member and the action taken are recorded for each matter and are publicly available, unless exempted from disclosure pursuant to 5 U.S.C. 552 (the Freedom of Information Act);

(e) "Public observation" means that a member or group of the public may listen to and observe any open meeting and may record in an unobtrusive manner any portion of that meeting by use of a camera or any other electronic device, but shall not participate in any meeting unless authorized by the Board;

(f) "Public announcement" or "publicly announce" means making reasonable efforts under the particular circumstances to fully inform the public, especially those individuals who have expressed interest in the subject matters to be discussed or the decisions of the agency;

(g) "Sunshine Act" means the open meeting provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b.)

§ 790.11 Open Meetings.

Except as provided in § 791.12(a), any portion of any meeting of the Board shall be open to public observation. The Board, and any subdivision of the Board, shall jointly conduct official agency business only in accordance with this subpart.

§ 791.12 Exemptions.

(a) Under the procedures specified in § 791.14, the Board may close a meeting or any portion of a meeting from public observation or may withhold information pertaining to such meetings provided the Board has properly determined that the public interest does not require otherwise and that the meeting (or any portion thereof) or the disclosure of meeting information is likely to:

(1) Disclose matters that are:

(i) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy, and

(ii) In fact properly classified pursuant to such Executive Order;

(2) Relate solely to internal personnel rules and practices;

(3) Disclose matters specifically exempted from disclosure by statute (other than section 552 of Title 5 of the United States Code, the Freedom of Information Act), provided that such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by a Federal agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of Federal agencies responsible for the regulation or supervision of financial institutions;

(9) Disclose information the premature disclosure of which would be likely to (i)(A) lead to significant speculation in currencies, securities, or commodities, or (B) significantly endanger the stability of any financial institution, or (ii) be likely to significantly frustrate implementation of a proposed action,

except that this paragraph (a)(9) shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

(10) Specifically concern the issuance of a subpoena, participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct or disposition of a particular case of formal agency adjudication pursuant to the procedures in section 554 of Title 5 of the United States Code or otherwise involving a determination on the record after opportunity for a hearing.

(b) Prior to closing a meeting whose discussions are likely to fall within the exemptions stated in paragraph (a) of this section, the Board will balance the public interest in observing the deliberations of an exemptible matter and the agency need for confidentiality of the exemptible matter. In weighing these interests, the Board is assisted by the General Counsel as provided in § 791.16, by expressions of the public interest set forth in requests for open meetings as provided by § 791.15(b), and by the brief staff analysis of public interest which will accompany each staff recommendation that an agenda item be considered in a closed meeting.

§ 791.13 Public announcement of meetings.

(a) Except as otherwise provided in this section, the Board shall, for each meeting, make a public announcement, at least one week in advance of the meeting, of the time, place and subject matter of the meeting, whether it will be open or closed to public observation, and the name and telephone number of the Secretary of the Board or the person designated by the Board to respond to requests for information about the meeting.

(b) Advance notice is required unless a majority of the members of the Board determine by a recorded vote that agency business requires that a meeting be called at an earlier date, in which case, the information to be announced in paragraph (a) of this section shall be publicly announced at the earliest practicable time.

(c) A change, including a postponement or a cancellation, in the time or place of a meeting after a published announcement may be made only if announced at the earliest practicable time.

(d) A change in or deletion of the subject matter of a meeting or any portion of a meeting or a redetermination to open or close a meeting or any portion of a meeting after a published announcement may be made only if:

(1) A majority of the Board determines by recorded vote that agency business so requires and that no earlier announcement of the change was possible and

(2) Public announcement of the change and of the vote of each member on such change shall be made at the earliest practicable time.

(e) Each meeting announcement or amendment thereof shall be posted on the Public Notice Bulletin Board in the reception area of the agency headquarters and may be made available by other means deemed desirable by the Board. Immediately following each public announcement required by this section, the stated information shall be submitted to the **Federal Register** for publication.

(f) No announcement shall contain information which is determined to be exempt from disclosure under § 791.12(a).

(g) The agency shall maintain a mailing list of names and addresses of all persons who wish to receive copies of agency announcements of meetings open to public observation and amendments to such announcements. Requests to be placed on the mailing list should be made by telephoning or by writing to the Secretary of the Board.

§ 791.14 Regular procedure for closing meeting discussions or limiting the disclosure of information.

(a) A decision to close any portion of a meeting and to withhold information about any portion of a meeting closed pursuant to § 791.12(a) will be taken only when a majority of the entire Board votes to take such action. In deciding whether to close a meeting or any portion of a meeting or to withhold information, the Board shall independently consider whether the public interest requires an open meeting. A separate vote of the Board will be taken and recorded for each portion of a meeting to be closed to public observation pursuant to § 791.12(a) or to withhold information from the public pursuant to § 791.12(a). A single vote may be taken and recorded with respect to a series of meetings, or any portions of meetings which are proposed to be closed to the public, or with respect to any information concerning the series of meetings, so long as each meeting in the series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. No proxies shall be allowed.

(b) Any person whose interests may be directly affected by any portion of a meeting for any of the reasons stated in § 791.12(a) (5), (6) or (7) may request that the Board close such portion of the meeting. After receiving notice of a person's desire for any specified portion of a meeting to be closed, the Board, upon a request by one member, will decide by recorded vote whether to close the relevant portion or portions of the meeting. This procedure applies to requests received either prior or subsequent to the announcement of a decision to hold an open meeting.

(c) Within one day after any vote is taken pursuant to paragraphs (a) or (b) of this section, the Board shall make publicly available a written copy of the vote taken indicating the vote of each Board member. Except to the extent that such information is withheld and exempt from disclosure, for each meeting or any portion of a meeting closed to the public, the Board shall make publicly available within one day after the required vote, a written explanation of its action, together with a list of all persons expected to attend the closed meeting and their affiliation. The list of persons to attend need not include the names of individual staff, but shall state the offices of the agency expected to participate in the meeting discussions.

§ 791.15 Requests for open meeting.

(a) Following any announcement that the Board intends to close a meeting or any portion of any meeting, any person may make a written request to the Secretary of the Board that the meeting or a portion of the meeting be open. The request shall be circulated to the members of the Board, and the Board, upon the request of one member, shall reconsider its action under § 791.14 before the meeting or before discussion of the matter at the meeting. If the Board decides to open a portion of a meeting proposed to be closed, the Board shall publicly announce its decision in accordance with § 791.13(e). If no request is received from a Board member to reconsider the decision to close a meeting or portion thereof prior to the meeting discussion, the Chairman of the Board shall certify that the Board did not receive a request to reconsider its decision to close the discussion of the matter.

(b) The request to open a portion of a meeting shall be submitted to the Secretary of the Board in advance of the meeting in question. The request shall set forth the requestor's interest in the matter to be discussed and the reasons why the requestor believes that the public interest requires that the meeting or portions thereof be open to public observation.

(c) The submission of a request to open a portion of a meeting shall not act to stay the effectiveness of Board action or to postpone or delay the meeting unless the Board decides otherwise.

(d) The Secretary of the Board shall advise the requestor of the Board's consideration of the request to open a portion of the meeting as soon as practicable.

§ 791.16 General counsel certification.

For each meeting or any portion of a meeting closed to public observation under § 791.14, the General Counsel shall publicly certify, whether in his or her opinion, the meeting or portion thereof may be closed to public observation and shall state each relevant exemption provision of law. A copy of the certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting and the persons present, shall be retained as a part of the permanent meeting records. As part of the certification, the General Counsel shall recommend to the Board whether the public interest requires that the meeting or portions thereof proposed to be closed to public observation be held in the open.

§ 791.17 Maintenance of meeting records.

(a) Except in those circumstances which are beyond the control of the

agency, the Board shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or any portion thereof, closed to public observation. However, for meetings closed under § 791.12(a) (8), (9)(i) or (10), the Board shall maintain either a transcript, a recording or a set of minutes. The Board shall maintain a complete electronic recording for each open meeting or any portion thereof. All records shall clearly identify each speaker.

(b) A set of minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons for taking such action. Minutes shall also include a description of each of the views expressed by each person in attendance on any item and the record of any roll call vote, reflecting the vote of each member. All documents considered in connection with any action shall be identified in the minutes.

(c) The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes or a complete electronic recording of each meeting, or any portion of a meeting, closed to public observation, for at least two years after such meeting or for one year after the conclusion of any agency proceeding with respect to which the meeting or any portion was held, whichever occurs later. The agency shall maintain a complete electronic recording of each open meeting for at least three months after the meeting date. A complete set of minutes shall be maintained on a permanent basis for all meetings.

§ 791.18 Public availability of meeting records and other documents.

(a) The agency shall make promptly available to the public, in the Public Reference Room, the transcript, electronic recording, or minutes of any meeting, deleting any agenda item or any item of the testimony of a witness received at a closed meeting which the Board determined, pursuant to paragraph (c) of this section, was exempt from disclosure under § 791.12(a). The exemption or exemptions relied upon for any deleted information shall be reflected on any record or recording.

(b) Copies of any transcript, minutes or transcription of a recording, disclosing the identity of each speaker, shall be furnished to any person requesting such information in the form specified in paragraph (a) of this section. Copies shall be furnished at the actual cost of duplication or transcription unless waived by the Secretary of the Board.

(c) Following each meeting or any portion of a meeting closed pursuant to § 791.12(a), as the last item of business, the Board shall determine which, if any, portions of the meeting transcript, electronic recording or minutes not otherwise available under 5 U.S.C. 522a (the Privacy Act), contain information which should be withheld pursuant to § 791.12(a); provided, however, that should the Board not make such determinations immediately following any such closed meeting, the Secretary of the Board, upon the advice of the General Counsel or the General Counsel's designee and after consulting with the Board, shall make such determinations. If, at a later time, the Board determines that there is no further justification for withholding any meeting record or other item of information from the public which has previously been withheld, then such information shall be made available to the public.

(d) Except for information determined by the Board to be exempt from disclosure pursuant to paragraph (c) of this section, meeting records shall be promptly available to the public in the Public Reference Room. Meeting records include but are not limited to: The transcript, electronic recording or minutes of each meeting, as required by § 791.17(a); the notice requirements of §§ 791.13 and 791.14(c); and the General Counsel Certification along with the presiding officer's statement, as required by § 791.16.

(e) These provisions do not affect the procedures set forth in Part 790, Subpart A, governing the inspection and copying of agency records, except that the exemptions set forth in § 791.12(a) of this subpart and in 5 U.S.C. 552b(c) shall govern in the case of a request made pursuant to Part 790, Subpart A, to copy or inspect the meeting records described in this section. Any documents considered or mentioned at Board meetings may be obtained subject to the procedures set forth in Part 790, Subpart A.

[FR Doc. 88-17695 Filed 8-5-88; 8:45 am]
BILLING CODE 7535-01-M

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12 CFR Part 795

Collection Requirements Under the Paperwork Reduction Act; OMB Control Numbers

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule; OMB control numbers assigned to NCUA regulations pursuant to Paperwork Reduction Act.

SUMMARY: 12 CFR Part 795 collects and displays the control numbers assigned to information collection requirements of the National Credit Union Administration by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96-511. The National Credit Union Administration intends that this part comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement found in a regulation. This document updates the control numbers assigned by OMB to paperwork requirements in NCUA regulations.

EFFECTIVE DATE: August 8, 1988.

ADDRESS: National Credit Union Administration, 1776 G Street NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Wilmer Theard, Director, Administrative Procedures, at the above address or telephone (202) 357-1055.

SUPPLEMENTARY INFORMATION: The purpose of this final rule, in accordance with the Paperwork Reduction Act, is to put the public on notice of the control numbers assigned by OMB to paperwork requirements in NCUA regulations. The Part was first promulgated in 1984. This regulation was last issued on January 28, 1988 (See 53 FR 3000, Feb. 3, 1988). The February publication contained errors in the display table. Hence, it is being reissued. Section 795.1(a) of the final rule sets forth the purpose of the regulation and has not been amended. Section 795.1(b) provides notice of current control numbers assigned in a display table. This section has been amended to add all current control numbers and delete those that are no longer valid.

Regulatory Procedures

The NCUA Board has determined that because this action is non-substantive in nature, consideration of the Regulatory Flexibility Act and Executive Order 12612 is unnecessary.

List of Subjects in 12 CFR Part 795

Credit unions, Collection requirements.

By the National Credit Union Administration Board on July 26, 1988.

Becky Baker,

Secretary, National Credit Union Administration Board.

Accordingly, 12 CFR Part 795 is revised to read as follows:

PART 795—OMB CONTROL NUMBERS ASSIGNED PURSUANT TO THE PAPERWORK REDUCTION ACT

Authority: 12 U.S.C. 1766(a) and 5 U.S.C. 3507(f).

§ 795.1 OMB control numbers.

(a) *Purpose.* This subpart collects and displays the control numbers assigned to information collection requirements of the NCUA by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The NCUA intends to comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

12 CFR part or section where identified and described	Current OMB control No.
701.1	3133–0015
701.12	3133–0075
701.13	3133–0053
701.21	3133–0092
	3133–0101
	3133–0110
701.31	3133–0068
701.36	3133–0040
702.2	3133–0072
705	3133–0109
708	3133–0024
708	3133–0107
710	3133–0076
724.1	3133–0035
725	3133–0060
	3133–0061
	3133–0063
	3133–0064
740.2	3133–0098
741	3133–0004
	3133–0009
	3133–0011
	3133–0099
	3133–0106
748	3133–0033
	3133–0094
	3133–0108
749	3133–0032

[FR Doc. 88–17696 Filed 8–5–88; 8:45 am]

BILLING CODE 7535–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88–NM–23–AD; Amdt. 39–5992]

Airworthiness Directives: Boeing Model 747 and Model 767 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Boeing Model 747 series airplanes equipped with the two piece off-wing escape ramp and slide, and to all Model 767 series airplanes, which requires modification of the Model 747 door opening thrusters and Model 767 off-wing escape slide door opening/snubbing actuators by replacing certain O-rings. This amendment is prompted by reports of actuator and thruster malfunctions that resulted in non-deployment of the slides. The malfunctions were the result of insufficient oil in the thruster or actuator due to leakage past defective or contaminated O-rings. This condition, if not corrected, could lead to failure of the escape slide to deploy, thus delaying and possibly jeopardizing successful emergency evacuation of an airplane.

EFFECTIVE DATE: September 7, 1988.

ADDRESSES: The applicable service information may be obtained from OEA, Inc., P.O. Box 10488, Denver, Colorado 80210. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Roger S. Young, Airframe Branch, ANM–120S; telephone (206) 431–1929. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive which requires modification of Model 747 off-wing slide compartment door opening thrusters and Model 767 off-wing slide compartment door opening/snubbing actuators, was published in the **Federal Register** on April 8, 1988 (53 FR 11676).

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

The Air Transport Association (ATA) of America stated that its members intend to return all the affected units to OEA, Inc., for modification. However, ATA is concerned that OEA will not be able to support the proposed compliance time, and has requested an extension of the proposed compliance time to accurately reflect OEA's delivery schedule. In the absence of OEA's estimate, ATA proposed an extension of the compliance time to 30 months.

Further investigation by the FAA has revealed that most, if not all, of the units in the U.S. fleet will be returned to OEA for modification. OEA has advised that the units can be modified at a maximum rate of 100 per week with an 8 to 14 day turn around time. The modifications can be accomplished within 18 months if OEA receives the units in an orderly manner. In light of this information, the FAA has determined that the compliance time may be extended to 18 months. Considering that the off-wing compartment door opening system was designed to operate when only one of the two thrusters or actuators performs properly, extending the compliance time from 15 to 18 months will allow the operators time to accomplish the modification without undue burden, while providing an acceptable level of safety.

The ATA also suggested that a total of 16 manhours per airplane will be required to accomplish the required actions in addition to the time necessary for OEA to modify the thrusters. The NPRM indicated that 10 manhours would be required. The FAA has reviewed ATA's 16 manhour estimate, which included 4 manhours to rig the door opening system. Boeing's estimate was 4 manhours per airplane. Since it is not normally necessary to rig the door opening system when only a thruster or actuator is changed, the FAA estimates that 10 manhours on the airplane plus 4 manhours for the thruster modification, for a total of 14 manhours, are necessary to accomplish this AD. The economic analysis, as indicated below, has been revised to reflect this new manhour estimate.

Boeing and OEA, Inc., commented that the proposed AD should be revised to allow the modification to be accomplished either in a Federal Standard 209B clean room, or in a clean area with a subsequent leak check, as specified in Revision A of the OEA

Service Bulletins, which were released on June 17, 1988. Since most of the oil leakage reported was due to contaminated O-rings, the FAA concurs that the proposed requirement for both a clean room and a leak check is not necessary. Paragraph A. of the final rule has been revised accordingly. Paragraph A. has also been revised to reflect Revision A of the OEA service bulletins. The FAA has determined that modification in accordance with Revision A does not increase the economic burden of any operator, nor does it increase the scope of the AD.

Boeing also suggested that the AD should more clearly state that the off-wing slide non-deployments were due to leakage of the actuators. The FAA notes that both the Summary and Discussion sections of the NPRM clearly stated that the malfunctions were due to leakage past the O-rings; thus, further clarification is not considered necessary.

OEA, Inc., also commented that the AD should stress that the leak check inspection must be carried out as detailed in their service bulletin. The FAA concurs and has revised the final rule to make this clear.

Additionally, the final rule has been revised to remove all references to the use of "later FAA-approved revisions of the applicable service bulletin," in order to be consistent with FAA policy in that regard. The FAA has determined that this change will not increase the economic burden on any operator, nor will it increase the scope of the AD, since later revisions of the service bulletin may be approved as an alternate means of compliance with this AD, as provided by paragraph B.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the proposed rule, with the changes previously noted.

It is estimated that 150 airplanes of U.S. registry will be affected by this AD, that it will take approximately 14 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $84,000.

The regulations set forth in this amendment are promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities, because few, if any, Model 747 or Model 767 airplanes are operated by small entities. A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adpotion of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to all Model 767 series airplanes and to Model 747 series airplanes equipped with the two piece off-wing escape ramp and slide, certificated in any category. Compliance required within 18 months after the effective date of this AD, unless previously accomplished.

To ensure that the off-wing escape slide does not malfunction due to leaking actuators or thrusters, accomplish the following:

A. Replace the O-rings and perform a leak check, or accomplish the O-ring replacement in a clean room, in accordance with Section 2 of the following service bulletins, as applicable; and perform the radiograph inspection in accordance with Section 3 of the following service bulletins, as applicable:

1. Model 747 door opening thrusters identified in OEA Service Bulletin 2174200–25–012, Revision A, dated June 17, 1988.

2. Model 767 door opening/snubbing actuators identified in OEA Service Bulletin 3092100–25–001, Revision A, dated June 17, 1988.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to OEA, Inc., P.O. Box 10488, Denver, Colorado 80210. These documents may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective September 7, 1988.

Issued in Washington, DC, on July 29, 1988.

M.C. Beard,

Director, Office of Airworthiness.

[FR Doc. 88–17764 Filed 8–5–88; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 39

[Docket No. 88–NM–48–AD; Amdt. 39–5993]

Airworthiness Directives: Short Brothers, PLC, SD3–60 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Shorts Model SD3–60 series airplanes, which requires replacement of certain pitot tubes. This amendment is prompted by reports of inoperative pitot tubes due to icing. This condition, if not corrected, could result in erroneous airspeed and altitude indications.

EFFECTIVE DATE: September 7, 1988.

ADDRESSES: The applicable service information may be obtained from the Short Brothers, PLC, Service Representative, 2011 Crystal Drive, Suite 713, Arlington, Virginia 22202–3702. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Ms. Armella Donnelly, Standardization Branch, ANM–113, telephone (206) 431–1967. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway

South, C–68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations, to include a new airworthiness directive, applicable to Shorts Brothers, PLC, Model SD–360 series airplanes, to require replacement of certain pitot tubes, was published in the **Federal Register** on May 16, 1988 (53 FR 17222).

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

The commenter supported the rule, but suggested that the compliance time be changed from 180 days to 45 days. The commenter stated that, since the service bulletin has been available for over four years now, this period has afforded operators more than sufficient time to modify their airplanes. The FAA does not concur. The compliance time was established with due consideration to the likelihood of the reported problem and an appropriate compliance time previously recommended by the manufacturer and the foreign regulatory agency.

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 66 airplanes of U.S. registry will be affected by this AD, that it will take approximately 3 manhours per airplane to accomplish the required actions, and that the average cost will be $40 per manhour. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be $7,920.

The regulations set forth in this amendment are promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane ($120). A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends Section 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness direction:

Short Brothers, PLC: Applies to Model SD3–60 series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent pitot tubes from becoming inoperative due to icing, which could result in erroneous airspeed and altitude indication, accomplish the following:

A. Within the next 180 days after the effective date of this AD, replace pitot tubes having the code letter "Z" adjacent to the serial number with one containing a code letter other than "Z," in accordance with accomplishment instructions in Service Bulletin SD360–34–09, dated March 1984.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM–113, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to Manager, Standardization Branch, ANM–113.

C. Special-flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections and/or modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Short Brothers, PLC, Service Representative, 2011 Crystal Drive, Suite 713, Arlington, Virginia 22202–3702. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective September 7, 1988.

Issued in Washington, DC on July 29, 1988.

M.C. Beard,

Director, Office of Airworthiness.

[FR Doc. 88–17763 Filed 8–5–88; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 161, 250, and 284

[Docket Nos. RM87–5–001, et al.]

Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines

Issued August 1, 1988.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order granting rehearing solely for the purpose of further consideration.

SUMMARY: On June 1, 1988, the Federal Energy Regulatory Commission (Commission) issued a final rule in Order No. 497 to address possible abuses in the relationship between interstate natural gas pipelines and their marketing or brokering entities. In this order, the Commission grants rehearing of its decision in the final rule solely for the purpose of further consideration.

EFFECTIVE DATE: August 1, 1988.

FOR FURTHER INFORMATION CONTACT: Thomas J. Lane, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357–8530.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 1000 at the Commission's Headquarters, 825 North Capitol Street NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 357–8997. The full text of this rehearing order is available on CIPS for 10 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's

copy contractor, La Dorn Systems Corporation, also located in Room 1000, 825 North Capitol Street NE., Washington, DC 20426.

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa,[1] Charles G. Stalon and Charles A. Trabandt.

On June 1, 1988, the Commission issued a final rule in Order No. 497 [2] to address possible abuses in the relationship between interstate natural gas pipelines and their marketing or brokering affiliates. Pursuant to 18 CFR 385.713 (1987), the Commission has received a number of requests for rehearing of its decision.

In order to review more fully the comments raised in the rehearing requests, the Commission grants rehearing of its decision in this docket solely for the purpose of further consideration. This action does not constitute a grant or denial of the requests on their merits in whole or in part.

Pursuant to Rule 713(d) of the Commission's Rules of Practice and Procedure (18 CFR 385.713(d)(1987)), no answers to the requests for rehearing will be entertained by the Commission. This order is effective on the date of issuance.

By the Commission.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17821 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 74, 81, and 82

[Docket Nos. 76N-0366, 83C-0102, 83C-0127, and 83C-0129]

Revocation of Regulations; D&C Orange No. 17, D&C Red No. 19, D&C Red No. 8, and D&C Red No. 9; Clarification

AGENCY: Food and Drug Administration.

ACTION: Final rule; clarification.

SUMMARY: The Food and Drug Administration (FDA) is clarifying inadvertent errors in its final rules of July 15, 1988 (53 FR 26766 and 53 FR 26768), that withdrew the regulations permanently listing D&C Orange No. 17, D&C Red No. 19, D&C Red No. 8, and D&C Red No. 9. Although the notices denying the petitions properly included an opportunity to file objections and requests for hearing, the final rules should not have included a date for submission of objections to the final rule because, pursuant to a holding of the U.S. Court of Appeals for the District of Columbia, the agency has concluded that the issuance of the regulations permanently listing these colors was not in accordance with applicable law.

EFFECTIVE DATE: August 8, 1988.

FOR FURTHER INFORMATION CONTACT: Gerad L. McCowin, Center for Food and Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C Street, SW., Washington, DC 20204, 202-472-5676.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 15, 1988 (53 FR 26766 and 53 FR 26768), FDA issued final rules that withdrew the regulations permanently listing D&C Orange No. 17, D&C Red No. 19, D&C Red No. 8, and D&C Red No. 9. Those final rules inadvertently included a date for filing objections. The agency wishes to clarify that the filing of objections will not serve to automatically stay the effectiveness of the final rules pursuant to section 701(e)(2) of the Federal Food, Drug, and Cosmetic Act (the act). The agency withdrew the permanent listing regulations of these color additives in response to a decision issued by the U.S. Court of Appeals that found that the principle upon which the listing regulations were based was inconsistent with the statute. Therefore, the agency concluded that the regulations permanently listing these color additives were contrary to law and without legal effect, and, accordingly, had to be withdrawn. In reaching this conclusion, the agency was not required to follow the procedures laid out in section 701(e)(2) of the act.

Additionally, on July 15, 1988, the agency published three notices denying the color additive petitions for D&C Red No. 19 (53 FR 26881), D&C Orange No. 17 (53 FR 26884), and D&C Red No. 8 and D&C Red No. 9 (53 FR 26886). These notices properly provide for a 30-day period in which to submit objections which is not affected by this final rule.

Dated: August 2, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-17814 Filed 8-5-88; 8:45 am]

BILLING CODE 4160-01-M

21 CFR Part 177

[Docket No. 87F-0289]

Indirect Food Additives: Polymers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of pentaerythritol tetrastearate as an optional adjuvant substance in the manufacture of polycarbonate resins. This action is in response to a petition filed by The Dow Chemical Co.

DATES: Effective August 8, 1988; objections and requests for a hearing by September 7, 1988.

ADDRESS: Written objections may be sent to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Julius Smith, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-472-5690.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of September 25, 1987 (52 FR 36104), FDA announced that a food additive petition (FAP 7B3995) had been filed by The Dow Chemical Co., Midland, MI 48674, proposing that § 177.1580 *Polycarbonate resins* (21 CFR 177.1580) be amended to provide for the safe use of pentaerythritol tetrastearate as an optional adjuvant substance in the manufacture of polycarbonate resins.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed food additive use is safe, and that 21 CFR 177.1580(b) should be amended as set forth below.

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

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not

[1] Commissioner Sousa resigned effective July 31, 1988; however, he was present and voted on this item at the meeting of July 27, 1988.

[2] 53 FR 22139 (June 14, 1988)

required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's final rule implementing the National Environmental Policy Act (21 CFR Part 25).

Any person who will be adversely affected by this regulation may at any time on or before September 7, 1988 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection.

Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulations may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 177

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director of the Center for Food Safety and Applied Nutrition, Part 177 is amended as follows:

PART 177—INDIRECT FOOD ADDITIVES: POLYMERS

1. The authority citation for 21 CFR Part 177 continues to read as follows:

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 177.1580 is amended in paragraph (b) by alphabetically adding a new entry in the table under the headings "List of substances" and "Limitations" to read as follows:

§ 177.1580 Polycarbonate resins.

* * * * *

(b) * * *

List of substances	Limitations
* * * * *	
Pentaerythritol tetrastearate (CAS Reg. No. 115–83–3).	For use only as a mold release agent, at a level not to exceed 0.5 percent by weight of the finished resin.
* * * * *	

* * * * *

Dated: July 26, 1988.

Fred R. Shank,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 88–17816 Filed 8–5–88; 8:45 am]

BILLING CODE 4160–01–M

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21 CFR Part 178

[Docket No. 87F–0281]

Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of octadecyl 3,5-di-*tert*-butyl-4-hydroxyhydrocinnamate as an antioxidant and stabilizer in rubber articles intended for repeated use. This action is in response to a petition filed by Ciba-Geigy Corp.

DATES: Effective August 8, 1988; objections and requests for a hearing by September 7, 1988.

ADDRESS: Written objections may be sent to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Vir Anand, Center for Food Safety and Applied Nutrition (HFF–335), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of September 21, 1987 (52 FR 35482), FDA announced that a food additive petition (FAP 7B4028) had been filed by Ciba-Geigy Corp., Three Skyline Dr., Hawthorne, NY 10532. The firm's petition proposed that the food additive regulations be amended to provide for the safe use of octadecyl 3,5-di-*tert*-butyl-4-hydroxyhydrocinnamate as an antioxidant and/or stabilizer in rubber articles for repeated use in contact with food by amendment of § 178.2010 *Antioxidants and/or stabilizers for polymers* (21 CFR 178.2010) and as an antioxidant and/or stabilizer in lubricants with incidental food contact by amendment of § 178.3570 *Lubricants with incidental food contact* (21 CFR 178.3570). By letter dated March 24, 1988, the petitioner withdrew the request for use of the additive in lubricants with incidental food contact and amended the petition to request only the use in repeated-use rubber articles.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed food additive use is safe, and that 21 CFR 178.2010 should be amended in paragraph (b) as set forth below.

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

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's final rule implementing the National Environmental Policy Act (21 CFR Part 25).

Any person who will be adversely affected by this regulation may at any time on or before September 7, 1988 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for

which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 178

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director of the Center for Food Safety and Applied Nutrition, Part 178 is amended as follows:

PART 178—INDIRECT FOOD ADDITIVES: ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

1. The authority citation for 21 CFR part 178 continues to read as follows:

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 178.2010 is amended in the table in paragraph (b) by adding a new entry "14" under the heading "Limitations" for the entry "Octadecyl 3,5-di-*tert*-butyl-4-hydroxyhydrocinnamate" under the heading "Substances" to read as follows:

§ 178.2010 Antioxidants and/or stabilizers for polymers.

* * * * *

(b) * * *

Substances	Limitations
* * * * *	
Octadecyl 3,5-di-*tert*-butyl-4-hydroxyhydrocinnamate (CAS Reg. No. 2082-79-3).	For use only: * * * 14. At levels not exceeding 0.5 percent by weight of the finished rubber article complying with § 177.2600 of this chapter.
* * * * *	

Dated: July 26, 1988.

Fred R. Shank,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 88-17815 Filed 8-5-88; 8:45 am]

BILLING CODE 4160-01-M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 207

Indemnification of Employees

AGENCY: Agency for International Development, IDCA.

ACTION: Final rule.

SUMMARY: This rule adds a new Part 207 to Title 22 of the Code of Federal Regulations. It parallels provisions adopted by the Department of Justice (28 CFR Part 50) and the Department of Health and Human Services (53 FR 11279, April 6, 1988). It permits indemnification of employees of the Agency for International Development (A.I.D.) for adverse judgments for actions taken within the scope of their employment.

EFFECTIVE DATE: August 8, 1988.

FOR FURTHER INFORMATION CONTACT: Jan Miller, Assistant General Counsel for Employee and Public Affairs, Room 6892 N.S., Washington, DC 20523, (202) 647-8218.

SUPPLEMENTARY INFORMATION: A.I.D. does not presently indemnify its employees who are sued personally and suffer an adverse judgment as a result of conduct taken within the scope of employment, nor does its settle claims against employees, who are sued in their individual capacities. Since the 1971 Supreme Court decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), lawsuits against federal employees in their individual capacities have proliferated. The most recent statistics from the Department of Justice indicate that over 14,000 claims had been filed against federal employees personally since the Bivens case. Nearly 5,000 such suits are now pending. Despite the fact the Department of Justice is aware of only 37 adverse judgments against federal employees in their individual capacities, suits personally attacking federal employees at all levels of government continue to increase.

The potential for adverse judgments against a federal employee for actions taken within the scope of employment is detrimental to both the individual employee and the federal government. Although there are currently provisions for employees to request representation by the Department of Justice in these actions, the individual employee still bears the risk of personal liability for an adverse judgment as a result of doing his or her job. Moreover, the prospect of personal liability and the uncertainty as to what conduct may result in a lawsuit against the employee personally, tend to intimidate all employees, to impede creativity and to stifle initiative and decisive action. Employees' fears of personal liability affect government operations, decisionmaking and policy determinations.

A.I.D. believes that lawsuits against federal employees in their individual capacities seriously hinder the effective functioning of the Agency. A modification of A.I.D. policy to permit indemnification would help alleviate this problem and would afford A.I.D. employees the same protection given other federal officials.

This modification of policy permits, but does not require, the Agency to indemnify an employee who suffers an adverse judgment, or other monetary award, provided that the actions giving rise to the award were taken within the scope of employment and that such indemnification is in the interest of the United States.

The policy also allows the Agency to settle a claim brought against an employee in his or her individual capacity by the payment of funds. Absent exceptional circumstances, the Agency will not agree either to indemnify or to settle before entry of an adverse judgment. The modification of policy, which is analogous to the approach adopted by the Department of Justice, is designed to discourage the filing of lawsuits against federal employees in their individual capacities solely in order to pressure the Government into settlement. In the usual case, the Agency will not settle a case, before trial and judgment merely because of a dispositive motion filed on behalf of the employee has been denied. This regulation is applicable to actions pending against A.I.D. employees as of its effective date.

Paperwork Reduction Act

This regulation is not subject to the Paperwork Reduction Act because it deals solely with internal Agency rules governing personnel.

Cost/Regulatory Analysis

This rule will not constitute a "major" rule and therefore is not subject to a regulatory impact analysis requirement of the Order. Major rules are those which impose a cost on the economy of $100 million or more a year or have certain other economic impacts.

The rule will not have a significant economic impact on small entities; therefore, preparation of a regulatory flexibility analysis is not required under the Regulatory Flexibility Act (5 U.S.C. 601–612).

Public Notice and Comment

These regulations are published in final form without the opportunity for public notice and comment because they relate to Agency management and personnel.

List of Subjects in 45 CFR Part 207

Administrative practice and procedure, Government employees.

For reasons stated in the preamble, Part 207, as set forth below, is added to Chapter 2 of Title 22 of the Code of Federal Regulations.

PART 207—INDEMNIFICATION OF EMPLOYEES

§ 207.01 Policy.

(a) A.I.D. may indemnify, in whole or in part, its employees (which for the purpose of this regulation includes former employees) for any verdict, judgment or other monetary award which is rendered against any such employee, provided that the conduct giving rise to the verdict, judgment or award was taken within the scope of his or her employment with the Agency and that such indemnification is in the interest of the United States, as determined by the Administrator, or his or her designee, in his or her discretion.

(b) A.I.D. may settle or compromise a personal damage claim against its employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damage claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Administrator, or his or her designee, in his or her discretion.

(c) Absent exceptional circumstances, as determined by the Administrator or his or her designee, A.I.D. will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment or monetary award.

(d) When an employee becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify A.I.D. that such an action is pending.

(e) The employee may, thereafter, request either: (1) Indemnification to satisfy a verdict, judgment or award entered against the employee or (2) payment to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with documentation including copies of the verdict, judgment, award or settlement proposal, as appropriate, to the General Counsel. The General Counsel may also seek the views of the Department of Justice. The General Counsel shall forward the request and the General Counsel's recommendation to the Administrator for decision.

(f) Any payment under this part either to indemnify an employee or to settle a personal damage claim shall be contingent upon the availability of appropriated funds.

Authority: 5 U.S.C. 301; 22 U.S.C. 2381(a).

Date: June 14, 1988.

Alan Woods,

Administrator.

[FR Doc. 88–17770 Filed 8–5–88; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8217]

Income Tax; Taxable Years Beginning After December 31, 1953 and OMB Control Numbers Under the Paperwork Reduction Act; Certain Cash or Deferred Arrangements Under Employee Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to certain cash or deferred arrangements under employee plans. They generally reflect changes in the applicable tax law made by the Revenue Act of 1978. The regulations provide the public with the guidance needed to comply with the law and affect sponsors of plans that contain cash or deferred arrangements and employees who are entitled to make elections under these arrangements.

DATES: These provisions are generally effective for plan years which begin after December 31, 1979.

FOR FURTHER INFORMATION CONTACT: William D. Gibbs of the Employee Benefits and Exempt Organizations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 (Attention: CC:LR:T) (202–377–9372) (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this final regulation has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1069.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents/recordkeepers may require greater or less time, depending upon their particular circumstances. The estimated annual burden per respondent/recordkeeper varies from 30 minutes to 450 hours, depending on individual circumstances, with an estimated average of 2.1 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Washington, DC 20224, Attention: IRS Reports Clearance Officer TR:FP, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for Internal Revenue Service.

Background

On November 10, 1981, the **Federal Register** published proposed amendments to the Income Tax Regulations (26 CFR Part 1) under sections 401(k) and 402(a)(8) of the Internal Revenue Code of 1954, 46 FR 55544. The Service issued a clarifying Notice on January 8, 1982, 47 FR 988. The amendments were proposed to conform the regulations to section 135 of the Revenue Act of 1978, Pub. L. 95–600, 92 Stat. 2763, 2785 (1978).

A public hearing on the proposed regulations was announced on February 24, 1982, 47 FR 8028, and held on April 20, 1982. After consideration of all comments regarding the proposed regulations, such proposed regulations are adopted as revised by this Treasury Decision.

These regulations are issued under the authority contained in section 7805 of

the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

Tax Reform Act of 1984

The final regulations include provisions interpreting the amendments to section 401(k) enacted by section 527 of the Tax Reform Act of 1984 (TRA '84), 98 Stat. 494, 875 (1984). These amendments provide for the treatment of certain money purchase pension plans in existence on June 27, 1974, as cash or deferred arrangements and change the application of the special actual deferral percentage (ADP) tests. As amended, section 401(k) requires an arrangement to satisfy one of the special ADP tests in order to be a qualified arrangement.

The amendments also clarify the definition of the actual deferral percentage with respect to an employee who is eligible to participate in more than one cash or deferred arrangement sponsored by the same employer. In addition, the amendments require aggregation of certain arrangements for purposes of testing for discrimination.

Tax Reform Act of 1986

The Tax Reform Act of 1986 (TRA '86), Pub. L. 99–514, 100 Stat. 2085, made numerous changes that affect cash or deferred arrangements. Some of these changes raise no questions of interpretation. These include such changes as allowing rural electric cooperatives to maintain qualified cash or deferred arrangements and a new ADP test. Such provisions have been incorporated in the final regulations with appropriate effective dates. The final regulations also use, where appropriate, terms introduced by TRA '86, such as "qualified nonelective contributions" (QNCs) and "qualified matching contributions" (QMACs), in lieu of terms used in the proposed regulations. In addition, the final regulations refer to changes made by TRA '86 relating to new definitions of compensation and highly compensated employee and to new standards for testing discrimination in coverage. The substantive aspects of such changes have been or will be addressed in proposed regulations.

Certain changes affecting cash or deferred arrangements that were made by TRA '86 are not addressed in these regulations. Thus, for example, the circumstances under which QMACs may be treated as elective contributions in plan years beginning after December 31, 1986, are not addressed in these regulations. No inferences as to the interpretation of TRA '86 provisions not specifically addressed in these regulations should be drawn from these regulations.

Comments Received and Actions Taken

Comments received about the proposed regulations centered on four major areas: the definition of compensation; the time when contributions must be made to be used in the ADP test; the definition of hardship for purposes of making withdrawals; and whether plans may recharacterize certain deferrals of highly compensated employees as employee contributions. The following discussion summarizes the comments received and the provisions adopted in the final regulations in response to the comments received.

Cash or Deferred Arrangements Generally

The proposed regulations defined a cash or deferred arrangement to mean any arrangement which is part of a profit-sharing or stock bonus plan under which an eligible employee may elect to have the employer contribute an amount to a trust under the plan or to have the amount paid to the employee in cash. The proposed regulations did not discuss the cash or deferred election. The final regulations expand the definition of cash or deferred arrangement to include any such arrangement that is part of a qualified plan (including a plan intended to be a qualified plan), rather than merely a profit-sharing or stock bonus plan, and clarify that a cash or deferred election exists if an employee may choose between receiving an employer contribution to a qualified plan and receiving cash or another taxable benefit.

The proposed regulations stated that a profit-sharing or stock bonus plan that included a nonqualified cash or deferred arrangement could nevertheless be a qualified plan under section 401(a). The final regulations adopt this provision, but clarify that in determining whether such a plan satisfies the requirements of section 401(a)(4), elective contributions under the nonqualified cash or deferred arrangement are to be treated as employer contributions to the extent that such contributions would be treated as employer contributions if the arrangement were a qualified cash or deferred arrangement. However, for this purpose, the special nondiscrimination test of section 401(k)(3) and Treas. Reg. § 1.401(k)–1(b)(2) may not be used. This rule applies without regard to the reason the cash or deferred arrangement fails to be a qualified arrangement under section 401(k). Future guidance will set forth the method for determining whether the amount of elective contributions under a nonqualified cash or deferred arrangement satisfies section 401(a)(4).

401(k) Exclusive Means to Electively Defer Compensation Under Qualified Plans

Some commentators suggested that section 401(k) is not the exclusive means for electively deferring compensation under qualified plans on a pre-tax basis. Under this theory, an employee (using the rational of Rev. Rul. 60–31, 1960–1 CB 174) would be permitted to choose before the end of a taxable year not to received some portion of the compensation he would earn and to which he would otherwise be entitled for the next taxable year. This amount then could be contributed by the employee's employer to a qualified plan and not be included in the employee's income for the next taxable year. In addition, the qualified plan would not be required to satisfy any of the special rules applicable to cash or deferred arrangements under section 401(k).

Based on the Revenue Act of 1978 (sections 131–135), the legislative history of that Act, and subsequent legislation, the final regulations clarify that section 401(k) is the exclusive method of deferring compensation on an elective, pre-tax basis under a qualified plan. Thus, if the requirements of section 401(k) are not satisfied, an employee's elective contributions under a qualified plan are includible in the employee's gross income for the taxable year in which the employee would have received the amounts (but for the deferral election). This is the case even though the employee makes the election before the taxable year in which the amounts are earned.

This position is consistent with the Service's position on elective contributions under a nonqualified deferred compensation plan, a tax-sheltered annuity contract, and a flexible benefit plan (including a cafeteria plan). Thus, except as provided under sections 401(k) and 402(a)(8) (with respect to certain cash or deferred arrangements in qualified plans), section 457 (with respect to certain nonqualified deferred compensation plans of state and local governments and tax-exempt employers), section 132 of the Revenue Act of 1978 (with respect to certain nonqualified deferred compensation plans of taxable employers), section 403(b) (with respect to certain tax-sheltered annuity contracts), and section 125 (with respect to cafeteria plans), compensation that an employee electively defers or converts under a

deferred compensation plan or a flexible benefit plan, respectively, are includible in the employee's gross income for the taxable year in which such amounts would have been received by the employee (but for the employee's election).

The final regulation provides that the exception under sections 402(a)(8) and 401(k) to this general rule of inclusion of electively deferred or converted compensation applies with respect to compensation that has not yet become currently available. The "currently available" concept is not related to the question of whether amounts are treated as having been made available under section 451.

Compensation

Proposed Treas. Reg. § 1.401(k)–1(b)(8)(vi) defined compensation to mean the amount taken into account under the plan for purposes of determining the amount deferred. The proposed regulations also stated that if such amount has the effect of discriminating against employees who are not highly compensated, a nondiscriminatory definition shall be determined by the Commissioner. The proposed regulations permitted a plan to calculate plan compensation other than on a plan year basis if it was calculated on a reasonable and consistent basis.

Many commentators asked that the definition of compensation be clarified. Among the specific issues raised were the permissibility of annualizing compensation and whether compensation could include amounts deferred.

These concerns have been addressed in § 1.401(k)–1(g)(9) of the final regulations. The definition of compensation is intended to give plans flexibility in design while avoiding discrimination. In general, compensation is still defined to mean the amount taken into account under the plan (or plans) in calculating the elective contribution that may be made on behalf of an employee under the deferral election. The regulations specifically provide that plans may define compensation to include or exclude elective contributions. However, actual compensation for a portion of a year may not be annualized for purposes of testing whether a plan meets the discrimination tests of section 401(k)(3).

The final regulations adopt the position in the proposed regulations that if a plan's definition of compensation has the effect of discriminating in favor of employees who are highly compensated, a nondiscriminatory definition shall be determined by the Commissioner. A plan's definition of compensation will be treated as nondiscriminatory if, for purposes of determining the amount that may be contributed under the plan, the plan defines compensation as either total nondeferred compensation or total nondeferred compensation plus elective contributions under the plan.

For plan years which begin after December 31, 1986, plans must use the definition of compensation contained in section 414(s) and the regulations thereunder.

Time When Contributions Must Be Made

Prop. Treas. Reg. § 1.401(k)–1(b)(7)(iii) required that elective contributions be paid into the trust within 30 days after the end of the plan year in order to be counted in determining the actual deferral percentage for such year. Many commentators pointed out that employers may not know the amount of their profits by this time and will therefore be unable to communicate with their employees regarding the total contribution available to each and the amount of the total contribution that is to be deferred. Other commentators asserted that the difference between this requirement and the time-of-filing deduction rule (section 404(a)(6)) applicable to all other employer contributions would be administratively complex and that all contributions should be required to be made by the section 404(a)(6) date. Finally, other commentators argued that elective contributions under a qualified cash or deferred arrangement should not be subject to contribution due date rules that are more restrictive than the rules that apply to other employer contributions.

In response to comments, the final regulations (§ 1.401(k)–1(b)(6)) extend the time period for making elective contributions that may be used in the ADP test for a plan year to the last day of the twelve-month period immediately following the plan year to which the contributions relate. The contributions must be allocated to participants' accounts for the plan year with respect to which the APD test is performed. In addition, the final regulations clarify that the elective contributions taken into account for a plan year must relate either to compensation that would have been received in the plan year (but for the deferral election) or to compensation attributable to services performed in the plan year that would have been received by the employee (but for the deferral election) within 2½ months after the close of the plan year.

No inference should be drawn from these regulations as to when elective contributions must be contributed to a trust to satisfy Title I of the Employee Retirement Income Security Act of 1974 (ERISA). The Department of Labor has informed the Treasury Department that elective contributions to an employee benefit plan, whether made pursuant to a salary reduction agreement or otherwise, would be considered amounts paid to or withheld by an employer (i.e., participant contributions) within the scope of § 2510.3–102 (53 FR 17628) and therefore would, in accordance with that regulation, constitute plan assets for purposes of Subtitle A and Parts 1 and 4 of Subtitle B of Title I of ERISA and for purposes of the prohibited transaction provisions of section 4975 of the Internal Revenue Code.

Hardship Withdrawals

Prop. Treas. Reg. § 1.401(k)–1(d)(2) permitted hardship distributions to be made only if two tests were met:

(1) The participant had an immediate and heavy financial need; and

(2) Other resources were not reasonably available to meet the need.

Many commentators interpreted the hardship rules as being stricter than those in effect through 1981 under Rev. Rul. 71–224, 1971–1, CB 124, and argued that Congress intended that those same rules should apply to section 401(k) plans. The standard contained in Rev. Rul. 71–224 is not adopted in the final regulations because Rev. Rul. 71–224 merely required that a plan operate in accordance with its definition of hardship.

Commentators also requested clarification of terms such as "immediate and heavy financial needs," "not reasonably available," and "other resources of the employee." Major concerns centered around whether employees would be required to sell non-liquid assets or borrow from other sources before being eligible for a hardship distribution. Several commentators proposed that needs for college tuition, a down payment on a principal residence, or uninsured medical expenses be treated as *per se* hardships, permitting funds to be distributed without regard to the applicant's other financial resources.

The final regulations (§ 1.401(k)–1(d)(2)) retain the two-part definition of hardship in the proposed regulations with additional clarification. However, certain expenses are deemed to constitute immediate and heavy financial needs. These include medical expenses, purchase (excluding mortgage payments) of a principal residence for the employee, payment of tuition for

post-secondary education for the employee, his spouse or children, and payment of amounts necessary to prevent the eviction of the employee from his principal residence or foreclosure on the mortgage of the employee's principal residence. The Commissioner may expand the list of expenses that will be deemed to be made on account of an immediate and heavy financial need of the employee. The Commissioner may exercise this authority only through the publication of revenue rulings, notices, and other documents of general applicability, rather than on an individual basis.

As under the proposed regulations, a hardship distribution cannot be made if the employee has other resources available to meet the financial need (even if the need is deemed to be an immediate and heavy financial need). The final regulations clarify that an employee thus may have to secure the needed funds elsewhere through liquidation of other assets, reimbursement, or borrowing of funds from commercial sources. A plan may provide, however, than an employee will be deemed to lack other resources reasonably available to meet a financial need, including a deemed financial need, if (1) the employee has obtained all distributions, other than hardship distributions, and all nontaxable loans available under all plans maintained by the employer; (2) the plan, and all other plans maintained by the employer, provide that the employee's elective contributions (and employee contributions) will be suspended for at least twelve months after receipt of the hardship distribution; and (3) the plan, and all other plans maintained by the employer, provide that the maximum amount of elective contributions for the employee for the taxable year of the employee following the taxable year in which the employee received the hardship distribution is the excess of the applicable limit under section 402(g) for such next taxable year over such employee's elective contributions for the taxable year in which the employee received the hardship distribution. Of course, the distribution may not exceed the amount of the employee's immediate and heavy financial need. The final regulations also include a limited exception to section 411(d)(6) permitting an employer to adopt the deemed no other resources provision.

Many commentators proposed that the plan administrator have the right to rely upon the applicant's representations regarding his need for, and proposed use of, his benefits. These commentators argued that requiring financial statements from employees would invade the applicant's privacy and deter truly needy employees from applying for hardship distributions. The final regulations permit the employer to reasonably rely upon the representations of the employee regarding the employee's financial affairs and thus do not require the employer or plan administrator to make an independent investigation of an employee's financial affairs. In addition, the special rule under which employees may be deemed to lack other resources is available to minimize a plan administrator's intrusion into the employee's financial affairs.

Recharacterization

The proposed regulations permitted a plan to preclude elections or contributions that would cause a plan that contained a cash or deferred arrangement to fail the ADP test and to correct discrimination through additional nonelective employer contributions that met the nonforfeitability and distribution requirements applicable to elective contributions. In the preamble to the proposed regulations, the Service requested comments on additional methods that plans could utilize to satisfy the nondiscrimination test.

Numerous commentators urged the Service to permit employers to recharacterize amounts contributed at the employee's election if, at the end of the plan year, the actual deferral percentage for the higher-paid group exceeded the limits of section 401(k)(3)(A). The effect of recharacterization would be to treat recharacterized amounts as employee contributions and, thus, these amounts would not be subject to the anti-discrimination rules of section 401(a)(4) and 401(k) that apply to employer contributions. If permitted to use this approach after the end of a plan year, plan sponsors could avoid disqualification of their cash or deferred arrangements (and plans including such arrangements) while ensuring that higher-paid employees did not receive elective contributions in excess of the amounts permitted under the ADP tests of section 401(k)(3)(A). The Service announced on January 8, 1982, 47 FR 998, that such recharacterization was not permitted by the proposed regulations.

Several commentators pointed out that the Service itself had established the precedent for recharacterization in the proposed regulations governing TRASOP's, Prop. Treas. Reg. § 1.46–9(f)(3)(iv), 44 FR 48269, 48273 (1979); later adopted in T.D. 7856, 47 FR 54803, 54807 (1982). These regulations permit the return of employer contributions "to the extent that plan operation would otherwise result in prohibited discrimination."

In response to these comments, the final regulations, under the authority of section 7805(b), permit recharacterization; such recharacterization will be permitted for plan years which begin before January 1, 1987. Plans may be amended to permit recharacterization for such plan years. Excess elective contributions recharacterized as employee contributions are to be taxed (income, FICA, SECA, and FUTA) to the employee in the year to which the contributions relate, rather than the year in which the recharacterization takes place. However, for purposes of other Code provisions, including sections 401(k)(2), 404, 409, 411, 412, 415, 416, and 417, recharacterized contributions continue to be treated as employer contributions. In addition, these amounts cannot be distributed except as provided in § 1.401(k)–1(d) of the final regulations.

If amounts recharacterized for any plan year were not previously included in income, they are to be treated as received by employees for income tax purposes on the first day of the first plan year ending in 1988. If notice of recharacterization is provided to the affected highly compensated employees within 75 days after the date of publication of this Treasury Decision in the **Federal Register**, recharacterization is deemed to have occurred 75 days after the close of the plan year and the penalty tax of section 4979 will not be imposed.

For plan years which begin after December 31, 1986, the treatment of excess contributions will be addressed in regulations under 401(k)(8) of the Internal Revenue Code of 1986.

Other Actions Taken

Other changes in style and organization have been made in order to improve, clarify and resolve areas that commentators noted as being ambiguous.

Effective Dates

These regulations are generally effective for plan years which begin after December 31, 1979. Those provisions of the regulations relating to changes made by the Tax Reform Act of 1986 are generally effective for plan years which begin after December 31, 1986. There is a special effective date rule for the provisions of the Tax Reform Act of 1986 that affect plans maintained pursuant to collective bargaining

agreements. For plan years beginning after December 31, 1979 (or, in the case of a pre-ERISA money purchase plan, plan years beginning after July 18, 1984) and before January 1, 1988, a reasonable interpretation of the rules set forth in section 401(k) of the Code (as in effect during those years) may be relied upon to determine whether a cash or deferred arrangement was qualified during those years. For years beginning before January 1, 1987, operation in accordance with the regulations proposed on November 10, 1981, is a reasonable interpretation of section 401(k).

Plan Amendments

Plan sponsors may defer amendments required by these regulations until the earlier of plan termination or the last date for making amendments provided by section 1140 of the Tax Reform Act of 1986, as extended in the regulations under section 401(b). In general, the last day on which a determination letter on plan amendments may be requested under section 401(b) is the last date prescribed by law, including extensions, for filing the income tax return of the employer for the employer's taxable year in which the date of the remedial amendment period begins. If a determination letter is requested during this period, the required plan amendments must be adopted no later than ninety days after receipt of a favorable determination letter.

401(b) Amendment Period

Section 1140 of TRA '86 provides, in general, that if the statutory provisions of TRA '86 effective before 1989 require amendment of plan provisions, plan amendments need not be made until the last day of the first plan year beginning after December 31, 1988, provided the amendment is effective retroactively to the statutory effective date and the plan is operated in accordance with the requirements of the provision as of its effective date with respect to the plan. Section 401(b) and the regulations thereunder permit retroactive amendments of "disqualifying provisions."

Pursuant to the authority of section 7805(b), the regulations under section 401(b) of the Code are amended to provide that, under certain circumstances, a plan provision (or the absence of a required plan provision) that results in the failure of a plan to satisfy the qualification requirements of the Code by reason of any change in such requirements effected by the Tax Reform Act of 1986 (TRA '86), Pub. L. 99–514, the Omnibus Budget Reconciliation Act of 1986 (OBRA '86), Pub. L. 99–509, or the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), Pub. L. 100–203, that is effective before the first day of the first plan year beginning after December 31, 1989, will be a "disqualifying provision" within the meaning of Treas. Reg. § 1.401(b)–1(b). Included in the definition of disqualifying provisions with respect to TRA '86, OBRA '86 and OBRA '87 are provisions that are integral to a qualification requirement changed by TRA '86, OBRA '86, or OBRA '87 or otherwise treated, directly or indirectly, as subject to the conditions of section 1140 of TRA '86. Examples of provisions to which the preceding sentence might apply are: (1) a plan provision permitting contributions to a profit-sharing plan without regard to current or accumulated profits and (2) plan amendments required under Rev. Rul. 86–74, 1986–1 C.B. 205, that may be deferred until the date the plan must be amended to comply with TRA '86 as determined under section 1140 thereof as provided in Notice 88–9, 1988–4 I.R.B. 21.

Plan provisions will not be considered disqualifying provisions to which the amended section 401(b) retroactive amendment period applies unless two conditions are met. First, with respect to requirements effective before 1989, the plan must have been operated in accordance with the requirement as of the applicable effective date. Second, the applicable qualification requirement must be effective before the first day of the first plan year beginning after December 31, 1989. Thus, for example, if a collectively bargained plan need not comply with TRA '86 provisions until 1990, such plan does not have the section 401(b) amendment period based on the 1990 plan year, since it already has a period longer than that which would apply to the plan under a section 401(b) period based on a 1989 effective date.

In applying Treas. Reg. § 1.401(b)–1(c)(1), as it applies to any disqualifying provision described above resulting from TRA '86, OBRA '86, and OBRA '87, the remedial amendment period begins on the day the applicable disqualifying provision becomes effective with respect to the plan. In applying Treas. Reg. § 1.401(b)–1(c)(2) to determine the end of such remedial amendment period, such remedial amendment period is deemed to have begun on the first day of the first plan year which begins after December 31, 1988.

The regulations under section 401(b) are also being amended to give the Commissioner the authority in the future to treat changes to the qualification requirements made by an amendment to the Code as disqualifying provisions.

Non-Applicability of Executive Order

The Treasury Department has determined that this regulation is not subject to review under Executive Order 12291 or the Treasury and OMB implementation of the Order dated April 29, 1983.

Regulatory Flexibility Act

No general notice of proposed rule making is required by 5 U.S.C. 553(b) for interpretative regulations. Accordingly, the Regulatory Flexibility Act (5 U.S.C. Chapter 6) does not apply and no Regulatory Flexibility Analysis is required for this rule.

Drafting Information

The principal authors of this regulation were William D. Gibbs and Mary E. Oppenheimer of the Employee Benefits and Exempt Organizations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR 1.401–0—1.425–1

Income taxes, Employee benefit plan, Pensions, Stock options, Individual retirement accounts, Employee stock ownership plans.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

PART 1—[AMENDED]

Paragraph 1. The authority citation of Part 1 continues to read:

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

Par. 2. Section 1.401(b)–1 is amended by revising paragraphs (b)(2), (c)(1)(iii), and (c)(2) concluding text to read as follows:

§ 1.401(b)–1 Certain retroactive changes in plan.

* * * * *

(b) *Disqualifying Provisions.* * * *

(2) A plan provision which results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in such requirements—

(i) Effected by the Employee Retirement Income Security Act of 1974 (Pub. L. 93–406, 88 Stat. 829), hereafter referred to as "ERISA," or the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. 97–248, 96 Stat. 324), hereafter referred to as "TEFRA," or

(ii) Effective before the first day of the first plan year beginning after December 31, 1989 and that is effected by the Tax Reform Act of 1986 (Pub. L. 99–514, 100 Stat. 2085, 2489), hereafter referred to as "TRA '86," the Omnibus Budget Reconciliation Act of 1986, (Pub. L. 99–509, 100 Stat. 1874), hereafter referred to as "OBRA '86," or the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100–203, 101 Stat. 1330), hereafter referred to as "OBRA '87." For purposes of this paragraph (b)(2)(ii), a disqualifying provision includes any plan provision that is integral to a qualification requirement changed by TRA '86, OBRA '86, or OBRA '87 or any requirement treated by the Commissioner, directly or indirectly, as if section 1140 of TRA '86 applied to it, but only to the extent such provision is effective before the first day of the first plan year beginning after December 31, 1989. With respect to disqualifying provisions described in this paragraph (b)(2)(ii) effective before the first day of the first plan year which begins after December 31, 1988, there must be compliance with the conditions of section 1140 of TRA '86 (other than the requirement that the plan amendment be made on or before the last day of the first plan year beginning after December 31, 1988), including operation in accordance with the plan provision as of its effective date with respect to the plan.

(iii) Effected by amendments to the Code that are designated by the Commissioner, at his discretion, as disqualifying provisions described in this paragraph (b)(2). For purposes of this paragraph (b)(2), a disqualifying provision includes the absence from a plan of a provision required by such change if the plan was in effect on the date such change became effective with respect to such plan.

(c) *Remedial amendment period.* (1) * * *

(iii) In the case of a disqualifying provision described in paragraph (b)(2) of this section, the date on which the change effected by ERISA, TEFRA, TRA '86, OBRA '86, OBRA '87, or a qualification requirement that is treated, directly or indirectly, as subject to the conditions of section 1140 of TRA '86 described in paragraph (b)(2) of this section, became effective with respect to such plan or, in the case of a provision, described in paragraph (b)(2)(ii) of this section, that is integral to such qualification requirement, the first day on which the plan was operated in accordance with such provision.

(2) * * *

(iv) * * *

For purposes of paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this section, for any disqualifying provision described in paragraph (b)(2)(ii) of this section, the remedial amendment period shall be deemed to have begun with the first day of the first plan year which begins after December 31, 1988.

For purposes of this paragraph (c)(2) of this section, a master or prototype plan shall not be considered to be a plan maintained by more than one employer, and whether or not a plan is maintained by more than one employer, shall be determined without regard to section 414 (b) and (c) except that if a plan is maintained solely by an affiliated group of corporations (within the meaning of section 1504) which files a consolidated income tax return pursuant to section 1501 for a taxable year within which falls the latest of the dates described in paragraph (c)(2)(i) of this section, such plan shall be deemed to be maintained by one employer.

* * * * *

Par. 3. A new § 1.401(k)–0 is added immediately after § 1.401(f)–1 to read as follows:

§ 1.401 (k)–0 Certain cash or deferred arrangements, table of contents.

This section contains the captions that appear in § 1.401(k)–1.

§ 1.401(k)–1 Certain cash or deferred arrangements.

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(4) Transitional rules for plans of state and local governments.

Par. 4. A new §1.401(k)-1 is added immediately after § 1.401(k)-0 to read as follows:

§ 1.401(k)-1 Certain cash or deferred arrangements.

(a) *In general*—(1) *General rule.* A plan, other than a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural electric cooperative plan, will fail to satisfy the requirements of section 401(a) if the plan includes a cash or deferred arrangement. A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural electric cooperative plan will not fail to satisfy the requirements of section 401(a) merely because the plan includes a cash or deferred arrangement.

(2) *Cash or deferred arrangement*—(i) *In general.* Except as provided in paragraph (a)(2)(ii), a cash or deferred arrangement is an arrangement under which an eligible employee may make a cash or deferred election to have the employer either contribute an amount to a trust under a plan that meets (or is intended to meet) the requirements of section 401(a) or provide an amount to the employee in cash or in the form of some other taxable benefit. An arrangement under which the employee may make a cash or deferred election to have the employer contribute an amount to a trust under a plan that meets (or is intended to meet) the requirements of section 401(a) includes an arrangement under which the employee may elect either to receive cash or a taxable amount or to accrue a benefit under a defined benefit plan that is intended to meet the requirements of section 401(a), and an arrangement under which the employee may elect either to receive cash or a taxable amount or to have the employer contribute an amount to a contract that meets the requirements of section 401(a) of 403(a).

(ii) *After-tax employee contributions.* A cash or deferred arrangement does not include an arrangement pursuant to which amounts contributed under a plan at an employee's election are designated or treated at the time of deferral or contribution as after-tax employee contributions (e.g., by reporting the contributions as taxable income subject to applicable withholding requirements). See also section 414(h)(1). This is the case even if the employee's election to make after-tax employee contributions is made before the amounts subject to the election are currently available to the employee.

(3) *Cash or deferred election*—(i) *General rule.* A cash or deferred election is an election (or modification of an earlier election) that is made at any time permitted by the plan with respect to cash or other taxable amounts that are not currently available to the electing employee as of the date of the election and are not designated or treated as after-tax employee contributions at the time of deferral or contribution. A cash or deferred election includes a salary reduction agreement between an eligible employee and the employer under which a contribution is made under the plan only if the employee elects to reduce his cash compensation or to forgo an increase in his cash compensation.

(ii) *Amounts currently available.* Cash or another taxable amount is currently available to the employee if it has been paid to the employee or if the employee is able currently to receive the cash or other taxable amount at his discretion. An amount is not currently available to an employee if there is a significant limitation or restriction on the employee's right to receive the amount currently. Similarly, an amount is not currently available as of a date if the employee may under no circumstances receive the amount before a particular time in the future.

(iii) *Certain one-time elections.* A cash or deferred election does not include a one-time irrevocable election, upon an employee's commencement of employment or upon an employee's first becoming eligible under any plan of the employer, to have a specified amount or percentage of compensation (including no amount of compensation) contributed by the employer, on behalf of the employee to the plan and any other plan of the employer (including plans not yet established) for the duration of the employee's employment with the employer. Thus, employer contributions pursuant to such a one-time election are not treated as having been made pursuant to a cash or deferred arrangement.

(iv) *Tax treatment.* An amount generally is includible in an employee's gross income for the taxable year in which the employee actually receives, or is treated as having received, such amount. But for section 402(a)(8) and section 401(k), an employee is treated as having received an amount that is contributed under a plan pursuant to the employee's cash or deferred election. This is the case even if the election to defer is made before the year in which such amount has been earned or becomes currently available. See § 1.402(a)-1(d).

(v) *Examples.* The provisions of this subparagraph (a)(3) are illustrated by the following examples:

Example (1). An employer maintains a profit-sharing plan under which each eligible employee has an election with respect to an annual bonus of ten percent of his compensation payable on January 30 each year with respect to the prior calendar year's profits. Deferred amounts are not treated as after-tax employee contributions. An election made prior to January 30 to defer all or part of the bonus is a cash or deferred election and the bonus deferral arrangement is a cash or deferred arrangement.

Example (2). An employer maintains a profit-sharing plan under which each eligible employee may elect to defer up to 10 percent of compensation for each payroll period during the plan year. An election to defer compensation for a payroll period is a cash or deferred election if such election is made prior to the date on which such compensation is to be paid to the employee and if such deferred amount is not treated as an after-tax employee contribution at the time of deferral.

(4) *Qualified cash or deferred arrangement*—(i) *In general.* A qualified cash or deferred arrangement is a cash or deferred arrangement that satisfies the requirements of paragraphs (b), (c), (d), and (e) of this section and that is part of a plan that otherwise meets the requirements of section 401(a).

(ii) *Treatment of elective contributions as employer contributions.* Except as provided in paragraph (f) of this section, elective contributions under a qualified cash or deferred arrangement are treated as employer contributions under the Internal Revenue Code of 1986. Thus, for example, such elective contributions are treated as employer contributions for purposes of sections 401(a), 401(k), 404, 409, 411, 412, 415, 416, and 417.

(iii) *Tax treatment of employees.* Except as provided in section 402(g) and paragraph (f) of this section, elective contributions under a qualified cash or deferred arrangement are not includible in an employee's gross income at the time such contributions would have been received in cash (but for the cash or deferred election) or at the time contributed under the plan. See § 1.402(a)–1(d).

(iv) *Nondiscrimination requirement.* The amount of elective contributions under a qualified cash or deferred arrangement must satisfy section 401(a)(4). For plan years beginning after December 31, 1984, the amount of elective contributions will satisfy section 401(a)(4) only if such elective contributions satisfy the special nondiscrimination test in paragraph (b)(2) of this section.

(v) *Plan assets.* The extent to which elective contributions under a cash or deferred arrangement constitute plan assets for purposes of the prohibited transaction provisions of section 4975 of the Internal Revenue Code and Title I of the Employee Retirement Income Security Act of 1974 shall be determined in accordance with regulations and rulings issued by the Department of Labor.

(5) *Nonqualified cash or deferred arrangement*—(i) *In general.* A nonqualified cash or deferred arrangement is a cash or deferred arrangement that is not a qualified cash or deferred arrangement. Thus, if a cash or deferred arrangement fails to satisfy one or more of the requirements in paragraph (b), (c), (d) or (e) of this section, such arrangement is a nonqualified cash or deferred arrangement.

(ii) *Treatment of elective contributions as employer contributions.* Except as specifically provided otherwise, elective contributions under a nonqualified cash or deferred arrangement are treated as employer contributions under the Internal Revenue Code of 1986. Thus, for example, such elective contributions are treated as employer contributions for purposes of sections 401(a) (including section 401(a)(4)), 401(k), 404, 409, 411, 412, 415, 416, and 417.

(iii) *Tax treatment of employees.* Elective contributions under a nonqualified cash or deferred arrangement are includible in an employee's gross income at the time such contributions would have been received (but for the cash or deferred election). See § 1.402(a)–1(d).

(iv) *Qualification of plan that includes a nonqualified cash or deferred arrangement.* A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural electric cooperative plan will not fail to satisfy section 401(a) merely because such plan includes a nonqualified cash or deferred arrangement. In determining whether such a plan satisfies the requirements of section 401(a)(4), elective contributions under the nonqualified cash or deferred arrangement are to be treated as employer contributions to the extent that such contributions would be treated as employer contributions if the arrangement were a qualified cash or deferred arrangement, but the special nondiscrimination test of paragraph (b)(2) may not be used.

(b) *Coverage and discrimination requirements*—(1) *Coverage.* (i) For plan years which begin before January 1, 1989, or such later date provided under paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (b) for a plan year only if the eligible employees under the arrangement satisfy the 70 percent test of section 410(b)(1)(A) or the nondiscriminatory classification test of section 410(b)(1)(H). For purposes of this subdivision, all eligible employees under the arrangement are treated as benefiting under the arrangement. For purposes of this subdivision, section 410(b) means section 410(b) prior to its amendment by section 1112 of the Tax Reform Act of 1986 (TRA '86).

(ii) For plan years which begin after December 31, 1988, or on or after the later date provided under paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (b) for a plan year only if the eligible employees under the arrangement satisfy either the percentage test of section 410(b)(1)(A), the ratio test of section 410(b)(1)(B), or the reasonable classification test of section 410(b)(2)(A)(i) (and, in such case, the average benefit percentage test of section 410(b)(2)(A)(ii) is satisfied). For purposes of applying section 410(b), all eligible employees under the arrangement are treated as benefiting under the arrangement.

(iii) A plan described in section 410(c)(1) will be treated as satisfying the requirements of section 410 if such plan meets the requirements of section 401(a)(3) as in effect on September 1, 1974.

(2) *Nondiscriminatory elective contributions.* A cash or deferred arrangement satisfies this paragraph (b) for a plan year only if—

(i) The elective contributions under the arrangement, or

(ii) The elective contributions, in combination with qualified nonelective contributions and qualified matching contributions that are treated as elective contributions under the arrangement,

satisfy the actual deferral percentage test in paragraph (b)(4) of this section. If a cash or deferred arrangement satisfies this paragraph (b)(2), such arrangement will be treated as satisfying section 401(a)(4) with respect to the amount of elective contributions. See paragraph (e)(1) of this section with respect to the application of section 401(a)(4) to other benefits, rights and features under a cash or deferred arrangement. Employee contributions may not be treated as elective contributions under a cash or deferred arrangement for purposes of this paragraph (b)(2).

(3) *Qualified nonelective contributions and qualified matching contributions that may be treated as elective contributions.* Except as specifically provided otherwise, for purposes of paragraph (b)(2)(ii) of this section, all or part of the qualified nonelective contributions and qualified matching contributions made with respect to those employees who are eligible employees under the cash or deferred arrangement being tested may be treated as elective contributions provided that each of the following (to the extent applicable) is satisfied:

(i) The nonelective contributions, including those qualified nonelective contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(ii) The nonelective contributions, excluding those qualified nonelective contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(iii) The matching contributions, including those qualified matching contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(iv) The matching contributions, excluding those qualified matching contributions treated as elective contributions for purposes of the actual

deferral percentage test, satisfy the requirements of section 401(a)(4).

(v) Except as provided in subdivisions (i) and (iii) of this paragraph (b)(3), the qualified nonelective contributions for purposes of the actual deferral percentage test are not taken into account in determining whether any other contributions or benefits satisfy section 401(a)(4).

(vi) The qualified nonelective contributions and qualified matching contributions satisfy paragraph (b)(6)(i) for the plan year as if such contributions were elective contributions.

Qualified matching contributions taken into account for plan years which begin after December 31, 1986, or on or after the later date provided under paragraph (h) of this section, are also to be treated in accordance with the requirements of section 401(m) and the regulations thereunder.

(4) *Actual deferral percentage tests.* (i) For plan years which begin after December 31, 1979, and before January 1, 1987, or such later date provided under paragraph (h) of this section, the actual deferral percentage test is satisfied if either of the following test is met:

(A) The actual deferral percentage for the group of eligible highly compensated employees (top one-third) is not more than the actual deferral percentage for the group of all other eligible employees (lower two-thirds) multiplied by 1.5, or

(B) The excess of the actual deferral percentage for the top one-third over the actual deferral percentage for the lower two-thirds is not mroe than three percentage points, and the actual deferral percentage for the top one-third is not more than the actual deferral percentage for the lower two-thirds multiplied by 2.5.

(ii) For plan years which begin after December 31, 1986, or such later date provided under paragraph (h) of this section, the actual deferral percentage test is satisfied if either of the following test is met:

(A) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by 1.25, or

(B) The excess of the actual deferral percentage for the group of eligible highly compensated employees over the actual deferral percentage for the group of all other eligible employees is not more than two percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by two.

For plan years which begin after December 31, 1986, or such later date provided in paragraph (h) of this section, the plan must provide that the actual deferral percentage test will be met. For purposes of this paragraph (b)(4)(ii), the plan may incorporate by reference the provisions of section 401(k)(3) and this section.

(5) *Aggregation rules*—(i) *Permissive aggregation of arrangements and plans.* Two or more cash or deferred arrangements may be considered as a single arrangement for purposes of determining whether or not such arrangements satisfy sections 401(a)(4), 410(b), and 401(k). In such a case, the case or deferred arrangements included in such plans and the plans including such arrangements shall be treated as one arrangement and as one plan for purposes of this paragraph (b) and sections 401(a)(4), 401(k) and 410(b). If an employer maintains two or more plans that are treated as a single plan for purposes of section 401(a)(4) or 410(b) (other than section 410(b)(2)(A)(ii) as in effect for plan years which begin after December 31, 1988), all cash or deferred arrangements that are included in such plans are treated as a single arrangement for purposes of this paragraph (b) and sections 401(a)(4), 401(k), and 410(b).

(ii) *Impermissible aggregation of arrangements and plans.* For plan years which begin after December 31, 1988, notwithstanding paragraphs (b)(2), (b)(3) and (b)(5)(i) of this section, contributions and allocations under a plan described in section 4975(e)(7) (an ESOP) may not be combined with contributions or allocations under any plan not described in section 4975(e)(7) (a non-ESOP) for purposes of determining whether either the ESOP or the non-ESOP satisfies this paragraph (b) and sections 401(a)(4), 401(k), and 410(b). See § 54.4975–11(e), which includes an exception to this rule for certain plans in existence on November 1, 1977. See also § 54.4974–11(a)(5), which provides that an ESOP may form a portion of a plan the balance of which includes a qualified pension, profit-sharing, or stock bonus plan which is not an ESOP. For example, in determining whether elective contributions under a cash or deferred arrangement that is included in the portion of a plan that is not an ESOP satisfy paragraph (b) and section 401(a)(4) and whether nonelective contributions under the portion of the plan that is an ESOP satisfy section 401(a)(4), such elective contributions and nonelective contributions may not be considered together. Thus, with respect to such elective contributions, the nonelective contributions may not be treated as qualified nonelective contributions. Similarly, for plan years which begin after December 31, 1988, contributions for which a tax credit is provided may not be treated as elective contributions under paragraphs (b)(2) and (b)(3) of this section.

(6) *Elective contributions taken into account for a plan year.* An elective contribution may be taken into account under paragraph (b)(2) of this section for a plan year only if it satisfies paragraphs (b)(6)(i) and (b)(6)(ii) of this section.

(i) The elective contribution is allocated to the employee under the plan as of a date within that plan year. For purposes of this rule, an elective contribution is considered allocated as of a date within a plan year only if—

(A) The allocation is not contingent upon the employee's participation in the plan or performance of services on any date subsequent to that date, and

(B) The elective contribution is actually paid to the trust no later than the end of the twelve-month period immediately following the plan year to which the contribution relates.

(ii) The elective contribution relates to compensation that either—

(A) Would have been received by the employee in the plan year but for the employee's election to defer under the arrangement, or

(B) Is attributable to services performed by the employee in the plan year and, but for the employee's election to defer, would have been received by the employee within two and one-half months after the close of the plan year.

Elective contributions that do not satisfy the requirements of paragraphs (b)(6) (i) and (ii) of this section may not be taken into account under paragraph (b)(2) for the plan year with respect to which the contributions were made or for any other plan year. Instead, such elective contributions must satisfy section 401(a)(4) (without regard to the special nondiscrimination test in paragraph (b)(2) of this section) for the plan year for which allocated under the plan as if such elective contributions were the only employer contributions for such year.

(7) *Examples.* The provisions of this paragraph (b) are illustrated by the following examples. The examples apply the rules in paragraph (b)(4) of this section for plan years beginning after December 31, 1979, and before January 1, 1987, or such later date provided in paragraph (h) of this section.

Example (1). (i) Employees A, B, and C are eligible employees and earn $30,000, $15,000 and $10,000 per year respectively. In addition, their employer, X, contributes a bonus of up to 10 percent of their regular compensation to a trust under a profit-sharing plan that includes a cash or deferred arrangement. Under the arrangement, each eligible employee may elect to receive none, all, or any part of the 10 percent in cash. The employer will contribute the remainder to the trust. For the 1985 plan year, A, B, and C make the following elections:

Employee	Compensation	Elective contribution	Cash election
A	$30,000	$2,000	$1,000
B	15,000	750	750
C	10,000	400	600

(ii) The ratios of employer contributions to the trust on behalf of each eligible employee to the employee's compenation for the plan year (calculated separately for each employee) are:

Employee	Ratio of elective contribution to compensation	Individual's actual deferral percentage (percent)
A	$2,000/$30,000	6.67
B	750/15,000	5.00
C	400/10,000	4.00

(iii) The actual deferral percentage for the top one-third is 6.67 percent (2,000/30,000). The actual deferral percentage for the lower two-thirds is 4.5 percent ((5% + 4%)/2)). Because 6.67 percent is less than 6.75 percent (4.50% multiplied by 1.5), the first percentage test is satisfied.

Example (2). (i) The facts are the same as in *Example (1)* except that elective contributions are made pursuant to a salary reduction agreement. Compensation includes amounts that are contributed by salary reduction. In addition, A wishes to defer $2,250. Thus, the compensation and elective contributions for A, B, and C are as shown below:

Employee	Compensation (A)	Elective contribution (B)	Actual deferral percentage (B/A) (percent)
A	$30,000	$2,250	7.50
B	15,000	750	5.00
C	10,000	400	4.00

(ii) The actual deferral percentage (ADP) for the top one-third is 7.5 percent. The ADP for the lower two-thirds is 4.5 percent ((5.00% + 4.00%/2). Because 7.5 percent exceeds 6.75 percent (4.50 × 1.5), the first percentage test is not satisfied. Because 7.5 percent is not more than 11.25 percent (4.50% × 2.5) and not more than 7.5 percent (4.50% + 3), the second percentage test is satisfied.

Example (3). (i) Employees 1 through 9 are eligible employees who participate in a profit-sharing plan maintained by employer A. Each eligible employee may elect to defer up to six percent of compensation under the plan. The compensation and elective contributions of these employees for the 1983 plan year are shown below:

Employee	Compensation	Elective contributions
1	$100,000	$6,000
2	80,000	4,800
3	60,000	3,600
4	40,000	1,200
5	30,000	900
6	20,000	600
7	20,000	600
8	10,000	300
9	5,000	150

(ii) For the 1983 plan year, the ratios of the elective contributions on behalf of each employee to the employee's compensation are:

Employee	Ratio of elective contributions to compensation	Individual's deferral percentage (percent)
1	$6,000/$100,000	6
2	4,800/ 80,000	6
3	3,600/ 60,000	6
4	1,200/ 40,000	3
5	900/ 30,000	3
6	600/ 20,000	3
7	600/ 20,000	3
8	300/ 10,000	3
9	150/ 5,000	3

(iii) The actual deferral percentage for the top one-third, consisting of employees 1, 2, and 3, is six percent. The actual deferral percentage for the lower two-thirds, consisting of employees 4 through 9, is three percent. Because six percent is greater than 4.5 percent (3% multiplied by 1.5), the first percentage test is not satisfied. However, because six percent is not more than three percentage points greater than three percent and six percent is less than 7.5 percent (3% × 2.5), the second percentage test is satisfied.

Example (4). (i) Employees 1 through 9 are the only employees of Employer D. Employer D maintains and contributes to a profit-sharing plan the following amounts:

(A) Six percent of each employee's compensation. These contributions do not satisfy the requirements for qualified nonelective contributions.

(B) Two percent of each employee's compensation. These contributions satisfy the requirements for qualified nonelective contributions.

(C) Up to three percent of each employee's compensation which the employee may elect to receive as a direct cash payment or to defer under the plan.

(ii) For the 1984 plan year, employees 1 through 9 received compensation and plan contributions as indicated in the table below:

Employee	Compensation	Six percent nonqualified nonelective contribution	Two percent qualified nonelective contribution	Elective contributions
1	$100,000	$6,000	$2,000	$3,000
2	80,000	4,800	1,600	2,400
3	60,000	3,600	1,200	1,800
4	40,000	2,400	800	0
5	30,000	1,800	600	0
6	20,000	1,200	400	0
7	20,000	1,200	400	0
8	10,000	600	200	0
9	5,000	300	100	0

(iii) Both types of nonelective contributions are made for all employees. Thus both the six percent and the two percent nonelective employer contributions satisfy the requirements of section 401(a)(4) and paragraph (b)(3)(i) of this section.

(iv) However, the elective contributions under the plan do not by themselves satisfy the special rules in paragraph (b)(4) of this section because, based solely on such elective deferrals, the actual deferral percentage for the top one-third, consisting of employees 1, 2, and 3, is three percent and the actual deferral percentage for the lower two-thirds is zero. Nevertheless, the two percent nonelective contribution may also be taken into account in applying the special rules because those contributions are qualified nonelective contributions that satisfy paragraph (b)(3) of this section. The six percent nonelective contribution may not be taken into account because it is not a qualified nonelective contribution.

(v) If the two percent qualified nonelective contributions are taken into account, the actual deferral percentage for the top one-third is five percent, and the actual deferral percentage for the lower two-thirds is two percent. Because five percent is not more than three percentage points greater than two percent, and not more than two percent multiplied by 2.5, the actual deferral percentage test in paragraph (b)(4)(i)(B) of this section is satisfied. Thus, the plan satisfies this paragraph (b).

(c) *Nonforfeitability*—(1) *General rule.* A cash or deferred arrangment satisfies this paragraph (c) only if each employee's right to the amount attributable to elective contributions—

(i) Is immediately nonforfeitable within the meaning of section 411, without regard to section 411(a)(3), and would be nonforfeitable under the plan regardless of the age and service of the employee or whether the employee is employed on a specific date;

(ii) Is disregarded for purposes of applying section 411(a) to other contributions or benefits; and

(iii) Remains nonforfeitable even if the employee makes no additional elective contributions under a cash or deferred arrangement.

(2) *Example.* This paragraph may be illustrated by the following example:

Example. Employees B and C are covered by Employer Y's stock bonus plan, which includes a qualified cash or deferred arrangement. Under the plan, Employer Y makes a nonelective contribution on behalf of each employee equal to four percent of their compensation. All employees participating in the plan have a nonforfeitable right to a percentage of their accrued benefit derived from this contribution according to the following table:

Years of service	Nonforfeitable percentage (percent)
Less than 1	0
1	20
2	40
3	60
4	80
5 or more	100

B and C have three and six years of service, respectively. Employer Y also permits employees to elect to defer up to six percent of their compensation through salary reduction agreements. Amounts deferred under these agreements are nonforfeitable at all times. In accordance with paragraph (c)(1)(i), the nonforfeitable percentage of Employer Y's nonelective contribution on behalf of B and C may not be treated as a qualified nonelective contribution under paragraph (b)(3) of this section, because these amounts are nonforfeitable by reason of the completion by B and C of a stated number of years of service, and not regardless of the age and service of B and C.

(d) *Distribution limitation*—(1) *General rule.* For plan years which begin before January 1, 1985, a cash or deferred arrangement satisfies this paragraph (d) only if amounts attributable to elective contributions are not distributable earlier than upon one of the following events:

(i) The employee's retirement, death, disability, or separation from service; or

(ii) In the case of a profit-sharing or stock bonus plan, the employee's hardship or attainment of age 59½.

A plan will not fail to satisfy this paragraph by reason of a dividend distribution described in section 404(k)(2).

(2) *Hardship*—(i) *General rule.* For purposes of this section, a distribution is on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy such financial need. The determinations of the existence of an immediate and heavy financial need and of the amount necessary to meet the need must be made in accordance with nondiscriminatory and objective standards set forth in the plan. See section 411(d)(6) and the regulations thereunder.

(ii) *Immediate and heavy financial need*—(A) *In general.* The determination of whether an employee has an immediate and heavy financial need is to be made on the basis of all relevant facts and circumstances. Generally, for example, the need to pay the funeral expenses of a family member would constitute an immediate and heavy financial need. A distribution made to an employee for the purchase of a boat or television would generally not constitute a distribution made on account of an immediate and heavy financial need. A financial need shall not fail to qualify as immediate and heavy merely because such need was reasonably foreseeable or voluntarily incurred by the employee.

(B) *Deemed immediate and heavy financial need.* A distribution will be deemed to be made on account of an immediate and heavy financial need of the employee if the distribution is on account of:

(*1*) Medical expenses described in section 213(d) incurred by the employee, the employee's spouse, or any dependents of the employee (as defined in section 152);

(*2*) Purchase (excluding mortgage payments) of a principal residence of the employee; or

(*3*) Payment of tuition for the next semester or quarter of post-secondary education for the employee, his or her spouse, children, or dependents.

(*4*) The need to prevent the eviction of the employee from his principal residence or foreclosure on the mortgage of the employee's principal residence.

The Commissioner may expand this list of deemed immediate and heavy financial needs only through the publication of revenue rulings, notices, and other documents of general applicability, rather than on an individual basis.

(iii) *Distribution necessary to satisfy financial need*—

(A) *In general.* A distribution will not be treated as necessary to satisfy an immediate and heavy financial need of an employee to the extent the amount of the distribution is in excess of the amount required to relieve the financial need or to the extent such need may be satisfied from other resources that are reasonably available to the employee. This determination generally is to be made on the basis of all relevant facts and circumstances. A distribution generally may be treated as necessary to satisfy a financial need if the employer reasonably relies upon the employee's representation that the need cannot be relieved—

(*1*) Through reimbursement or compensation by insurance or otherwise,

(*2*) By reasonable liquidation of the employee's assets, to the extent such liquidation would not itself cause an immediate and heavy financial need,

(*3*) By cessation of elective contributions or employee contributions under the plan, or

(*4*) By other distributions or nontaxable (at the time of the loan) loans from plans maintained by the employer or by any other employer, or by borrowing from commercial sources on reasonable commercial terms.

For purposes of this subdivision, the employee's resources shall be deemed to include those assets of his spouse and minor children that are reasonably available to the employee. Thus, for example, a vacation home owned by the employee and the employee's spouse, whether as community property, joint tenants, tenants by the entirety, or tenants in common, will be deemed a resource of the employee. However, property held for the employee's child under an irrevocable trust or under the Uniform Gifts to Minors Act will not be treated as a resource of the employee.

(B) *Distribution deemed necessary to satisfy financial need.* A distribution will be deemed to be necessary to satisfy an immediate and heavy financial need of an employee if all of the following requirements are satisfied:

(*1*) The distribution is not in excess of the amount of the immediate and heavy financial need of the employee,

(*2*) The employee has obtained all distributions, other than hardship

distributions, and all nontaxable loans currently available under all plans maintained by the employer,

(3) The plan, and all other plans maintained by the employer, provide that the employee's elective contributions and employee contributions will be suspended for at least 12 months after receipt of the hardship distribution, and

(4) The plan, and all other plans maintained by the employer, provide that the employee may not make elective contributions for the employee's taxable year immediately following the taxable year of the hardship distribution in excess of the applicable limit under section 402(g) for such next taxable year less the amount of such employee's elective contributions for the taxable year of the hardship distribution.

An employee shall not fail to be treated as an eligible employee for purposes of paragraph (b) of this section merely because he is suspended in accordance with this provision. The Commissioner may prescribe additional methods under which distributions will be deemed to be necessary to satisfy an immediate and heavy financial need only through the publication of revenue rulings, notices, and other documents of general applicability.

(iv) *Adoption of deemed hardship standards*—(A) *Exception to section 411(d)(6).* Subject to the requirements of paragraph (d)(2)(iv)(B), a plan that permits hardship distributions of amounts subject to the requirements of paragraph (d) of this section will not be treated as violating section 411(d)(6) merely because such plan is amended to permit hardship distributions only in accordance with the deemed hardship standards set forth in paragraphs (d)(2)(ii)(B) and (d)(2)(iii)(B).

(B) *Required effective and amendment dates.* The exception to section 411(d)(6) set forth in paragraph (d)(2)(iv)(A) is available only with respect to an amendment that is effective on or before the first day of the first plan year commencing on or after January 1, 1989. In the case of a plan maintained pursuant to collective bargaining agreement, such exception is available only with respect to an amendment that is effective on or before the later of the first day of the first plan year commencing on or after January 1, 1989, or the first day of the first plan year that the requirements of section 410(b), as modified by the Tax Reform Act of 1986, first apply to such plan. A plan amendment conforming a plan to the deemed hardship standard selected by an employer in accordance with paragraph (d)(2)(iv)(A) and effective by the applicable required effective date must be adopted within the time period permitted for required amendments to the plan under section 1140 of the Tax Reform Act of 1986 (as extended in the regulations under section 401(b)). Such conforming amendment must be consistent with the plan's operation during the period from the applicable required effective date to the date the amendment is required.

(3) *Impermissible distributions* Amounts attributable to elective contributions may not be distributed on account of any event not described in this paragraph (d), such as completion of a stated period of plan participation or the lapse of a fixed number of years.

(4) *Deemed distributions.* The cost of life insurance (P.S. 58 costs) will not be treated as a distribution for purposes of section 401(k)(2) and this paragraph. The making of a loan is not treated as a distribution, even if the loan is secured by the employee's accrued benefit attributable to elective contributions or is includible in the employee's income under section 72(p). However, the reduction, by reason of default on a loan, of an employee's accrued benefit derived from elective contributions is treated as a distribution.

(5) *Example.* The provisions of this paragraph (d) are illustrated by the following example:

Example. Employer C maintains a profit-sharing plan that includes a cash or deferred arrangement. Elective contributions under the arrangement may be withdrawn for any reason after two years following the end of the plan year in which the contributions were made. Because the plan permits distributions of elective contributions before the occurrence of one of the events specified in section 401(k)(2)(B) and this paragraph (d), the plan includes a nonqualified cash or deferred arrangement and the elective contributions are currently includible in income.

(e) *Additional requirements*—(1) *Qualified profit-sharing, stock bonus, pre-ERISA money purchase, and rural electric cooperative plan requirement*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if the elective contributions under such arrangement are treated as contributions under a profit-sharing, stock bonus, pre-ERISA money purchase pension or rural electric cooperative plan that satisfies the requirements of section 401(a). The plan of which a cash or deferred arrangement is a part may provide for other contributions, including employer contributions (other than elective contributions), employee contributions, or both. The plan will be treated as satisfying the requirements of section 401(a) only if such plan, taking into account any cash or deferred arrangement that is part of such plan and any elective contributions under such arrangement, satisfies the requirements of section 401(a). See paragraph (b) of this section for certain limitations on the extent to which elective contributions under a cash or deferred arrangement may be taken into account in determining the extent to which other contributions satisfy the requirements of section 401(a).

(ii) *Nondiscrimination requirements.* A cash or deferred arrangement satisfies this paragraph (e)(1) only if, in addition to satisfying paragraph (b)(2) of this section with respect to the amount of elective contributions, the plan of which the arrangement is a part satisfies section 401(a)(4) with respect to other benefits, rights, and features under the plan, including, for example, the availability of elective contributions to eligible employees. Thus, for example, the percentage of compensation available under a cash or deferred arrangement for deferral as elective contributions by eligible employees may not discriminate in favor of the group of employees described in section 401(a)(4). Furthermore, for example, if all employees are eligible to make elective contributions under an arrangement, but such contributions may be made only from compensation in excess of a stated amount, such as the Social Security taxable wage base, such arrangement would favor highly compensated employees with respect to the availability of elective contributions and thus would not satisfy section 401(a)(4). In such a case, the plan of which the arrangement is a part fails to satisfy section 401(a). See also §1.40(a)-4 with respect to optional forms of benefit.

(2) *Cash availability.* A cash or deferred arrangement satisfies this paragraph (e) only if such arrangement provides that the amount that each eligible employee may defer as an elective contribution is available to the employee in cash. Thus, for example, if an eligible employee is provided the option to receive a taxable benefit (other than cash) or to have the employer contribute on the employee's behalf to a profit-sharing plan an amount equal to the value of the taxable benefit, such arrangement is not a qualified cash or deferred arrangement. Similarly, if an employee has the option to receive a specified amount in cash or to have the employer contribute on his behalf to a profit-sharing plan an amount in excess of the specified cash amount, any contribution made by the employer on the employee's behalf in

excess of the specified cash amount is not treated as made pursuant to a qualified cash or deferred arrangement. This cash availability requirement applies even if the cash or deferred arrangement is part of a cafeteria plan within the meaning of section 125.

(3) *Separate accounting*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if all amounts held under a plan that includes a cash or deferred arrangement or under another plan whose contributions are taken into account under the arrangement for purposes of paragraph (b) (including amounts contributed for plan years which begin prior to January 1, 1980, contributions made other than on account of a cash or deferred election, and contributions made for years when the cash or deferred arrangement is not qualified) are treated as attributable to elective contributions subject to the requirements of paragraphs (c) and (d) of this section.

(ii) *Exception.* The requirements of subdivision (i) of this paragraph (e)(3) will be treated as satisfied if the portion of an employee's benefit that is actually attributable to elective contributions subject to the requirements of paragraphs (c) and (d) of this section, and to qualified nonelective contributions and qualified matching contributions treated as elective contributions, is determined by an acceptable separate accounting between such portion and any other benefits. Separate accounting is not acceptable unless gains, losses, withdrawals, and other credits or charges are separately allocated on a reasonable and consistent basis to the accounts in which accrued benefits are subject to paragraphs (c) and (d) of this section and to the accounts for other benefits. Subject to section 401(a)(4), forfeitures are not required to be allocated to the accounts in which benefits are subject to paragraphs (c) and (d) of this section.

(f) *Correction of excess contributions*—(1) *General rule.* A cash or deferred arrangement will not be treated as failing to satisfy section 401(k)(3) or paragraph (b)(2) of this section with respect to the amount of elective contributions under the arrangement if the employer, in accordance with the terms of the plan and paragraph (b)(3) of this section, makes qualified nonelective contributions or qualified matching contributions that are treated as elective contributions under the arrangement and that, in combination with the elective contributions, satisfy the requirements of paragraph (b)(2) of this section. In addition, a cash or deferred arrangement will not be treated as failing to satisfy section 401(k)(3) or paragraph (b)(2) of this section with respect to the amount of the elective contributions if, in accordance with the terms of the plan that includes the arrangement, excess contributions on behalf of highly compensated employees are recharacterized in accordance with paragraph (f)(3) of this section. Excess contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year.

(2) *Amount of excess contributions.* The amount of excess contributions for a highly compensated employee for a plan year is to be determined by the following leveling method, under which the actual deferral ratio of the highly compensated employee with the highest actual deferral ratio is reduced to the extent required to—

(i) Enable the arrangement to satisfy the actual deferral percentage test, or

(ii) Cause such highly compensated employee's actual deferral ratio to equal the ratio of the highly compensated employee with the next highest actual deferral ratio.

This process must be repeated until the cash or deferred arrangement satisfies the actual deferral percentage test. For each highly compensated employee, the amount of excess contributions is equal to the total elective contributions, plus qualified nonelective contributions and qualified matching contributions treated as elective contributions, on behalf of the employee (determined prior to the application of this paragraph (f)(2)) minus the amount determined by multiplying the employee's actual deferral ratio (determined after application of this subparagraph) by his compensation used in determining such ratio. In no case shall the amount of excess contributions to be recharacterized for a plan year with respect to any highly compensated employee exceed the amount of elective contributions made on behalf of such highly compensated employee for such plan year.

(3) *Recharacterization of excess contributions*—(i) *General rule.* Excess contributions are recharacterized in accordance with this paragraph (f)(3) only if the excess contributions are treated as described in paragraph (f)(3)(ii) of this section and all of the conditions set forth in paragraph (f)(3)(iii) of this section are satisfied.

(ii) *Treatment of recharacterized excess contributions.* Excess contributions recharacterized under this paragraph (f)(3) are includible in the employee's gross income on the earliest dates any elective contribution made on behalf of the employee during the plan year would have been received by the employee had he originally elected to receive the amounts in cash or on such later date permitted in paragraph (f)(3)(iv) of this section. Such recharacterized excess contributions must be treated as employee contributions for the following purposes:

(A) The payor or plan administrator must report such recharacterized excess contributions as employee contributions to the Internal Revenue Service and the employee by—

(*1*) Timely providing such forms as the Commissioner shall designate to the employer and to employees whose excess contributions are recharacterized under this paragraph (f)(3); and

(*2*) Timely taking such other action as the Commissioner shall require; and

(B) The plan administrator must account for such amounts as contributions by the employee for purposes of sections 72 and 6047.

For purposes of section 401(a)(4) and paragraph (b) of this section, recharacterized excess contributions are to be treated as employee contributions. For all other purposes under the Code, however, including sections 404, 409, 411, 412, 415, 416, and 417, and, with respect recharacterized excess contributions for plan years which begin after December 31, 1988, section 401(k)(2), recharacterized excess contributions continue to be treated as employer contributions that are elective contributions. Thus, for example, recharacterized excess contributions remain subject to the requirements of paragraphs (c) and (d) of this section; must be deducted under section 404; and are treated as employer contributions described in section 415(c)(2)(A) and § 1.415–6(b). In addition, these amounts are not treated as compensation for purposes of sections 404 and 415, and may be treated as compensation for purposes of sections 401(a)(4), 401(a)(5), 401(k), 401(l) and 414(s) only to the extent that elective contributions may be treated, and are treated under the plan, as compensation. Recharacterized excess contributions which relate to plan years ending on or before October 24, 1988 may be treated as either employer contributions or employee contributions for purposes of paragraph (d) of this section.

(iii) *Additional requirements*—(A) *Time of recharacterization.* Excess contributions may not be recharacterized under this subparagraph after the later of (*1*) two and one-half months after the close of the plan year to which the recharacterization relates

or (2) October 24, 1988.
Recharacterization will be deemed to have occurred on the date on which the last of those highly compensated employees with excess contributions to be recharacterized is notified in accordance with paragraph (f)(3)(ii). Such notification may be provided by such means as the Commissioner may designate.

(B) [Reserved.]

(C) [Reserved.]

(iv) *Transition rules.* If amounts recharacterized for any plan year were not previously included in income, they are to be treated as received by employees for income tax purposes on the first day of the first plan year ending in 1988.

If notice of recharacterization is provided to the affected highly compensated employees by October 24, 1988, recharacterization is deemed to have occurred 2½ months after the close of the plan year and the penalty tax of section 4979 will not be imposed. The rules in this subdivision (iv) are effective only for plan years which end on or before August 8, 1988.

(v) *Example.* The principles of this paragraph (f)(3) are illustrated by the following example:

Example. (i) Employer X maintains Plan Y, a calendar year profit-sharing plan that includes a qualified cash or deferred arrangement. Under Plan Y, each eligible employee may elect to defer up to 10 percent of his compensation under a salary reduction agreement. These are the only contributions to the plan. X pays the amounts deferred under the arrangement to the trust under Plan Y each month on the last day of the month. Salaries are paid on the same date.

(ii) In January 1989, X determines that, during 1988, the compensation and actual deferral percentages (ADPs) of X's six employees were as follows:

Employee	Compensation (A)	Elective contribution (B)	ADP (B/A) (percent)
A	$70,000	$7,000	10.00
B	60,000	4,500	7.50
C	20,000	1,000	5.00
D	15,000	0	0
E	10,000	350	3.50
F	10,000	350	3.50

The ADP for X's highly compensated employees, A and B, is 8.75 percent (10.00% + 7.50% [2]). The ADP for X's other employees is three percent (5.00 percent) + 0% + 3.50% + 3.50%)/4). Because 8.75 percent is more than 2.0 times three percent and more than three percent plus two percent, the plan fails to satisfy paragraph (b)(4) of this section.

(iii) Plan Y provides that each highly compensated participant will have his excess contributions, as defined in paragraph (g)(13) of this section, recharacterized. The amount to be so treated will be determined according to the method described in paragraph (f)(2)(ii) of this section.

(iv) In order to satisfy paragraph (b)(4) of this section, Plan Y must reduce the ADP for X's highly compensated employees to not more than five percent. This will satisfy the test described in paragraph (b)(5)(iii) of this section, because five percent is not more than 2.0 times three percent and is not more than two percentage points greater than three percent. Plan Y does this by reducing A's ADP to 7.5 percent (the ADP of the highly compensated employee having the next highest ADP). Since this is not sufficient to satisfy the ADP test in paragraph (b)(4)(iii) of this section, the ADP of both A and B must be reduced to five percent.

(v) The maximum dollar amount that may be deferred by each employee is determined by using the formula D = (ADP × S) where D is the maximim allowable deferral, ADP is the reduced ADP, and S is the compensation. Thus, A's maximum allowable deferral is $3,500 (.50 × $70,000), and B's maximum allowable deferral is $3,000 (.05 × $60,000). The balance of the original deferrals by A and B ($3,500 and $1,500 respectively) must be included in their taxable wages for 1988, the year in which X would have paid cash to A and B.

(vi) A deferred $583.33 per month, except for January, February, March, and April, when he deferred $583.34. Pursuant to the first-in, first-out rule in paragraph (f)(3)(ii) of this paragraph, the deferrals made in January, February, March, April, May, and June as well as $.02 of the deferral made in July, are treated as employee contributions. A similar procedure is undertaken with respect to B. X and the plan administrator provide A and B with such forms and notices as the Commissioner may require. If A and B had already filed income tax returns for 1988, they must file amended returns. In addition, the plan administrator must satisfy paragraph (f)(3)(ii)(B) of this section.

(g) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Employee.* The term "employee" means an individual who performs services for the employer and who is either a common law employee of the employer or a self-employed individual treated as an employee pursuant to section 401(c)(1). The term "employee" also includes a leased employee who is treated as an employee of the employer-recipient pursuant to the provisions of section 414(n)(2) or 414(o)(2) other than individuals covered by a plan described in section 414(n)(5). Individuals that an employer treats as leased employees under section 414(n), pursuant to the requirements of section 414(o), are considered to be leased employees for purposes of this rule.

(2) *Employer.* The term "employer" means the employer maintaining the plan and those employers required to be aggregated with such employer under sections 414(b), (c), (m), or (o).

(3) *Eligible employee*—(i) *In general.* The term "eligible employee" means an employee who is directly or indirectly eligible to make a cash or deferred election under the plan for all or a portion of the plan year. For example, if an employee must perform certain acts in order to be eligible to make a cash or deferred election for a plan year, such employee is an eligible employee for such plan year without regard to whether the employee performs such acts. An employee is an eligible employee if he is unable to make a cash or deferred election merely because his compensation is less than a stated dollar amount.

(ii) *Certain one-time elections.* An employee is not an eligible employee merely because such employee, upon commencing employment with the employer or upon the employee's first becoming eligible to make a cash or deferred election under any arrangement of the employer, is given the one-time opportunity to elect, and such employee did in fact elect, not to be eligible to make a cash or deferred election under such plan or any other plan maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer.

(4) *Elective contributions.* The term "elective contributions" means employer contributions made to a plan that were subject to a cash or deferred election under a cash or deferred arrangement (whether or not such arrangement is a qualified cash or deferred arrangement under paragraph (a)(4)). No amount that has become currently available to an employee or that is designated or treated, at the time of deferral or contribution, as an after-tax contribution may be treated as an elective contribution. See paragraphs (a)(2) and (a)(3).

(5) *Nonelective contributions.* The term "nonelective contributions" means employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan.

(6) *Matching contributions.* The term "matching contributions" means employer contributions made to a plan on behalf of an employee on account of employee contributions or elective contributions of such employee.

(7) *Qualified matching contributions and qualified nonelective contributions*—(i) *Qualified matching contributions.* The term "qualified

matching contributions" means matching contributions that satisfy the additional requirements of paragraph (g)(7)(iii) of this section.

(ii) *Qualified nonelective contributions.* The term "qualified nonelective contributions" means employer contributions, other than elective contributions and matching contributions, that satisfy the additional requirements of paragraph (g)(7)(iii) of this section.

(iii) *Additional requirements.* Except to the extent that paragraphs (c) and (d) of this section specifically provide otherwise, the matching contributions and the nonelective contributions must satisfy the requirements of paragraphs (c) and (d) as though such contributions were elective contributions without regard to whether such contributions are actually taken into account as elective contributions under paragraphs (b)(2) and (b)(3).

(8) *Actual deferral percentage*—(i) *General rule.* The actual deferral percentage for the group of eligible highly compensated employees, as well as the actual deferral percentage for the group of other eligible employees, for a plan year is the average of the actual deferral ratios, calculated separately for each employee in the group, of the amount of elective contributions (including qualified nonelective contributions and qualified matching contributions treated as elective contributions under paragraph (b)(3)) made on behalf of each employee for the plan year to the employee's compensation for the plan year. For plan years which begin after December 31, 1988, or such later date provided in paragraph (h) of this section, such actual deferral ratios and the actual deferral percentage for each group shall be calculated to the nearest one-hundredth of one percent of the employee's compensation. The actual deferral ratio of an eligible employee who makes no elective contribution is zero.

(ii) *Employee eligible under more than one arrangement.* In the case of an employee who is eligible to participate in more than one cash or deferred arrangement of the same employer, the actual deferral ratio shall be calculated by treating all the cash or deferred arrangements in which the employee is eligible to participate as one arrangement. For example, if an employee with compensation of $80,000 may make elective contributions under two separate cash or deferred arrangements, the actual deferral ratio for such employee under each arrangement is to be calculated by dividing the total elective contributions by the employee under both arrangements by $80,000. This paragraph (g)(8)(ii) is effective for plan years beginning after December 31, 1984. For plan years which begin after December 31, 1986, or such later date provided under paragraph (h) of this section, this paragraph (g)(8)(ii) shall apply only to employees who are highly compensated employees. See paragraph (b)(5) of this section for the treatment of certain multiple plans and cash or deferred arrangements.

(9) *Compensation*—(i) *Years before January 1, 1987*—(A) *In general.* An employee's compensation for a plan year beginning before January 1, 1987, or such later date provided under paragraph (h) of this section, is the amount taken into account under the plan (or plans) in calculating the elective contribution that may be made on behalf of the employee. In a plan that is top-heavy (as defined in section 416), such compensation may not exceed $200,000. Compensation may not exclude amounts less than a stated amount, such as the integration level under the plan. Compensation may include all compensation for the plan year, including compensation for the period when an employee was ineligible to make a cash or deferred election.

(B) *Nondiscrimination.* (*1*) If the plan's definition of compensation has the effect of discriminating in favor of employees who are highly compensated, a nondiscriminatory definition shall be determined by the Commissioner.

(*2*) A plan's definition of compensation will be treated as nondiscriminatory if the plan defines compensation for a plan year either as (*i*) an employee's total nondeferred compensation includible in gross income plus elective contributions under the plan and/or elective contributions under a plan described in section 125 or (*ii*) an employee's W–2 or total nondeferred compensation includible in gross income.

(ii) *Years after December 31, 1986.* For plan years which begin after December 31, 1986, or such later date provided in paragraph (h) of this section, "compensation" has the meaning given such term by section 414(s). For plan years beginning after December 31, 1988, or on or after the later date provided under paragraph (h) of this section, the applicable period under section 414(s) for purposes of applying section 401(k) and this section is the plan year for which a determination under paragraph (b) is being made.

(10) *Highly compensated employees.* (i) For plan years which begin after December 31, 1979, and before January 1, 1987, or such later date provided under paragraph (h) of this section, for purposes of the actual deferral percentage test, highly compensated employees are the one-third of all eligible employees (rounded to the nearest integer) who receive the most compensation. When one or more employees of a group would be highly compensated employees except that each member of the group receives the same amount of compensation, the employer shall designate which employees of the group are highly compensated, so that one-third of all eligible employees are considered highly compensated.

(ii) For plan years beginning after December 31, 1986, or such later date provided under paragraph (h) of this section, the term "highly compensated employee" has the meaning given such term by section 414(q).

(11) *Pre-ERISA money purchase pension plan.* (i) A pre-ERISA money purchase pension plan is a pension plan—

(A) That is a defined contribution plan (as defined in section 414(i));

(B) That was in existence on June 27, 1974, and as in effect on that date, included a salary reduction agreement described in paragraph (a)(3) of this section; and

(C) Under which neither the employee contributions nor the employer contributions, including elective contributions, may exceed the levels (as a percentage of compensation) provided for by the contribution formula in effect on June 27, 1974.

(ii) A plan was in existence on June 27, 1974, if it was a written plan adopted on or before that date, even if no funds had yet been paid to the trust associated with the plan.

(12) *Rural electric cooperative plan.* For purposes of this section, a rural electric cooperative plan is a plan described in section 401(k)(7).

(13) *Excess contributions.* The term "excess contributions" means, with respect to a plan year, the excess of the elective contributions, including qualified nonelective contributions and qualified matching contributions that are treated as elective contributions under paragraphs (b)(2) and (b)(3), on behalf of eligible highly compensated employees for the plan year over the maximum amount of such contributions permitted under paragraphs (b)(2) and (b)(4). The amount of excess contributions for each highly compensated employee is determined by using the method described in paragraph (f)(2) of this section.

(h) *Effective dates*—(1) *In general.* Except as otherwise provided, in this paragraph (h), or as specifically

provided elsewhere in this section, this section shall apply to plan years beginning after December 31, 1979.

(2) *Collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986,

(i) The provisions of this section first effective for plan years which begin after December 31, 1986, shall not apply to years which begin before the earlier of—

(A) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986), or

(B) January 1, 1989; and

(ii) The provisions of this section first effective for plan years which begin after December 31, 1988, shall not apply to years which begin before the earlier of—

(A) The later of—

(*1*) January 1, 1989, or,

(*2*) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986) or

(B) January 1, 1991.

(3) *Transitional rules.* (i) See § 1.402(a)–1(d)(3) for a transitional rule applicable to cash or deferred arrangements in existence on June 27, 1974.

(ii) For plan years beginning after December 31, 1979 (or, in the case of a pre-ERISA money purchase plan, plan years beginning after July 18, 1984) and before January 1, 1988, a reasonable interpretation of the rules set forth in section 401(k) of the Code (as in effect during those years) may be relied upon to determine whether a cash or deferred arrangement was qualified during those years. Operation in accordance with the proposed regulations published in the Federal Register on November 10, 1981, 46 FR 55544, will be deemed a reasonable interpretation of section 401(k).

(4) *Transitional rules for plans of state and local governments.* (i) A plan adopted by a state or local government prior to May 6, 1986, that is not a collectively bargained plan is subject to the transitional rules of paragraphs (h)(4) (ii), (iii), and (iv) of this section.

(ii) For plan years beginning before January 1, 1989, the plan is subject to the ADP test in section 401(k)(3) prior to its amendment by section 1116(a) of TRA '86. For plan years beginning after December 31, 1988, the plan is subject to the ADP test in paragraph (b)(4)(i) of this section.

(iii) (A) For plan years beginning before January 1, 1989, in the case of an employee who is eligible to participate in more than one cash or deferred arrangement of the same employer, the actual deferral percentage shall be calculated by treating all cash or deferred arrangements in which the employer is eligible to participate as one cash or deferred arrangement.

(B) For plan years beginning after the December 31, 1988, in the case of a highly compensated employee who is eligible to participate in more than one cash or deferred arrangement of the same employer, the actual deferral percentage shall be calculated by treating all cash or deferred arrangements in which the high-compensated employee is eligible to participate as one cash or deferred arrangement.

(iv) For plan years beginning before January 1, 1989, the plan must use the definition of "highly compensated employee" contained in paragraph (g)(10)(i) of this section, and the definition of compensation contained in paragraph (g)(9)(i) of this section. For plan years which begin after December 31, 1988, the plan must use the definitions of "highly compensated employee" and "compensation" contained in sections 414(q) and (s), respectively, for purposes of the participation and discrimination standards of paragraph (b) of this section and must follow the rules pertaining to compensation in paragraph (g)(9)(ii) of this section.

(v) In the case of a plan that is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers adopted by a state or local government prior to May 6, 1986, the provisions in paragraphs (h)(4) (ii), (iii) and (iv) of this section and other provisions of this section that would be subject to paragraph (h)(2) if they were not a state or local plan described above, effective for plan years beginning after December 31, 1988, shall not apply to years beginning before the earlier of—

(A) The later of—

(*1*) January 1, 1989, or

(*2*) The date on which the last such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986), or

(B) January 1, 1991.

Par. 5. Section 1.402(a)–1 is amended by adding a new paragraph (d) to read as follows:

§ 1.402(a)–1 Taxability of beneficiary under a trust which meets the requirements of section 401(a).

* * * * *

(d) *Salary reduction, cash or deferred arrangements—*

(1) *Inclusion in income.* Whether a contribution to an exempt trust or plan described in section 401(a) or 403(a) is made by the employer or the employee must be determined on the basis of the particular facts and circumstances of each case. Nevertheless, an amount contributed to plan or trust will, except as otherwise provided under paragraph (d)(2) of this section, be treated as contributed by the employee if such amount was contributed at the employee's election, even though the election was made before the year in which the amount was earned by the employee or before the year in which the amount has become currently available to the employee. Any amount treated as contributed by the employee is includible in the gross income of the employee for the year in which the amount would have been received by the employee but for the election. Thus, for example, if amounts are contributed to an exempt trust or plan by reason of a salary reduction agreement under a cash or deferred arrangement, such amounts are treated as received by the employee at such time as such amounts would have been received by the employee but for the election to defer, and thus are includible in the gross income of the employee for the year that includes such time (except as provided under paragraph (d)(2) of this section). A matching contribution described in section 401(m)(4) is not treated as an employee contribution merely because it is made by the employer as a result of the employee's election. See § 1.40(k)–1(g) for definitions applicable to this paragraph (d)(1).

(2) *Qualified cash or deferred arrangement.* Elective contributions for a plan year made by an employer on behalf of an employee to a trust pursuant to a cash or deferred election under a qualified cash or deferred arrangement, as defined in section 401(k)(2), shall not be treated as received by or distributed to the employee or as employee contributions. See § 1.401(k)–1(g) for definitions and restrictions applicable to this paragraph (d)(2).

(3) *Effective date and transitional rule.* (i) In the case of a plan or trust that does not include a salary reduction or cash or deferred arrangement in existence on June 27, 1974, this paragraph applies to taxable years ending after such date.

(ii) In the case of a plan or trust that includes a salary reduction or a cash or deferred arrangement in existence on June 27, 1974, this paragraph applies to plan years beginning after December 31, 1979 (or, in the case of pre-ERISA money purchase plan, as defined in § 1.401(k)–1(g), plan years beginning after July 18, 1984). For plan years of such plans or trusts beginning prior to January 1, 1980 (or, in the case of pre-ERISA money purchase plan, plan years beginning before July 19, 1984), the taxable year of inclusion in gross income of the employee of any amount so contributed by the employer to the trust shall be determined in a manner consistent with Rev. Rul. 56–497, 1956–2 CB 284, Rev. Rul. 63–180, 1963–1 CB 189, and Rev. Rul. 68–89, 1968–1 CB 402.

(iii) A cash or deferred arrangement shall be considered as in existence on June 27, 1974, if, on or before such date, it was reduced to writing and adopted by the employer (including, in the case of a corporate employer, formal approval by the employer's board of directors and, if required, shareholders), even though no amounts had been contributed pursuant to the terms of the arrangement as of such date.

(iv) For plan years beginning after December 31, 1979 (or in the case of pre-ERISA money purchase plan, plan years beginning after July 18, 1984) and before January 1, 1988, a reasonable interpretation of the rules set forth in section 401(k) of the Code (as in effect during those years) may be relied upon to determine whether contributions were made under a qualified cash or deferred arrangement. Operation in accordance with the proposed regulations published in the **Federal Register** on November 10, 1981, 46 FR 55544, will be deemed a reasonable interpretation of section 401(k).

PART 602—OMB CONTROL NUMBER UNDER THE PAPERWORK REDUCTION ACT

Par. 6. The authority citation for part 602 continues to read:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 7. Section 602.101(c) is amended by inserting in the appropriate place in the table,

§ 1.401(k)–1 ..... 1545–1069.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved: July 7, 1988.

O. Donaldson Chapoton,

Assistant Secretary of the Treasury.

[FR Doc. 88–17720 Filed 8–8–88; 8:45 am]

BILLING CODE 4830–01–M

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[T.D. ATF–276; Ref. Notice No. 642]

Warren Hills Viticultural Area

AGENCY: Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF) has decided to establish a viticultural area in northwestern New Jersey to be known as "Warren Hills." This decision is the result of a petition submitted by a group of wineries and grape growers from the area. The establishment of viticultural areas and the subsequent use of viticultural area names in wine labeling and advertising enables winemakers to label wines more precisely and helps consumers to better identify the wines they purchase.

EFFECTIVE DATE: September 7, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Steve Simon, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, 1200 Pennsylvania Avenue NW., Washington, DC 20226; (202) 566–7626.

SUPPLEMENTARY INFORMATION:

Background

ATF regulations in 27 CFR Part 4 provide for the establishment of definite viticultural areas. The regulations allow the name of an approved viticultural area to be used as an appellation of origin on wine labels and in wine advertisements. Part 9 of 27 CFR provides for the listing of approved American viticultural areas, the names of which may be used as appellations of origin.

Section 4.25a(e)(1), Title 27 CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographical features. Section 4.25(e)(2) outlines the procedures for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area.

Petition

ATF received a petition prepared by Mr. Rudolf Marchesi of Alba Vineyard and submitted on behalf of a group of wineries and grape growers from Warren County, New Jersey. The group consists of Alba Vineyard, Marble Mountain Vineyards, Four Sisters Winery, Tamuzza Vineyards, and Mr. Daniel Campanelli (an individual grape grower). The petition proposed establishmernt of a viticultural area to be known as "Warren Hills."

The "Warren Hills" area is located entirely within Warren County. The area contains approximately 226 square miles, within which there are approximately 77 acres planted to winegrapes. Three wineries are operating within the area. Just to the south is the approved "Central Delaware Valley" viticultural area.

Notice of Proposed Rulemaking

In response to the petition, ATF published a notice of proposed rulemaking, Notice No. 642, in the **Federal Register** on Tuesday, September 29, 1987 (52 FR 36432). The notice proposed establishment of the "Warren Hills" viticultural area with boundaries as described in the petition, and solicited public comment with respect to the proposal.

Public Comment

In response to the notice of proposed rulemaking, ATF received no public comments. Accordingly, this Treasury decision establishes "Warren Hills" as a new viticultural area with the name and boundaries as proposed in Notice No. 642.

Geography of the Area

Geographically, the "Warren Hills" area consists of a series of narrow, parallel valleys formed by tributaries of the Delaware River. The petitioner submitted evidence that the area is distinguished from surrounding areas by soil, topography, and climatic conditions.

According to the petitioner, the "Warren Hills" soils are less acidic than those of some surrounding areas, "due to the nature of the bedrock." He explained that "The vineyard soils of the Warren Hills region are formed from Dolomitic Limestone which has a high concentration of calcium and magnesium," while the soils of surrounding areas "are formed from shale and other sources." The relative pH values of vineyard soils within and to the north of the "Warren Hills" are contrasted as follows:

"Warren Hills" soils	Soils to the north
Hazen loam 5.6–7.8	Bath soils 4.5–6.5.
Annandale gravely loam 5.1–6.5.	Nassau soils 4.5–5.5.
Washington loam 5.6–6.3	Swartswood soils 3.6–5.5.

The higher pH values of the "Warren Hills" soils indicate less acidity. These

values show that the "Warren Hills" vineyard soils range from moderately acidic to slightly alkaline. This feature contrasts with soils to the south, as well as with those to the north. Typical vineyard soils in the "Central Delaware Valley" viticulatural area (south of the "Warren Hills") have been described, in soil surveys published by the U.S. Department of Agriculture, as: "Natural reaction is strongly acid," and "Natural reaction ranges from medium acid to strongly acid."

The soils to the northeast of the new viticultural area are also distinguishable, but in a different way. The northeastern boundary of the area corresponds generally to the terminal morraine of a glacial advance known as the "Wisconsin." According to the petitioner, there was once a large glacier, which covered the land just northeast of the "Warren Hills" but did not extend into the viticultural area itself. When the glacier receded from the adjacent area, it left deposits behind, which became mixed with the native soil there, rendering it less suitable for viticulture. By contrast, the "Warren Hills" soil generally does not contain glacial deposits.

Westward, across the Delaware River, limestone soils like those of the "Warren Hills" reappear. However, such soils are less prevalent west of the river, and the topography there is significantly different from the "Warren Hills." For these reasons, the Delaware River does form a proper viticultural area boundary, despite a similarity of soils.

Concerning the difference in topography, the farmland west of the Delaware River lies mostly in a single broad valley (the Lehigh Valley), while in the "Warren Hills" area there are about five narrower valleys. These narrow valleys run southwest to northeast, creating numerous south-facing or southeast-facing slopesides. Such slopesides make the best vineyard sites, because they receive more direct sunlight. Consequently, they have microclimates with warmer than average temperatures, especially in winter.

Further, the valleys of the "Warren Hills" create a desirable air drainage situation, in which cool air drains downward, away from the hillside vineyards. This feature is important in the spring and fall, when there may be a danger of untimely frost.

Another way in which the distinctive topography of the "Warren Hills" area affects its viticulture is by channeling the prevailing southwest winds. Since the area's valleys parallel the wind direction, they form channels through which the winds may travel with minimal obstruction. The winds cool the vines on hot summer afternoons and reduce relative humidity. These effects, together with the favorable air drainage already mentioned, "assist in the control of mold and mildew on the vines," according to the petitioner.

Topography also forms a basis for the northwestern and southeastern boundaries of the "Warren Hills." The northwestern boundary marks the beginning of a more mountainous area: Kittatinny Mountain, a member of the Pocono chain. Similarly, the southeastern boundary of the new viticultural area marks the division between two geological regions of New Jersey: The "Upland Valley" region (in which the "Warren Hills" lie) and the "Piedmont" region. The Piedmont's rolling hills contrast with the straight, narrow valleys of the "Warren Hills." (This distinction was previously cited by ATF in the rulemaking for the "Central Delaware Valley" viticultural area.)

The "Warren Hills" viticultural area is also contrasted with surrounding areas on the basis of climate. In particular, the eastern boundary of the area lies where the growing season drops off to less than 150 days. Inside the area, according to the petitioner's evidence, the growing season "averages 175 frost-free days, but is often longer on selected sites." This difference is significant for viticulture, because it means that certain late-repening varieties, such as vidal blanc, seyval blanc, and cabernet sauvignon, could not be grown in the area to the east.

Some of the climatic features that affect viticulture in the "Warren Hills" are directly caused by the area's unique topography. Specifically, the combination of sunny microclimates on the southward-facing vineyard slopes, together with the funneling of prevailing winds by the long, narrow valleys, results in warm days and cool nights during the growing season. This feature significantly benefits the grapes, according to the petitioner.

Name of the Area

The petitioner submitted evidence that the area is locally known by the name "Warren Hills." Such evidence included a page from the local telephone directory, listing the "Warren Hills Family Health Center." The petitioner also demonstrated that both a "Warren Hills High School" and a "Warren Hills Junior High School" exist in the area.

The Warren Hills High School draws students from most parts of the new viticultural area. The northern part of Warren County, outside the viticultural area, is served by a different high school, named the "North Warren Regional High School." The Warren Hills Junior High School is near the Warren Hills High School, and the two schools draw students from approximately the same area.

The name "Warren Hills" derives from Warren County and from the area's topography. The county was named in the early nineteenth century after a Revolutionary War patriot from the area who died in the Battle of Bunker Hill.

Boundaries of the Area

The area is bounded by the Delaware River, the Musconetcong River, the Warren County/Sussex County line, and Paulins Kill (a stream). The boundaries may be found on 13 U.S.G.S. maps of the 7.5 minute series; namely, the Riegelsville, Easton, Bangor, Bloomsbury, Belvidere, Portland, High Bridge, Washington, Blairstown, Hackettstown, Tranquility, Flatbrookville, and Newton West Quadrangles. The boundaries of the area are fully described in new § 9.121, as added to regulations by this Treasury decision.

Miscellaneous

ATF does not want to give the impression by approving "Warren Hills" as a viticultural area that it is approving or endorsing the quality of the wine from this area. ATF is approving this area as being distinct but not better than other areas. By approving this area, ATF will allow wine producers to claim a distinction on labels and advertisements as to the origin of the grapes. Any commercial advantage can only come from consumer acceptance of "Warren Hills" wines.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a final regulatory flexibility analysis (5 U.S.C. 604) are not applicable to this final rule, because it will not have a significant economic impact on a substantial number of small entities. The final rule is not expected to have significant secondary or incidental effects on a substantial number of small entities. Further, the final rule will not impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of Section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this final rule will not have a significant economic impact on a substantial number of small entities

Executive Order 12291

In compliance with Executive Order 12291 of Feb. 17, 1981, the Bureau has determined that this final rule is not a major rule, since it will not result in:

(a) An annual effect on the economy of $100 million or more;

(b) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographical regions; or

(c) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1980, Pub. L. 96–511, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR Part 1320, do not apply to this final rule, because no requirement to collect information is imposed.

Drafting Information

The principal author of this document is Steve Simon of the Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practice and procedures, Consumer protection, Viticultural areas, Wine.

Issuance

Accordingly, 27 CFR Part 9 is amended as follows:

PART 9—AMERICAN VITICULTURAL AREAS

Paragraph A. The authority citation for Part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Par. B. The table of sections in 27 CFR Part 9, Subpart C, is amended to add the title of § 9.121, to read as follows:

* * * * *

Subpart C—Approved American Viticultural Areas

Sec.

9.121 Warren Hills.

* * * * *

Part. C. Subpart C of 27 CFR Part 9 is amended by adding § 9.121, which reads as follows:

§ 9.121 Warren Hills.

(a) *Name.* The name of the viticultural area described in this section is "Warren Hills."

(b) *Approved maps.* The appropriate maps for determining the boundaries of the Warren Hills viticultural area are thirteen U.S.G.S. maps of the 7.5 minute series. They are titled:

(1) Riegelsville Quadrangle, Pennsylvania—New Jersey, 1956 (photorevised 1968 and 1973).

(2) Bloomsbury Quadrangle, New Jersey, 1955 (photorevised 1970).

(3) High Bridge Quadrangle, New Jersey, 1954 (photorevised 1970).

(4) Washington Quadrangle, New Jersey, 1954 (photorevised 1971).

(5) Hackettstown Quadrangle, New Jersey, 1953 (photorevised 1971, photoinspected 1976).

(6) Tranquility Quadrangle, New Jersey, 1954 (photorevised 1971).

(7) Newton West Quadrangle, New Jersey, 1954 (photorevised 1971).

(8) Flatbrookville Quadrangle, New Jersey—Pennsylvania, 1954 (photorevised 1971).

(9) Blairstown Quadrangle, New Jersey—Warren Co., 1954 (photorevised 1971).

(10) Portland Quadrangle, Pennsylvania—New Jersey, 1955 (photorevised 1984).

(11) Belvidere Quadrangle, New Jersey—Pennsylvania, 1955 (photorevised 1984).

(12) Bangor Quadrangle, Pennsylvania—New Jersey, 1956 (photorevised 1968 and 1973).

(13) Easton Quadrangle, New Jersey—Pennsylvania, 1956 (photorevised 1968 and 1973).

(c) *Boundary*—(1). *General.* The Warren Hills viticultural area is located in Warren County, New Jersey. The beginning point of the following boundary description is the junction of the Delaware River and the Musconetcong River, at the southern tip of Warren County (on the Riegelsville map).

(2) *Boundary Description*—(i) From the beginning point, the boundary goes northeastward along the Musconetcong River about 32 miles (on the Riegelsville, Bloomsbury, High Bridge, Washington, Hackettstown, and Tranquaility maps) to the point where it intersects the Warren County-Sessex County line;

(ii) Then northwestward along that county line for about 10 miles (on the Tranquility, Newton West, and Flatbrookville maps) to Paulins Kill;

(iii) Then generally southwestward along Paulins Kill (on the Flatbrookville, Blairstown and Portland maps) to the Delaware River;

(iv) Then generally south-southwestward along the Delaware River (on the Portland, Belvidere, Bangor, Easton, and Reigelsville maps) to the beginning point.

Signed: July 8, 1988.

Stephen E. Higgens,

Director.

Approved: July 23, 1988.

John P. Simpson,

Deputy Assistant Secretary, (Regulatory, Trade, and Tariff Enforcement).

[FR Doc. 88–17847 Filed 8–5–88; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 05–88–35]

Special Local Regulations for Marine Events; Delaware River, Vicinity of Penns Landing, Philadelphia, PA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: Permanent special local regulations are adopted for the Delaware River in the vicinity of the Penns Landing area of downtown Philadelphia, Pennsylvania. This area is the site of several marine events each year, including Independence Day Celebrations, New Years Eve Celebrations, Jazz Festival, fireworks displays, etc. The special local regulations govern vessel activities during these events. Notices of precise dates and times that the regulations are effective is published in the Fifth District Local Notice to Mariners and a Federal Register Notice. The special local regulations are considered necessary due to the potential dangers to the waterway users and the expected spectator craft congestion at the time of the events.

EFFECTIVE DATE: Section is added August 8, 1988. This regulation will be effective from 6:30 p.m. to 10:30 p.m. on August 19, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Billy J. Stephenson, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204.

SUPPLEMENTARY INFORMATION: The Coast Guard published a notice of proposed rulemaking in the **Federal Register** on June 17, 1988, (53 FR 22680). Interested persons were requested to submit comments. No comments were received. Good cause exists under 5 U.S.C. 553 for making this rule effective in less than 30 days after publication in the **Federal Register**. Delaying the effective date would result in a significant adverse impact on this year's Jazz Festival, since the required safety for the event would not be provided.

Drafting Information

The drafters of this notice are Mr. Billy J. Stephenson, project officer, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, and Lieutenant Robin K. Kutz, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Comments and Final Rule

No comments were received in response to the notice of proposed rulemaking. The regulations as proposed are adopted. By a separate notice published in this issue of the **Federal Register**, these regulations are made applicable to the 1988 Jazz Festival that will be held on Friday August 19, 1988, from 7:30 p.m. to 10:30 p.m.

Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policy and procedures (44 FR 11034; February 26, 1979). Because closure of the waterway is not anticipated for any extended period, commercial marine traffic will be inconvenienced only slightly. The economic impact has been found to be so minimal that a full regulatory evaluation is unnecessary. Since the impact of this proposal is expected to be minimal, the Coast Guard certifies it will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 100

Marine Safety, Navigation (water).

Final Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

1. The authority citation for Part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. Section 100.509 is added to read as follows:

§ 100.509 Delaware River, Philadelphia, Pennsylvania.

(a) *Definitions:*

(1) *Regulated Area:* The waters of the Delaware River from shore to shore, bounded to the south by a line drawn from Pier 30, Penns Landing, Delaware River, Philadelphia, Pennsylvania, at latitude 39°56'24.0" North, longitude 75°08'26.0" West, across the river to the eastern shoreline at Camden, New Jersey, at latitude 39°56'24.0" North, longitude 75°07'57.0" West, and bounded to the north by the Benjamin Franklin Bridge.

(2) *The Coast Guard Patrol Commander:* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Group Philadelphia.

(b) *Special Local Regulations:*

(1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the immediate vicinity of this area shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard ensign.

(ii) Proceed as directed by any commissioned, warrant, or petty officer.

(3) Any spectator vessel may anchor outside of the regulated area specified in paragraph (a) of these regulations but may not block a navigable channel.

(c) *Effective Period:* This section is effective during, and for one hour before the events start. The Commander, Fifth Coast Guard publishes a notice in the **Federal Register** and in the Fifth Coast Guard District Local Notice to Mariners that announces the times and dates that this section is in effect.

Dated: July 26, 1988.

A.D. Breed,

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

[FR Doc. 88-17850 Filed 8-5-88; 8:45 am]

BILLING CODE 4910-14-M

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33 CFR Part 100

[CGD 09-88-21]

Special Local Regulations; Detroit Jazz Festival Fireworks, Detroit River

AGENCY: Coast Guard, DOT.

ACTION: Cancellation of rulemaking.

SUMMARY: Special Local Regulations are being cancelled for the Detroit Jazz Festival Fireworks Display. This event was to be held on the Detroit River on September 2, 1988 from 9:00 p.m. to 10:00 p.m. Due to comments received concerning this event, the Coast Guard is cancelling the Special Local Regulations for the Detroit Jazz Festival.

FOR FURTHER INFORMATION CONTACT: MST2 Scott E. Befus, Office of Search and Rescue, Ninth Coast Guard District, 1240 E 9th St., Cleveland, OH 44199, (216) 522-3982.

SUPPLEMENTARY INFORMATION: On July 15, 1988, the Coast Guard published this special local regulation in the **Federal Register** (53 FR 26770). However, interested parties were requested to submit comments. Based on the comments received, this special local regulation is cancelled.

Drafting Information

The drafters of this regulation are MST2 Scott E. Befus, project officer, Office of Search and Rescue and LCDR C.V. Mosebach, project attorney, Ninth Coast Guard District Legal Office.

Discussion of Regulations

The Detroit Jazz Festival was held for the first time last year. Following the event, comments were received from the Lake Carrier's Association and the Dominion Marine Association concerning the costly delays experienced by commercial carriers in the area.

As explained in the July 15, 1988 **Federal Register**, there was not sufficient time to publish a notice of proposed rulemaking for the event this year since the event application was received on June 16, 1988. However, interested parties were previously, notified of, and some commented on, the event, and those comments were considered in preparing the special local regulation. Also, comments were requested after the fact. The Windsor Harbor Master, Ontario, Canada commented on this regulation and strongly objected because of interference to commercial traffic. As a result of the comments received this year and last year, the Coast Guard is cancelling the special local regulation (§ 100.35-0921) for the Detroit Jazz Festival Fireworks Display.

List of Subjects In 33 CFR Part 100

Marine safety, Navigation (water).

Dated: July 27, 1988.

D.H. Ramsden,

Capt., U.S. Coast Guard, Acting Commander, Ninth Coast Guard District.

[FR Doc. 88-17851 Filed 8-5-88; 8:45 am]

BILLING CODE 4910-14-M

33 CFR Parts 100 and 165

[CGD 88-058]

Safety and Security Zones: Temporary Rules

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary rules issued.

SUMMARY: This document gives notice of temporary safety zones, security zones, and local regulations. Periodically the Coast Guard must issue safety zones, security zones, and special local regulations for limited periods of time in limited areas. Safety zones are established around areas where there has been a marine casualty or when a vessel carrying a particularly hazardous cargo is transiting a restricted or congested area. Special local regulations are issued to assure the safety of participants and spectators of regattas and other marine events.

DATES: The following list includes safety zones, security zones, and special local regulations that were established between April 1, 1988 and June 30, 1988 and have since been terminated. Also included are several zones established earlier but inadvertently omitted from the past published list.

ADDRESS: The complete text of any temporary regulations may be examined at, and is available on request from, Executive Secretary, Marine Safety Council (G-LRA-2), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce Novak, Executive Secretary, Marine Safety Council at (202) 267-1477.

SUPPLEMENTARY INFORMATION: The local Captain of the Port must be immediately responsive to the safety needs of the waters within his jurisdiction; therefore, he has been delegated the authority to issue these regulations. Since events and emergencies usually take place without advance notice or warning, timely publication of notice in the **Federal Register** is often precluded. However, the affected public is informed through Local Notices to Mariners, press releases, and other means. Moreover, actual notification is frequently provided by Coast Guard patrol vessels enforcing the restrictions imposed in the zone to keep the public informed of the regulatory activity. Because mariners are notified by Coast Guard officials on scene prior to enforcement action, **Federal Register** notice is not required to place the special local regulations, security zone, or safety zone in effect. However, the Coast Guard, by law, must publish in the **Federal Register** notice of substantive rules adopted. To discharge this legal obligation without imposing undue expense on the public, the Coast Guard publishes a periodic list of these temporary special local regulations, security zones, and safety zones. Permanent safety zones are not included in this list. Permanent zones are published in their entirety in the **Federal Register** just as any other rulemaking. Temporary zones are also published in their entirety if sufficient time is available to do so before they are placed in effect or terminated.

Non-major safety zones, special local regulations, and security zones have been exempted from review under E.O. 12291 because of their emergency nature and temporary effectiveness.

The following regulations were placed in effect temporarily during the period April 1, 1988 through June 30, 1988 unless otherwise indicated.

Docket No.	Location	Type	Date
1-88-019	New York Harbor	Security Zone	Apr. 14, 1988.
1-88-013	N.Y. Harbor, New York, NY	Safety Zone	Apr. 21, 1988.
1-88-024	Thames River, CT	Security Zone	May 18, 1988.
1-88-033	Upper New York Bay, New York Harbor	do	May 26, 1988.
1-88-032	Hempstead Harbor, Long Island, New York	Safety Zone	May 27, 1988.
1-88-027	Upper New York Bay, Lower East River, NY	do	May 29, 1988.
1-88-028	Hudson River, Poughkeepsie, NY	do	June 4, 1988.
1-88-038	New York Harbor, NY	Security Zone	June 5, 1988.
1-88-029	Hudson River, Newburgh, NY	Safety Zone	June 7, 1988.
1-88-042	Hudson River, Troy, NY	do	June 10, 1988.
COTP Providence, RI, Reg. 88-012	Rhode Island Sound, Narragansett Bay	do	Mar. 12, 1988.
COTP Providence, RI, Reg. 88-018	do	do	Apr. 13, 1988.
COTP Providence, RI, Reg. 88-025	do	do	May 15, 1988.
COTP Providence, RI, Reg. 88-041	do	do	June 17, 1988.
COTP Louisville, KY, Reg. 88-02	Louisville, KY	do	Apr. 15, 1988.
COTP Louisville, KY, Reg. 88-05	do	do	Apr. 30, 1988.
COTP Louisville, KY, Reg. 88-04	do	do	May 1, 1988.
COTP Louisville, KY, Reg. 88-01	do	do	May 3, 1988.
COTP Louisville, KY, Reg. 88-03	do	do	May 4, 1988.
COTP Louisville, KY, Reg. 88-06	do	do	May 29, 1988.
COTP Louisville, KY, Reg. 88-07	do	do	June 25, 1988.
COTP Louisville, KY, Reg. 88-08	do	do	June 25, 1988.
COTP Paducah, KY, Reg. 88-02	Ohio River, Mile 968, 968 to Mile 975	do	June 14, 1988.
COTP St. Louis, MO, Reg. 88-01	Pine Bend, MN	do	Apr. 1, 1988.
COTP St. Louis, MO, Reg. 88-02	St. Louis, MO	do	Do.
COTP St. Louis, MO, Reg. 88-03	Leavenworth, KS	do	Apr. 26, 1988.
COTP St. Louis, MO, Reg. 88-04	St. Louis, MO Upper Mississippi River, Mile 180.2 to Mile 179.2.	do	May 29, 1988.
COTP Pittsburgh, PA, Reg. 88-02	Ohio River, from Mile 39.5 to Mile 44.0	do	June 25, 1988.
COTP Memphis, TN, Reg. 88-01	Lower Mississippi River, Mile 737.0 to Mile 733.0	do	Jan. 3, 1988.
COPT Memphis, TN, Reg. 88-03	Mississippi River, Mile 734.8 to Mile 736.7	do	May 28, 1988.
COTP Memphis, TN, Reg. 88-02	Arkansas River, Mile 118.8	do	May 29, 1988.
COTP Memphis, TN, Reg. 87-05	White River from Mile 0 to Mile 10	do	June 7, 1988.
COTP Memphis, TN, Reg. 88-06	do	do	June 10, 1988.
Do	do	do	Do.
COTP Memphis, TN, Reg. 88-07	Lower Mississippi River, Mile 743 to Mile 744	do	June 19, 1988.
COTP Memphis, TN, Reg. 88-08	Lower Mississippi River, Memphis Harbor, Wolf River Chute.	do	June 20, 1988.
COTP Memphis, TN, Reg. 88-09	Lower Mississippi River, Mile 743 to Mile 744	do	June 21, 1988.

Docket No.	Location	Type	Date
COTP Huntington, WV, Reg. 88-01	Ohio River, Mile 171.5 to Mile 172.1	do	Feb. 24, 1988.
COTP Huntington, WV, Reg. 88-02	Kanawha River, Mile 59.5 to Mile 60.5	do	June 5, 1988.
COTP Huntington, WV, Reg. 88-03	Kanawha River, Mile 49.5 to Mile 50.5	do	June 11, 1988.
COTP Huntington, WV, Reg. 88-04	Ohio River, Mile 327.0 to Mile 329.0	do	June 23, 1988.
5-88-14	Elizabeth River between Norfolk and Portsmouth, VA	Special Local Regulations	Apr. 10, 1988.
5-88-01	Hampton Roads, Norfolk, VA	do	Apr. 23, 1988.
5-88-18	Willoughy Bay & Swells Point Spit, Norfolk, VA	do	Do.
5-88-42	Philadelphia, PA	do	June 16, 1988.
5-88-44	Delaware River, Philadelphia, PA	do	June 25, 1988.
5-88-45	do	do	June 26, 1988.
COTP Baltimore, MD, Reg. 88-01	Pocomoke River, Upper Chesapeake Bay	Safety Zone	Mar. 25, 1988.
COTP Baltimore, MD, Reg. 88-04	Wicomico River, Upper Chesapeake Bay	do	Apr. 13, 1988.
COTP Baltimore, MD, Reg. 88-05	do	do	Apr. 19, 1988.
COTP Baltimore, MD, Reg. 88-06	do	do	Apr. 20, 1988.
COTP Baltimore, MD, Reg. 88-09	Elk River Channel, Upper Chesapeake Bay	do	June 23, 1988.
7-88-04	North of Fanny Key, North of The Moser Channel Bridge	Special Local Regulations	Apr. 30, 1988.
7-88-015	Jacksonville, FL	do	May 29, 1988.
COTP Miami, FL, Reg. 88-12	Atlantic Ocean, Port Everglades, FL; Approaches to and Turn Basin.	Security Zone	Apr. 30, 1988.
COTP Savannah, GA, Reg. 88-013	Savannah River	Safety Zone	May 15, 1988.
COTP Savannah, GA, Reg. 88-014	do	do	June 5, 1988.
COTP Port Charles, SC, Reg. 88-165.T0706.	Ashley River, Charleston, SC	do	Do.
8-88-06	Blessing of the Fleet, Galveston, TX	Special Local Regulations	Apr. 24, 1988.
8-88-07	Neches River Festival Regatta, Beaumont, TX	do	Do.
8-88-09	U.S. Customs, Bicentennial Demonstration, Galveston, TX	do	May 11, 1988.
8-88-08	Popeye's Offshore Grand Prix, Lake Ponchartrain, LA	do	June 4, 1988.
COTP Mobile, AL, Reg. 88-02	Southeast End of Mobile Bay, AL	Safety Zone	Mar. 18, 1988.
COTP Mobile, AL, Reg. 88-03	Pensacola Bay Fishing Pier, Pensacola, FL	do	Mar. 27, 1988.
COTP Mobile, AL, Reg. 88-04	Back Bay Biloxi Channel, Biloxi, MS	do	Apr. 20, 1988.
COTP Mobile, AL, Reg. 88-05	Escambia Bay Channel, Pensacola, FL	do	June 22, 1988.
COTP New Orleans, LA, Reg. 88-01	USS FORRESTAL (CV 59), Mississippi River, Southwest Pass to Julia Street Wharf, Mile 95.3 and return.	do	Feb. 12, 1988.
COTP Corpus Christi, TX, Reg. 88-01	Port Ingleside, TX	do	Feb. 20, 1988.
COTP Corpus Christi, TX, Reg. 88-02	Matagorda Bay, TX	do	Apr. 22, 1988.
COTP Corpus Christi, TX, Reg. 88-03	do	do	Apr. 26, 1988.
COTP Corpus Christi, TX, Reg. 88-04	Brownsville, TX	do	Apr. 28, 1988.
COTP Corpus Christi, TX, Reg. 88-05	Matagorda Bay, TX	do	Apr. 29, 1988.
COTP Corpus Christi, TX, Reg. 88-06	Gulf Intracoastal Waterway, at mile marker 539.4, Port Ingleside, TX.	do	Apr. 30, 1988.
COTP Corpus Christi, TX, Reg. 88-07	Corpus Christi Ship Channel	do	May 9, 1988.
COTP Galveston, TX, Reg. 88-03	Galveston and Innter Bar Channels from the Gulf of Mexico to the Port of Galveston Piers 33 & 34.	do	Mar. 22, 1988.
COTP Galveston, TX, Reg. 88-04	Gulf Intracoastal Waterway (GIWW) MM 369	do	Mar. 27, 1988.
COTP Houston, TX, Reg. 88-004	Houston Ship Channel, from Buoys 79 and 80 to Morgans Point.	do	Apr. 11, 1988.
COTP Houston, TX, Reg. 88-005	Houston Ship Channel, from Arco Dock to Manchester A Dock.	do	Apr. 12, 1988.
COTP Port Arthur, TX, Reg. 88-01	Neches River, at the Bethlehem Steel Shipyard Vessel Launching Facility, Beaumont, TX.	do	June 4, 1988.
9-88-06	Toledo, Ohio, Toledo International Grand Prix	Special Local Regulations	May 28, 1988.
9-88-03	Sandusky Bay Challenge, Lake Erie	do	May 29, 1988.
9-88-03	Channel Park Heat Wave Classic, Lake Erie	do	June 11, 1988.
9-88-07	Bridgefest Regatta Hydroplane Races, Keweenaw Waterway.	do	June 19, 1988.
9-88-09	Tug Across the Detroit River, Detroit, MI	do	June 21, 1988.
COTP Chicago, IL, Reg. 88-01	Lake Michigan at Chicago Harbor and Burnham Park Harbor, Chicago River, Main Branch, North Branch, Chicago, IL.	Security Zone	May 4, 1988.
COTP Cleveland, OH, Reg. 88-02	Lake Erie	Safety Zone	May 22, 1988.
Do.	do	do	June 6, 1988.
COTP Buffalo, NY, Reg. 88-002	Buffalo Harbor, Buffalo, NY	do	June 30, 1988.
COTP LA/LB, CA, Reg. 88-09	Port of Long Beach, CA	Security Zone	Apr. 6, 1988.
COTP LA/LB, CA, Reg. 88-10	Port of Los Angeles, CA	Safety Zone	Apr. 25, 1988.
COTP LA/LB, CA, Reg. 88-11	do	do	May 7, 1988.
COTP LA/LB, CA, Reg. 88-13	Ports of Los Angeles/Long Beach, CA	do	May 26, 1988.
COTP LA/LB, CA, Reg. 88-11-14	Santa Monica Bay, CA	do	May 27, 1988.
COTP San Diego, CA, Reg. 88-06	San Diego Bay, CA, Pacific Ocean	do	Apr. 1, 1988.
COTP San Diego, CA, Reg. 88-09	do	do	Apr. 12, 1988.
COTP San Diego, CA, Reg. 88-10	Coronado Roads, San Diego, CA, Pacific Ocean	do	Apr. 18, 1988.
COTP San Diego, CA, Reg. 88-12	San Diego Bay, CA, Pacific Ocean	do	Apr. 27, 1988.
COTP San Diego, CA, Reg. 88-13	do	do	May 5, 1988.
COTP San Diego, CA, Reg. 88-14	do	do	May 9, 1988.
COTP San Diego, CA, Reg. 88-15	do	do	May 26, 1988.
COTP San Diego, CA, Reg. 88-16	San Diego Bay, Pacific Ocean	do	June 7, 1988.
COTP San Diego, CA, Reg. 88-17	San Diego Bay, CA Pacific Ocean	do	June 13, 1988.
COTP Puget Sound, WA, Reg. 88-01	Rosario Strait, Lat. 48.30.7N, Long. 122.41.2W	do	Jan. 31, 1988.
COTP Puget Sound, WA, Reg. 88-02	Liberty Bay, Port Gardner, Keyport, WA	do	Mar. 14, 1988.
COTP Puget Sound, WA, Reg. 88-03	Naval Station Indian Island, WA	do	June 16, 1988.
COTP Southeast AK, Reg. 88-1	Sitka Sound, AK	do	June 7, 1988.

Date: August 3, 1988.

Bruce P. Novak,

Executive Secretary, Marine Safety Council.

[FR Doc. 88-17852 Filed 8-5-88; 8:45 am]

BILLING CODE 491-014-M

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33 CFR Part 117

[CGD1-88-057]

Temporary Drawbridge Operation Regulations: Kennebec River, ME

AGENCY: Coast Guard, DOT.

ACTION: Final temporary rule.

SUMMARY: At the request of the Maine Department of Transportation (Maine DOT), the Coast Guard is issuing temporary regulations permitting the Carlton drawbridge over Kennebec River, at mile 14.0, between Bath and Woolwich, Maine, to limit bridge openings within 30 minutes of each other and to extend the evening rush hour forty-five minutes for 60 days commencing 8 August through 6 October 1988. This amendment is being made to examine the effect on vehicular traffic during the above period. This action should accommodate the needs of vehicular traffic, while providing for the reasonable needs of navigation.

DATE: This temporary regulation becomes effective on 8 August 1988, and terminates October 7, 1988.

ADDRESSES: Comments should be mailed to Commander (obr), First Coast Guard District, Bldg. 135A, Governors Island, NY 10004-5073. The comments and other materials referenced in this notice will be available for inspection and copying at that address. Normal office hours are between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: William C. Heming, Bridge Administrator, First Coast Guard District, (212) 668-7170.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking was not published for these regulations and good cause exists for making it effective in less than 30 days after **Federal Register** Publication. Publishing a Notice of Proposed Rulemaking and delaying its effective date would be contrary to the public interest since implementation of these temporary regulations is necessary to evaluate their effect during the summer months when both boating and vehicular traffic are at their peak.

Persons affected by these temporary regulations are invited to comment on their feasibility and impact on both marine and vehicular traffic, including observed effects (beneficial and detrimental), and any suggestions for changes. Persons submitting comments should include their name and addresses, identify the bridge, and give reasons for support of or opposition to these temporary regulations. Persons desiring acknowledgment that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Commander, First Coast Guard District will evaluate all communications received and will determine a final course of action on this proposal. This temporary rule may be changed in light of comments received.

Drafting Information

The drafters of these regulations are Waverly W. Gregory, Jr., project manager, and CDR R.B. Ellard, project attorney.

Discussion of Temporary Regulations

This temporary rule is being issued under 33 CFR 117.43 to evaluate suggested changes to the drawbridge regulations (33 CFR 117.525) to reduce vehicular traffic congestions caused by the opening of the bridge during the summer months. Statistics provided by the Maine DOT indicate that bridge openings normally take five to eight minutes per opening. State and local officials have indicated that bridge openings during these months interrupts traffic for 30 to 45 minutes. The officials therefore desire to restrict marine traffic when Bath Iron Works lets out and tourist traffic is at a peak. Openings for recreational vessels from June through September were 112 in 1986 and 84 in 1987. This averages less than one opening per day for recreational vessels. However, total openings for all vessels were 188 in 1986 and 191 in 1987. Additionally, during June and July in 1988, about 17% of the openings occurred with less than 30 minutes between openings and the evening rush hour appeared to extend beyond 4:45 p.m. due to the staggering of shifts at Bath Iron Works.

The impact of this temporary regulation on vehicular and marine traffic during the remainder of the summer will be evaluated to determine if the proposed changes result in substantial improvements in vehicular traffic without restricting marine traffic.

Economic Assessment and Certification

These temporary regulations are considered to be non-major under Executive Order 12291 on Federal Regulation, and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact has been found to be so minimal that a full regulatory evaluation is unnecessary. The intent of this temporary regulation is to accommodate vehicular traffic to and from the Bath Iron Works and local parks in the summertime when tourist traffic is at its peak. The draw will continue to open on signal for inbound commercial fishing vessels only in the morning.

Since the impact of these regulations is expected to be minimal the Coast Guard certifies that they will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Temporary Regulations

In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations is amended as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05-1(g).

2. Section 117.525(a) is revised for the period of August 8, 1988, through October 6, 1988.

Note.—Because this is a temporary rule, the following amendment will not be codified in the Code of Federal Regulations.

§ 117.525 Kennebec River.

(a) From August 8, through October 6, 1988, the draw of the Carlton highway-railroad bridge, mile 14.0 between Bath and Woolrich shall open on signal as follows:

(1) At all times, as soon as possible for vessels owned and operated by the United States Government, State and local vessels used for public safety, and vessels in distress.

(2) The bridge need not remain open for longer than 10 minutes and shall remain closed for 30 minutes between openings, and

(3) The bridge need not open from 6:30 a.m. to 7:30 a.m. and from 3:45 p.m. to 5:30 p.m. Monday through Friday excluding legal holidays observed locally, except for inbound loaded commercial fishing vessels during the morning closure.

* * * * *

Dated: August 2, 1988.

R.I. Rybacki,

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

[FR Doc. 88-17849 Filed 8-5-88; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Lake Mead National Recreation Area; Noise Abatement

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: On December 20, 1985, the National Park Service, Department of the Interior, published in the **Federal Register** (50 FR 51887) a proposed rule to continue to allow motor vessels to exceed noise level limitations while participating in authorized regattas consistent with the exemptions allowed by Arizona, Nevada and U.S. Coast Guard Regulations when the boats are engaged in an authorized boating regatta. Powerboats designed and constructed for competitive water events have powerful engines with minimum muffling and have traditionally been exempted from State and Federal noise limitations during authorized regattas. This proposal was made available for public review and comment for a period of 30 days following publication in the **Federal Register**, ending on January 21, 1986. No comments were received.

EFFECTIVE DATE: September 7, 1988.

FOR FURTHER INFORMATION CONTACT: Chief Ranger, Lake Mead National Recreation Area, 601 Nevada Highway, Boulder City, Nevada 89005, Telephone: (702) 293-8908.

SUPPLEMENTARY INFORMATION: Boating regattas have been accepted activity at Lake Mead since the area was established and are an appropriate use of Lakes Mead and Mohave. The July, 1984, revision of 36 CFR 3.7 deleted the exemption for intense or prolonged noise during periods of regattas and requires all boats not exceed a noise level of 82 decibels measured at 82 feet. Title 36 CFR allowed for exemptions until the July, 1984, revision. The States of Arizona and Nevada provide for exemptions to noise and promote water regattas on the lakes and rivers within their respective jurisdictions. U.S. Coast Guard Regulations provide similar exemptions. Present National Park Service regulations do not make an exemption and are, therefore, in conflict with local State laws. To impose a noise level restriction on vessels participating in regattas is inconsistent with longstanding policy and puts an unnecessary burden on boaters who participate nationwide and who are then expected to meet severe noise limit standards when operating at Lake Mead National Recreation Area.

Allowing this exemption will not impact on other lake users and will occur on a limited basis under a permit basis. There are an average of four such events each year within the recreation area.

Drafting Information

The following persons participated in the writing of this regulation: Newton Sikes and Alsen E. Inman, Lake Mead National Recreation Area.

Paperwork Reduction Act

This rule does not contain information collection requirements which require approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance with Other Laws

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 (February 19, 1981), 46 FR 13193, and 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 regulation will not have any significant economic effect because it only serves to make an infrequent exception to the noise level limitation imposed by 36 CFR 3.7, during authorized boating regattas. There should be no additional expenditures involved as a result.

The NPS has determined that this rulemaking will not have a significant effect on the quality of the human environment, health and safety because it is not expected to:

(a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

(b) Introduce noncompatible uses which might compromise the nature and characteristics of the area, or cause physical damage to it;

(c) Conflict with adjacent ownerships or land uses; or

(d) Cause a nuisance to adjacent owners or occupants.

Based on this determination, this rulemaking is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by

Departmental regulations in 516 DM 6 (49 FR 21438). As such, neither an Environmental Assessment nor an Environmental Impact Statement has been prepared.

List of Subjects in 36 CFR Part 7

National parks: Reporting and record keeping requirement.

In consideration of the foregoing, 36 CFR Chapter 1 is amended as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 16 U.S.C. 1, 3, 9a, 462(k); section 7.96 also issued under D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

2. In § 7.48, by adding paragraph (f) to read as follows:

§ 7.48 Lake Mead National Recreation Area

* * * * *

(f) The Superintendent may exempt motor vessels participating in a regatta that has been authorized by permit issued by the Superintendent from the noise level limitations imposed by § 3.7 of this chapter.

Susan Recce,

Assistant Secretary for Fish and Wildlife and Parks.

Date: June 17, 1988.

[FR Doc. 88-17798 Filed 8-5-88; 8:45 am]

BILLING CODE 4310-70-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3367-6]

Standards of Performance for New Stationary Sources; Method 5F Amendment; Addition of Barium-Thorin Titration Procedure for Sulfates

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This amendment was proposed in the **Federal Register** on March 18, 1987 (52 FR 8476). This action would promulgate the amended method, which would allow the use of an alternative analysis (barium-thorin titration) procedure to the current analysis (ion chromatograph) procedure. The alternative procedure requires a much lower capital outlay and would increase the number of laboratories that can perform Method 5F analyses.

EFFECTIVE DATE: August 8, 1988.

Under section 307(b)(1) of the Clean Air Act, judicial review of the actions taken by this notice is available *only* by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under section 307(b)(2) of the Clean Air Act, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESS: *Docket.* Docket No. A–86–17, containing supporting information used in developing the promulgated rule is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, South Conference Center, Room 4, Waterside Mall, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Gary McAlister or Mr. Roger T. Shigehara, Emission Measurement Branch (MD–19), Emission Standards and Engineering Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541–2237.

SUPPLEMENTARY INFORMATION:

I. Background

Method 5F is the test method for measurement of nonsulfate particulate matter from stationary sources. It was proposed on May 29, 1985 (50 FR 21863). After the proposal a commenter requested that the barium-thorin titration procedure be included in the method as an alternative. The primary reason for the request was the substantially lower capital cost of the equipment used in the titration procedure as opposed to the cost of the ion chromatograph currently specified in Method 5F. The EPA has completed the necessary development work to allow the use of the titration procedure as an alternative to the ion chromatograph and is now amending Method 5F to include this alternative analysis procedure.

This rulemaking does not impose emission measurement requirements beyond those specified in the current regulations nor does it change any emission standard. Rather, the rulemaking would simply amend test procedures associated with emission measurement requirements that would apply irrespective of this rulemaking.

II. Public Participation

The test method was proposed in the **Federal Register** on March 18, 1987 (52 FR 8476). To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed rules, a public hearing was scheduled for May 4, 1987, at the Research Triangle Park, North Carolina, but no one wished to make an oral presentation. The public comment period was from March 18, 1987, to June 1, 1987. One comment letter was received.

III. Significant Comments and Changes to the Proposed Test Method

One comment letter containing a single comment was received. The commenter thought that the blank determination should be performed on a blank of the same volume as the samples being processed rather than 500 ml as currently specified. The procedure has been changed to reflect this.

IV. Administrative

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify readily and locate documents so that they can intelligently and effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated test methods and EPA responses to significant comments, the contents of the docket will serve as the record in case of judicial review [section 307(d)(7)(a)].

Miscellaneous

The rulemaking does not impose any additional emission measurement requirements on facilities affected by this rulemaking. Rather, this rulemaking amends the test method to which the affected facilities are already subject.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and, therefore, subject to the requirement of a regulatory impact analysis. This regulation is not major because it will not have an annual effect on the economy of $100 million or more; it will not result in a major increase in costs or prices; and there will be no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this attached rule, if promulgated, will not have any economic impact on small entities because no additional costs will be incurred.

List of Subjects in 40 CFR Part 60

Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Incorporation by reference, and Petroleum refineries.

Date: August 1, 1988.

Lee M. Thomas,

Administrator.

40 CFR Part 60, Method 5F of Appendix A, is amended as follows:

PART 60—[AMENDED]

1. The authority citation for Part 60 continues to read as follows:

Authority: Sections 101, 111, 114, 116, and 301 of the Clean Air Act, as amended (42 U.S.C. 7401, 7411, 7414, 7416, 7601).

2. Method 5F of Appendix A is amended by redesignating the current section 7 as section 8 and by adding a new section 7 to read as follows:

Appendix A—Reference Methods

* * * * *

Method 5F—Determination of Nonsulfate Particulate Matter From Stationary Sources

* * * * *

7. Alternative Procedures

7.1 The following procedure may be used as an alternative to the procedure in Section 4.3.

7.1.1 Apparatus. Same as for Method 6, Sections 2.3.3 to 2.3.6 with the following additions.

7.1.1.1 Beakers. 250-ml, one for each sample, and 600-ml.

7.1.1.2 Oven. Capable of maintaining temperatures of 75 ± 5 °C and 105 ±5 °C.

7.1.1.3 Buchner Funnel.

7.1.1.4 Glass Columns. 25-mm × 305-mm (1-in. × 12-in.) with Teflon stopcock.

7.1.1.5 Volumetric Flasks. 50-ml and 500-ml, one set for each sample, and 100-ml, 200-ml, and 1000-ml.

7.1.1.6 Pipettes. Two 20-ml and one 200-ml, one set for each sample, and 5-ml.

7.1.1.7 Filter Flasks. 500-ml.

7.1.1.8 Polyethylene Bottle. 500-ml, one for each sample.

7.1.2 Reagents. Same as Method 6, Sections 3.3.2 to 3.3.5 with the following additions:

7.1.2.1 Water, Ammonium Hydroxide, and Phenolphthalein. Same as Sections 3.2.1, 3.2.5, and 3.2.6 of this method, respectively.

7.1.2.2 Filter. Glass fiber to fit Buchner funnel.

7.1.2.3 Hydrochloric Acid (HCl), 1 M. Add 8.3 ml of concentrated HCl (12 M) to 50 ml of

water in a 100-ml volumetric flask. Dilute to 100 ml with water.

7.1.2.4 Glass Wool.

7.1.2.5 Ion Exchange Resin. Strong cation exchange resin, hydrogen form, analytical grade.

7.1.2.6 pH Paper. Range of 1 to 7.

7.1.3 Analysis.

7.1.3.1 Ion Exchange Column Preparation. Slurry the resin with 1 M HCl in a 250-ml beaker, and allow to stand overnight. Place 2.5 cm (1 in.) of glass wool in the bottom of the glass column. Rinse the slurried resin twice with water. Resuspend the resin in water, and pour sufficent resin into the column to make a bed 5.1 cm (2 in.) deep. Do not allow air bubbles to become entrapped in the resin or glass wool to avoid channeling, which may produce erratic results. If necessary, stir the resin with a glass rod to remove air bubbles, after the column has been prepared, never let the liquid level fall below the top of the upper glass wool plug. Place a 2.5-cm (1-in.) plug of glass wool on top of the resin. Rinse the column with water until the eluate gives a pH of 5 or greater as measured with pH paper.

7.1.3.2 Sample Extraction. Follow the procedure given in Section 4.3.1 except do not dilute the sample to 500 ml.

7.1.3.3 Sample Residue. Place at least one clean glass fiber filter for each sample in a Buchner funnel, and rinse the filters with water. Remove the filters from the funnel, and dry them in an oven at 105 ± 5 °C; then cool in a desiccator. Weigh each filter to constant weight according to the procedure in method 5, Section 4.3. Record the weight of each filter to the nearest 0.1 mg.

Assemble the vacuum filter apparatus, and place one of the clean, tared glass fiber filters in the Buchner funnel. Decant the liquid portion of the extracted sample (Section 7.1.3.2) through the tared glass fiber filter into a clean, dry, 500-ml filter flask. Rinse all the particulate matter remaining in the volumetric flask onto the glass fiber filter with water. Rinse the particulate matter with additional water. Transfer the filtrate to a 500-ml volumetric flask, and dilute to 500 ml with water. Dry the filter overnight at 105 ± 5 °C, cool in a desiccator, and weigh to the nearest 0.1 mg.

Dry a 250-ml beaker at 75 ± 5 °C, and cool in a desiccator; then weigh to constant weight to the nearest 0.1 mg. Pipette 200 ml of the filtrate that was saved into a tared 250-ml beaker; add five drops of phenolphtahalein indicator and sufficient concentrated ammonium hydroxide to turn the solution pink. Carefully evaporate the contents of the beaker to dryness at 75 ± 5 °C. Check for dryness every 30 minutes. Do not continue to bake the sample once it has dried. Cool the sample in a desiccator, and weigh to constant weight to the nearest 0.1 mg.

7.1.3.4 Sulfate Analysis. Adjust the flow rate through the ion exchange column to 3 ml/min. Pipette a 20-ml aliquot of the filtrate onto the top of the ion exchange column, and collect the eluate in a 50-ml volumetric flask. Rinse the column with two 15-ml portions of water. Stop collection of the eluate when the volume in the flask reaches 50-ml. Pipette a 20-ml aliquot of the eluate into a 250-ml Erlenmeyer flask, add 80 ml of 100 percent isopropanol and two to four drops of thorin indicator, and titrate to a pink end point using 0.0100 N barium perchlorate. Repeat and average the titration volumes. Run a blank with each series of samples. Replicate titrations must agree within 1 percent or 0.2 ml, whichever is larger. Perform the ion exchange and titration procedures on duplicate portions of the filtrate. Results should agree within 5 percent. Regenerate or replace the ion exchange resin after 20 sample aliquotes have been analyzed or if the end point of the titration becomes unclear.

Note: Protect the 0.0100 N barium perchlorate solution from evaporation at all times.

7.1.3.5 Blank Determination. Begin with a sample of water of the same volume as the samples being processed and carry it through the analysis steps described in Sections 7.1.3.3 and 7.1.3.4. A blank value larger that 5 mg should not be subtracted from the final particulate matter mass. Causes for large blank values should be investigated and any problems resolved before proceeding with further analyses.

7.1.4 Calibration. Calibrate the barium perchlorate solutions as in Method 6, Section 5.5.

7.1.5 Calculations.

7.1.5.1 Nomenclature. Same as Section 6.1 with the following additions:

m_a = Mass of clean analytical filter, mg.
m_d = Mass of dissolved particulate matter, mg.
m_e = Mass of beaker and dissolved particulate matter after evaporation of filtrate, mg.
m_p = Mass of insoluble particulate matter, mg.
m_r = Mass of analytical filter, sample filter, and insoluble particulate matter, mg.
m_{bk} = Mass of nonsulfate particulate matter in blank sample, mg.
N = Normality of $ba(C10_4)_2$ titrant, meq/ml.
V_a = Volume of aliquot taken for titration, 20 ml.
V_c = Volume of titrant used for titration blank, ml.
V_d = Volume of filtrate evaporated, 200ml.
V_e = Volume of eluate collected, 50 ml.
V_f = Volume of extracted sample, 500 ml.
V_i = Volume of filtrate added to ion exchange column, 20 ml.
V_t = Volume of $Ba(C10_4)_2$ titrant, ml.
W = Equivalent weight of ammonium sulfate, 66.07 mg/meq.

7.1.5.2 Mass of Insoluble Particulate Matter.

$$m_p = m_r - m_a - m_f \qquad \text{Eq. 5F-4}$$

7.1.5.3 Mass of Dissolved Particulate Matter.

$$m_d = (m_e - m_b)\frac{V_f}{V_d} \qquad \text{Eq. 5F-5}$$

7.1.5.4 Mass of Ammonium Sulfate.

$$m_s = \frac{(V_t - V_c)\,N\,W\,V_e\,V_f}{V_a\,V_i} \qquad \text{Eq. 5F-6}$$

7.1.5.5 Mass of Nonsulfate Particulate Matter.

$$m_n = m_p + m_d - m_s - m_{bk} \qquad \text{Eq. 5F-7}$$

8. *Bibliography*

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[FR Doc. 88-17800 Filed 8-5-88; 8:45 am]
BILLING CODE 6560-50-M

Proposed Rules

Federal Register
Vol. 53, No. 152
Monday, August 8, 1988

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 430 and 534

Pay and Performance Under the Senior Executive Service

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: OPM is issuing proposed regulations on Senior Executive Service (SES) pay and performance. The regulations establish requirements necessary to apply consistently and equitably the SES pay provisions of the Civil Service Reform Act of 1978, as amended. In particular, the regulations focus on setting individual basic pay under the SES and implementing the statutory provisions on aggregate compensation. They attempt to provide as much flexibility to agencies as possible under the statutory provisions while providing adequate protections for career appointees. The regulations would also permit more flexibility on the part of agencies in operating their SES performance appraisal systems by revising current requirements on the number of SES summary rating levels and the ending date of the SES performance appraisal period.

DATES: Comments will be considered if received no later than October 7, 1988.

ADDRESS: Send or deliver written comments to the Director, Office of Executive Personnel, Office of Executive Administration, Office of Personnel Management, Room 6R48, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Neal Harwood, (202) 632–4625.

SUPPLEMENTARY INFORMATION: These proposed regulations revise current regulations on SES pay and performance to fully implement the provisions of the Civil Service Reform Act (CSRA) of 1978 (Pub. L. 95–454), as amended, in as flexible a manner as possible.

(1) Pay Under the Senior Executive Service (Part 534, Subpart D)

Since the passage of the CSRA, policy on the administration of pay for the SES has evolved from decisions on specific issues and OPM responses to individual agency inquiries. Additional changes have resulted from enactment of Pub. L. 98–615 on November 8, 1984. The pay provisions of this law were effective February 6, 1985. These regulations would implement the new law, codify interpretations of previous law, and incorporate, or change where necessary, current regulations at 5 CFR Part 534, Subpart D. They provide a basis for consistent and equitable application of the provisions of the CSRA and Pub. L. 98–615. The statutory authority for these regulations may be found in 5 U.S.C. 5382, 5383, and 5385.

Under the SES, which is a gradeless system, management officials enjoy considerable latitude to use pay flexibly. Before CSRA, the specific grades to which positions were classified (e.g., GS–16, 17, 18) most often determined the differences in pay among employees. CSRA removed this automatic linkage. Thus, managers may use pay as an inducement in recruiting, as a means to recognize organizational hierarchy and the responsibility of positions, as a reward for good performance, or as an incentive to improve poor performance. These regulations are written to optimize this flexibility and, at the same time, ensure against arbitrary decisions. The regulations help assure the public and the workforce that pay decisions are made in a reasonable manner and are based upon sound management principles.

Pay Setting Upon Initial Appointment and While in the SES

Under 5 U.S.C. 5383(c), pay for SES members may be adjusted only once in a 12-month period by an appointing authority. The change made by the President in the salary attached to each pay rate is not considered a pay adjustment for the purpose of this restriction. A number of questions have arisen, however, over whether other actions affecting an individual's pay are considered adjustments and thus subject to the 12-month waiting period.

The proposed regulations at § 534.401 (b) and (c) provide that pay upon initial SES appointment may be set at any ES rate and clarify that this pay setting action is considered a pay adjustment. Therefore, for example, if an individual is appointed to the SES as an ES–2, that pay rate could not be changed for 12 months. When the rate is changed (e.g., to ES–3), the individual would have to begin a new 12-month waiting period before being eligible for another change.

The 12-month restriction is not applicable if the individual transfers between agencies because the individual is now under a new appointing authority, who can set pay at any SES rate. A new 12-month waiting period would begin, however, if there is a change in the ES rate upon the transfer. Pay setting upon transfer is clarified in the proposed § 534.401(d).

The provision in the current § 534.401 that restricts the reduction of an SES member's pay to no more than one rate in a 12-month period is retained in the proposed § 534.401(c)(3), which also incorporates the requirement in 5 U.S.C. 5383(d) that career SES members be given 15-days' advance notice when pay is to be reduced.

There is no restriction on the number of rates that pay may be adjusted upwards at one time.

The current § 534.402 restrictions on reducing the pay of SES members who converted to the SES under Subpart C of Part 317 are continued in the proposed § 534.401(f).

Pay Setting Following Break in SES Service

The proposed regulations at § 534.401(e)(1) provide that if there is a break in SES service of more than 30 days, pay may be set at any rate upon reappointment to the SES. A new 12-month waiting period begins upon the reappointment action.

The proposed § 534.401(e)(2), however, provides that if a career senior executive elected to retain SES pay while serving under a Presidential appointment with Senate confirmation, pay may not be adjusted upon reinstatement to the SES unless 12 months have elapsed since the individual's last pay adjustment. If the executive did not elect to retain SES pay, pay may be set at any rate upon reinstatement.

Restrictions on Aggregate Compensation

The proposed regulations at § 534.402(a) define an individual's

aggregate compensation to consist of basic pay, performance awards, Presidential rank awards, and physicians comparability allowances.

In accordance with 5 U.S.C. 5383(b), the regulations at § 534.402(b) state that an individual's aggregate compensation may not exceed the Executive Level I pay rate in effect at the end of that fiscal year. For example, if an executive received a distinguished rank award of $20,000 in FY 1987, had basic pay that equaled $75,000, and received $10,000 in physicians comparability allowance, the executive's aggregate compensation for the fiscal year would be $105,000. The pay rate for Executive Level I at the end of FY 1987, however, was only $99,500. Therefore, as a result of the rank award, the executive would have surplus compensation of $5,500 that could not be paid during FY 1987.

Note.—As in the example here, if either a performance award or a rank award would cause the executive's aggregate compensation to exceed the Executive Level I ceiling by the end of the fiscal year, the excess amount is withheld from the award, rather than from the individual's basic salary.

Before the changes made by Pub. L. 98-615, the executive would have lost the $5,500 surplus. Based on the law, however, proposed § 534.402(c) provides that—

(a) Any surplus compensation (i.e., compensation in excess of the Executive Level I ceiling) will be paid in a lump sum at the beginning of the next fiscal year. In this case, the $5,500 would be paid at the beginning of FY 1988 and become part of that fiscal year's aggregate compensation. (Note that if the full surplus compensation would cause the individual's aggregate compensation for FY 1988 to exceed the Executive Level I ceiling for that year, then the individual would be paid only that portion of the surplus compensation which would bring him to the ceiling; and the remainder would be paid at the beginning of FY 1989.)

(b) The individual is still entitled to any surplus amount in case of separation from the Federal service (e.g., resignation or retirement), or acceptance of a position outside the SES (e.g., at GS-15). As with individuals who remain in the SES, payment may not be made until the beginning of the next fiscal year for individuals who take a position outside the SES. For individuals who leave the Federal service, or who die, payment will be made in accordance with § 534.402(c)(3). The requirement for a 30-day break in service for individuals who separate before payment may be made is to prevent an individual from retiring or resigning solely to receive the payment and then being immediately reemployed.

(c) If the individual transfers between agencies, the agency the individual was in at the time the surplus amount was created is responsible for paying the amount at the beginning of the next fiscal year. For example, if an individual receives a rank award in agency A in FY 1987, and there is a surplus amount of $5,500, but transfers to agency B, agency A must pay the $5,500 when FY 1988 begins. This provision is based on the principle that the agency which creates the obligation should be responsible for paying it. Note that although payment is made by agency A, agency B must still keep a record of it since the payment counts against the aggregate compensation for the new fiscal year.

(2) Performance Appraisal for the Senior Executive Service (Part 430, Subpart C)

Final SES performance appraisal regulations were issued in 1986. Based on experience operating under those regulations, two changes are being proposed. The first change would eliminate the requirement for five summary rating levels. The CSRA (5 U.S.C. 4314(a)) required only three levels (unsatisfactory, minimally satisfactory, and fully successful); and until the 1986 regulations, agencies had the option of determining whether to have additional levels. We believe this option should be returned to agencies, and the proposed regulations would allow agencies to have a three, four, or five-level system.

The second change would eliminate the requirement that SES appraisal periods end between June 30 and September 30. Again, this requirement was added by the 1986 regulations, but is not required by law.

One other change was considered, but is not being proposed. Under 5 U.S.C. 4312(b)(3), an SES member is entitled to have a supervisor's rating reviewed by an employee in a higher level in the agency before the rating becomes final. Section 430.306(a)(3) of the current regulations requires that the review take place before review by the agency Performance Review Board (PRB). Some agencies have suggested that the regulation be changed so that agencies could provide the higher level review after, rather than before, the PRB acts. In our view, the intent of the statutory provision was to have the higher level reviewer's comments available for consideration by the PRB. Therefore, no change is being proposed in the regulations. Nevertheless, it should be noted that under the current regulations, those agencies that want to provide a higher level review after PRB action, in addition to before, may do so.

E.O. 12291. Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it deals with the SES employees of the Federal Government.

List of Subjects

5 CFR Part 430

Administrative practice and procedure, Government employees.

5 CFR Part 534

Government employees, Wages.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is proposing to amend 5 CFR Part 430 and 5 CFR Part 534 as follows:

PART 430—PERFORMANCE MANAGEMENT

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

Authority: 5 U.S.C. chapters 43, 45, 53, and 54.

2. Section 430.304(g) is revised to read as follows:

§ 430.304 SES performance appraisal systems.

* * * * *

(g) Each SES appraisal system shall provide for at least three and not more than five summary rating levels. The rating levels must include an "Unsatisfactory" level, a "Minimally Satisfactory" level, and a "Fully Successful" level. Agencies may also establish up to two levels which are above "Fully Successful." For purposes of this subpart, "Unsatisfactory" is referred to as level 1, "Minimally Satisfactory" is level 2, and "Fully Successful" is level 3. A level one level above "Fully Successful" is level 4, and a level two levels above "Fully Successful" is level 5.

* * * * *

3. Section 430.305(a)(1) is revised to read as follows:

§ 430.305 Appraisal of performance.

(a) *Appraisal period.* (1) Each agency appraisal system shall establish an official appraisal period for which a rating of record shall be prepared. Employees shall be given a rating of record at least annually. Systems shall provide for preparing a summary rating

when an executive changes positions during the appraisal period, if the executive has served for the minimum appraisal period in the position from which he/she has changed; agency SES Performance Management Plan(s) must describe how these ratings will be taken into consideration in deriving the next rating of record. A summary rating prepared when an executive changes positions during the appraisal period shall not be considered an initial rating.

* * * * *

PART 534—PAY UNDER OTHER SYSTEMS

1. The authority citation for Part 534 is revised as set forth below:

Authority: 5 U.S.C. 1104, 5351, 5352, 5353, 5361, 5383, 5384, 5385, and 5541.

2. Sections 534.401 and 534.402 of Subpart D are revised to read as follows:

Subpart D—Pay Under the Senior Executive Service

§ 534.401 Definitions and setting individual basic pay.

(a) *Definitions.* In this subpart:

(1) "Senior executive" means a member of the Senior Executive Service (SES).

(2) "Agency" means an executive agency or military department, as defined by 5 U.S.C. 105 and 102.

(3) "ES rate" means one of the five or more rates of basic pay established by the President under 5 U.S.C. 5382 for the SES.

(b) *Setting pay upon initial appointment.*

An appointing authority may set the pay of a new appointee into the SES at any ES rate.

(c) Adjusting pay while in the SES. (1) An appointing authority may adjust the pay for a senior executive no more than once in any 12-month period. A pay adjustment includes:

(i) The assignment of an ES rate upon initial appointment to the SES;

(ii) The change from one ES rate to another while employed in the SES; or

(iii) The assignment of an ES rate upon reappointment to the SES following a break in SES service of more than 30 days.

(2) An appointing authority may raise the pay for a senior executive any number of ES rates at the time of adjustment.

(3) An appointing authority may lower the pay for a senior executive only one rate at the time of adjustment. A career senior executive must be provided a 15-day written notice before a pay reduction.

(d) *Setting pay upon transfer.* An appointing authority may set the pay of a senior executive transferring from another agency at any ES rate.

(e) *Setting pay following a break in SES service.* (1) General. An appointing authority may set the pay of a former senior executive at any ES rate upon reappointment if there has been a break in SES service of more than 30 days or if the reappointment is in a different agency.

(2) Reinstatement from a Presidential appointment requiring Senate confirmation. If a former career senior executive elected under 5 CFR 317.801(b) to remain subject to SES pay provisions while serving under the Presidential appointment, pay may be adjusted upon reinstatement to the SES only if 12 months have elapsed since the last SES pay adjustment, in accordance with paragraph (c) of this section. If the former senior executive did not elect to remain subject to the SES pay provisions while serving under the Presidential appointment, pay may be set at any ES rate upon reinstatement.

(f) *Restrictions on reducing the pay of senior executives who converted under Subpart C of Part 317 of this chapter.* The ES rate of a senior executive who entered the SES under the conversion provisions of Subpart C of Part 317 of this chapter cannot be reduced, during such executive's appointment in the SES, below the basic payable salary for that individual immediately before converting to the SES.

§ 534.402 Aggregate compensation.

(a) *Definition.* "Aggregate compensation" consists of basic pay, performance awards, Presidential rank awards, and physicians comparability allowances.

(b) *Limitation on aggregate compensation.* No senior executive may receive in any fiscal year aggregate compensation that will exceed the payable rate in effect for Level I of the Executive Schedule as of the end of the fiscal year.

(c) *Payment of amount exceeding limitation on aggregate compensation.* (1) Any excess amount that cannot be paid to a senior executive during a fiscal year because of the limitation under paragraph (b) of this section will be paid to that individual in a lump sum at the beginning of the following fiscal year, even if the individual is no longer in the SES. The amount so paid will then be considered part of the aggregate compensation for the new fiscal year.

(2) If a senior executive transfers to a different Federal agency or leaves the Federal service, the agency responsible for making the payment is the agency that employed the executive at the time the excess amount was created.

(3) The only exceptions to waiting until the following fiscal year to make the payment of the excess amount are as follows:

(i) If a senior executive dies. Payment of the entire excess amount will be made immediately as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(ii) If a senior executive separates from the Federal service. Payment will be made following a 30-day break in service. The executive shall be paid any excess amount that would not bring aggregate compensation for the fiscal year above the Level I salary rate anticipated to be in effect on the last day of the fiscal year. Any additional excess amount shall be paid at the beginning of the next fiscal year. If the executive is reemployed in the Federal service during the same fiscal year as separation, any previous payment of an excess amount shall be considered part of that year's aggregate compensation for applying the Level I limitation for the remainder of the fiscal year.

[FR Doc. 88-17776 Filed 8-5-88; 8:45 am]
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5 CFR Part 890

Federal Employees Health Benefits Program—Opportunity for Certain Annuitants to Reenroll

AGENCY: Office of Personnel Management.

ACTION: Proposed regulations.

SUMMARY: The Office of Personnel Management (OPM) is proposing to revise its Federal Employees Health Benefits (FEHB) Program regulations to permit reenrollment for certain annuitants who are entitled to Part B of Medicare and cancel their FEHB coverage to enroll in a Medicare risk or cost contract under Section 1876 of the Social Security Act, under current regulations, annuitants cannot (except under very limited circumstances) reenroll in the FEHB program once they cancel.

We believe that this proposal will result in a savings to the government and to the annuitant by eliminating duplicative premium costs. This reenrollment opportunity is *limited* to annuitants who: (1) were previously enrolled in FEHB, (2) dropped the FEHB coverage to enroll in a Medicare risk or cost plan, and (3) subsequently lost the Medicare risk or cost plan coverage due to either a move out of the plan

enrollment area or discontinuance of the plan.

DATE: Comments must be received on or before October 7, 1988.

ADDRESS: Written comments may be sent to Reginald M. Jones, Jr., Assistant Director for Retirement and Insurance Policy, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 57, Washington, DC 20044, or delivered to OPM, Room 4351, 1900 E Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Bill Smith, (202) 632–4634.

SUPPLEMENTARY INFORMATION: Under the FEHB law, to continue FEHB coverage after retirement, a retiring employee must have been covered by the FEHB Program for the 5 years of service immediately before retirement (or, if less than 5 years, for all periods of service during which he or she was eligible for coverage). The law requires that, to qualify for continued FEHB coverage, survivor annuitants must be covered as family members when the employee or annuitant dies. Continuous enrollment after retirement has been a requirement of the FEHB Program since its inception in 1960. At that time, the availability of other federally-sponsored health care programs for annuitants was a rarity.

Today, the Health Care Financing Administration (HCFA) of the Department of Health and Human Services offers individuals who are entitled to Part B of Medicare an opportunity to obtain comprehensive health care services from a health care organization under a Medicare risk or cost contract. Under these contracts, HCFA pays the contracting organization a monthly capitation payment (or premium) for each Medicare enrollee, and the enrollee may also pay a monthly premium. Because of this financing arrangement, an individual may be able to obtain comprehensive coverage that equals that offered under the FEHB program at a lower overall premium cost by enrolling in a Medicare risk or cost contracting organization.

Some annuitants have expressed interest in enrolling in a Medicare risk or cost contract but are reluctant to drop their FEHB coverage because they cannot (except under very limited circumstances) reenroll in the FEHB program once they cancel. Those who do enroll under a Medicare risk or cost contract and maintain their FEHB may be paying an unnecessary cost by contributing their share of premiums for FEHB coverage they do not need. This also results in an unnecessary government expenditure, since a substantial portion of each total FEHB premium is contributed by the Government. We are therefore proposing to allow annuitants who cancel their FEHB enrollment for the purpose of enrolling in a Medicare risk or cost contract under Section 1876 of the Social Security Act to reenroll in FEHB upon involuntary loss of their Medicare risk or cost contract coverage. We believe that this proposal will result in a savings to the government and to the annuitant by eliminating duplicative premium costs.

An important factor for a married annuitant who is considering enrolling in a Medicare risk or cost contract is maintaining continued health benefits coverage for his/her spouse. A spouse who is not eligible for Medicare Part B can not be covered by a Medicare risk or cost contract. If this is the case, the annuitant would need to retain FEHB coverage for the spouse (and/or children).

Annuitants' requests to their employing office to cancel their FEHB enrollment must be accompanied by a statement that they are cancelling to enroll in a plan under a Medicare risk or cost contract. The statement must provide the effective date of enrollment in the risk or cost plan. Failure to provide this statement could result in forfeiture of the opportunity to reenroll in FEHB at a later time.

In order to provide uninterrupted health benefits coverage for those annuitants who enroll in a Medicare risk or cost contract, we are proposing that the effective date of FEHB cancellation would be the day before the date the Medicare risk or cost contract coverage takes effect, as shown in the statement provided by the annuitant.

Disenrollment from the Medicare risk or cost plan results in loss of coverage under that plan. Disenrollment may be initiated either by the individual or by the plan. The *involuntary* disenrollment from a Medicare risk or cost plan, and immediate reenrollment in any FEHB plan, of an annuitant may be required or dictated by either of the circumstances described below:

—The enrollee moves out of the plan enrollment area.
—The plan discontinues or loses its Medicare risk or cost contract for any reason.

An enrolled member may also *voluntarily* disenroll from a risk or cost plan at any time for any reason. However, annuitants who voluntarily disenroll will *not* be allowed back into FEHB. Therefore, individuals who are considering dropping their FEHB enrollment should be mindful of the possible consequences of that action. For example, an individual may decide to disenroll from the Medicare risk or cost plan because their favorite doctor has left the plan. In this case, the disenrollment would be a voluntary one, and the annuitant would not be allowed to reenroll in FEHB.

In order to reenroll in FEHB, the annuitant will be responsible for notifying his/her employing office and providing documentation from the Medicare risk or cost plan confirming the date of involuntary disenrollment. The reenrollment in FEHB would take effect on the effective date of involuntary disenrollment from the plan as shown on the documentation from the plan.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they relate to Federal employees and annuitants.

List of Subjects in 5 CFR Part 890

Administrative practice and procedures, Government employees, Health insurance.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM proposes to amend 5 CFR Part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for Part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.102 also issued under 5 U.S.C. 1104.

2. Section 890.301 is amended by adding paragraph (g)(5) as follows:

§ 890.301 Opportunities to register to enroll and change enrollments.

* * * * *

(g) Loss of coverage under Federal programs. * * *

(5)(i) An employee annuitant who had been covered under this part since his or her first opportunity to enroll or for the 5 years immediately preceding the commencing date of annuity payments, whichever is shorter, or a survivor annuitant who had been enrolled or was otherwise eligible to enroll for coverage under this part—who cancels enrollment for the purpose of enrolling in a Medicare risk or cost contract, and is subsequently involuntarily disenrolled

from the Medicare risk or cost contract (due to either a move out of the plan area or discontinuance of the plan)—may register to reenroll in self alone or in self and family coverage under this part.

(ii) Disenrollment under paragraph (g)(5)(i) of this section provides an opportunity to reenroll in FEHB at any time beginning on the 30th day before and ending on the 31st day after the disenrollment.

* * * * *

3. In section 890.304, paragraph (d) is amended by removing the last sentence and adding the two sentences set forth below at the end of the paragraph.

§ 890.304 Termination of enrollment.

* * * * *

(d) *Cancellation.* * * * The cancellation of an annuitant who submits documentation that the cancellation is for the purpose of enrolling in a Medicare risk or cost contract becomes effective on the day before the enrollment under the Medicare risk or cost contract takes effect. The employee or annuitant and his or her family members are not entitled to the temporary extension of coverage for conversion or to convert to an individual contract for health benefits.

4. Section 890.306 is amended by redesignating paragraph (h) as paragraph (i) and adding a new paragraph (h) to read as follows:

§ 890.306 Effective dates.

* * * * *

(h) *Reenrollment of annuitants.* The effective date of an annuitant's reenrollment under § 890.301(g)(5) is the date of disenrollment from the Medicare risk or cost plan, as shown on the documentation from the plan.

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[FR Doc. 88-17777 Filed 8-5-88; 8:45 am]
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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 931 and 932

Proposed Expenses and Assessment Rate for Marketing Order Covering Fresh Bartlett Pears Grown in Oregon and Washington; and Proposed Increase in Expenses for Marketing Order Covering California Olives

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule regarding fresh Bartlett pears grown in Oregon and Washington and California olives would authorize expenditures and establish an assessment rate under Marketing Order No. 931 for the 1988–89 fiscal period established for that order. The proposal is needed for the Northwest Fresh Bartlett Pear Marketing Committee established under M.O. 931 to incur operating expenses during the 1988–89 fiscal period and to collect funds during that period to pay those expenses. This would facilitate program operations. The proposal would also authorize an increase in expenditures for the California Olive Committee established under Marketing Order No. 932 for the 1988 fiscal year. This increase is needed to cover liability insurance expenses for the committee manager, members, alternates, and administrative assistant and to fund an additional production research project. Funds to administer these programs are derived from assessments on handlers.

DATE: Comments must be received by August 18, 1988.

ADDRESS: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085–S, Washington, DC 20090–6456. Comments should reference the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Patrick Packnett, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456, telephone 202–475–3862.

SUPPLEMENTARY INFORMATION: This rule is proposed under Marketing Order No. 931 [7 CFR Part 931] regulating the handling of fresh Bartlett pears grown in Oregon and Washington and Marketing Order No. 932 [7 CFR Part 932] regulating the handling of olives grown in California. These orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 78 handlers of fresh bartlett pears and seven handlers of California olives regulated under their respective marketing orders, and approximately 1,390 olive producers in California and 1,900 Bartlett pear producers in Washington and Oregon. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having annusl gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of the handlers and producers of Bartlett pears may be classified as small entities. Most, but not all, of the olive producers and none of the olive handlers may be classified as small entities.

Each marketing order administered by the Department of Agriculture requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the Department for approval. The members of the administrative committees are handlers and producers of the regulated commodities. They are familiar with the committee's needs and with the costs for goods, services, and personnel in their local areas, and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is derived by dividing the anticipated expenses by the expected shipments of the commodity (i.e., pounds, tons, boxes, cartons, etc.). Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committee before a season

starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committees will have funds to pay their expenses.

The Northwest Fresh Bartlett Pear Marketing Committee met July 11, 1988, and unanimously recommended 1988–89 fiscal period expenditures of $53,800 and an assessment rate of $0.015 per western standard pear box of assessable pears shipped under M.O. 931. In comparison, 1987–88 fiscal period budgeted expenditures were $56,656 and the assessment rate was the same as recommended for the 1988–89 fiscal period. The proposed expenditures are primarily for program administration.

Assessment income for the 1988–89 fiscal period is expected to total $41,508, based on the shipment of 2,767,200 packed boxes of pears. Other available funds include a reserve of $51,468 carried into this fiscal period, and $1,500 in miscellaneous income primarily from interest bearing accounts.

A final rule establishing expenses in the amount of $1,620,350 for the California Olive Committee for the fiscal year ending December 31, 1988, was published in the **Federal Register** on February 2, 1988 [53 FR 2824]. That action also fixed an assessment rate of $23.92 per ton of assessable olives shipped under M.O. 932 to be levied on handlers during the 1988 fiscal year, ending December 31, 1988.

At a meeting held on July 6, 1988, the California Olive Committee voted unanimously to increase its budget of expenses from $1,620,350 to $1,627,482. The proposed increase is needed to cover the premiums for liability insurance for the committee's manager, members, alternates, and administrative assistant, and to fund an additional production research project to be started during the 1988 fiscal period.

No change in the assessment rate was recommended by the committee. Adequate funds are available to cover any increase in expenses resulting from this proposal.

While the expenses and assessment rate proposed under M.O. 931 and the increase in expenses proposed under M.O. 932 would impose some additional costs on Bartlett pear and olive handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be significantly offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

Based on the foregoing, it is further found and determined that a comment period of less than 30 days is appropriate because the budget and assessment rate approvals for the pear program and the budget increase for the olive program need to be expedited. The committees need to have sufficient funds to pay their expenses, which are incurred on a continuous basis.

List of Subjects

7 CFR Part 931

Marketing agreements and orders, Bartlett pears, Oregon, and Washington.

7 CFR Part 932

Marketing agreements and orders, Olives, California.

For the reasons set forth in the preamble, it is proposed that a new § 931.223 be added and that § 932.222 be amended as follows:

1. The authority citation for 7 CFR Parts 931 and 932 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. New § 931.223 is added to read as follows:

PART 931—FRESH BARTLETT PEARS GROWN IN OREGON AND WASHINGTON

§ 931.223 Expenses and assessment rate.

Expenses of $53,800 by the Northwest Fresh Bartlett Pear Committee are authorized, and an assessment rate of $0.015 per western standard pear box of assessable pears is established, for the fiscal period ending June 30, 1989. Unexpended funds from the 1988–89 fiscal period may be carried over as a reserve.

3. Section 932.222 is amended as follows:

PART 932—OLIVES GROWN IN CALIFORNIA

§ 932.222 [Amended]

Section 932.222 is amended by changing "$1,620,350" to "$1,627,482".

Dated: August 3, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 88–17791 Filed 8–5–88; 8:45 am]

BILLING CODE 3410–02–M

7 CFR Part 1126

[DA–88–114]

Milk in the Texas Marketing Area; Notice of Proposed Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed suspension of rule.

SUMMARY: This notice invites written comments on a proposal that would continue, for the months of August 1988 through July 1989, a suspension of portions of the pool plant and producer milk definitions of the Texas order. The continuation of the suspension was requested by Associated Milk Producers, Inc., and Mid-America Dairymen, Inc., cooperative associations that represent a substantial proportion of the producers who supply milk to the market.The requested action would continue the suspension of the 60-percent delivery standard for pooling cooperative association plants, the limitation on the types of pool plants at which milk receipts are used to determine the amount of milk that a cooperative may divert to nonpool plants, and the limits on the amount of milk that a pool plant operator may divert to nonpool plants. In addition, the cooperatives have requested that the shipping standards for pooling supply plants under the order, and the individual producer performance standards that must be met to be eligible to be diverted to a nonpool plant, also be suspended for August 1988 through July 1989. The cooperatives contend that the action is necessary to give handlers the flexibility to dispose of the market's increasing milk supplies without engaging in uneconomic movements of milk solely for the purpose of insuring that dairy farmers who have historically supplied the fluid milk needs of the market would continue to have their milk pooled and priced under the order.

DATE: Comments are due on or before August 15, 1988.

ADDRESS: Comments (two copies) should be filed with the USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: John F. Borovies, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 447–2089.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the

impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

This proposed rule has been reviewed under Executiv Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under the criteria contained therein.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), the suspension of the following provisions of the order regulating the handling of milk in the Texas marketing area is being considered for the months of August 1988 through July 1989:

1. In § 1126.7(d) introductory text, the words "during the months of February through July" and the words "under paragraph (b) or (c) of this section".

2. In § 1126.7(e) introductory text, the words "and 60 percent or more of the producer milk of members of the cooperative association (excluding such milk that is received at or diverted from pool plants described in paragraphs (b), (c) and (d) of this section) is physically received during the month in the form of a bulk fluid milk product at pool plants described in paragraph (a) of this section either directly from farms or by transfer from plants of the cooperative association for which pool plant status under this paragraph has been requested".

3. In § 1126.13, paragraph (e)(1).

4. In § 1126.13(e)(2), the paragraph references "(a), (b), (c), and (d)".

5. In § 1126.13(e)(3), the sentence, "The total quantity of milk so diverted during the month shall not exceed one-third of the producer milk physically received at such pool plant during the month that is eligible to be diverted by the plant operator;"

All persons who want to send written data, views or arguments about the proposed suspension should send two copies of them to the USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, by the 7th day after publication of this notice in the **Federal Register**. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include August in the suspension period.

The comments that are sent will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27(b)).

Statement of Consideration

The proposed action would continue, for the months of August 1988 through July 1989, a suspension of portions of the pool plant and producer milk definitions of the Texas order. Specifically, the action would continue the suspension of the 60-percent delivery standard for pool plants operated by cooperative associations, the restriction on the types of pool plants at which milk must be received to establish the maximum amount of milk that a cooperative may divert to nonpool plants, and the limits on the amount of milk that a pool plant operator may divert to nonpool plants. In addition, the action would, for the same time period, suspend the shipping standards that must be met by supply plants to be pooled under the order and the individual producer performance standards that must be met in order for a producer's milk to be eligible for diversion to a nonpool plant.

The order provides for pooling a cooperative association plant located in the marketing area if at least 60 percent of the producer milk of members of the cooperative association is physically received at pool distributing plants during the month. Also, a cooperative association may divert to nonpool plants up to one-third of the amount of milk that the cooperative causes to be physically received at pool distributing and supply plants during the month. In addition, the order provides that the operator of a pool plant may divert to nonpool plants not more than one-third of the milk that is physically received during the month at the handler's pool plant. The suspension would inactivate the 60-percent delivery standard for plants operated by a cooperative association, allow a cooperative's deliveries to all types of pool plants to be included as a basis from which the diversion allowance would be computed, and remove the diversion limitation applicable to the operator of a pool plant. Such provisions were suspended during March–July 1988.

The order also provides for regulating a supply plant each month in which it ships a sufficient percentage of its receipts to distributing plants. The order provides for pooling a supply plant that ships 15 percent of its milk receipts during August and December and 50 percent of its receipts during September through November and January. A supply plant that is pooled during each of the immediately preceding months of September through January is pooled under the order during the following months of February through July without making qualifying shipments to distributing plants. The requested suspension would remove these performance standards during August 1988 through July 1989 for supply plants that were regulated under the Texas order during each of the immediately preceding months of September through January.

The order also specifies that the milk of each producer must be physically received at a pool plant each month in order to be eligible for diversion to a nonpool plant. During the months of September through January, 15 percent of a producer's milk must be received at a pool plant for diversion eligibility. The suspension would remove these requirements.

The continuation of the current suspension, as well as the additional suspension of the supply plant and producer performance standards, were requested by two cooperative associations (Associated Milk Producers, Inc., and Mid-America Dairymen, Inc.) that represent a substantial proportion of the dairy farmers who supply the Texas market. Associated Milk Producers operates supply-balancing plants that are pooled under the order and Mid-America operates a supply plant in southwestern Missouri that has historically been pooled under the Texas order. The cooperatives contend that the suspension is necessary because of increasing production by Texas dairy farmers. The cooperatives indicate that the supplies of milk are more than ample to meet fluid milk needs and that significant quantities of milk will have to be shipped to nonpool plants for use in manufactured dairy products. In addition, because of increases in production by Texas dairy farmers, the cooperatives contend that it is unlikely that additional supplies of milk from southwestern Missouri would be necessary to meet fluid milk needs. Because of the increasing production, the cooperatives contend that the suspension is necessary to give handlers the flexibility to dispose of excess milk supplies in the most efficient manner and to eliminate costly and inefficient movements of milk that would be made solely for the purpose of pooling the milk of dairy farmers who have historically supplied the Texas market.

In view of the foregoing, it may be appropriate to suspend the aforementioned provisions of the Texas order.

List of Subjects in 7 CFR Part 1126

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Part 1126 continues to read as follows:

Authority: Sec. 1–19, Stat. 31, as amended; 7 U.S.C. 601–674.

Signed at Washington, DC, on August, 3, 1988.

L.P. Massaro

Acting Administrator.

[FR Doc. 88–17845 Filed 8–5–88; 8:45 am]

BILLING CODE 3410–02–M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

Disaster Loans

AGENCY: Small Business Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: The first rule proposed here would amend the disaster loan regulation, 13 CFR Ch. I, Part 123, by authorizing SBA to establish a flexible repayment schedule during the first two years of a disaster loan, reflecting the borrower's ability to pay. At present, equal monthly payments of principal and interest are required beginning five months from the date of the note, except for borrowers with seasonal or fluctuating income. The other rule proposed here would harmonize SBA's disaster loan making authority with the Federal Emergency Management Administration's (FEMA) standard flood insurance policy. FEMA's policy bars compensation for damage to or loss of a building and its contents, located seaward of mean high tide, or entirely in, on or over water if such building was constructed or substantially improved on or after October 1, 1982. Because SBA does not make disaster loans on property located in special flood hazard areas unless the property is covered by flood insurance (if available), SBA proposes to bar such structures from disaster loan eligibility, if constructed or substantially improved on or after the effective date of this regulation, unless there is a business need for that specific location.

DATE: Comments must be received on or before October 7, 1988.

ADDRESS: Written comments, in duplicate, may be sent to Bernard Kulik, Deputy Associate Administrator for Disaster Assistance, Small Business Administration, 1441 L Street, NW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Bernard Kulik, Deputy Associate Administrator for Disaster Assistance, (202) 653–6879.

SUPPLEMENTARY INFORMATION: The first amendment to SBA's disaster regulations proposed here would authorize a departure from the standard repayment schedule, which requires equal monthly payments of principal and interest, beginning five months after the date of the note, and permits a choice of different payment terms only if the borrower can show a seasonal or fluctuating income flow. There are, however, other circumstances in which it is desirable to accommodate a borrower's individual needs. For example, a borrower may have limited repayment ability, due to the need to satisfy a major debt. However, within two years or sooner that debt will be satisfied and repayment ability can be expected to increase. The converse situation, that a disaster loan borrower would want to pay off more of the loan at an earlier time, is also conceivable; for example, where the borrower is committed to retire. Under the proposed rule, in cases of a definite change in the borrower's circumstances, SBA could authorize a payment plan tailored to the borrower's ability to make payments. This departure from the standard payment schedule would be authorized during the first two years of the note, because for longer periods events are difficult to predict. Accordingly, § 123.9(a) would be revised to permit accommodation of a borrower's individual needs during the first two years of repayment, notwithstanding the absence of a showing of seasonal or fluctuating income.

The other amendment proposed here is geared to FEMA's Standard Flood Insurance Policy, 44 CFR Part 61, Appendix A (2) (1987). That policy excepts from its coverage

> B. A building, and its contents, located entirely in, on, or over water, or seward of mean high tide, if the building was newly constructed or substantially improved on or after October 1, 1982.

"Substantial improvement" is defined in FEMA's regulations. Briefly summarized, that definition considers as substantial improvement any repair or improvement of a structure if the work costs at least 50% of the market value of the structure either before the improvement, or—if damaged—before such damage, not including any improvement to bring the structure "up to Code" or any alteration of a historic structure. For the complete definition, see 44 CFR Ch. 1, 59.1 (1987). SBA regulations implementing the National Flood Insurance Act Program, 13 CFR Ch. I, Part 116, Subpart B (1988), require flood insurance before financial assistance for acquisition or construction purposes in FEMA-designated special flood hazard areas, if such insurance has been made available under the National Flood Insurance Act of 1968, 42 U.S.C. 4011, 4012(a). In line with the Congressional purpose that "any Federal assistance . . . will be related closely to all flood-related programs . . . of the Federal Government" and "to guide the development of proposed future construction * * * away from locations which are threatened by flood hazards," 42 U.S.C. 4001(c) (2) and (4), SBA proposes to exclude from disaster loan eligibility those same structures excluded from FEMA's insurance coverage. Accordingly, a new paragraph would be added to § 123.14 which would track closely FEMA's exclusionary language, adapted to business needs and the giving of public notice.

Executive Order 12291, Regulatory Flexibility and Paperwork Management

SBA has determined that the rule changes proposed here woud not constitute a major rule for the purposes of Executive Order 12291, since the annual effect of this rule on the national economy cannot attain $100 million. In this regard, SBA estimates (based on F/Y 1988 to date) that the flexible repayment rule may affect an aggregate loan volume of $13.2 million, and the flood insurance rule $1.35 million. Also, these proposed rules, if adopted, would not result in a major increase in costs or prices to consumers, individual industries, Federal, State and local government agencies or geographic regions, and will have no significant effects on competition, employment, investment, productivity or innovation.

For the purpose of compliance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, this proposal, if promulgated in final form, may have a significant economic impact on a substantial number of small entities. It is estimated that approximately 800 out of approximately 15,000 disaster loan borrowers (roughly 5.3%) will benefit economically from the flexible repayment plan, and that about 100 disaster loan applicants will be affected by the flood insurance rule. The following analysis of those provisions is provided within the context of the review prescribed by the Regulatory Flexibility Act (5 U.S.C. 603).

The reasons why these proposal are under consideration, and their purposes are as follows:

The proposal to authorize fluctuating payments during the first two years of a disaster loan is designed to give greater

flexibility to SBA's loan officers and disaster loan borrowers where rigid adherence to a requirement of equal monthly payments of principal plus interest may adversely affect the borrower's financial situation, require a denial of the loan, or require a longer payout period. Since the purpose of SBA's disaster assistance is remedial, close attention to a disaster victim's individual circumstances is preferable to adherence to standardized requirements.

The proposal to remove structures surrounded by water from disaster loan eligibility is prompted by the statutory requirement that all Federal flood assistance programs follow integrated policies. Specifically, recognizing that the various kinds of Federal assistance available in the event of flood damage

> are often determining factors in the utilization of land and the location and construction of public and of private industrial, commercial, and residential facilities [42 U.S.C. 4002(a)(2)],

it is incongruous to offer disaster loan assistance for structures that, because of their location, cannot be covered by FEMA flood insurance, if no business need for such location exists. SBA's loan program for flood disasters should harmonize with, rather than defeat, national flood disaster policy objectives.

The legal authority for these proposed rule changes is section 5(b)(6) of the Small Business Act, 15 U.S.C. 634(b)(6).

SBA estimates that the proposal to offer flexible payment terms during the first two years of a disaster loan will benefit 800 disaster victims, out of an average annual disaster loan volume of 15,000 loans. The proposal to bar structures surrounded by water is estimated to affect 100 such structures each year.

There are no additional reporting, recordkeeping and other compliance requirements inherent in these proposed rules which would come under the Paperwork Reduction Act. 44 U.S.C. Chapter 35. There are no federal rules which duplicate, overlap or conflict with these proposed rules; SBA views its policy to harmonize its disaster assistance policy with FEMA's as supplementing rather than duplicating FEMA's rule. There are no significant alternate means to accomplish the objectives of these proposed rules.

List of Subjects in 13 CFR Part 123

Disaster assistance—Loan programs/business—Small Business Administration—Small businesses.

For the reasons set out in the preamble, Part 123 of Ch. I, Title 13, Code of Federal Regulations is proposed to be amended as follows:

PART 123—[AMENDED]

1. The authority citation for Part 123 continues to read as follows:

Authority: Secs. 5(b)(6), 7(b), (c), (f) of the Small Business Act, 15 U.S.C. 634(b)(6) and 636(b), (c), (f); Pub. L. 98-270, Title III; Pub. L. 99-272, Sec. 18006.

§ 123.9 [Amended]

2. Section 123.9 (a) is proposed to be revised as follows:

(a) *Loan terms.* No loans made under this part, including renewals and extensions thereof, may be authorized for a term in excess of thirty years (see also § 123.13(b)), and no physical disaster loan made to a business able to obtain Credit Elsewhere (as defined in § 123.3) may be authorized for a term exceeding three years. Repayment ability shall be determined by SBA. Maturity and installment terms shall be established on each loan on the basis of the borrower's need and ability to pay. In most cases equal montly installment payments of principal and interest, beginning five months from the date of the note, are required, but other payment terms may be accorded borrowers with seasonal or fluctuating income and installment payments of varying amounts over the first two years of the loan may be agreed upon if SBA determines that such schedule better reflects the borrower's ability to pay. There is no penalty for prepayment of a direct loan.

3. Section 123.14 is proposed to be amended by redesignating paragraphs (c) and (d), respectively, as paragraphs (d) and (e), and adding a new paragraph (c) to read as follows:

§ 123.14 [Amended]

* * * * *

(c) *Buildings ineligible for flood insurance.* No loans under this part shall be made to an applicant for losses sustained to a building, and its contents, located seaward of mean high tide, or entirely in, on or over water, without a business need therefor, if such building was newly constructed or substantially improved on or after [the effective date of this regulation]. "Substantial improvement" shall have the same meaning as the definition in 44 CFR Ch. 1, 59.1 (1987).

* * * * *

[Catalog of Federal Domestic Assistance, Numbers 59002, Economic Injury Disaster Loans; 59.008, Physical Disaster Loans]

Dated: July 19, 1988.

James Abdnor,

Administrator.

[FR Doc. 88-17711 Filed 8-5-88; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88-NM-93-AD]

Airworthiness Directives; Boeing Model 737 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to certain Boeing Model 737 series airplanes, which would require replacement of aluminum nose landing gear actuator support fittings. This proposal is prompted by numerous reports of nose landing gear support fitting failures and one recent incident of nose gear collapse on landing. This condition, if not corrected, could lead to failure of the nose landing gear due to inability to achieve a down and locked position.

DATES: Comments must be received no later than September 28, 1988.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-93-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara J. Mudrovich, Airframe Branch, ANM-120S; telephone (206) 431-1927. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-93-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

There have been 27 reported failures of the nose landing gear actuator support fitting on Boeing Model 737 series airplanes. The most recent failure caused collapse of the nose gear upon landing. Investigation has revealed that failure of the fitting is due to fatigue.

The fitting was originally made of 7079-T6 aluminum, changed to 7075-T73 aluminum at line number 126, and changed to 4340 steel at line number 447. No cracks have been reported in the steel fittings. Failure of this fitting may lead to the inability to obtain a down and locked nose gear and subsequent collapse upon landing.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require replacement of aluminum nose landing gear fittings with the steel fittings currently used in production by the manufacturer.

It is estimated that 200 airplanes of U.S. registry would be affected by this AD, that it would take approximately 8 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Parts are estimated to be $3,000 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $664,000.

The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 737 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to Model 737 series airplanes, line numbers 1 through 446, certificated in any category. Compliance required within 18 months after the effective date of this AD, unless previously accomplished.

To prevent collapse of the nose landing gear, accomplish the following:

A. Replace the aluminum nose gear actuator support fitting with steel fitting P/N 65C34095-2, in accordance with the drawing contained in Boeing Kit Number 65C34095.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Washington, DC on July 29, 1988.

M.C. Beard,

Director, Office of Airworthiness.

[FR Doc. 88-17762 Filed 8-5-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-89-AD]

Airworthiness Directives; Boeing Model 757 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to certain Boeing Model 757 series airplanes, which would require modification of the wing and body duct leak detection system. This proposal is prompted by reports that operators have experienced duct leak detection from the right pneumatic air duct leak detection system when a significant leak had actually developed in the left pneumatic duct. This condition, if not corrected, could result in the flight crew switching off the inappropriate bleed system, causing loss of all air inflow and airplane depressurization.

DATES: Comments must be received no later than September 28, 1988.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional

Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-89-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT:

Mr. Robert C. McCracken, Systems and Equipment Branch, ANM-130S; telephone (206) 431-1947. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-89-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

Several operators of Boeing Model 757 airplanes have reported that leaks developing in the left pneumatic duct have been sensed by the right duct leak detection system sensors, resulting in the right duct leak caution light illuminating and the Engine Indication and Crew Alerting System (EICAS) displaying a RIGHT DUCT LEAK caution message. Since the pilot procedure recommended when a duct leak is indicated is to turn off the affected bleed system, this situation resulted in loss of airflow from both the left and right bleed systems. This condition, if not corrected, could lead to loss of all cabin air inflow and airplane depressurization.

The FAA has reviewed and approved Boeing Service Bulletin 757-26-0016, dated May 5, 1988, which describes modification of the wing and body duct leak detection system by relocating the duct leak sensing elements to preclude erroneous duct leak sensing.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require modification of the wing and body duct leak detection system in accordance with the service bulletin previously mentioned.

It is estimated that 103 airplanes of U.S. registry would be affected by this AD, that it would take approximately 16 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Cost for parts is estimated to be $217 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $88,271.

The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 757 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

2. By adding the following new airworthiness directive:

§ 39.13 [Amended]

Boeing: Applies to Model 757 series airplanes, as listed in Boeing Service Bulletin 757-26-0016, dated May 5, 1988, certificated in any category. Compliance required within the next 15 months after the effective date of this AD, unless previously accomplished.

To prevent depressurization due to loss of all bleed air inflow following crew action based on an erroneous duct leak indication, accomplish the following:

A. Modify the wing and body duct leak detection system in accordance with Boeing Service Bulletin 757-26-0016, dated May 5, 1988.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the inspections required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Washington, DC, on July 29, 1988.

M.C. Beard,

Director, Office of Airworthiness.

[FR Doc. 88-17760 Filed 8-5-88; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 88-NM-92-AD]

Airworthiness Directives; Fokker Model F-27 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to Fokker Model F-27 series airplanes, which would require a one-time inspection of the main landing gear torque links, and repair, if necessary. This proposal is prompted by reports of a number of torque links that were improperly machined during manufacture. This condition, if not corrected, could lead to jamming of the main landing gear in a position other than full extension.

DATE: Comments must be received no later than September 28, 1988.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attention: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-92-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Fokker Aircraft USA, Inc., 1199 N. Fairfax Street, Alexandria, Virginia 22314. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Ms. Armella Donnelly, Standardization Branch, ANM-113; telephone (206) 431-1967. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attention: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-92-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

The Rijksluchtvaartdienst (RLD), which is the airworthiness authority of the Netherlands, in accordance with existing provisions of a bilateral airworthiness agreement, has notified the FAA of an unsafe condition which may exist on Fokker Model F-27 series airplanes.

The manufacturer has reported that a number of main landing gear torque links were improperly machined during manufacture. This condition, if not corrected, could lead to possible jamming of the main landing gear (MLG) in a position other than extension.

Fokker has issued Service Bulletin F27/32-157, dated December 18, 1987, which describes a one-time inspection of the MLG torque links, and repair, if necessary, in accordance with Dowty Rotol Service Bulletins 32-49SW, 32-82S and 32-161B. The RLD has classified this service bulletin as mandatory.

This airplane model is manufactured in the Netherlands and type certificated in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since these conditions are likely to exist or develop on airplanes of this model registered in the United States, an AD is proposed that would require a one-time inspection of the MLG torque links, and repair, if necessary, in accordance with the Fokker service bulletin previously mentioned.

It is estimated that 38 airplanes of U.S. registry would be affected by this AD, that it would take approximately 2 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be $3,040.

The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane ($80). A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Fokker: Applies to Model F-27 series airplanes, Serial Numbers 10102 to 10692, inclusive, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent jamming of the main landing gear, accomplish the following:

A. Within 90 days after the effective date of this AD, perform a one-time inspection of the main landing gear torque links, and repair, if necessary, in accordance with Fokker Service Bulletin F27/32-157, dated December 18, 1987.

Note.—Fokker Service Bulletin F27/32-157, dated December 18, 1987, references Dowty-Rotol Service Bulletins 32-49SW, 32-82S, and 32-161B for procedures for the inspection and repair.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Standardization Branch, ANM-113.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the inspection and modification required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Fokker Aircraft, USA, Inc., 1199 N. Fairfax Street, Alexandria, Virginia 22314. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Washington, DC, on July 29, 1988.

M.C. Beard,

Director, Office of Airworthiness.

[FR Doc. 88-17761 Filed 8-5-88; 8:45 am]

BILLING CODE 4910-13-M

FEDERAL TRADE COMMISSION

15 CFR Part 600

Fair Credit Reporting Act; Statements of General Policy or Interpretation; Proposed Official Commentary

AGENCY: Federal Trade Commission.

ACTION: Proposed interpretations (official commentary).

SUMMARY: The Federal Trade Commission ("Commission") is proposing to revise its statements of general policy or interpretations under the Fair Credit Reporting Act ("FCRA"). The basic purpose of the FCRA is to insure that consumer reporting agencies exercise their responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy. The Commission believes that prior Commission and staff interpretations should be streamlined and updated. The Commission proposes to remove the existing interpretations currently appearing in Part 600 and add an Appendix containing an official commentary. A primary purpose of the Commentary is to interpret the FCRA in a manner that gives effect to Congressional intent. Comments are sought on the Commentary which may have a substantial impact on the consumer reporting industry, consumer report users, and consumers.

DATE: Comments must be received on or before October 7, 1988.

ADDRESS: Comments should be addressed to: David G. Grimes, Jr., Division of Credit Practices, Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Clarke Brinckerhoff, FCRA Program Advisor, (202) 326-3208, David G. Grimes, Jr., Attorney, (202) 326-3171.

DATES: Comments on the paperwork reduction implications of the Commentary must be submitted to the address immediately below on or before September 7, 1988.

ADDRESS: Send paperwork comments to Don Arbuckle, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3228, Washington, DC 20503. Copies of the Request for OMB Review under the Paperwork Act may be obtained from: Public Reference Branch, Room 130, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Background

The Fair Credit Reporting Act (Pub. L. 91-508, 84 Stat. 1127-36, 15 U.S.C. 1681-81t, sometimes referred to as the "FRCA"), enacted on October 26, 1970, and effective on April 24, 1971, is the first Federal regulation of the consumer reporting industry. This industry is comprised mostly of credit bureaus, investigative reporting companies, and other organizations that regularly gather and report information about consumers for use by others in making decisions concerning those consumers, including credit transactions, insurance underwriting, or employment.

The FCRA's basic purpose is to insure that consumer reporting agencies exercise their responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy. The law requires that the manner in which consumers reporting agencies provide information be fair and equitable to the consumer with regard to the confidentiality, accuracy, and proper use of such information.

The FCFRA requires consumer report users to inform consumers when adverse action is taken concerning credit, insurance or employment on the basis of such reports. Such a user must also identify the consumer reporting agency making the report.

The FCRA gives the Federal Trade Commission primary responsibility for enforcing its provisions, by exercising its functions and powers under the Federal Trade Commission Act. Although the Commission has taken formal action against a number of consumer report providers and users, significant staff enforcement activity has involved issuance of informal staff interpretations, contained in the staff's "Compliance with the Fair Credit Reporting Act" manual (Compliance Manual), and in approximately 350 informal staff opinion letters responding to consumer and industry inquiries. The Commission has also issued eight formal interpretations of the FCRA (at 16 CFR 600.1-600.8), pursuant to § 1.73 of the Commission's Rules (16 CFR 1.73). Some of the opinions have been superseded or overruled by subsequent staff interpretations, while others reflect a reading of the statute that the Commission now believes is either consistent with the FCRA legislative history or inappropriate in light of subsequent experience.

The Commission believes that prior Commission and staff interpretations should be streamlined and brought up-to-date by promulgation of a Commission Commentary on the FCRA. In preparing the proposed Commentary, the Commission resolved inconsistencies in prior interpretations, discarded those that it believes may not be supported by the FCRA or that merely paraphrase it, and summarized the remaining interpretations in the Commentary. The proposed Commentary incorporates the Commission's position concerning the issues dealt with in the current eight formal interpretations, which would be withdrawn upon the Commission's adoption of the Commentary. The interpretations in the Commentary are not trade regulation rules or regulations, and, as provided in § 1.73 of the Commission's Rules, they do not have the force or effect of statutory provisions.

A primary purpose of the Commentary is to interpret the FCRA in a manner that gives effect to Congressional intent. In addition, the Commission hopes that adopting a commentary format for interpetations will enhance the document's usefulness in three major respects:

First, the Commentary's consolidation of all interpretations in a single document will enable interested parties to resolve their questions more easily

Second, the Commentary will present more comprehensive interpretations of the FCRA's provisions. A number of previous interpretations were limited to

specific facts and were therefore useful only to parties in very similar situations. Where appropriate, the Commentary explains Commission policy in terms that may be applied to a range of situations. The Commentary also attempts to provide an in-depth discussion of certain portions of the statute.

Third, the Commentary's recasting of seemingly inconsistent or inaccurate interpretations will facilitate compliance with the FCRA.

The proposed Commentary is intended to present the most useful existing interpretations in a clear and comprehensible format. The interpretations have been drafted to include only the essential elements of the principles involved to make them easy to understand, and have been organized to correspond to sections of the Act that they construe, to make them easy to locate.

Principal Changes From Prior Views

The following paragraphs highlight some of the issues for which the Commentary expresses views that differ either in substance or emphasis from those expressed in the current formal Commission interpretations, in the Compliance Manual, and in prior informal staff opinion letters. This list is not all-inclusive.

1. *Claims reports* (section 603(d)). The Compliance Manual and some staff interpretations have stated that a claims report—which is not normally a consumer report—can become a consumer report *ab initio*, when the insurer to which it is provided later uses the report for underwriting purposes, with the result that its provider may be considered a consumer reporting agency.

The Commentary rejects this position in situations in which the claims report provider has entered into a contract with the insurer-user that states such reports will not be used for underwriting purposes. The Commission believes that a claims reporting service should not be deemed a consumer reporting agency because of an occurrence beyond its control—a unilateral use decision by the insurer to which it provides a claims report.

2. *Prescreening* (section 604(3)(A)). The Commission's "prescreening" interpretation (16 CFR 600.5) sanctions the common process whereby a consumer reporting agency assists in the development of lists of qualified consumers to be solicited by its customers that market their products or services by direct mail. The consumer reporting agency uses the client's criteria for creditworthiness to either (1) delete names that do not qualify from a list provided by the client or (2) create a list of creditworthy individuals for solicitation. The interpretation requires that the user of the consumer reporting agency's service intend that each consumer whose name is on the list after the prescreening will receive an "offer of extension of credit from the company", in which case a permissible purpose for the service (which amounts to a series of consumer reports) is deemed to exist under section 604(3)(A) of the FCRA.

The Commentary expands the concept of prescreening to encompass the situations where (1) demographic analysis is performed in preparing the list, in addition to the traditional credit screen by the consumer reporting agency, and (2) multiple lists of consumers, who meet different creditworthiness criteria, are provided to a client that intends to make different credit offers (*e.g.*, various credit limits) to consumers, based on which criteria they meet. These changes expand the usefulness of prescreening to the clients of consumer reporting agencies, without detracting from the privacy of consumers that is protected by section 604.

3. *Welfare fraud as a permissible purpose* (section 604(3)(D)). Prior staff interpretations stated or implied that only the government office charged with *granting* a welfare benefit had a permissible purpose to obtain a consumer report in connection with welfare fraud, and/or that the permissible purpose applied only to the *initial* determination of a consumer's eligibility for the benefit.

The Commentary makes it clear that *any* public office that is charged with determining a consumer's eligibility for such a benefit can obtain a consumer report on that consumer under this section, and that it may do so to review the subject's *continuing* eligibility for the benefit, as well as to evaluate the subject's initial application. In our view, the section's provision of a permissible purpose should not be restricted by requirements not within the language of the statute.

4. *Reporting period for wage earner plans* (section 605(a)(1)). The Compliance Manual and some staff opinion letters state that wage earner plans may be reported for only seven years, rather than for the ten year reporting period provided by this subsection for reporting bankruptcies.

However, the subsection states that it applies to "cases under title 11 of the United States Code," a description that clearly includes wage earner plans, because they are covered by Chapter XIII of title 11. Thus, the Commentary concludes that wage earner plans may be reported for ten years.

5. *Reporting period for credit accounts* (section 605(a)(4)). Some staff interpretations have been unclear about the proper date from which a consumer reporting agency should measure the permissible period for reporting a credit account that is charged to profit and loss or placed for collection.

The Commentary states that the actual date the account was "charged to profit and loss" or "placed for collection" starts the seven year reporting period with respect to that event. The fact that the delinquency occurred before the charge off (or placement for collection) does not require that the date be moved back, and the occurrence of a subsequent payment on the account does not permit the date to be moved forward.

6. *Notice to consumers of reports used for purposes other than credit, employment or insurance* (section 607(b), section 615(a), FTC Act section 5). Some staff interpretations have stated that consumer report users must provide notices to consumers under circumstances not limited to the express provisions of section 615(a), which requires users to provide notice that a consumer report was used as a basis for adverse action (and provide the name and address of the consumer reporting agency) only when credit, insurance, or employment is involved. Those letters opined that landlords who refused to rent apartments, or merchants who used consumer reports as the basis for adverse actions not covered by section 615(a), were required by section 5 of the FTC Act to provide such notices. One interpretation stated that section 607(b) required consumer reporting agencies to compel such users to provide such notices, implying that the notices would generate disputes by consumers that could improve the completeness or accuracy of the agencies' reports.

The Commission believes that Congress intended to limit the number of situations for which section 615(a) requires notices to be sent, and that it is therefore not appropriate to expand the number of such situations by broadly reading section 607(b) or by invoking the Commission's authority under section 5 of the FTC Act. Thus, the Commentary rejects the previously mentioned interpretations, and concludes that (1) users need not provide such notices and (2) consumer reporting agencies need not require them to do so.

7. *Extent of consumer reporting agency duty to respond to consumer*

"completeness" claims (section 611). Staff opinions have been inconsistent or vague as to whether this section, which imposes requirements on consumer reporting agencies and when consumers dispute the "completeness" of items in their files, requires a consumer reporting agency to either (1) create new files or add information about unreported accounts to consumer's file upon request or (2) add to a consumer's file the consumer's statement that does not dispute the completeness or accuracy of any item, but only explains extenuating circumstances, such as ill health or a layoff, that led to credit delinquencies.

The Commentary answers both questions in the negative, stating that the section is designed to permit a consumer to dispute only the accuracy or completeness of items in the file. It takes the view that "completeness" refers only to items of information contained in a consumer's file (not the file as a whole), and that a consumer's statement solely concerning extenuating circumstances such as inability to pay obligations does not constitute a dispute of the accuracy or completeness of the information being reported.

8. *Notice of consumer report to consumers not selected for employment for which they have not applied* (section 615(a)). Staff interpretations have been inconsistent as to whether an employer must send a "section 615(a)" notice to consumers who are not selected for employment, promotion or reassignment, when they have not applied for the position.

The Commentary concludes that section 615(a) does not require that an individual who has not been selected for a position be given the notice in these circumstances, on the ground that a consumer has not been "denied" a position for which he or she never applied.

Opportunity For Public Comment

The Commission will accept written comments on the proposed Commentary for a period of sixty days. The Commission wishes to receive comments to aid in its consideration of the Commentary, which may have a substantial impact on the consumer reporting industry, consumer report users, and consumers. Comments may be addressed to any aspect of the Commentary, including the following:

(1) Is a commentary the most appropriate or useful format in which to communicate Commission views on the FCRA? Are members of the public (including consumer reporting agencies, insurers, employers, creditors, debt collectors, consumers, and others) more likely to rely on the Commentary than on existing Commission and staff interpretations of the Act? Why or why not?

(2) The proposed Commentary attempts to (A) eliminate interpretations that are considered to be relatively unimportant, (B) recast or correct other interpretations that appear inaccurate, or inconsistent with other more recent interpretations, and (c) restate the remaining interpretations in a more understandable format. Are the modifications made by the proposed Commentary beneficial to the industry and other members of the public? Why or why not?

(3) Are there any changes from prior Commission or staff interpretations reflected in the Commentary that you think are particularly valuable? If so, which one(s) and why?

(4) Are there any changes from prior Commisison staff interpretations that should have been made in the Commentary, but were not? If so, which one(s) and why?

(5) The proposed Commentary requires that a firm offer of credit be made to consumers who have been "prescreened" by a consumer reporting agency. (Comment 6 to section 604(3)(A); 16 CFR 600.5) Would sending an application or general advertising, instead of an offer, be consistent with the FCRA and its legislative history? Specifically, would it be appropriate for the Commission to permit prescreening as long as the user of the service will send consumers on the final list an application for credit, or to otherwise liberalize its interpretation? Why or why not?

(6) The user of an investigative consumer report must send the subject of the report a notice stating that the report being prepared will include information as to the individual's character, general reputation, personal characteristics, and mode of living (whichever are applicable), and that he or she has the right to request a complete and accurate disclosure of the nature and scope of the investigation. The proposed Commentary takes the position that this notice must also state that the report will involve personal interviews with sources such as neighbors, friends, and associates of the consumer. (Comment 6 to section 606; *National Indemnity Co.*, 92 F.T.C. 416, 428, 431 (1978)) Would notices that do not include this additional language be consistent with the FCRA and its legislative history? Is the additional language in any way burdensome? Specifically, would it be appropriate for the Commission to require only that the notice include the items specifically set forth in section 606? Why or why not?

(7) Some of users of consumer reports have both permissible and impermissible purposes for using those reports. A law firm or a detective agency may thus be able to procure reports for some purposes but not others. The proposed Commentary states that in those circumstances a separate certification must be made for each report that is ordered, and no general certifications are permitted. (Comment 2C to section 607; *Credit Data Northwest*, 86 F.T.C. 389, 391, 395 (1975), *Credit Bureau of Columbus*, 81 F.T.C. 938, 940, 944 (1972), *Credit Bureau of Lorain*, 81 F.T.C. 381, 382, 384 (1972)). Is this requirement too restrictive, How burdensone (if at all) is the requirement that each report be certified separately, How does the certification process work in practice? Specifically, would it be appropriate for the Commission to permit consumer reporting agencies to rely on a general certification from such users (as is permitted for users such as creditors or insurers, which typically only have permissible purposes) or to use some other procedure (such as a general certification, combined with periodic audits) to ensure that a "mixed purpose" user obtains reports only for permissible purposes? Why or why not?

(8) Will any part of the Commentary as presently drafted impose unnecessary burdens on industry or cause unnecessary injury to consumers. If so, which part(s) and why?

(9) Are there aspects of FCRA compliance not addressed in the proposed Commentary that should be addressed at this time? If so what are they?

Review Under the Regulatory Flexibility Act

Pursuant to section 605 of the Regulatory Flexibility Act it is hereby certified that the proposed statements of general policy or interpretations will not have a significant impact on a substantial number of small entities within the meaning of the Act. They are not trade regulation rules or regulations and the proposal would not cause a significant increase in compliance burdens on a substantial number of small entities.

Review Under the Paperwork Reduction Act

Because the Commentary may involve the "collection of information" as defined in 5 CFR 1320.7(c), it has been submitted to OMB for review under the Paperwork Reduction Act. The supporting Statement accompanying that submission includes an estimate that, if the Commentary is issued in final

form, the public may spend some 1000 hours per year studying its contents Although the Commentary will likely *reduce* the amount of time and effort spent determining compliance obligations imposed by the FCRA, publication of the document will lead the public to spend some time and effort studying it that obviously would not take place unless it is issued. The time and effort spent reviewing the document will fall primarily on the credit reporting industry and the lawyers who advise it.

List of Subjects in 16 CFR Part 600

Credit, Trade practices.

Pursuant to 15 U.S.C. 1681s and 16 CFR 1.73, the Commission hereby proposes to revise 16 CFR Part 600 to read as follows:

PART 600—STATEMENTS OF GENERAL POLICY OR INTERPRETATIONS

Sec.
600.1 Authority and purpose.
600.2 Legal effect.
Appendix—Commentry on the Fair Credit Reporting Act

Authority: 15 U.S.C. 1681s; and 16 CFR 1.73.

§ 600.1 Authority and purpose.

(a) *Authority.* This part is issued by the Commission pursuant to the provisions of the Fair Credit Reporting Act, Pub. L. 91–508, approved October 26, 1970, 84 Stat. 1127–36 (15 U.S.C. 1681 *et seq*).

(b) *Purpose.* The purpose of this part is to clarify and consolidate statements of general policy or interpretations in a commentary in the Appendix to this part. The Commentary will serve as guidance to consumer reporting agencies, their customers, and consumer representatives. The Fair Credit Reporting Act requires that the manner in which consumer reporting agencies provide information be fair and equitable to the consumer with regard to the confidentiality, accuracy, and proper use of such information. The Commentary will enable interested parties to resolve their questions more easily, present a more comprehensive treatment of interpretations and facilitate compliance with the Fair Credit Reporting Act in accordance with Congressional intent.

§ 600.2 Legal effect.

(a) The interpretations in the Commentary are not trade regulation rules or regulations, and, as provided in § 1.73 of the Commission's rules, they do not have the force or effect of statutory provisions.

(b) The regulations of the Commission relating to the administration of the Fair Credit Reporting Act are found in Subpart H of 16 CFR Part 1 (§§ 1.71–1.73).

Appendix—Commentary on the Fair Credit Reporting Act [1]

Introduction

1. *Official status.* This Commentary contains interpretations of the Federal Trade Commission (Commission) of the Fair Credit Reporting Act (FCRA). It is a guideline intended to clarify how the Commission will construe the FCRA in light of Congressional intent as reflected in the statute and its legislative history. The Commentary does not have the force or effect of regulations or statutory provisions, and its contents may be revised and updated as the Commission considers necessary or appropriate.

2. *Status of previous interpretations.* The Commentary primarily addresses issues discussed in the Commission's earlier formal interpretations of the FCRA (16 CFR 600.1–600.8), which are hereby superseded, in the staff's manual entitled "Compliance With the Fair Credit Reporting Act" (the current edition of which was published in May 1973, and revised in January 1977 and March 1979), and in informal staff opinion letters responding to public requests for interpretations, and it also reflects the results of the Commission's FCRA enforcement program. It is intended to synthesize the Commission's views and give clear advice on important issues. The Commentary sets forth some interpretations that differ from those previously expressed by the Commission or its staff, and is intended to supersede all prior formal Commission interpretations, informal staff opinion letters, and the staff manual cited above.

3. *Statutory references.* Reference to several different provisions of the FCRA is frequently required in order to make a complete analysis of an issue. For various sections and subsections of the FCRA, the Commentary discusses the most important and common overlapping references under the heading "Relation to other (sub)sections." FTC has set out excerpts of FCRA for the convenience of the public.

4. *Issuance of staff interpretations.* The Commission will revise and update the Commentary as it deems necessary, based on the staff's experience in responding to public inquiries about, and enforcing, the FCRA. The Commission welcomes input from interested industry and consumer groups and other public parties on the Commentary and on issues discussed in it. Staff will continue to respond to requests for informal staff interpretations. In proposing revisions of the Commentary, staff will consider and, where appropriate, recommend that the Commentary incorporate issues raised in correspondence and other public contacts, as well as in connection with the Commission's enforcement efforts. Therefore, a party may raise an issue for inclusion in future editions of the Commentary without making any formal submission or request to that effect. However, requests for formal Commission interpretations of the FCRA may also still be made pursuant to the procedures set forth in the Commission's Rules (16 CFR 1.73).

5. *Commentary citations to FCRA.* The Commentary should be used in conjunction with the text of the statute. In some cases, the Commentary includes an abbreviated description of the statute, rather than the full text, as a preamble to discussion of issues pertaining to various sections and subsections. These summary statements of the law should not be used as a substitute for the statutory text.

Section 601 Short Title

"This title may be cited as the Fair Credit Reporting Act."

The Fair Credit Reporting Act (FCRA) is Title VI of the Consumer Credit Protection Act, which also includes other Federal statutes relating to consumer credit, such as the Truth in Lending Act (Title I), the Equal Credit Opportunity Act (Title VII), and the Fair Debt Collection Practices Act (Title VIII).

Section 602 Findings and Purpose

Section 602 recites the Congressional findings regarding the significant role of consumer reporting agencies in the nation's financial system, and states that the basic purpose of the FCRA is to require consumer reporting agencies to adopt reasonable procedures for providing information to credit grantors, insurers, employers and others in a manner that is fair and equitable to the consumer with regard to confidentiality, accuracy, and the proper use of such information.

Section 603 Definitions and Rules of Construction

Section 603(a) states that "definitions and rules of construction set forth in this section are applicable for the purposes of this title." Section 603(b) defines "person" to mean "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency or other entity."

[1] The quoted material contained in this Appendix is from the Fair Credit Reporting Act (Pub. L. 91–508, 84 Stat. 1127–36, 5 U.S.C 1681–811).

1. Relation to Other Sections

Certain "persons" must comply with the Act. The term "consumer reporting agency" is defined in section 603(f) to include certain "persons." Section 619 subjects any "person" who knowingly and willfully obtains information from a consumer reporting agency on a consumer under false pretenses to criminal sanctions. Requirements relating to report users apply to "persons." Section 606 imposes disclosure obligations on "persons" who obtain investigative reports or cause them to be prepared. Section 615(c) uses the term "person" to denote those subject to disclosure obligations under sections 615(a) and 615(b).

2. Examples

The term "person" includes universities, creditors, collection agencies, insurance companies, private investigators, and employers.

Section 603(c) defines the term "consumer" to mean "an individual."

1. Relation to Other Sections

The term "consumer" denotes an individual entitled to the Act's protections. Consumer reports, as defined in section 603(d), are reports about consumers. A "consumer" is entitled to obtain disclosures under section 609 from consumer reporting agencies and to take certain steps that require such agencies to follow procedures in section 611, concerning disputes about the completeness or accuracy of items of information in the consumer's file. Disclosures required under section 606 by one procuring an investigative report must be made to the "consumer" on whom the report is sought. Notifications required by section 615 must be provided to "consumers." A "consumer" is the party entitled to sue for willful noncompliance (section 616) or negligent noncompliance (section 617) with the Act's requirements.

2. General

The definition includes only a natural person. It does not include artificial entities (*e.g.*, partnerships, corporations, trusts, estates, cooperatives, associations) or entities created by statute (*e.g.*, governments, governmental subdivisions or agencies).

Section 603(d) defines "consumer report" to mean "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarilly for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under Section 604" (with three specific exclusions).

1. Relation to "Consumer Reporting Agency."

To be a "consumer report," the information must be furnished by a "consumer reporting agency" as that term is defined in section 603(f). Conversely, the term "consumer reporting agency" is restricted to persons that regularly engage in assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing "consumer reports" to third parties. In other words, the term "consumer reporting agency" in section 603(f) and "consumer report" in section 603(d)) are mutually dependent and must therefore be construed together. For example, information is not a "consumer report" if the person furnishing the information is clearly not a "consumer reporting agency" (*e.g.*, if the person furnishing the information does not regularly furnish such information for monetary fees or on a cooperative nonprofit basis).

2. Relation to the Applicability of the Act

If a report is not a "consumer report," then the Act does not usually apply to it.[2] For example, because a commercial credit report is not a report on a consumer, it is not a "consumer report". Therefore, the user need not notify the subject when taking adverse action, and the provider need not omit "obsolete" information, as would be required if the Act applied.

3. Report Concerning a "Consumer's" Attributes and History

A. *General.* A "consumer report" is a report on a "consumer" to be used for certain purposes involving that "consumer."

B. *Artificial entities.* Reports about corporations, associations, and other collective entities are not consumer reports, and the Act does not apply to them.

C. *Reports on businesses for business purposes.* Reports used to determine the eligibility of a business, rather than a consumer, for certain puroses, are not consumer reports and the Act does not apply to them, even if they contain information on individuals.

[2] However, a creditor denying a consumer's application based on a report from a "third party" must give the disclosure required by section 615(b).

4. "(C)redit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. . . ."

A. *General.* To be a "consumer report," the information must bear on at least one of the seven characteristics listed in this definition.

B. *Credit guides.* Credit guides are listings, furnished by credit bureaus to credit grantors, that rate how well consumers pay their bills. Such guides are a series of "consumer reports," because they contain information which is used for the purpose of serving as a factor in establishing the consumers' eligibility for credit. However, if they are coded (by identification such as social security number, driver's license number, or bank account number) so that the consumer's identity is not disclosed, they are not "consumer reports" until decoded. (See discussion of uncoded credit guides under section 604(3)(A), item 8 *infra.*)

C. *Motor vehicle reports.* Motor vehicle reports are distributed by state motor vehicle departments, generally to insurance companies upon request, and usually reveal a consumer's entire driving record, including arrests for driving offenses. Such reports are consumer reports when they are sold by a Department of Motor Vehicles for insurance underwriting purposes and contain information bearing on the consumer's "personal characteristics," such as arrest information. The Act's legislative history indicates Congress intended the Act to cover mutually beneficial exchanges of information between commercial enterprises rather than between governmental entities. Accordingly, these reports are not consumer reports when provided to other governmental authorities involved in licensing or law enforcement activities. (See discussion titled "State Departments of Motor Vehicles," under section 603(f), item 10 *infra.*)

D. *Consumer lists.* A list of the names of creditworthy individuals, or of individuals on whom credit bureaus have derogatory information, is a series of "consumer reports" because the information bears on credit worthiness.

E. *Public record information.* A report solely of public record information is not a "consumer report" unless that information bears on at least one of the seven characteristics listed in the definition. Public record information relating to records of arrest, or the institution or disposition of civil or criminal proceedings, bears on one or more of these characteristics.

F. *Name and Address.* A report consisting of the consumer's name and address alone, with no connotations as to credit worthiness or other characteristics, does not constitute a "consumer report," because it does not bear on any of the seven factors.

G. *Rental characteristics.* Reports about rental charateristics (*e.g.*, consumers' evictions, rental payment histories, treatment of premises) are consumer reports, because they relate to character, general reputation, personal characteristics, or mode of living.

5. "(U)sed or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility * * *"

A. *Law enforcement bulletins.* Bulletins that are limited to a series of descriptions, sometimes accompanied by photographs, of individuals who are being sought by law enforcement authorities for alleged crimes are not a series of "consumer reports" because they have not been collected for use in evaluating consumers for credit, insurance, employment or other consumer purposes, and it cannot reasonably be anticipated they will be used for such purposes.

B. *Directories.* Telephone directories and city directories, to the extent they only provide information regarding name, address and phone number, marital status, home ownership, and number of children, are not "consumer reports," because the information is not used or expected to be used in evaluating consumers for credit, insurance, employment or other purposes and does not reflect on credit standing, credit worthiness, or any of the other factors. A list of names of individuals with checking accounts is not a series of consumer reports because the information does not bear on credit worthiness or any of the other factors. A trade directory, such as a list of all insurance agents licensed to do business in a state, is not a series of consumer reports because it is commercial information that would be used for commercial purposes.

C. *Use of prior consumer report in preparation.* A report that would not otherwise be a consumer report may be a consumer report, notwithstanding the purpose for which it is furnished, if it includes a prior consumer report or information from consumer report files, because it would contain some information "collected in whole or in part" for consumer reporting purposes. For example, an insurance claim report would be a consumer report if a consumer report (or information from a consumer report) were used to prepare it.

D. *Use of reports for purposes not anticipated by the reporting party.* The question arises whether a report that is not othewise a consumer report is subject to the FCRA because the recipient subsequently used the report for a permissible purpose. If the reporting party's procedures are such that it neither knows of nor should reasonably anticipate such use, the report is not a consumer report. If a reporting party has taken reasonable steps to insure that such a report is not used for an impermissible purpose, and if it neither knows of, nor can reasonably anticipate such use, the report should not be deemed a consumer report by virtue of uses beyond the reporting party's control. A reporting party might establish that it does not reasonably anticipate such use of the report by requiring the recipient to certify that the report will not be used for one of the purposes listed in section 604. (Such procedure may be compared to the requirement in section 607(a), discussed *infra*, that consumer reporting agencies furnishing consumer reports require that prospective users certify the purposes for which the information is sought and certify that the information will be used for no other purpose). For example, a claims reporting service could use such a certification to avoid having its insurance claims reports deemed "consumer reports" if the report recipient/insurer were to use the report later for "underwriting purposes" under section 604(3)(C), such as terminating insurance coverage or raising the premium.

6. "(E)stablishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or household purposes, or (2) employment purposes, or (3) other purposes authorized under Section 604"

A. *Relation to Section 604.* Because section 603(d)(3) refers to "purposes authorized under section 604" (often described as "permissible purposes" of consumer reports), some of which overlap purposes enumerated in section 603 (*e.g.*, 603(d)(1) and 603(d)(2)), section 603 and 604 must be construed together, to determine what are "consumer reports" and "permissible purposes" under the two sections. See discussion *infra*, under section 604.

B. *Commercial credit or insurance.* A report on a consumer for credit or insurance in connection with a business operated by the consumer is not a "consumer report," and the Act does not apply to it.

C. *Insurance claims reports.* (It is assumed that information in prior consumer reports is not used in claims reports. See discussion, *supra*, in item 5–C under this subsection.) Reports obtained solely to determine the validity of insurance claims are not consumer reports, because section 604(3)(C) specifically sets forth only underwriting (not claims) as an insurance-related purpose, and section 603(d)(1) deals specifically with eligibility for insurance and no other insurance-related purposes. To construe section 604(3)(E) as including reports furnished in connection with insurance claims would be to disregard the specific language of sections 604(3)(C) and 603(d)(1).

D. *Scope of employment purpose.* A report that is used or is expected to be used or collected in whole or in part in connection with establishing an employee's eligibility for "promotion, reassignment or retention," as well as to evaluate a job applicant, is a consumer report because sections 603(d)(2) and 604(3)(B) use the term "employment purposes," which section 603(h) defines to include these situations.

E. *Bad check lists.* A report indicating that an individual has issued bad checks, provided by printed list or otherwise, to a business for use in determining whether to accept consumers' checks tendered in transactions primarily for personal, family or household purposes, is a consumer report. The information furnished bears on consumers' character, general reputation and personal characteristics, and it is used or expected to be used in connection with business transactions involving consumers.

F. *Tenant screening reports.* A report used to determine whether to rent a residence to a consumer is a consumer report, because it is used for a business transaction that the consumer wishes to enter into for personal, family or household purposes.

7. Exclusions From the Definition of "Consumer Report."

A. *"(Any) reports containing information solely as to transactions or experiences between the consumer and the person making the report;"*—(1) *Examples of sources.* The exemption applies to reports limited to transactions or experiences between the consumer and the entity making the report (*e.g.*, retail stores, hospitals, present or former employers, banks, credit unions, or universities).

(2) *Information beyond the reporting entity's own transactions or experiences with the consumer.* The exemption does not apply to reports by these entities of information beyond their own

transactions or experiences with the consumer. An example is a creditor's or an insurance company's report of the reasons it cancelled credit or insurance, based on information from an outside source.

(3) *Opinions concerning transactions or experiences.* The exemption applies to reports that are not limited to the facts, but also include opinions (*e.g.*, use of the term "slow pay" to describe a consumer's transactions with a creditor), as long as the facts underlying the opinions involve only transactions or experiences between the consumer and the reporting entity.

B. *"(A)ny authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;"*—(1) *General.* The exemption applies to a credit card issuer's communication of its decision whether or not to authorize a charge, in response to a request from a merchant or other party that the consumer has asked to honor the card.

C. *"(A)ny report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to the consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 615."*—(1) *General.* The exemption covers retailers' attempts to obtain credit for their individual customers from an outside source (such as a bank or a finance company). The communication by the financial institution of its decision whether to extend credit is not a "consumer report" *if* the retailer informs the customer of the name and address of the financial institution to which the application or contract is offered *and* the financial institution makes the disclosures required by section 615 of the Act. Such disclosures must be made only when there is a denial of, or increase in the charge for, credit or insurance. (See discussion of section 615, item 10 *infra.*)

(2) *Information included in the exemption.* The exemption is not limited to a simple "yes" or "no" response, but includes the information constituting the basis for the credit denial, because it applies to "any report."

(3) *How third party creditors can insure that the exemption applies.* Creditors, who are requested by dealers or merchants to make such specific extensions of credit, can assure that communication of their decision to the dealer or merchant will be exempt under this section from the term "consumer report," by having written agreements that require such parties to inform the consumer of the creditor's name and address and by complying with any applicable provisions of section 615.

Section 603(e) defines "investigative consumer report" as "a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer."

1. Relation to Other Sections

The term "investigative consumer report" denotes a subset of "consumer report" for which the Act imposes additional requirements on recipients and consumer reporting agencies. Persons procuring "investigative consumer reports" must make certain disclosures to the consumers who are the subjects of the reports, as required by section 606. Consumer reporting agencies must comply with section 614, when furnishing "investigative consumer reports" containing adverse information that is not a matter of public record. Consumer reporting agencies making disclosure to consumers pursuant to section 609 are not required to disclose "sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purposes."

2. General

An "investigative consumer report" is a type of "consumer report" that contains information that is both related to a consumer's character, general reputation, personal characteristics or mode of living and obtained by personal interviews with the consumer's neighbors, friends, associates or others.

3. Types of Sources Interviewed

A report consisting of information from any third party concerning the subject's character (reputation, etc.) may be an investigative consumer report because the phrase "obtained through personal interviews * * * with others" includes any source that is a third party interviewee. A report containing interview information obtained solely from the subject is not an "investigative consumer report."

4. Telephone Interviews

A consumer report that contains information on a consumer's "character, general reputation, personal characteristics or mode of living" obtained through telephone interviews with third parties is an "investigative consumer report," because "personal interviews" includes interviews conducted by telephone as well as in person.

5. Identity of Interviewer

A consumer report is an "investigative consumer report" if personal interviews are used to obtain information reported on a consumer's "character, general reputation, personal characteristics or mode of living," regardless of who conducted the interview.

6. Noninvestigative Information in "Investigative Consumer Reports"

An "investigative consumer report" may also contain noninvestigative information, because the definition includes reports, a "portion" of which are investigative reports.

7. Exclusions From "Investigative Consumer Reports"

A report that consists solely of information gathered from observation by one who drives by the consumer's residence is not an "investigative consumer report," because it contains no information from "personal interviews."

Section 603(f) defines "consumer reporting agency" as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

1. Relation to Other Sections

A. *Duties imposed on "consumer reporting agencies."* The Act imposes a number of duties on "consumer reporting agencies." They must have permissible purposes to furnish consumer reports (section 604), avoid furnishing obsolete adverse information in certain consumer reports (sections 605, 607(a)), adopt reasonable procedures to assure privacy (sections 604, 607(a)), and accuracy (section 607(b)) of consumer reports, provide only limited disclosures to governmental agencies (section 608), provide consumers certain disclosures upon request (sections 609 and 610) at no cost or for a reasonable charge (section 612).

follow certain procedures if a consumer disputes the completeness or accuracy of any item of information contained in his file (section 611), and follow certain procedures in reporting public record information for employment purposes or when reporting adverse information other than public record information in investigative consumer reports (sections 613, 614).

B. *Relation to "consumer reports."* The term "consumer reporting agency," as defined in section 603(f), includes certain persons who assemble or evaluate information on individuals for the purpose of furnishing "consumer reports" to third parties. Conversely, section 603(d) defines the term "consumer report" to mean the communication of certain information by a "consumer reporting agency." In other words, the terms "consumer report" in section 603(d) and "consumer reporting agency" as defined in section 603(f) are defined in a mutually dependent manner and must therefore be construed together. For example, a party is not a "consumer reporting agency" if it provides only information that is excepted from the definition of "consumer report" under section 603(d), such as reports limited to the party's own transactions or experiences with a consumer, or credit information on organizations.

2. Isolated Reports

Parties that do not "regularly" engage in assembling or evaluating information for the purpose of furnishing consumer reports to third parties are not consumer reporting agencies. For example, a creditor that furnished information on a consumer to a governmental entity in connection with one of its investigations, would not "regularly" be making such disclosure for a fee or on a cooperative nonprofit basis, and therefore would not become a consumer reporting agency, even if the information exceeded the creditor's transactions or experiences with the consumer.

3. Public Record Information

A firm that regularly compiles and reports public record information about consumers for use in connection with consumer transactions is a consumer reporting agency.

4. Employment Agency

An employment agency that routinely obtains information on job applicants from their former employers and furnishes the information to prospective employers is a consumer reporting agency.

5. Information Compiled for Insurance Underwriting

A business that compiles claim payment histories on individuals from insurers and furnishes them to insurance companies for use in underwriting decisions concerning those individuals is a consumer reporting agency.

6. Private Investigators and Detective Agencies

Private investigators and detective agencies that regularly obtain consumer reports and furnish them to clients may thereby become consumer reporting agencies.

7. Collection Agencies and Creditors

Collection agencies and creditors become consumer reporting agencies if they regularly furnish information beyond their transactions or experiences with consumers for use in connection with consumers' transactions.

8. Joint Users of Consumers Reports

Entities that share consumer reports with others that are jointly involved in decisions for which there are permissible purposes to obtain the reports may be "joint users" rather than consumer reporting agencies. For example, if a lender forwards consumer reports to governmental agencies administering loan guarantee programs, or to other prospective loan insurers or guarantors, or to another creditor for use in considering a consumer's loan application at the consumer's request, the lender does not become a consumer reporting agency by virtue of such action. An agent or employee that obtains consumer reports does not become a consumer reporting agency by sharing such reports with its principal or employer in connection with the purposes for which the reports were initially obtained.

9. Loan Exchanges

Loan exchanges, which are generally owned and operated on a cooperative basis by consumer finance companies, constitute a mechanism whereby each member furnishes the exchange information concerning the full identity and loan amount of each of its borrowers, and receives information from the exchange concerning the number and types of outstanding loans for each of its applicants. A loan exchange or any other exchange that regularly collects information bearing on decisions to grant consumers credit or insurance for personal, family or household purposes, or employment, is a "consumer reporting agency."

10. State Departments of Motor Vehicles

State motor vehicle departments are "consumer reporting agencies" if they regularly furnish motor vehicle reports containing information bearing on the consumer's "personal characteristics," such as arrest information, to insurance companies for insurance underwriting purposes. (See discussion of motor vehicle reports under section 603(d), item 4c *supra*.)

11. Federal Agencies

The Office of Personnel Management collects and files data concerning current and potential employees of the Federal Government and transmits that information to other government agencies for employment purposes. Because Congress did not intend that the FCRA apply to the Office of Personnel Management and similar federal agencies (see 116 Cong. Rec. 36576 (1970) (remarks of Rep. Brown)), no such agency is a "consumer reporting agency."

Section 603(g) defines "file," when used in connection with information on any consumer, to mean "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored."

1. Relation to Other Sections

Consumer reporting agencies are required to make disclosures of all information in their "files" to consumers upon request (section 609) and to follow reinvestigation procedures if the consumer disputes the completeness or accuracy of any item of information contained in his "file" (section 611).

2. General

The term "file" denotes all information on the consumer that is recorded and retained by a consumer reporting agency that might be furnished, or has been furnished, in a consumer report on that consumer.

3. Audit Trail

The term "file" does not include an "audit trail" (a list of changes made by a consumer reporting agency to a consumer's credit history record, maintained to detect fraudulent changes to that record), because such information is not furnished in consumer reports or used as a basis for preparing them.

4. Other Information

The term "file" does not include information in billing records or in the consumer relations folder that a consumer reporting agency opens on a consumer who obtains disclosures or

files a dispute, if the information has not been used in a consumer report and would not be used in preparing one.

Section 603(h) defines "employment purposes" to mean "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."

1. Relation to Other Sections

The terms "employment purposes" is used as part of the definition of "consumer reports" (section 603(d)(2)) and as a permissible purpose for the furnishing of consumer reports (section 604(3)(B)). Where an investigative consumer report is to be used for "employment purposes" for which a consumer has not specifically applied, section 606(a)(2) provides that the notice otherwise required by section 606(a)(1) need not be sent. When a consumer reporting agency furnishes public record information in reports "for employment purposes," it must follow the procedure set out in section 613.

2. Security Clearance

A report in connection with security clearances of a government contractor's employees would be for "employment purposes" under this section.

Section 603(i) defines "medical information" to mean "information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilties."

1. Relation to Other Sections.

Under section 609(a)(1), a consumer reporting agency must, upon the consumer's request and proper identification, disclose the nature and substance of all information in its files ont he consumer, except "medical information."

2. Information From Non-medical Sources.

Information from non-medical sources such as employers, is not "medical information."

Section 604 Permissible Purposes of Reports

"A consumer reporting agency may furnish a consumer report under the following circumstances and no other: * * *

1. Relation to Section 603.

Sections 603(d)(3) and 604 must be construed together to determine what are "permisible purposes," because section 603(d)(3) refers to "purposes authorized under section 604" (often described as "permissible purposes" of consumer reports), and some purposes are enumerated in section 603 (e.g., sections 603(d)(1) and 603(d)(2). Subsections of sections 603 and 604 that specifically set forth "permissible purposes" relating to credit, insurance and employment, are the only subsections that cover "permissible purposes" relating to those three areas. Section 604(3)(E), a general subsection, is limited to purposes not otherwise addressed in section 604(3) (A)–(D).

A. *Credit.* Sections 603(d)(1)—which defines "consumer report" to include certain reports for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance primarily for personal, family, or household purposes—and 604(3)(A) must be read together as fully describing permissible purposes involving credit for obtaining consumer reports. Accordingly, section 604(3)(A) permits the furnishing of a consumer report for use in connection with a credit transaction involving the consumer, primarily for personal, family or household purposes, and involving the extension of credit to, or review or collection of an account of, the consumer.

B. *Insurance.* Sections 603(d)(1) and 604(3)(C) must be read together as describing the only permissible insurance purposes for obtaining consumer reports. Accordingly, section 604(3)(C) permits the furnishing of a consumer report, provided it is for use in connection with the underwriting of insurance involving the consumer, primarily for personal, family, or household purposes.

C. *Employment.* Employment is covered exclusively by sections 603(d)(2) and 604(3)(B), and by section 603(h) (which defines "employment purposes"). Therefore, "permissible purposes" relating to employment include reports used for evaluating a consumer "for employment, promotion, reassignment or retention as an employee."

D. *Other purposes.* "Other purposes" are referred to in section 603(d)(3) and covered by section 604(3)(E), as well as sections 604(1), 604(2) and 604(3)(D) (which contain specific purposes not involving credit, insurance, employment). Permissible purposes relating to Section 604(3)(E) are limited to transactions that consumers enter into primarily for personal, family or household purposes (excluding credit, insurance or employment, which are specifically covered by other subsections discussed above). The Act does not cover reports furnished for transactions that consumers enter into primarily in connection with businesses they operate (e.g., a consumer's rental of equipment for use in his retail store).

2. Relation to Other Sections.

A. *Section 607(a).* Section 607(a) requires consumer reporting agencies to keep information confidential by furnishing consumer reports only for purposes listed under section 604, and to follow specified, reasonable procedures to achieve this end. Section 619 provides criminal sanctions against any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses.

B. *Section 608.* Section 608 allows "consumer reporting agencies" to furnish governmental agencies specified identifying information concerning consumers, notwithstanding the limitations of section 604.

Section 604(1)—A consumer reporting agency may furnish a consumer report "in response to the order of a court having jurisdiction to issue such an order."

1. Subpoena

A subpoena, including a grand jury subpoena, is not an "order of a court" unless signed by a judge.

2. Internal Revenue Service Summons

An I.R.S. summons is an exception to the requirement that an order be signed by a judge before it constitutes an "order of a court" under this section, because a 1976 revision to Federal statutes (26 U.S.C. 7609) specifically requires a consumer reporting agency to furnish a consumer report in response to an I.R.S. summons upon receipt of the designated I.R.S. certificate that the consumer has not filed a timely motion to quash the summons.

Section 604(2)—A consumer reporting agency may furnish a consumer report "in accordance with the written instructions of the consumer to whom it relates"

1. No Other Permissible Purpose Needed

If the report subject furnished written authorization for a report, that creates a permissible purpose for furnishing the report.

2. Refusal to Furnish Report

The consumer reporting agency may refuse to furnish the report because the statute is permissive, not mandatory. (Requirements that consumer reporting agencies make disclosure to consumers (as contrasted with furnishing reports to users) are discussed under section 609 and 610, infra.)

Section 604(3)(A)—A consumer reporting agency may issue a consumer report to "a person which it has reason to believe . . . intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be

furnished and involving the extension of credit to, or review or collection of an account of, the consumer;"

1. Reports Sought in Connection with the "Review or Collection of an Account."

A. *Reports for collection.* A collection agency has a permissible purpose under this section to receive a consumer report on a consumer for use in attempting to collect that consumer's debt, regardless of whether that debt is assigned or referred for collection. Similarly, a detective agency or private investigator, attempting to collect a debt owed by a consumer, would have a permissible purpose to obtain a consumer report on that individual for use in collecting that debt. An attorney may obtain a consumer report under this section on a consumer for use in connection with a decision whether to sue that individual to collect a credit account.

B. *Unsolicited reports.* A consumer reporting agency may not send an unsolicited consumer report to the recipient of a previous report on the same consumer, because the recipient will not necessarily have a permissible purpose to receive the unsolicited report.[3] For example, the recipient may have rejected the consumer's application or ceased to do business with the consumer.

2. Judgment Creditors

A judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with collection of the judgment debt, because it is in the same position as any creditor attempting to collect a debt from a consumer who is the subject of a consumer report.

3. Child Support Debts

A district attorney's office or other child support agency may obtain a consumer report in connection with enforcement of the report subject's child support obligation, established by court (or quasi-judicial administrative) orders, since the agency is acting as or on behalf of the judgment creditor, and is, in effect, collecting a debt. However, a consumer reporting agency may not furnish consumer reports to child support agencies seeking to *establish* paternity or the duty to pay child support.

[3] Of course a consumer reporting agency must furnish notifications required by section 611(d), upon the consumer's requests, to prior recipients of reports containing disputed information that is deleted or that is the subject of a dispute statement under section 611(b).

4. Tax obligations

A tax collection agency has no general permissible purpose to obtain a consumer report to collect delinquent tax accounts, because this subsection applies only to collection of "credit" accounts. However, if a tax collection agency acquired a tax lien having the same effect as a judgment or obtained a judgment, it would be a judgment creditor and would have a permissible purpose for obtaining a consumer report on the consumer who owed the tax. Similarly, if a consumer taxpayer entered an agreement with a tax collection agency to pay taxes according to some timetable, that agreement would create a debtor-creditor relationship, thereby giving the agency a permissible purpose to obtain a consumer report on that consumer.

5. Information on an Applicant's Spouse

A. *Permissible purpose.* A creditor may request any information concerning an applicant's spouse if that spouse will be permitted to use the account or will be contractually liable upon the account, or the applicant is relying on the spouse's income as a basis for repayment of the credit requested. A creditor, therefore, may request any information concerning an applicant's spouse if (1) the state law doctrine of necessaries applies to the transaction, or (2) the applicant resides in a community property state, or (3) the property upon which the applicant is relying as a basis for repayment of the credit requested is located in such a state, or (4) the applicant is acting as the agent of the nonapplicant spouse.

B. *Lack of permissible purpose.* If the creditor receives information clearly indicating that the applicant is not acting as the agent of the nonapplicant spouse, and that the applicant is relying only on separate property to repay the credit extended, and that the state law doctrine of necessaries does not apply to the transaction and that the applicant does not reside in a community property state, the creditor does not have a permissible purpose for obtaining a report on a nonapplicant spouse. A permissible purpose for making a consumer report on a nonapplicant spouse can never exist under the FCRA, where Regulation B, issued under the Equal Credit Opportunity Act (12 CFR 202), prohibits the creditor from requesting information on such spouse. There is no permissible purpose to obtain a consumer report on a nonapplicant former spouse or on a nonapplicant spouse who has legally separated or otherwise indicated an intent to legally disassociate with the marriage. (This does not preclude reporting a prior joint credit account of former spouses for which the spouse that is the subject of the report is still contractually liable. See discussion in section 607, item 3–D *infra*.)

6. Prescreening

"Prescreening" means the process whereby a consumer reporting agency, using the client's criteria for creditworthiness, compiles lists of qualified consumers (or deletes unqualified consumers from client-supplied lists) to be solicited by its clients who market products or services by direct mail solicitations. The process may also include demographic analysis of the consumer on the list (*e.g.*, use of census tract data reflecting real estate values) by the consumer reporting agency or by a third party employed for that purpose before the list is provided to the consumer reporting agency's client. In such situations, the client's creditworthiness criteria may be provided only to the consumer reporting agency and not to the third party performing the demographic analysis. The consumer reporting agency that performs a "prescreening" service may furnish a client with several different lists of consumers who meet different sets of creditworthiness criteria supplied by the client, who intends to make different credit offers (*e.g.*, various credit limits) to consumers who meet the different criteria.

A prescreened list constitutes a series of consumer reports, because the list conveys the information that each consumer named meets certain criteria for creditworthiness. Prescreening is permissible under the FCRA if the client agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit. In these circumstances, a permissible purpose for the prescreening service exists under this section, because of the client's present intent to grant credit to all consumers on the final list, with the result that the information is used "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to * * * the consumer."

7. Seller of Property Extending Credit

A seller of property has permissible purpose under this subsection to obtain a consumer report on a prospective purchaser to whom he is planning to extend credit.

8. Uncoded Credit Guides

A consumer reporting agency may not furnish an uncoded credit guide, because the recipient does not have a permissible purpose to obtain a consumer report on each consumer listed. (As discussed under section 603(d), item 4 supra, credit guides are listings that credit bureaus furnish to credit grantors, rating how consumers pay their bills. Such guides are a series of "consumer reports" on the "consumers" listed therein, unless coded so that the consumer's identity is not disclosed.)

9. Liability for Bad Checks

A party attempting to recover the amount due on a bad check is attempting to collect a debt and, therefore, has a permissible purpose to obtain a consumer report on the consumer who wrote it, and on any other consumer who is liable for the amount of that check under applicable state law.

Section 604(3)(B)—A consumer reporting agency may issue a consumer report to "a person which it has reason to believe * * * intends to use the information for employment purposes;"

1. Current Employees

An employer may obtain a consumer report on a current employee in connection with an investigation of the disappearance of money from employment premises, because "retention as an employee" is included in the definition of "employment purposes" (seciton 603(h)).

2. Consumer Reports on Applicants and Non-applicants

An employer may obtain a consumer report for use in evaluating the subject's application for employment but may not obtain a consumer report to evaluate the application of a consumer who is not the subject of the report.

3. Grand Jurors

The fact that grand jurors are usually paid a stipend for their service does not provide a district attorney's office a permissible purpose for obtaining consumer reports on them, because such service is a duty, not "employment."

Section 604(3)(C)—A consumer reporting agency may isue a consumer report to "a person which it has reason be believe * * * intends to use the information in connection with the underwriting of insurance involving the consumer;"

1. Underwriting

An insurer may obtain a consumer report to decide whether or not to issue a policy to the consumer, the amount and terms of coverage, the duration of the policy, the rates or fees charged, or whether or not to renew or cancel a policy, because these are all "underwriting" decisions.

2. Claims Reports

An insurer may not obtain a consumer report for the purpose of evaluating a claim (to ascertain its validity or otherwise determine what action should be taken), because permissible purposes relating to insurance are limited by this section to "underwriting" purposes.

Section 604(3)(D)—A consumer reporting agency may issue a consumer report to "a person which it has reason to believe * * * intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or stautus * * *.

1. Appropriate recipient

Any party charged with responsibility for assessing the consumer's eligibiilty for the benefit (not only the agency directly responsible for administering the benefit) has a permissible purpose to receive a consumer report. For example, a district attorney's office or social services bureau, required by law to consider a consumer's financial status in determining whether that consumer qualifies for welfare benefits, has a permissible purpose to obtain a report on the consumer for that purpose. Similarly, consumer reporting agencies may furnish consumer reports to townships on consumers whose financial status the townships are required by law to consider in determining the consumers' eligibility for assistance.

2. Inappropriate Recipient

Parties not charged with the responsibility of determining a consumer's eligibility for a license or other benefit, for example, a party competing for an FCC radio station construction permit, would not have a permissible purpose to obtain a consumer report on that consumer.

3. Initial or Continuing Benefit

The permissible purpose includes the determination of a consumer's continuing eligibility for a benefit, as well as the evaluation of a consumer's initial application for a benefit. If the governmental body has reason to believe a particular consumer's eligibility is in doubt, or wishes to conduct random checks to confirm eligibility, it has a permissible purpose to receive a consumer report.

Section 604(3)(E)—A consumer reporting agency may issue a consumer report to "a person which it has reason to believe * * * otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

1. Relation to Other Subsections of Section 604(3)

The issue of whether credit, employment, or insurance provides a permissible purpose is determined exclusively by reference to subsections (A), (B), or (C), respectively.

2. Commercial Transactions

The term "business transaction" in this section means a business transaction with a consumer primarily for personal, family, or household purposes. Business transactions that involve purely commercial purposes are not covered by the Act. Therefore, a consumer reporting agency may furnish a report on an individual to a business that has a commercial purpose for obtaining the report, and the Act does not apply to such report.

3. "Legitimate Business Need."

Under this subsection, a party has a permissible purpose to obtain a consumer report on a consumer for use in connection with some action the consumer takes from which he or she might expect to receive a benefit that is not more specifically covered by subsections (A), (B), or (C). For example, a consumer report may be obtained on a consumer who applies to rent an apartment, offers to pay for goods with a check, applies for a checking account or similar service, seeks to be included in a computer dating service, or who has sought and received over-payments or government benefits that he has refused to return.

4. Litigation

The possibility that a party may be involved in litigation involving a consumer does not provide a permissible purpose for that party to receive a consumer report on such consumer under this subsection, because litigation is not a "business transaction" involving the consumer. Therefore, potential plaintiffs may not always obtain reports on potential defendants to determine whether they are worth suing. The transaction that gives rise to the litigation may or may not provide a permissible purpose. A party seeking to sue on a *credit* account would have a permissible purpose under section 604(3)(A). (That section also permits judgment creditors and lien creditors to obtain consumer reports on judgment debtors or individuals whose

property is subject to the lien creditor's lien.) If that transaction is a business transaction involving the consumer, there is a permissible purpose. If the litigation arises from a tort, there is no permissible purpose. Similarly, a consumer report may not be obtained solely for use in discrediting a witness at trial or for locating a witness. This section does not permit consumer reporting agencies to furnish consumer reports for the purpose of locating a person suspected of committing a crime. (As stated in the discussion of section 608 *infra* (item 2), section 608 permits the furnishing of specified, limited identifying information to governmental agencies, notwithstanding the provisions of section 604.)

5. Impermissible Purposes

A consumer reporting agency may not furnish a consumer report to satisfy a requester's curiosity, or for use by a news reporter in preparing a newspaper or magazine article.

6. Agents

A. *General.* An agent [4] of a party with a "permissible purpose" may obtain a consumer report on behalf of his principal, where he is involved in the decision that gives rise to the permissible purpose. Such involvement may include the agent's making a decision (or taking action) for the principal, or assisting the principal in making the decision (*e.g.*, by evaluating information). In these circumstances, the agent is acting on behalf of the principal. In some cases, the agent and principal are referred to as "joint users." See discussion in section 603(f), *supra*, (item 8).

B. *Real Estate agent.* A real estate agent may obtain a consumer report on behalf of a seller, to evaluate the eligibility as a prospective purchaser of a subject who has expressed an interest in purchasing property from the seller.

C. *Private detective agency.* A private detective agency may obtain a consumer report as agent for its client while investigating a report subject that is a client's prospective employee, or in connection with advising a client concerning a business transaction with the report subject or in attempting to collect a debt owed its client by the subject of the report. In these circumstances, the detective agency is acting on behalf of its client.

D. *Rental clearance agency.* A rental clearance agency that obtains consumer reports to assist owners of residential properties in screening consumers as tenants, has a permissible purpose to obtain the reports, if it uses them in applying the landlord's criteria to approve or disapprove the subjects as tenant applicants. Similarly, an apartment manager investigating applicants for apartment rentals by a landlord may obtain consumer reports on these applicants.

E. *Attorney.* An attorney collecting a debt for a creditor client, including a party suing on a debt or collecting on behalf of a judgment creditor or lien creditor, has a permissible purpose to obtain a consumer report on the debtor to the same extent as the client.

Section 604 General

1. Furnishing of Consumer Reports to Other Consumer Reporting Agencies

A consumer reporting agency may furnish a consumer report to another consumer reporting agency for it to furnish pursuant to a subscriber's request. In these circumstances, one consumer reporting agency is acting on behalf of another.

2. Consumer's Permission not Needed

When permissible purposes exist, parties may obtain, and consumer reporting agencies may furnish, consumer reports without the consumers' permission. Similarly, parties may furnish information concerning their transactions with consumers to consumer reporting agencies and others, and consumer reporting agencies may gather information, without consumers' permission.

3. User's Disclosure of Report to Subject Consumer

The FCRA does not prohibit a consumer report user from giving a copy of the report, or otherwise disclosing it, to the consumer who is the subject of the report.

Section 605 Obsolete Information

"(a) Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information * * *:

(b) The provisions of subsection (a) are not applicable in the case of any consumer credit report to be used in connection with—

(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $50,000 or more;

(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $50,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal $20,000, or more."

1. General

Section 605(a) provides that most adverse information more than seven years old may not be reported, except in certain circumstances set out in section 605(b). With respect to delinquent accounts, accounts placed for collection, and accounts charged to profit and loss, there are many dates that could be deemed to commence seven year reporting periods. The discussion in subsections (a)(2), (a)(4), and (a)(6) is intended to set forth a clear, workable rule that effectuates Congressional intent.

2. Favorable Information

The Act imposes no time restriction on reporting of information that is not adverse.

3. Retention of Information in Files

Consumer reporting agencies may retain obsolete adverse information and furnish it in reports for purposes that are exempt under subsection (b) (*e.g.*, credit for a principal amount of $50,000 or more).

4. Use of Shorter Periods

The section does not require consumer reporting agencies to report adverse information for the time periods set forth, but only prohibits them from reporting adverse items beyond those time periods.

5. Inapplicability to Users

The section does not limit creditors or others from using adverse information that would be "obsolete" under its terms, because it applies only to reporting by consumer reporting agencies. Similarly, this section does not bar a creditor's reporting such adverse obsolete information concerning its transactions or experiences with a consumer, because the report would not constitute a consumer report.

6. Indicating the Existence of Nonspecified, Obsolete Information

A consumer reporting agency may not furnish a consumer report indicating the existence of obsolete adverse information, even if no specific item is reported. For example, a consumer reporting agency may not communicate the existence of a debt older than seven years by reporting that a credit grantor cannot locate a debtor whose debt was charged off ten years ago.

7. Operative Dates

The times or dates set forth in this section, which relate to the occurrence of events involving adverse information, determine whether the item is obsolete.

[4] Of course agents *and* principals are bound by the Act.

The date that the consumer reporting agency acquired the adverse information is irrelevant to how long that information may be reported.

Section 605(a)(1)—"Cases under title 11 of the United States Code or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years."

1. Relation to Other Subsections

The reporting of suits and judgments is governed by subsection (a)(2), the reporting of accounts placed for collection or charged to profit and loss is governed by subsection (a)(4), and the reporting of other delinquent accounts is governed by subsection (a)(6). Any such item, even if discharged in bankruptcy, may be reported separately for the applicable seven year period, while the existence of the bankruptcy filing may be reported for ten years.

2. Wage Earner Plans

Wage earner plans may be reported for ten years, because they are covered by Title 11 of the United States Code.

3. Date for Filing

A voluntary bankruptcy petition may be reported for ten years from the date that it is filed, because the filing of the petition constitutes the entry of an "order for relief" under this subsection, just like a filing under the Bankruptcy Act (11 U.S.C. 301).

Section 605(a)(2)—"Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period."

1. Operative Date

For a suit, the term "date of entry" means the date the suit was initiated. A protracted suit may be reported for more than seven years from the date it was entered, if the governing statute of limitations has not expired. For a judgment, the term "date of entry" means the date the judgment was rendered.

2. Paid Judgments

Paid judgments cannot be reported for more than seven years after the judgment was entered, because payment of the judgment eliminates any "governing statute of limitations" under this subsection that might otherwise lengthen the period.

Section 605(a)(3)—"Paid tax liens which, from date of payment, antedate the report by more than seven years."

1. Unpaid Liens

If a tax lien (or other lien) remains unsatisfied, it may be reported as long as it remains filed against the consumer, without limitation, because this subsection addresses only paid tax liens.

Section 605(a)(4)—"Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years."

1. Placement for Collection

The term "placed for collection" means internal collection activity by the creditor, as well as placement with an outside collector, whichever occurs first. Sending of the initial past due notices does not constitute placement for collection. Placement for collection occurs when dunning notices or other collection efforts are initiated. The reporting period is not extended by assignment to another entity for further collection, or by a partial or full payment of the account. However, where a borrower brings his delinquent account to date and returns to his regular payment schedule, and later defaults again, a consumer reporting agency may disregard any collection activity with respect to the first delinquency and measure the reporting period from the date the account was placed for collection as a result of the borrower's ultimate default. A consumer's repayment agreement with a collection agency can be treated as a new account that has its own seven year period.

2. Charge to Profit and Loss

The term "charged to profit and loss" means action taken by the creditor to write off the account, and the applicable time period is measured from that event. If an account that was charged off is later paid in part or paid in full by the consumer, the reporting period of seven years from the charge-off is not extended by this subsequent payment.

3. Reporting of a Delinquent Account That Is Later Placed for Collection or Charged to Profit and Loss

The fact that an account has been placed for collection or charged to profit and loss may be reported for seven years from the date that either of those events occurs, regardless of the date the account became delinquent. The fact of delinquency may also be reported for seven years from the date the account became delinquent.

Section 605(a)(5)—"Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years."

1. Records

The term "records" means any information a consumer reporting agency has in its files relating to arrest, indictment or conviction of a crime.

2. Computation of Time Period

The seven year reporting period runs from the date of disposition, release or parole, as applicable. For example, if charges are dismissed, or the consumer is acquitted, the date of such dismissal or acquittal is the date of disposition. If the consumer is convicted of a crime and sentenced to confinement, the date of release or placement on parole controls. (Confinement, whether continuing or resulting from revocation of parole, may be reported until seven years after the confinement is terminated.) The sentencing date controls for a convicted consumer whose sentence does not include confinement. The fact that information concerning the arrest, indictment, or conviction of crime is obtained by the reporting agency at a later date from a more recent source (such as a newspaper or interview) does not serve to extend this reporting period.

Section 605(a)(6)—"Any other adverse item of information which antedates the report by more than seven years."

1. Relation to Other Subsections

This section applies to all adverse information that is not covered by section 605(a)(1)–(5). For example, a delinquent account that has neither been placed for collection, nor charged to profit and loss, may be reported for seven years from the date of the last regularly scheduled payment. (Accounts placed for collection or charged to profit and loss may be reported for the time periods stated in section 605(a)(4).)

2. Non Tax Liens

Liens (other than paid tax liens) may be reported as long as they remain filed against the consumer or the consumer's property, and remain effective (under any applicable statute of limitations). (See discussion under section 605(a)(3), *supra*).

Section 606 Disclosure of Investigative Consumer Reports

"(a) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing

mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section; or

(2) the report is to be used for employment purposes for which the consumer has not specifically applied.

(b) Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after receipt by him of the disclosure required by subsection (a)(1), make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b)."

1. Relation to Other Sections

The term "investigative consumer report" is defined at section 603(e) to mean a consumer report, all or a portion of which contains information obtained through personal interviews (in person or by telephone) with persons other than the subject, which information relates to the subject's character, general reputation, personal characteristics or mode of living.

2. Inapplicability to Consumer Reporting Agencies

The section applies only to report users, not consumer reporting agencies. The FCRA does not require consumer reporting agencies to inform consumers that information will be gathered or that reports will be furnished concerning them.

3. Inapplicability to Noninvestigative Consumer Reports

The section does not apply to noninvestigative reports.

4. Exemptions

An employer who orders investigative consumer reports on a current employee who has not applied for a job change need not notify the employee, because the term "employment purposes" is defined to include "promotion, reassignment or retention" and subsection (b) provides that the disclosure requirements do not apply to "employment purposes for which the consumer has not specifically applied".

5. Form and Delivery of Notice

The notice must be in writing and delivered to the consumer. The user may include the disclosure in an application for employment, insurance, or credit, if it is clear and conspicuous and not obscured by other language. A user may send the required notice via first class mail. The notice must be mailed or otherwise delivered to the consumer not later than three days after the report was first requested.

6. Content of Notice of Right to Disclosure

The notice must clearly and accurately disclose that an "investigative consumer report" including information as to the consumer's character, general reputation, personal characteristics and mode of living (whichever are applicable), may be made. The disclosure must also state that an investigative consumer report involves personal interviews with sources such as neighbors, friends, or associates. The notice may include any additional, accurate information about the report, such as the types of interviews that will be conducted. The notice must include a statement informing the consumer of the right to request complete and accurate disclosure of the nature and scope of the investigation.

7. Content of Disclosure of Report

When the consumer requests disclosure of the "nature and scope" of the investigation, such disclosure must include a complete and accurate description of the types of questions asked, the number and types of persons interviewed, and the name and address of the investigating agency. The user need not disclose the names of sources of information, nor must it provide the dnsumer with a copy of the report. A report user that provides the consumer with a blank copy of the standardized form used to transmit the report from the agency to the user complies with the requirement that it disclose the "nature" of the investigation.

Section 607 Compliance Procedures

"(a) Every consumer reporting agency shall maintain reasonable procedues designed to avoid violations of section 605 and to limit the furnishing of consumer reports to the purposes listed under section 604. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in Section 604.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

1. Procedures to Avoid Reporting Obsolete Information

A. *General.* A consumer reporting agency should establish procedures with its sources of adverse information that will avoid the risk of reporting obsolete information. For example, the agency should either require a creditor to supply the date an account was placed for collection or charged off, or the agency should use a conservative date for such placement or charge off (such as the date of the last regularly scheduled payment), to be sure of complying with the statute.

B. *Retention of obsolete information for reporting in excepted circumstances.* If a consumer reporting agency retains adverse information in its files that is "obsolete" under section 605(a) (*e.g.*, information about a satisfied judgment that is more than seven years old), so that it may be reported for use in transactions described by section 605(b) (*i.e.*, applications for credit or life insurance for $50,000 or more, or employment at an annual salary of $20,000 or more), it must have procedural safeguards to avoid reporting the information except in those situations. The procedure should require that such obsolete information be released only after an internal decision that its release will not violate section 605.

2. Procedures to Avoid Reporting for Impermissible Purposes

A. *Verification.* A consumer reporting agency should have a system to verify that it is dealing with a legitimate business having a "permissible purpose" for the information reported. What constitutes adequate veification would vary with the circumstances. If the consumer reporting agency is not familiar with the use, appropriate procedures might require an on-site visit to the user's place of business, or a check of the user's references.

B. *Required certification by user.* A consumer reporting agency should adopt procedures that require prospective report users to identify themselves, certify the purpose for which the information is sought, and certify that

the information will be used for no other purpose. A consumer reporting agency should determine initially that users have permissible purposes and ascertain what those purposes are. It should obtain a specific, written certification that the recipient will obtain reports for those purposes and no others. The user's certification that the report will be used for no other purposes should expressly prohibit the user from sharing the report or providing it to anyone else, other than the subject of the report or to a joint user having the same purpose. A consumer reporting agency should refuse to provide reports to those refusing to provide such certification.

C. *Blanket or individual certification.* Once the consumer reporting agency obtains a certification from a user (e.g., a creditor) that typically has a permissible purpose for receiving a consumer report, stating that it will use those reports only for specified permissible purposes (*e.g.*, for credit or employment purposes), a certification of purpose need not be furnished for each individual report obtained, provided there is no reason to believe the user may be violating its certification. However, in furnishing reports to users that typically could have both permissible and impermissible purposes for ordering consumer reports (*e.g.*, attorneys and detective agencies), the consumer reporting agency must require the user to provide a separate certification each time it requests a consumer report.

D. *Procedures to avoid recipients' abuse of certification.* When doubt arises concerning any user's compliance with its contractual certification, a consumer reporting agency must take steps to insure compliance, such as requiring a separate, advance certification for each report it furnishes that user, or auditing that user to verify that it is obtaining reports only for permissible purposes. A consumer reporting agency must cease furnishing consumer reports to users who repeatedly request consumer reports for impermissible purposes.

E. *Unauthorized access.* A consumer reporting agency should take several other steps when doubt arises concerning whether a user is obtaining reports for a permissible purpose from a computerized system. If it appears that a third party, not a subscriber, has obtained unauthorized access to the system, the consumer reporting agency should take appropriate steps such as altering authorized users' means of access, such as codes and passwords, and making random checks to ensure that future reports are obtained only for permissible purposes. If a subscriber has inadvertently sought reports for impermissible purposes or its employee has obtained reports without a permissible purpose, it would be appropriate for the consumer reporting agency to alter the subscriber's means of access, and require an individual written certification of the permissible purpose for each report requested or randomly verify such purposes. A consumer reporting agency should refuse to furnish any further reports to a user that repeatedly violates certifications.

F. *Use of computerized systems.* A consumer reporting agency may furnish consumer reports to users via terminals, provided the consumer reporting agency includes in its contract with users, a statement that each attempt to access a consumer report via a terminal constitutes a certification of a permissible purpose. (The agency would have to record the identity of consumer report recipients for each consumer, to be able to make any disclosures required under section 609(a)(3) or section 611(d)).

G. *Activity reports.* If a consumer reporting agency provides "activity reports" on all customers who have open-end accounts with a credit grantor, it must make certain that the credit grantor always notifies the agency when accounts are closed, to avoid furnishing reports on former customers or other customers for whom the credit grantor lacks a permissible purpose. (See also discussion in section 604(3)(A), item 1, *supra.*)

3. Reasonable Procedures to Assure Maximum Possible Accuracy

A. *General.* The section does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate. However, when a consumer reporting agency learns or should reasonably be aware of errors in its reports that may indicate systematic problems (by virtue of information from consumers, report users, from periodic review of its reporting system, or otherwise) it must review its procedures for assuring accuracy. Examples of errors that would require such review are the issuance of a consumer report pertaining entirely to a consumer other than the one on whom a report was requested, and the issuance of a consumer report containing information on two or more consumers (*e.g.*, information that was mixed in the file) in response to a request for a report on only one of those consumers.

B. *Required steps to improve accuracy.* If the agency's review of its procedures reveals, or the agency should reasonably be aware of, steps it can take to improve the accuracy of its reports at a reasonable cost, it must take any such steps. It should correct inaccuracies that come to its attention. A consumer reporting agency must also adopt reasonable procedures to eliminate systematic errors that it knows about, or should reasonably be aware of, resulting from procedures followed by its sources of information. For example, if a particular credit grantor has often furnished a significant amount of erroneous consumer account information, the agency must require the creditor to revise its procedures to correct whatever problems cause the errors or stop reporting information from that creditor.

C. *Use of automatic data processing equipment.* Consumer reporting agencies that use automatic data processing equipment (particularly for long distance transmission of information) should have procedures to assure that the data is accurately converted into a machine-readable format and not distorted by machine malfunction or transmission failure. Security procedures must be adopted to control the possibility that computerized consumer information will be stolen or altered by either authorized or unauthorized users of the information system.

D. *Reliability of sources.* Whether a consumer reporting agency may rely on the accuracy of information from a source depends on the circumstances. This section does not hold a consumer reporting agency responsible where an item of information that it receives from a source that it reasonably believes to be reputable appears credible on its face, and is transcribed, stored and communicated as provided by that source. Requirements are more stringent where the information furnished appears implausible or inconsistent, or where procedures for furnishing it seem likely to result in inaccuracies, or where the consumer reporting agency has had numerous problems regarding information from a particular source.

E. *Undesignated information in credit transactions.* "Undesignated information" means all credit history information in a married (or formerly married) consumer's file, which was not reported to the consumer reporting agency with a designation indicating that the information relates to either the

consumer's joint or individual credit experience. The question arises what is meant by reasonable procedures under this section for treatment of credit history in the file of only one (present or former) spouse (usually the husband) that has not been designated by the procedure in Regulation B, 12 CFR 202.10, which implements the Equal Credit Opportunity Act. (This situation exists only for certain credit history file information compiled before June 1, 1977, and certain accounts opened before that date.) A consumer reporting agency may report information solely in the file of spouse A, when spouse B applies for a separate extension of credit, only if such information relates to accounts for which spouse B was either a user or was contractually liable, or the report recipient has a permissible purpose for a report on spouse A. A consumer reporting agency may not supply all undesignated information from the file of a consumer's spouse in response to a request for a report on the consumer, because some or all of that information may not relate to both spouses. Consumer reporting agencies must honor without charge the request of a married or formerly married individual that undesignated information (that appears only in the files of the individual's present or former spouse) be segregated—*i.e.*, placed in a separate file that is accessible under that individual's name. This procedure insures greater accuracy and protection of the privacy of spouses than does the automatic reporting of undesignated information.

F. *Reporting of credit obligation*—(1) *Past due accounts.* A consumer reporting agency must employ reasonable procedures to keep its file current on past due accounts (*e.g.*, by requiring its creditors to notify the credit bureau when a previously past due account has been paid or discharged in bankruptcy), but its failure to show such activity in particular instances, despite the maintenance of reasonable procedures to keep files current, does not violate this section. For example, a consumer reporting agency that reports accurately in 1985 that as of 1983 the consumer owed a retail store money, without mentioning that the consumer eventually paid the debt, does not violate this section if it was not informed by the store or the consumer of the later payment.

(2) *Significant, verified information.* A consumer reporting agency must report significant, verified information it possesses about an item. For instance, a consumer reporting agency may continue to report a paid account that was previously delinquent, but should also report that the account has been paid. Similarly, a consumer reporting agency may include delinquencies on debts discharged in bankruptcy in consumer reports, but must accurately note the status of the debt (*e.g.*, discharged, voluntarily repaid). Finally, if a reported bankruptcy has been dismissed, that fact should be reported.

(3) *Guarantor obligations.* Personal guarantees for obligations incurred by others (including a corporation) may be included in a consumer report on the individual who is the guarantor. The report should accurately reflect the individual's involvement (*e.g.*, as guarantor of the corporate debt).

4. Effect of Criminal Sanctions

Notwithstanding the fact that section 619 provides criminal sanctions against persons who knowingly and willfully obtain information on a consumer from a consumer reporting agency under false, pretenses, a consumer reporting agency must follow reasonable procedures to limit the furnishing of reports to those with permissible purposes.

5. Disclosure of Credit Denial

When reporting that a consumer was denied a benefit (such as credit), a consumer reporting agency need not report the reasons for the denial.

6. Content of Report

A consumer report need not be tailored to the user's needs. It may contain any information that is complete, accurate, and not obsolete on the consumer who is the subject of the report.

7. Completeness of Reports

Consumer reporting agencies are not required to include all existing derogatory or favorable information about a consumer in their reports. (See, however, discussion in section 611, item 14, *infra*, concerning conveying consumer dispute statements.) However, a consumer reporting agency may not mislead its subscribers as to the completeness of its reports by deleting nonderogatory information and not disclosing its policy of making such deletions.

8. User Notice of Adverse Action Based on a Consumer Report

A consumer reporting agency need not require users of its consumer reports to provide any notice to consumers against whom adverse action is taken based on a consumer report. The FCRA imposes such notice requirements directly on users, under the circumstances set out in section 615.

Section 608 Disclosures to Governmental Agencies

"Notwithstanding the provisions of section 604, a consumer reporting agency may furnish identifying information respecting any consumer limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency."

1. Relation to Other Sections

Because a report containing only a consumer's name and address is not a "consumer report" as defined in section 603(d), a consumer reporting agency may provide this identifying information to any party notwithstanding the provisions of sections 604 and 608.

2. Permissible Purpose Necessary for Additional Information

A consumer reporting agency may furnish limited identifying information concerning a consumer to a governmental agency (*e.g.*, an agency seeking a fugitive from justice) even if that agency does not have a "permissible purpose" under section 604 to receive a consumer report. However, a governmental agency must have a permissible purpose in order to obtain information beyond what is authorized by this section.

3. Entities Covered by Section

The term "governmental agency" includes federal, state, county and municipal agencies, and grand juries. Only governmental agencies may obtain disclosures of identifying information under this section.

Section 609 Disclosures to Consumers

"(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: Provided, That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(b) The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this title except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date."

1. Relation to Other Sections

This section states what consumer reporting agencies must disclose to consumers, upon request and proper identification. Section 610 sets forth the condition under which those disclosures must be made, and section 612 sets forth the circumstances under which consumer reporting agencies may charge for making such disclosures. The term "file" as used in section 609(a)(1) is defined in section 603(g). The term "investigative consumer report," which is used in section 609(a)(2), is defined in section 603(e). The term "medical information," which is used in section 609(a)(1), is defined in section 603(i).

2. Proper Identification

A consumer reporting agency must take reasonable steps to verify the identify of an individual seeking disclosure under this section.

3. Manner of "Proper Identification"

If a consumer provides sufficient identifying information, the consumer reporting agency cannot insist that the consumer execute a "request for interview" form, or provide the items listed on it, as a prerequisite to disclosure. However, the agency may use a form to identify consumers requesting disclosure if it does not use the form to seek or obtain any waiver of the consumers' rights. A consumer reporting agency may provide disclosure by telephone without a written request, if the consumer is properly identified, but may insist on a written request before providing such disclosure.

4. Power of Attorney

A consumer reporting agency must disclose a consumer's file to a third party authorized by the consumer's written power of attorney to obtain the disclosure, if the third party presents adequate identification and fulfills other applicable conditions of disclosure.

5. Nature of Disclosure Required

A consumer reporting agency must disclose the nature and substance of all items in the consumer's file, no matter how or where they are stored (*e.g.*, in other offices of the consumer reporting agency). The consumer reporting agency must have personnel trained to explain to the consumer any information furnished in accordance with the Act. Particularly when the file includes coded information that would be meaningless to the consumer, the agency's personnel must assist the consumer to understand the disclosures. Any summary must not mischaracterize the nature of any item of information in the file. The consumer reporting agency is not required to provide a copy of the file, or any other written disclosure, or to read the file verbatim to the consumer or to permit the consumer to examine any information in its files. A consumer reporting agency may choose to comply with the Act in writing, by providing a copy of the file to the consumer or otherwise.

6. Medical Information

Medical information includes information obtained with the consumer's consent from physicians and medical facilities, but does not include comments on a consumer's health by non-medical personnel. A consumer reporting agency is not required to disclose medical information in its files to consumers, but may do so. Alternatively, a consumer reporting agency may inform consumers that there is medical information in the files concerning them and supply the name of the doctor or other source of the information. Consumer reporting agencies may also disclose such information to a physician of the consumer's choice, upon the consumer's written instructions pursuant to section 604(2).

7. Ancillary Information

A consumer reporting agency is not required to disclose information consisting of an audit trail of changes it makes in the consumer's file, billing records, or the contents of a consumer relations folder, if the information is not from consumer reports and will not be used in preparing future consumer reports. Such data is not included in the term "information in its files" which must be disclosed to the consumer pursuant to this section. A consumer reporting agency must disclose claims report information only if it has appeared in consumer reports.

8. Information on Other Consumers

The consumer has no right to information in the consumer reporting agency's files on other individuals, because the disclosure must be limited to information "on the consumer." However, all information in the files of the consumer making the request must be disclosed, including information about another individual (*e.g.*, concerning that individual's dealings with the subject of the consumer report).

9. Disclosure of Sources of Information

Consumer reporting agencies must disclose the sources of information, except for sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose. When it has used information from another consumer reporting agency, the other agency should be reported as a source.

10. Disclosure of Recipients of Consumer Reports

Consumer reporting agencies must maintain records of recipients of prior consumer reports sufficient to enable them to meet the FCRA's requirements that they disclose the identity of recipients of prior consumer reports.

11. Disclosure of Recipients of Prescreened Lists

A consumer reporting agency must furnish to a consumer requesting file disclosure the identity of recipients of any prescreened lists that contained the disclosure's name when submitted by creditors (or other users) to the consumer reporting agency.

Section 610 Conditions of Disclosure

"(a) A consumer reporting agency shall make the disclosures required under section 609 during normal business hours and on reasonable notice.

(b) The disclosures required under section 609 shall be made to the consumer—

(1) in person if he appears in person and furnishes proper identification; or

(2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

(c) Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 609.

(d) The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

(e) Except as provided in sections 616 and 617, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615, except as to false

information furnished with malice or willful intent to injure such consumers."

1. Time of Disclosure

A consumer reporting agency must take disclosures during normal business hours, upon reasonable notice. However, the consumer reporting agency may waive reasonable notice, and the consumer may agree to disclosure outside of normal business hours.

2. Extra Conditions Prohibited

A consumer reporting agency may not add conditions not set out in the FCRA as a prerequisite to the required disclosure.

3. Manner of Disclosure

A consumer reporting agency may, with the consumer's actual or implied consent, meet its disclosure obligations by mail, in lieu of the in-person or telephone disclosures specified in the statute.

4. Disclosure in the Presence of Third Parties

When the consumer requests disclosure in a third party's presence, the consumer reporting agency may require that a consumer sign an authorization before such disclosure is made. The consumer may choose the third party to accompany him or her for the disclosure.

5. Expense of Telephone Calls

A consumer reporting agency is not required to pay the telephone charge for a telephone interview with a consumer obtaining disclosure.

6. Qualified Defamation Privilege

The privilege extended by subsection 610(e) does not apply to an action brought by a consumer if the action is based on information not disclosed pursuant to sections 609, 610 or 615. A disclosure to a consumer's representative (*e.g.*, based on the consumer's power of attorney) constitutes "information disclosed pursuant to section 609" and is thus covered by this privilege.

Section 611 Procedure in Case of Disputed Accuracy

"(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received."

1. Relation to Other Sections

This section sets forth procedures consumer reporting agencies must follow if a consumer conveys a dispute of the completeness or accuracy of any item of information to the consumer reporting agency. Section 609 provides for disclosures by consumer reporting agencies to consumers, and section 610 sets forth conditions of disclosure. Section 612 permits a consumer reporting agency to impose charges for certain disclosures, including the furnishing of certain information to recipients of prior reports, as provided by section 611(d).

2. Proper Reinvestigation

A consumer reporting agency conducting a reinvestigation must make a good faith effort to determine the accuracy of the disputed item or items. At a minimum, it must check with the original sources or other reliable sources of the disputed information and inform them of the nature of the consumer's dispute. In reinvestigating and attempting to verify a disputed credit transaction, a consumer reporting agency may rely on the accuracy of a creditor's ledger sheets and need not require the creditor to produce documentation such as the actual signed sales slips. Reinvestigation and verification may require more than asking the original source of the disputed information the same question and receiving the same answer. If the original source is contacted for reinvestigation, the consumer reporting agency should at least explain to the source that the original statement has been disputed, state the consumer's position, and then ask whether the source would confirm the information, qualify it, or accept the consumer's explanation.

3. Complaint of Insufficient File, or Lack of File

The FCRA does not require a consumer reporting agency to add new items of information to its file. A consumer reporting agency is not required to create new files on consumers for whom it has no file, nor is it required to add new lines of information about new accounts not reflected in an existing file, because the section permits the consumer to dispute only the completeness or accuracy of particular items of information in the file. If a consumer reporting agency chooses to add lines of information at the consumer's request, it may charge a fee for doing so.

4. Explanation of Extenuating Circumstances

A consumer reporting agency has no duty to reinvestigate, or take any other action under this section, if a consumer merely provides a reason for a failure to pay a debt (*e.g.*, sudden illness or layoff), and does not challenge the accuracy or completeness of the item of information in the file relating to a debt. Most creditors are aware that a variety of circumstances may render consumers unable to repay credit obligations. Although a consumer reporting agency is not required to accept a consumer dispute statement that does not challenge the accuracy or completeness of an item in the consumer's file, it may accept such a statement and may charge a fee for doing so.

5. Reinvestigation of a Debt

A consumer reporting agency must reinvestigate if a consumer conveys to it a dispute concerning the validity or status of a debt, such as whether the debt was owed by the consumer, or

whether the debt had subsequently been paid. For example, if a consumer alleges that a judgment reflected in the file as unpaid has been satisfied, or notifies a consumer reporting agency that a past due obligation reflected in the file as unpaid was subsequently paid, the consumer reporting agency must reinvestigate the matter. If a file reflects a debt discharged in bankruptcy without reflecting subsequent reaffirmation and payment of that debt, a consumer may require that the item be reinvestigated.

6. Status of a Debt

The consumer reporting agency must, upon reinvestigation, "record the current status" of the disputed item. This requires inclusion of any information relating to a change in status of an ongoing matter (*e.g.*, that a debt shown as past due had subsequently been paid or discharged in bankruptcy, or that a debt shown as discharged in bankruptcy was later reaffirmed and/or paid).

7. Dispute Conveyed to Party Other Than the Consumer Reporting Agency

A consumer reporting agency is required to take action under this section only if the consumer directly communicates a dispute to it. It is not required to respond to a dispute of information that the consumer merely conveys to others (*e.g.*, to a source of information). But see, however, discussion in section 607, item 3A, of consumer reporting agencies' duties to correct errors that come to their attention.)

8. Dispute Conveyed to the Consumer Reporting Agency by a Party Other Than the Consumer

A consumer reporting agency need not reinvestigate a dispute about a consumer's file raised by any third party, because the obligation under the section arises only where an "item of information in his file is disputed by the consumer."

9. Consumer Disclosures and Adverse Action Not Prerequisites to Reinvestigation Duty

A consumer reporting agency's obligation to reinvestigate disputed items is not contingent upon the consumer's having been denied a benefit or having asserted any rights under the FCRA other than disputing items of information.

10. Reasonable Period of Time

A consumer reporting agency is required to reinvestigate and record the current status of disputed information within a reasonable period of time after the consumer conveys the dispute to it. An appropriate yardstick of what is "reasonable" may be how long it would take to reinvestigate the same matter if it were brought to the consumer reporting agency's attention by one of its customers.

11. Frivolous or Irrelevant

The mere presence of contradictory information in the file does not provide the consumer reporting agency "reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant." A consumer reporting agency must assume a consumer's dispute is bona fide, unless there is clear and convincing evidence to the contrary. Such evidence may constitute receipt of letters from consumers disputing all information in their files without providing any allegations concerning the specific items in the files. The agency is not required to repeat a reinvestigation that it has just conducted simply because the consumer reiterates a dispute about the same item of information.

12. Deletion of Accurate Information That has not Been Disputed

The consumer reporting agency is not required to delete accurate information that would not be verified upon reinvestigation, if it has not been "disputed by a consumer." For example, if a creditor deletes adverse information from its files with the result that informaion could not be reverified if disputed, it is still permissible for a consumer reporting agency to report it (subject to the obsolescence provisions of section 605) until it is disputed.

13. Consumer Dispute Statements on Multiple Items

A consumer who disputes mulitiple items of information in his file may insert a one hundred word statement as to each disputed item.

14. Conveying Dispute Statements to recipients of Subsequent Reports

A consumer reporting agency may not merely tell the recipient of a subsequent report containing disputed information that the consumer's statement is on file but will be provided only if requested, because subsection (c) requires the agency to provide either the statement or "a clear and accurate codification or summary thereof."

Section 612 Charges for Certain Disclosures

"A consumer reporting agency shall make all disclosures pursuant to section 609 and furnish all consumer reports pursuant to section 611(d) without charge to the consumer if, within thirty days after receipt by such consumer of a notification pursuant to section 615 or notification from a debt collection agency affiliated with such consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 609 or 611(d). Otherwise, the consumer for making disclosure to such consumer pursuant to section 609, the charge for which shall be indicated to the consumer prior to making disclosure; and for furnishing notifications, statements, summaries,or codifications to persons designated by the consumer pursuant to section 611(d), the charge for which shall be indicated to the consumer prior to furnishing such information and shall not exceed the charge that the consumer reporting agency would impose on each designated recipient for a consumer report except that no charge may be made for notifying such persons of the deletion of information which is found to be inaccurate or which can no longer be verified."

1. Irrelevance of Subsequent Grant of Credit or Reason for Denial

A consumer denied credit because of a consumer report has the right to free disclosure within 30 days of receipt of the section 615(a) notice, even if credit was subsequently granted or the basis of the denial was that the references supplied by the consumer are too few or too new to appear in the credit file.

2. Charge for Investigation Prohibited

This section does not permit consumer reporting agencies to charge for making the reinvestigation or following other procedures required by section 611(a)–(c).

3. Permissible Charges for Services Requested by Consumers

A consumer reporting agency may charge fees for creating files on consumers at their request, or for other services not required by the FCRA that are requested by consumers.

Section 613 Public Record Information for Employment Purposes

"A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this

paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported."

1. Relation to Other Sections

A consumer reporting agency that complies with section 613(1) must also follow reasonable procedures to assure maximum possible accuracy, as required by section 607(b).

2. Alternate Methods of Compliance

A consumer reporting agency that furnishes public record information for employment purposes must comply with either subsection (1) or (2), but need not comply with both.

3. Information From Another Consumer Reporting Agency

If a consumer reporting agency uses information or reports from other consumer reporting agencies in a report for employment purposes, it must comply with this section.

4. Method of Providing Notice

A consumer reporting agency may use first class mail to provide the notice required by subsection (1).

5. Waiver

The procedures required by this section cannot be waived by the consumer to whom the report relates.

Section 614 Restrictions on Investigative Consumer Reports

"Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished."

Section 615 Requirements on Users of Consumer Reports

"(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

"(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within 60 days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

"(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections (a) and (b)."

1. Relation to Other Sections and Regulation B

Sections 606 and 615 are the only two sections that require users of reports to make disclosures to consumers. Section 606 applies only to users of "investigative consumer reports." Creditors should not confuse compliance with section 615(a), which only requires disclosure of the name and address of the consumer reporting agency, and compliance with the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.* and Regulation B, 12 CFR Part 202, which require disclosure of the *reasons* for adverse action. Compliance with section 615(a), therefore, does not constitute compliance with Regulation B.

2. Limited Scope of Requirements

The section does not require that creditors disclose their credit criteria or standards or that employers furnish copies of personnel files to former employees. The section does not require that the user provide any kind of advance notification to consumers before a consumer report is obtained. (See section 606 regarding notice of investigative consumer reports.)

3. Method of Disclosure

The disclosures required by this section need not be made in writing. However, users will have evidence that they have taken reasonable steps to comply with this section if they provide written disclosures and retain copies for at least two years, the applicable statute of limitations for most civil liability actions under the FCRA.

4. Adverse Action Based on Direct Information

This section does not require that a user send any notice to a consumer concerning adverse action regarding that consumer that is based neither on information from a consumer reporting agency nor on information from a third party. For example, no disclosures are required concerning adverse action based on information provided by the consumer in an application or based on past experience in direct transaction with the consumer.

5. Creditors Using "Prescreened" Mailing Lists

A creditor is not required to provide notices regarding consumer reporting agencies that prepare mailing lists by "prescreening" because they do not involve consumer requests for credit and credit has not been denied to consumers whose names are deleted from a list furnished to the agency for use in this procedure. See discussion of "prescreening," under section 604(3)(A), item 6, *supra.*

6. Applicability to Users of Motor Vehicle Reports

An insurer that refuses to issue a policy, or charges a higher than normal premium, based on a motor vehicle report is required to comply with subsection (a).

7. Securities and Insurance Transactions

A consumer report user that denies credit to a consumer in connection with a securities transaction must provide the required notice, because the denial is of "credit * * * for personal purposes," unless the consumer engages in such transactions as a business.

8. Denial of Employment

An employer must provide the notice required by subsection (a) to an individual who has applied for employment and has been rejected based on a consumer report. However, an employer is not required to send a notice when it decides not to offer a position to an individual who has not applied for it, because in this case employment is not "denied." (See discussion in section 606, item 4, *supra.*)

9. Adverse Action Involving Credit

A creditor must provide the required notice when it denies the consumer's request for credit (including a rejection based on a scoring system, where a credit report received less than the maximum number of points possible and caused the application to receive an insufficient score), denies the consumer's request for increased credit, grants credit in an amount less than the consumer requested, or raises the charge for credit.

10. Adverse Action Not Involving Credit, Insurance or Employment

The Act does not require that a report user provide any notice to consumers when taking adverse action not relating to credit, insurance or employment. For example, a landlord who refuses to rent an apartment to a consumer based on credit or other information in a consumer report need not provide the notice. Similarly, a party that uses credit or other information in a consumer report as a basis for refusing to accept payment by check need not comply with this section. Checks have historically been treated as cash items, and thus such refusal does not involve a denial of credit, insurance or employment.

11. Adverse Action Based on Non-derogatory Adverse Information

A party taking adverse action concerning credit or insurance or denying employment, "wholly or partly because of information contained in a consumer report," must provide the required notice, even if the information is not derogatory. For example, the user must give the notice if the denial is based wholly or party on the absence of a file or on the fact that the file contained insufficient references.

12. Name and Address of the Consumer Report Agency

The "section 615(a)" notice must include the consumer reporting agency's street address, not just a post office box address.

13. Agency To Be Idenfified

The consumer report user should provide the name and address of the consumer reporting agency from which it obtained the consumer report, even if that agency obtained all or part of the report from another agency.

14. Denial Based Partly on a Consumer Report

A "section 615(a)" notice must be sent even if the adverse action is based only partly on a consumer report.

15. Denial of Credit Based on Information From "Third Parties."

Subsection (b) imposes requirements on a creditor when it denies (or increase the charge for) credit for personal, family or household purposes involving a consumer, based on information from a "third party" source, which means a source *other* than the consumer reporting agency, the creditor's own files, or the consumer's application (*e.g.*, creditor, employer, or landlord). Where a creditor denies a consumer's application based on information obtained directly from another lender, even if the lender's name was furnised to the creditor by a consumer reporting agency, the creditor must give a "third party" disclosure.

16. Substance of Required "Third Party" Disclosures

When adverse action is communicated to the consumer, the creditor must clearly and accurately disclose to the consumer his or her right to make a written request for the disclsoure of the nature of the third party information that led to the adverse action. Upon timely receipt of such a request, however, the creditor need disclose only the nature of the information that led to the adverse action (*e.g.*, history of late rent payments or bad checks) and not the criteria that led to the adverse action. A creditor may comply with subsection (b) by providing a statement of the nature of the third party information that led to the denial when it notifies the consumer of the denial. A statement of principal, specific reasons for adverse action based on third party information that is sufficient to comply with the requirements of the Equal Credit Opportunity Act (*e.g.*, "unable to verify employment") is sufficient to constitute disclosurer of the "nature of the information" under subsection (b).

Section 616 Civil Liability for Willful Noncompliance

Section 616 permits consumers who sue and prove willful noncompliance with the Act to recover actual damages, punitive damages, and the costs of the action, together with reasonable attorney's fees.

Section 617 Civil Liability for Negligent Noncompliance

Section 617 permits consumers who sue and prove negligent noncompliance with the Act to recover actual damages and the costs of the action, together with reasonable attorney's fees.

Section 618 Jurisdiction of Courts; Limitation of Actions

Section 618 provides that any action brought under section 616 or section 617 may be brought in any United States district court or other court of competent jurisdiction. Such suit must be brought within two years from the date on which liability arises, unless a defendant has materially and willfully misrepresented information the Act requires to be disclosed, and the information misrepresented is material to establishment of the defendant's liability. In that event, the action must be brought within two years after the individual discovers the misrepresentation.

Section 619 Obtaining Information Under False Pretense

Section 619 provides criminal sanctions against any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses.

1. Relation to Other Sections

The presence of this provision does not excuse a consumer reporting agency's failure to follow reasonable procedures, as required by section 607(a), to limit the furnishing of consumer reports to the purposes listed under section 604.

Section 620 Unauthorized Disclosures by Officers or Employees

Section 620 provides criminal sanctions against any officer or employee of a consumer reporting agency who knowingly and willfully provides information conerning an individual from the agency's file to a person not authorized to receive it.

Section 621 Administrative Enforcement

This section gives the Federal Trade Commission authority to enforce the Act with respect to consumer reporting agencies, users of reports, and all others, except to the extent that it gives enforcement jurisdiction specifically to some other agency. Those excepted from the Commission's enforcement jurisdiction include certain financial institutions regulated by Federal agencies or boards, Federal credit unions, common carriers subject to acts to regulate commerce air carriers, and parties subject to the Packers and Stockyards Act, 1921.

1. General

The Commission can use its cease-and-desist power and other procedural, investigative and enforcement powers which it has under the FTC Act to secure compliance, irrespective of commerce or any other jurisdictional tests in the FTC Act.

2. Geographic Coverage

The Commission's authority encompasses the United States, the District of Columbia, the Commonwealth of Puerto Rico, and all United States territories but does not extend to activities outside those areas.

3. Status of Commission Commentary and Staff Interpretations

The FCRA does not give any Federal agency authority to promulgate rules having the force and effect of statutory provisions. The Commission has issued this Commentary, superseding the eight formal Interpretations of the Act (16 CFR 600.1–600.8), previously issued pursuant to § 1.73 of the Commission's Rules, 16 CFR 1.73. The Commentary

does not constitute substantive rules and does not have the force or effect of statutory provisions. It constitutes guidelines to clarify the Act that are advisory in nature and represent the Commission's views as to what particular provisions of the Act mean. Staff opinion letters constitute staff interpretations of the Act's provisions, but do not have the force or effect of statutory provisions and, as provided in § 1.72 of the Commission's Rules, 16 CFR 1.72, do not bind the Commission.

Section 622 Relation to State Laws

"This title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency."

1. Basic Rule

State law is pre-empted by the FCRA only when compliance with inconsistent state law would result in violation of the FCRA.

2. Examples of Statutes that are not Pre-empted

A state law requirement that an employer provide notice to a consumer before ordering a consumer report, or that a consumer reporting agency must provide the consumer with a written copy of his file, would not be pre-empted, because a party that complies with such provisions would not violate the FCRA.

3. Examples of Statutes that are Pre-empted

A state law authorizing grand juries to compel consumer reporting agencies to provide consumer reports, by means of subpoenas signed by a court clerk, is pre-empted by the FCRA's requirement that such reports be furnished only pursuant to an "order of the court" signed by a judge (section 604(1)), or furnished for other purposes not applicable to grand jury subpoenas (section 604(2)–(3)), and by section 607(a). A state statute requiring automatic dislosure of a deletion or dispute statement to every person who has previously received a consumer report containing the disputed information, regardless of whether the consumer designates such persons to receive this disclosure, is pre-empted by section 604 of the FCRA, which permits disclosure only for specified, permissible purposes and by section 607(a), which requires consumer reporting agencies to limit the furnishing of consumer reports to purposes listed under section 604. Absent a specific designation by the consumer, the consumer reporting agency has no reason to believe all past recipients would have a present, permissible purpose to receive the reports.

4. Statute Providing Access for Enforcement Purposes

A state "little FCRA" that permits state officials access to a consumer reporting agency's files for the purpose of enforcing that statute just as Federal agencies are permitted access to such files under the FCRA, is not pre-empted by the FCRA.

Effective Date

The FCRA was enacted October 26, 1970, and became effective April 24, 1971.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 88–17655 Filed 8–5–88; 8:45 am]

BILLING CODE 6750–01–M

NEIGHBORHOOD REINVESTMENT CORPORATION

24 CFR Part 4100

Organization and Channeling of Functions

AGENCY: Neighborhood Reinvestment Corporation.

ACTION: Proposed rule.

SUMMARY: The Neighborhood Reinvestment Corporation ("the Corporation") proposes to amend its rules on fees and fee waives in order to comply with the Freedom of Information Reform Act. The Corporation's rules are issued in conformance with Office of Management and Budget ("OMB") guidelines and schedule of fees.

DATE: Comments must be received by September 7, 1988.

ADDRESS: Send comments to Carol J. McCabe, Secretary, Neighborhood Reinvestment Corporation, 1325 G Street, NW., Suite 800, Washington, DC. 20005.

FOR FURTHER INFORMATION CONTACT: Bonnie Nance Frazier, Director of Communications, 202-376-3224.

SUPPLEMENTARY INFORMATION: Pursuant to the Freedom of Information Reform Act and the OMB guidelines, the Corporation proposes to set fees to recover the direct costs incurred by the Corporation in searching for, reviewing and duplicating documents in response to FOIA requests. In compliance with the FOI Reform Act, requesters are classified into four categories for the purposes of making fee assessments: commercial use requesters; educational and noncommerical scientific institution requesters; representatives of the news media; and all other requesters.

The proposed rule establishes new fees for manual search, computer search, review of records and duplication. The proposed rule also provides for the Corporation to require advance payment of fees if the total fees are estimated to exceed $250.00, or where a requester has previously failed to make timely payment of fees due.

The FOI Reform Act requires that fees shall be waived or reduced where the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Corporation and is not primarily in the commerical interest of the requester. The proposed rule sets forth the required contents of a request for a waiver or reduction of fees and the factors the Corporation will consider in determining whether to grant the request.

List of Subjects in 24 CFR Part 4100

Freedom of information, Organization and channeling of functions.

Carol J. McCabe,

Secretary.

The Neighborhood Reinvestment Corporation hereby proposes to amend Part 4100, Chapter 25 of Title 24, Code of Federal Regulations, as set forth below.

Part 4100—Organization and Channeling of Functions

1. The authority citation for Part 4100 is revised to read as follows:

Authority: Title VI, Pub. L. 95–557, 92 Stat. 2115 (42 U.S.C. 8101 et seq.); as amended by sec. 315, Pub. L. 96–399, 94 Stat. 1645; sec. 710, Pub. L. 97–320, 96 Stat. 1544; and sec. 520, Pub. L. 100–242, 101 Stat. 1815.

§ 4100.4 [Amended].

2. In Section 4100.4, paragraph (a) is amended to revise the Corporation's address from "1850 K Street NW., Suite 400, Washington, DC 20006" to "1325 G Street NW., Suite 800, Washington, DC 20005".

3. In § 4100.4, paragraph (c)(1) is amended to remove the last sentence.

4. In § 4100.4, paragraph (d) is revised to read as follows: (d) *Fees for providing copies of records.* Fees shall be assessed pursuant to the Freedom of Information Act (5 U.S.C. 552) in order to recover the full allowable direct costs of providing copies of records. For purposes of this section, the term "direct costs" means

those expenditures which the Corporation actually incurs in searching for and duplicating (and in the case of commerical use requesters, reviewing) documents to respond to a Freedom of Information Act ("FOIA") request. Direct costs include, for example, the salaries of the employees performing the work (the basic rate of pay plus 16 percent of that rate to cover benefits) and the cost of operating duplicating equipment. The term "search" includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line indentification of material within documents. Searches may be done manually or by computer using existing programming. The term "duplication" refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The term "review" refers to the process of examing documents located in response to a commerical use request to determine whether any portion of any document is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spend resolving general legal or policy issues regarding the application of exemptions. A schedule based on these principles is set forth in paragraph (d)(9) of this section.

(1) *Categories of requesters.* Fees will be assessed according to the category of the requester. There are four categories:

(i) *Commercial use requesters.* For purposes of this section, the term "commercial use request" refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Corporation will look to the use to which the requester will put the documents requested. If the use is not clear from the request itself, or if there is reasonable cause to doubt the requester's stated use, the Corporation shall seek additional clarification before assigning the request to a specific category.

(ii) *Educational and noncommercial scientific institution requesters.* For pusposes of this section, the term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, which operates a program or programs of scholarly research. The term "noncommercial scientific institution" refers to an institution that is not operated on a "commercial" basis, as that term is used in paragraph (d)(1)(i) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be eligible for inclusion in this category, requesters must show that the request is made as authorized by and under the auspices of a qualifying institution, and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a noncommercial scientific institution) research.

(iii) *Requesters who are representatives of the news media.* For purposes fo this section, the term "representative of the news media" refers to any person actively gathering news for an entity that is organized. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. In the case of "freelance" journalists, they may be regarded as working for a news organization if they demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but the Corporation may also look at the past publication record of a requester in making this determination. To be eligible for inclusion in this category, a requester must meet the criteria above, and his or her request must not be made for a commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.

(iv) *All other requesters.*

(2) *Limitations on fees to be charged.*

(i) *Commercial use requesters.* Commercial use requesters shall be assessed the full direct costs for searching for, reviewing, and duplicating records, in accordance with the fee schedule at paragraph (d)(9) of his section. Commercial use requesters are not entitled to the free search time or free pages of duplication provided to other categories of requesters.

(ii) *Educational and noncommercial scientific institution requesters.* Requesters in this category may be assessed fees only for duplication of records in excess of the first 100 pages. Requesters in this category may not be assessed fees for search or review

(iii) *Requesters who are representatives of the news media.* Requesters in this category may be assessed fees only for duplication of records in excess of the first 100 pages. Requesters in this category may not be assessed fees for search or review.

(iv) *all other requesters.* Requesters who do not fit into any of the categories above shall be assessed fees only for searching and duplicating records, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge. Requesters in this category may not be assessed fees for review.

(v) *Review of records.* Charges will be assessed only for the initial review of the located documents and not for time spent at the administrative appeal level on an exemption applied at the initial determination level. However, where records or portions of records are withheld in full under an exemption which is subsequently determined not to apply, and these records are reviewed again to determine the applicability of other exemptions not previously considered, charges for review are properly assessable.

(vi) *Additional Copies.* The Corporation will normally furnish only one copy of any record. The allowance of 100 free pages of duplication under paragraphs (d)(2) (ii), (iii), and (iv) of this section shall not apply to additional copies furnished at the request of the record requester. Full duplication fees shall be assessed for each page of each such additional copy.

(3) *Charges for unsuccessful search.* Where applicable under paragraph (d)(2) of this section search fees may be assessed for time spent searching, even if the Corporation fails to locate the records or if records located are determined to be exempt from disclosure.

(4) *Notice of anticipated fees in excess of $25.00.* Unless the person making the request states in his or her initial request that he or she will pay all costs regardless of amount, the Corporation will notify him or her as soon as possible if there is reason to

believe that the cost for obtaining access to and/or copies of such records will exceed $25. If such notice is given, the time limitations contained in the Freedom of Information Act shall not commence until the person making the initial request agrees in writing to pay such costs.

(5) *Advance Payments.* The Communications Director is authorized to require an advance payment of an amount up to full estimated charges whenever he or she determines that: the allowable charges that a requester may be required to pay are likely to exceed $250; or a requester has previously failed to pay a fee charged in a timely manner. If such a payment is required, the time limitations contained in the Freedom of Information Act shall not commence until payment is made.

(6) *Charging Interest.* The Corporation will assess interest charges on any unpaid fees starting on the 31th day following the day on which the billing for fees was sent to the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing. Receipt of the fee by the Corporation, even if not processed, will stay the accrual of interest. Interest is not chargeable for unpaid advance payments under paragraph (d)(5) of this section.

(7) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of the document or documents, solely in order to avoid payment of fees. When the Corporation reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Corporation may aggregate any such requests and charge accoordingly.

(8) *Waiver or reduction of fee.* The Corporation will furnish documents without charge or at a reduced charge when it is determined that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Corporation and is not primarily in the commercial interest of the requester. In determining whether disclosure is in the public interest, the following factors may be considered:

(i) The relationship of the records to tthe opertions or activities of the Corporation;

(ii) The informative value of the information to be disclosed;

(ii) Any contribution to an understanding of the subject by the general public likely to result from disclcsure.

(iv) The significance of that contribution to the public understanding of the subject;

(v) the nature of the requester's personal interest, if any, in disclosure; and whether the disclosure would be primarily in the requester's commercial interest. In making a request for a waiver or reduction of fees, a requester should include a clear statement of his or her interest in the requested documents; the proposed use for the docmuments and whether the requester will derive income or other benefit from such use; and a statement of how the public will benefit from such use. Determinations concerning waiver or reduction of fees shall be made by the Executive Director, or his or her designee.

(9) *Schedule of fees.* Fees for searching for, reviewing, duplicating, and providing records and information of the Corporation under this section will be assessed in accordance with the following schedule:

(i) *Manual search.* For each quarter hour or fraction thereof: $3.37.

(ii) *Computer search.* For each quarter hour or fraction thereof: $3.37.

(iii) *Review.* For each quarter hour or fraction thereof: $4.87.

(iv) *Duplication.*

(A) For a paper photocopy of an existing paper record, $.30 per page.

(B) For duplication of records other than existing paper records (such as computer-stored information, audio or video tapes, microfiche or microfilm), the fee shall equal the actual direct cost of production and duplication of the records or information in a form that is reasonably usable by the requester.

(10) *Processing Costs.* The Communications Director will waive payment in instances in which the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee.

[FR Doc. 17805 Filed 8–5–88; 8:45 am]
BILLING CODE 7570-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[EE–158–86, 160–86]

Excise and Income Taxes; 401(k) Arrangements Under the Tax Reform Act of 1986 and Nondiscrimination Requirements for Employee and Matching Contributions

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to cash or deferred arrangements described in section 401(k) of the Internal Revenue Code of 1986. This document also contains new nondiscrimination rules for employee contributions and matching contributions made to employee plans. These new rules are contained in section 401(m) of the Code. The changes relating to cash or deferred arrangements and employee and matching contributions were made to the Code by the Tax Reform Act of 1986. These regulations will provide the public with guidance necessary to comply with the law and would affect sponsors of, and participants in, pension, profit-sharing, and stock bonus plans, and certain other employee benefit plans.

DATES: Written comments and requests for a public hearing must be delivered or mailed by October 7, 1988. In general, these regulations are effective for plan years beginning after December 31, 1986.

ADDRESS: Send comments and requests for a public hearing to Commissioner of Internal Revenue, Attention: CC:LR:T (EE–158–86, 160–86), 1111 Constitution Ave. NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: William D. Gibbs of the Employee Benefits and Exempt Organizations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention: CC:LR:T) (202 377–9372) (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collections of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, attention: Desk Officer for Internal Revenue Service, with copies to the Internal Revenue Service, Washington, DC 20224, Attention: IRS Reports Clearance Officer TR:FP, at the address previously specified.

The collections of information in this regulation are in §§ 1.401(k)–(e)(8), 1.401(m)–1(c)(2), 54.4979–1(a)(3)(ii), and 54.4979–1(a)(4). This information is required by the Internal Revenue Service to assure compliance with sections 401(k) and 401(m) of the

Internal Revenue Code and to collect the tax imposed by section 4979. This information will be used to assure compliance with sections 401(k) and 401(m) and to collect the tax imposed by section 4979. The likely respondents and recordkeepers are State or local governments, businesses or other for-profit institutions, and small businesses or organizations.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents/recordkeepers may require greater or less time, depending upon their particular circumstances. Estimated total annual reporting and recordkeeping burden: 1,061,000 hours.

The estimated annual burden per respondent/recordkeeper varies from one hour to three hours, depending on individual circumstances, with an estimated average of three hours. Estimated number of respondents and recordkeepers: 351,000. Estimated frequency of responses: once.

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under sections 401(k), 401(m), 402(g), 414(q), 414(s), 415, and 416 of the Internal Revenue Code of 1986 (Code). This document also contains proposed amendments to the Pension Excise Tax Regulations (26 CFR Part 54) under section 4979. These amendments are proposed to conform the regulations to sections 1105, 1116 and 1117 of the Tax Reform Act of 1986 (TRA '86).

Changes to 401(k) Arrangements

Section 1116 of the Tax Reform Act of 1986 made several changes affecting cash or deferred arrangements. Those changes relating to computation of the actual deferral percentage (ADP), allowing rural electric cooperatives to maintain qualified cash or deferred arrangements, new standards for testing discrimination in coverage, and new definitions of compensation and highly compensated employee were contained in final regulations published under section 401(k) on August 8, 1988. Additional changes affecting cash or deferred arrangements are included in this notice of proposed rulemaking.

Section 401(k)(2)(B) permits distributions from cash or deferred arrangements upon termination of a plan without establishment of a successor plan, the sale by a corporation of substantially all of its assets used in its trade or business to another corporation, or the sale by a corporation of such corporation's interest in a subsidiary to an unrelated entity. The proposed regulations provide that a sale of 85 percent of the relevant assets will be deemed a sale of substantially all assets.

Prop. Treas. Reg. § 1.401(k)-1(e)(4) reflects new limits imposed by section 1116(f) of TRA '86 on the ability of state or local governments and tax exempt organizations to establish cash or deferred arrangements after certain dates. A state or local government may not establish a cash or deferred arrangement after May 5, 1986. An organization exempt from tax under Subtitle A of Code, including federal instrumentalities described in section 501(c)(1) of the Code, may not establish a cash or deferred arrangement after July 1, 1986. The proposed regulations contain special rules allowing all employees of an employer to participate in a plan established by the employer before the applicable effective dates. Comments are specifically requested on the definition of the appropriate employer.

Plans established by state and local governments and tax-exempt organizations before the applicable effective dates are, of course, subject to all requirements applicable to other plans that include cash or deferred arrangements. However, special effective dates are provided for plans of state and local governments to comply with the new discrimination tests of section 401(k)(3).

Prop. Treas. Reg. § 1.401(k)-1(e)(5) reflects the amendment of section 401(k)(2) to require a plan to permit an otherwise eligible employee to participate in a cash or deferred arrangement after the employee has completed one year of service.

Section 401(k)(4) provides that a cash or deferred arrangement does not meet the requirements of section 401(k) if any other benefit (other than a matching contribution described in section 401(m)) is contingent upon the employee's electing to have the employer make or not make contributions under the cash or deferred arrangement in lieu of receiving cash. The proposed regulations clarify that other employer benefits include, but are not limited to, health benefits, vacations or vacation pay, life insurance, dental plans, legal services plans, increases in salary, bonuses, loans, financial planning services, subsidized retirement benefits, stock options and property subject to section 83. Also, nonqualified deferred compensation is an employer benefit only to the extent that an employee may receive additional nonqualified deferred compensation to the extent the employee does not make elective contributions.

Section 401(k)(8) permits the distribution or recharacterization of excess contributions which would otherwise cause an employer's plan not to meet the ADP requirements of section 401(k)(3)(A). The proposed regulations provide that, for nondiscrimination purposes, recharacterized amounts are treated as employee contributions for the year in which the elective contributions would have been received (but for the deferral election) and must, therefore, be tested under section 401(m) for that year. The proposed regulations also provide that, whether distributed or recharacterized, excess contributions are annual additions in the year of deferral. Additional rules concerning recharacterization were contained in final regulations under section 401(k) published in August 8, 1988.

Nondiscrimination Requirements for Employee and Matching Contributions

Section 401(m), added by section 1117 of TRA '86, contains new nondiscrimination rules for employee and matching contributions. These new nondiscrimination rules, which supplement the ADP tests applicable to cash or deferred arrangements, apply to plans described in section 401(a), annuity plans described in section 403(a), and annuity contracts described in section 403(b).

The proposed regulations define the term "employee contribution" to include both voluntary and mandatory contributions that are credited to a separate account to which gains or losses are allocated. The term also includes recharacterized elective contributions. The term also includes employee contributions to the defined contribution portion of a plan described in section 414(k), employee contributions to a qualified cost-of-living arrangement described in section 415(k)(2)(B), employee contributions applied to the purchase of whole life insurance or survivor benefit protection under a defined contribution plan and employee contributions to a contract described in section 403(b). The term "employee contribution" does not include repayment of loans or buy-backs of benefits described in section 411(a)(7)(C).

The proposed regulations do not allow either elective contributions or matching contributions to be used to satisfy the minimum contribution or benefit which must be made to top-heavy plans on behalf of non-key employees. This is because a non-key employee must

receive the top-heavy minimum contribution or benefit regardless of whether he makes an elective contribution or has a matching contribution made on his behalf. This rule applies to plan years beginning after December 31, 1988. Qualified nonelective contributions, however, can be used to satisfy the minimum required contribution in a top-heavy plan.

The proposed regulations require that employee contributions and matching contributions meet both the special nondiscrimination test of section 401(m)(2)(A) with respect to the amount of contributions and the nondiscrimination test of section 401(a)(4) with respect to other benefits, rights, and features, including the availability of contributions. The special nondiscrimination test requires that the actual contribution percentage for eligible highly compensated employees not exceed the greater of (1) 125 percent of the actual contribution percentage for all other eligible employees, or (2) the lesser of 200 percent of the actual contribution percentage for all other eligible employees, or the actual contribution percentage for all other eligible employees plus two percentage points.

An employee contribution is taken into account under the special nondiscrimination test of section 401(m)(2)(A) for the plan year in which such amounts are contributed to the trust. Payment by the employee to an agent of the plan is treated as a contribution to the trust at the time of payment to the agent if the funds so paid are transmitted to the trust within a reasonable period after payment to the agent.

Section 401(m)(6) permits correction of excess aggregate contribution amounts contributed to a plan subject to the requirements of section 401(m). Such correction must be made through a plan distribution; recharacterization is not available as a method of correction. In addition, excess aggregate contributions may be avoided through making additional qualified nonelective or matching contributions. The proposed regulations also provide rules for coordinating the correction of elective deferrals, excess contributions, and excess aggregate contributions.

For plan years to which section 401(m) applies, the rules of Rev. Rul. 80–307, 1980–2 C.B. 136, and Rev., Rul. 80–350, 1980–2 C.B. 133, which set forth rules governing employee contributions, will no longer apply. Thus, for example, whether mandatory employee contributions and matching contributions are discriminatory will be determined without regard to the "six percent of compensation" rule, and voluntary employee contributions will not be limited to ten percent of compensation.

Section 401(m)(9) gives the Secretary of the Treasury the authority to prescribe rules limiting the use of the alternative limitation test (200 percent/2 percentage points) of sections 401(k)(3)(A)(ii)(II) and 401(m)(2)(A)(ii). In general, the proposed regulations take the position that if the alternative limitation is used to meet the section 401(k) test for any plan year beginning after December 31, 1988, it cannot be used to meet the section 401(m) test for any plan year beginning with or within such 401(k) plan year. Similarly, if the alternative limitation is used to meet the section 401(m) test, it cannot be used to meet the section 401(k) test. There is no limit on multiple use of the alternative limitation for plan years beginning before January 1, 1989. The proposed regulations take the position that the restriction on the alternative limitation applies only to the overlap group consisting of those highly compensated employees who are eligible to participate in both a plan subject to section 401(m) and an arrangement subject to section 401(k).

Section 4979 imposes a ten percent excise tax on excess contributions (amounts which exceed the limitations of section 401(k)(3)(A)(ii)) and excess aggregate contributions (amounts which exceed the limitations of section 401(m)(2)(A)) if such amounts are not corrected by 2½ months following the close of the plan year to which they relate. A plan which does not correct these amounts by the end of the plan year following the plan year to which they relate is disqualified for the plan year to which they relate and all subsequent plan years that they remain in the plan.

$7,000 Limit on Elective Deferrals

Section 402(g) limits the amount an employee may defer under a cash or deferred arrangement for any taxable year to $7,000. This amount is increased to $9,500 for elective deferrals under a salary reduction agreement to a section 403(b) contract.

A number of special transition rules relating to section 402(g) were contained in section 1105 of the Tax Reform Act of 1986. These transition rules are not discussed in the proposed regulations, but were discussed in Notice 87–13, 1987–4 I.R.B. 14.

The proposed regulations set forth the methods and requirements for correcting excess deferrals. Such deferrals may be corrected in the taxable year in which made as well as during the period ending on the first April 15 of the subsequent taxable year. The proposed regulations also set forth the manner in which income is computed on excess deferrals.

Safe-Harbor Income Rule

Section 402(g)(2)(A)(ii) requires that income on an excess deferral be distributed in order to correct such excess deferral. Similar rules apply under sections 401(k)(8) and 401(m)(6) to the correction of excess contributions and excess aggregate contributions, respectively. The proposed regulations clarify that income attributable to the period between the end of the taxable or plan year and the date of distribution must be distributed in order to correct such defects. In order to simplify plan administration, the proposed regulations contain an optional safe-harbor rule for determining income generated in such period. The income applicable to each month in such period is ten percent of the income for the previous plan year. Amounts distributed on or before the fifteenth day of the month are deemed to have been distributed on the last day of the preceding month. Amounts distributed after the fifteenth day of the month are deemed to be distributed on the last day of the month in which the distribution took place. In the case of excess deferrals, the taxable year of the participant is used instead of the plan year. Comments are invited on additional safe-harbor or procedural methods appropriate for determining income or loss for the period between the end of the taxable or plan year and the date of distribution.

For plan years which begin in 1987, plan sponsors may use any reasonable method for computing the gain or loss allocable to excess deferrals, provided that such method is used consistently for all participants and for all corrective distributions under a plan for that plan year. A similar rule is set forth for correction of excess contributions and excess aggregate contributions.

Additional transition rules relating to correction of excess contributions, excess aggregate contributions, and excess deferrals are contained in Notice 88–33, 1988–13 I.R.B. 17.

Effective Date of the Proposed Regulations

These regulations are generally proposed to be effective for plan years beginning after December 31, 1986. However, certain provisions relating to permitted plan distributions, time of participation, contingent benefits, multiple use of the alternative limitation, and other items are proposed to be

effective for plan years beginning after December 31, 1988.

A special effective date is provided for plans maintained pursuant to one or more collective bargaining agreements. This special date is applicable on a plan-wide basis to plans maintained pursuant to one or more collective bargaining agreements even if such plans cover employees other than those in a collective bargaining unit. To use the special effective date, at least twenty-five percent of the plan participants must be members of employee units covered by collective bargaining agreements. The special effective date must be used for sections 401(k)(2) and (8) as well as for other purposes. An additional special effective date is provided for cash or deferred arrangements maintained by state and local governments.

Time of Plan Amendments

Plan amendments to reflect the changes contained in these proposed regulations need not be made until the earlier of plan termination or the dates specified in section 1140 of TRA '86 (as amplified by the regulations under section 401(b)). This deferred amendment date is available only if (1) the plan is operated in accordance with the applicable provisions of TRA '86 for the period beginning with the effective date of the provision with respect to the plan; and (2) those plan amendments adopted which are required by TRA '86 are retroactive to such effective date and are consistent with plan operations during the retroactive effective period.

Reliance on These Proposed Regulations

Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. Because these regulations are generally effective for plan years after 1986, the Service will apply these proposed regulations in issuing determination letters, opinion letters, and other rulings and in auditing returns with respect to taxpayers and plans. If future guidance is more restrictive, such guidance will be applied without retroactive effect.

Special Analyses

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. Although this document is a notice of proposed rulemaking which solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Comments and Requests for Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register.**

Drafting Information

The principal author of these proposed regulations is William D. Gibbs of the Employee Benefits and Exempt Organizations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR 1.401–1—1.425–1

Income taxes, Employee benefit plans, Pensions, Stock options, Individual Retirement Accounts, Employee Stock Ownership Plans.

26 CFR Part 54

Excise taxes, Pensions.

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR Parts 1 and 54 are as follows:

PART I—[AMENDED]

Paragraph 1. The authority citation of Part 1 continues to read

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

Par. 2. § 1.401(k)–0 is revised to read as follows:

§ 1.401(k)–0 Certain cash or deferred arrangements, table of contents.

This section contains the caption in § 1.401(k)–1.

§ 1.401(k)–1. Certain cash or deferred arrangements

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(C) Allocable income for the period between the end of the plan year and distribution.
(D) Special rule for plan years which begin in 1987.
(iii) No employee or spousal consent required.
(iv) Tax treatment.
(v) No reduction of required minimum distribution.
(vi) Partial correction.
(5) Special rules.
(i) Coordination with distribution of excess deferrals.
(ii) Combination of correction methods.
(iii) Family members.
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(1) Employee.
(2) Employer.
(3) Eligible employee.
(i) In general.
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(4) Elective contributions.
(5) Nonelective contributions.
(6) Matching contributions.
(7) Qualified matching contributions and qualified nonelective contributions.
(i) Qualified matching contributions.
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(iii) Additional requirements.
(8) Actual deferral percentage.
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(9) Compensation.
(i) Years before January 1, 1987.
(A) In general.
(B) Nondiscrimination.
(ii) Years after December 31, 1986.
(10) Highly compensated employees.
(11) Pre-ERISA money purchase plan.
(12) Rural electric cooperative plan.
(13) Excess contributions.
(h) Effective dates.
(1) In general.
(2) Collectively bargained plans.
(3) Transitional rules.
(4) Transitional rules for plans of State and local governments.

Par. 3. Section 1.401(k)–1(a) is amended by adding a sentence at the end of paragraph (a)(3)(i), and adding a new paragraph (a)(6) to read:

§ 1.401(k)–1 Certain cash or deferred arrangements.

(a) *In general.* * * *

(3) *Cash or deferred election*—(i) *General rule.* * * * A cash or deferred election does not include an election made with respect to amounts that have become currently available on or before the later of the date on which the employer adopts the cash or deferred arrangement or the date on which such arrangement first becomes effective.

* * * * *

(6) *Application to partnerships*—(i) *In general.* A partnership may maintain a cash or deferred arrangement, and individual partners may make cash or deferred elections with respect to compensation attributable to services rendered to the partnership. Such compensation will be deemed not to be currently available at any time prior to the close of the partnership taxable year.

(ii) *Partnership cash or deferred arrangements.* An arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf will be deemed to constitute a cash or deferred arrangement with respect to such partners, and any contributions made on behalf of an individual partner pursuant to such an arrangement will constitute elective contributions unless designated or treated as after-tax employee contributions. Consistent with § 1.402(a)–1(d), any such elective contributions will constitute after-tax employee contributions unless the arrangement constitutes a qualified cash or deferred arrangement. For example, the arrangement will constitute a qualified cash or deferred arrangement only if the requirements of section 401(k) and this section (including paragraph (b)) are satisfied. In addition, if such elective contributions are made under a qualified cash or deferred arrangement, the contributions would constitute after-tax employee contributions to the extent they exceed the applicable limit under section 402(g). Conversely, if such an arrangement does not constitute a qualified cash or deferred arrangement, the contributions will be includible in the partner's income and are not deductible or excludable as employer contributions. See § 1.401(k)–1(a)(5)(ii).

(iii) *Certain matching contributions.* If the partnership makes matching contributions with respect to an individual partner's elective contributions or employee contributions and the deduction of such matching contributions is allocated to the partner, then such matching contributions shall constitute elective contributions made on behalf of such partner. In the case of a plan that, on August 8, 1988, did not treat such matching contributions as elective contributions, this rule shall apply only to plan years beginning after August 8, 1988.

* * * * *

Par. 4. Section 1.401(k)–1(b) is amended by revising paragraphs (b)(2), (b)(3) and (b)(4) and adding a new paragraph (b)(5)(iii), to read:

§ 1.401(k)–1 Certain cash or deferred arrangements.

* * * * *

(b) *Coverage and discrimination requirements.* * * *

(2) *Nondiscriminatory elective contributions*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (b) for a plan year only if—

(A) The elective contributions under the arrangement, or

(B) The elective contributions, in combination with qualified nonelective contributions and qualified matching contributions that are treated as elective contributions under the arrangement, satisfy the actual deferral percentage test in paragraph (b)(4) of this section. If a cash or deferred arrangement satisfies this paragraph (b)(2), such arrangement will be treated as satisfying section 401(a)(4) with respect to the amount of elective contributions. See paragraph (e)(1) of this section with respect to the application of section 401(a)(4) to other benefits, rights and features under a cash or deferred arrangement. An arrangement does not fail to satisfy this paragraph (b) merely because all of the eligible employees under an arrangement for a plan year are highly compensated employees.

(ii) *Separate test.* For plan years which begin after December 31, 1988, or in the case of a collectively-bargained plan, the date specified in paragraph (h) of this section, except as specifically provided otherwise, section 401(k)(3) is the exclusive nondiscrimination test applicable to the amount of elective contributions under a qualified cash or deferred arrangement. Accordingly, a plan under which elective contributions are made under a qualified cash or deferred arrangement will satisfy section 401(a)(4) only if the amount of such elective contributions satisfies section 401(k)(3) and paragraph (b)(1) of this section. In addition, except as expressly permitted under section 401(k) and section 401(m), elective contributions under a cash or deferred arrangement (whether or not such arrangement is a qualified cash or deferred arrangement) may not be taken into account in determining whether any other contributions under any plan (including the plan to which the elective contributions are made) satisfies section 401(a)(4) with respect to the amount of any other contributions or benefits.

(3) *Qualified nonelective contributions and qualified matching contributions that may be treated as elective contributions.* Except as specifically provided otherwise, for purposes of paragraph (b)(2)(i)(B) of this section, all or part of the qualified nonelective contributions and qualified matching contributions made with respect to those employees who are eligible employees under the cash or deferred arrangement being tested may be treated as elective contributions under such arrangement provided that each of the following (to the extent applicable) is satisfied:

(i) The nonelective contributions, including those qualified nonelective contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(ii) The nonelective contributions, excluding those qualified nonelective contributions treated as elective contributions for purposes of the actual deferral percentage test and those qualified nonelective contributions treated as matching contributions under § 1.401(m)–1(b)(2) for purposes of the actual contribution percentage test, satisfy the requirements of section 401(a)(4).

(iii) For plan years beginning before January 1, 1987, or such later date provided in paragraph (h) of this section, the matching contributions, including those qualified matching contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(iv) For plan years beginning before January 1, 1987, or such later date provided in paragraph (h) of this section, the matching contributions, excluding those qualified matching contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(v) For plan years which begin after December 31, 1986, or on or after the later date provided in paragraph (h) of this section, the matching contributions satisfy the requirements of section 401(m). Those qualified nonelective contributions and qualified matching contributions treated as elective contributions for purposes of the actual deferral percentage test shall be disregarded in making this determination.

(vi) Except as provided in subdivisions (i), (iii), and (v) of this paragraph (b)(3), the qualified nonelective contributions and qualified matching contributions treated as elective contributions for purposes of the actual deferral percentage test are not taken into account in determining whether any other contributions or benefits satisfy section 401(a)(4) and are not taken into account in determining whether employee contributions or other matching contributions meet the requirements of section 401(m).

(vii) Qualified nonelective contributions may not be treated as elective contributions if the effect is to increase the difference between the actual deferral percentage for the group of eligible highly compensated employees and the actual deferral percentage for the group of all other eligible employees.

(viii) The qualified nonelective contributions and qualified matching contributions satisfy paragraph (b)(6)(i) for the plan year as if such contributions were elective contributions.

(ix) For plan years which begin after December 31, 1988, or such later date provided in paragraph (h)(4) of this section, the plan year of the plan that includes the cash or deferred arrangement and takes qualified nonelective contributions and qualified matching contributions into account in determining whether elective contributions satisfy section 401(k) is the same as the plan year of the plan or plans to which the qualified nonelective contributions and qualified matching contributions are made. In the case of a short plan year of the plan that includes the cash or deferred arrangement which results from a change in plan years to satisfy the requirements of the preceding sentence, the qualified nonelective contributions and qualified matching contributions may be taken into account only for the plan year of the plan that includes the cash or deferred arrangement for which such contributions satisfy paragraph (b)(6)(i) of this section as if such contributions were elective contributions.

(4) *Actual deferral percentage tests.* (i) For plan years beginning after December 31, 1979, and before January 1, 1987, or such later date provided under paragraph (h) of this section, the actual deferral percentage test is satisfied if either of the following tests is met:

(A) The actual deferral percentage for the group of eligible highly compensated employees (top one-third) is not more than the actual deferral percentage for the group of all other eligible employees (lower two-thirds) multiplied by 1.5.

(B) The excess of the actual deferral percentage for the top one-third over the actual deferral percentage for the lower two-thirds is not more than three percentage points and the actual deferral percentage for the top one-third is not more than the actual deferral percentage for the lower two-thirds multiplied by 2.5.

(ii) For plan years which begin after December 31, 1986, or such later date as is provided under paragraph (h) of this section, the actual deferral percentage test is satisfied if either of the following tests is met:

(A) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by 1.25.

(B) The excess of the actual deferral percentage for the group of eligible highly compensated employees over the actual deferral percentage for the group of all other eligible employees is not more than two percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by two.

For plan years which begin after December 31, 1988, or such later date provided under paragraph (h)(4) of this section, if any highly compensated employee is eligible to make elective contributions under a cash or deferred arrangement and to make employee contributions or to receive matching contributions under the plan that includes the cash or deferred arrangement or under any other plan of the employer, the disparities between the actual deferral percentages of the respective groups shall be reduced as described in § 1.401(m)–2. For plan years which begin after December 31, 1986, or on or after the later date provided in paragraph (h) of this section, the plan must provide that the actual deferral percentage test will be met. For purposes of this subparagraph (b)(4)(ii), the plan may incorporate by reference the provisions of section 401(k)(3) and this paragraph (b).

(5) *Aggregation rules.* * * *

(iii) *Plans must have same plan year.* For plan years which begin after December 31, 1989, or such later date provided in paragraph (h) of this section, plans may be aggregated under this subparagraph only if they have the same plan year.

* * * * *

Par. 5. Section 1.401(k)–1(b) is amended by revising so much of paragraph (b)(7) as precedes *Example (1)* and by adding a new *Example (5)* at the end of paragraph (b)(7) to read as follows:

§ 1.401(k)–1 Certain cash or deferred arrangements

* * * * *

(b) *Coverage and discrimination requirements.* * * *

(7) The provisions of this paragraph (b) are illustrated by the following examples. Examples (1)–(4) apply rules in this paragraph (b) for plan years beginning after December 31, 1979 and before January 1, 1987, or such later date provided in paragraph (h) of this section. Example (5) applies the rules in this paragraph (b) for plan years beginning after December 31, 1986, or on or after the later date provided in paragraph (h) of this section.

* * * * *

Example (5). Assume that the employer is a corporation, and that the plan year and the employer's tax year are the calendar year. Also assume that the employee contributions, elective contributions, matching contributions, and qualified nonelective contributions (QNC's) meet the applicable requirements of section 401(a)(4) and may be treated as elective deferrals under paragraph (b)(3) of this section. Employer N maintains a plan that contains a 401(k) arrangement and makes matching contributions to such plan. Matching contributions on behalf of nonhighly compensated employees are qualified matching contributions (QMAC's). Matching contributions on behalf of highly compensated employees are not QMAC's. For the 1988 plan year, elective contributions and matching contributions with respect to highly compensated and nonhighly compensated employees are as given by the following chart.

	Elective contributions (percent)	Total matching contributions (percent)	QMAC's (percent)
Highly compensated	15	5	0
Nonhighly compensated	11	5	5

The plan fails to meet the requirements of section 401(k)(3)(A) because fifteen percent is more than 125 percent of, and more than two percentage points greater than, eleven percent. However, the plan provides that QMACs may be used to meet the requirements of section 401(k)(3)(A)(ii) to the extent needed under that section. The deferral and contribution percentage would then be as follows:

	Elective contributions with needed QMAC's (percent)	Total matching contributions (percent)
Highly compensated	15	5
Nonhighly compensated	12	4

The elective contributions and QMACs taken into account under section 401(k) meet the requirements of section 401(k)(3)(A)(ii) because fifteen percent is 125 percent of twelve percent and five percent is 125 percent of four percent.

* * * * *

Par. 6. Section 1.401(k)–1(d) is amended by revising paragraph (d)(1) and adding a new paragraph (d)(6) to read as follows:

§ 1.401(k)–1 Certain cash or deferred arrangements.

* * * * *

(d) *Distribution limitation*—(1) *General rule*—(i) *Distributions in plan years beginning before January 1, 1985.* For plan years beginning before January 1, 1985, a cash or deferred arrangement satisfies this paragraph (d) only if amounts attributable to elective contributions are not distributable earlier than upon one of the following events:

(A) The employee's retirement, death, disability, or separation from service; or

(B) In the case of a profit-sharing or stock bonus plan, the employee's hardship or attainment of age 59½.

A plan will not fail to satisfy this paragraph by reason of a dividend distribution described in section 404(k)(2).

(ii) *Distributions in plan years beginning after December 31, 1984, and before January 1, 1989.* (A) For plan years beginning after December 31, 1984, and before January 1, 1989, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (d) only of amounts attributable to elective contributions are not distributable earlier than upon one of the following events.

(*1*) The employee's retirement, death, disability, or separation from service.

(*2*) The termination of the plan without establishment of a successor plan.

(*3*) The date of the sale or other disposition by a corporation to an unrelated corporation, which does not maintain the plan, of substantially all of the assets (within the meaning of section 409(d)(2)) used by such corporation in a trade or business of such corporation. This rule applies only with respect to an employee who continues employment with the corporation acquiring such assets. The sale of 85 percent of the assets used in a trade or business will be deemed a sale of "substantially all" the assets used in such trade or business.

(*4*) The date of the sale or other disposition by a corporation of such corporation's interest in a subsidiary (within the meaning of section 409(d)(3)) to an unrelated entity which does not maintain the plan. This paragraph (d)(1)(ii)(A)(*4*) applies only to an employee who continues employment with such subsidiary.

(*5*) In the case of a profit-sharing or stock bonus plan, the employee's hardship or attainment of age 59½. A plan will not fail to satisfy this paragraph (d)(1)(ii) by reason of a dividend distribution described in section 404(k)(2).

(B) For purposes of paragraph (D)(1)(ii)(A)(*2*) of this section, the establishment of a successor plan means the existence at the time the plan including the cash or deferred arrangement is terminated or within the period ending twelve months after distribution of all assets from the arrangement of any other defined contribution plan (other than an employee stock ownership plan as defined in section 4975(e)(7)) maintained by the employer. If a successor plan exists with respect to a terminated plan, the cash or deferred arrangement under the plan making the distribution will not satisfy section 401(k), the successor plan will be treated as a continuation of the terminated plan, and the successor plan will be treated as not satisfying section 401(a). A plan maintained by an unrelated employer (i.e., an employer other than the employer maintaining the terminating plan and other than an employer related at the time of the termination to the employer maintaining the terminating plan within the meaning of section 414(b), (c), (m), and (o)) will be treated as a successor plan only if, as of the date of termination, the employer knows or has reason to know that such unrelated employer will become related to the employer.

(iii) *Distributions in plan years beginning after December 31, 1988.* (A) For plan years beginning after December 31, 1988, or on or after the later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (d) only if amounts attributable to elective contributions are not distributable earlier than upon one of the following events.

(*1*) The employee's retirement, death, disability, or separation from service.

(*2*) The termination of the plan without establishment of a successor plan.

(*3*) The date of the sale or other disposition by a corporation to an unrelated corporation of substantially all of the assets (within the meaning of section 409(d)(2)) used by such corporation in a trade or business of such corporation with respect to an employee who continues employment with the corporation acquiring such assets. The sale of 85 percent of the assets used in a trade or business will be deemed a sale of "substantially all" the assets used in such trade or business.

(*4*) The date of the sale or other disposition by a corporation of such corporation's interest in a subsidiary (within the meaning of section 409(d)(3)) to an unrelated entity. This paragraph (d)(1)(iii)(A)(*4*) applies only to an employee who continues employment with such subsidiary.

(*5*) In the case of a profit-sharing or stock bonus plan, the participant's attainment of age 59½.

(*6*) In the case of distributions of elective contributions (and of income allocable thereto credited to a participant's account as of December 31, 1988, such later date as provided in paragraph (h) of this section, or such earlier date as the plan may provide), under a profit-sharing or stock bonus plan, but not of amounts treated as elective contributions (and of income allocable thereto), the employee's hardship.

A plan will not fail to satisfy this subdivision (iii) by reason of a dividend distribution described in section 404(k)(2).

(B) For purposes of paragraph (d)(1)(iii)(A)(*2*) of this section, the establishment of a successor plan means the existence at the time the plan including the cash or deferred arrangement is terminated or within the period ending twelve months after distribution of all assets from the arangement of any other defined contribution plan (other than an employee stock ownership plan as defined in section 4975(e)(7)) maintained by the employer. If a successor plan exists with respect to a terminated plan, the cash or deferred arrangement under the plan making the distribution will not satisfy section 401(k), the successor plan will be treated as a continuation of the terminated plan, and the successor plan will be treated as not satisfying section 401(a). A plan maintained by an unrelated employer (i.e., an employer other than the employer maintaining the terminating plan and other than an employer related at the time of plan termination to the employer maintaining the terminating plan within the meaning of section 414 (b), (c), (m), and (o)) will be treated as a successor plan only if, as of the date of termination, the employer knows or has reason to know that such unrelated employer will become related to the employer.

* * * * *

(6) *Limitations apply after transfer.* The limitations of paragraph (d) of this section continue to apply to amounts attributable to elective contributions (including amounts treated as elective contributions) even if such amounts are transferred to another qualified plan of any employer. Such other plan will fail to meet the requirements of section 401(a) and this section if transferred amounts are distributable prior to the time specified in this paragraph (d).

* * * * *

Par. 7. Section 1.401(k)-1(e) is amended by adding new paragraphs (e)(4) through (e)(8) at the end to read as follows:

§ 1.401(k)-1 Certain cash or deferred arrangements.

* * * * *

(e) *Additional requirements.* * * *

(4) *State and local governments and tax-exempt organizations*—(i) A cash or deferred arrangement does not satisfy this paragraph (e) if the arrangement is adopted—

(A) After May 6, 1986, by a state or local government or political subdivision thereof, or any agency or instrumentality thereof, or

(B) After July 1, 1986, by any organization exempt from tax under Subtitle A of the Internal Revenue Code.

For purposes of this paragraph (e)(4), whether an organization is exempt from tax under Subtitle A of the Internal Revenue Code will be determined without regard to sections 414(b), (c), (m) or (o).

(ii) A cash or deferred arrangement is treated as adopted after the dates described in paragraph (e)(4)(1) of this section with respect to all employees of any employer that adopts the arrangement after such dates. If an employer had adopted an arrangement prior to such dates, all employees of the employer may participate in the arrangement.

(iii) For purposes of this paragraph (e)(4), an employer that, on a particular date, makes a legally binding commitment to adopt a cash or deferred arrangement will be treated as having adopted the arrangement on such date.

(5) *One year participation rule.* For plan years which begin after December 31, 1988, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (e) only if, as a condition to be eligible for the arrangement, no employee is required to complete a period of service greater than one year (determined without regard to section 410(a)(1)(B)(i)) with the employer (or employers) maintaining the plan.

(6) *Other benefits not contingent upon elective contributions.* (i) For plan years beginning after December 31, 1988, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (e) only if no other employer benefit is conditioned (directly or indirectly) upon the employee's electing to make or not to make elective contributions under the arrangement. The preceding sentence shall not apply to any matching contribution (as defined in section

401(m)) made by reason of such an election or to any benefit that is provided at the employee's election under a plan described in section 125(c) in lieu of an elective contribution under a qualified cash or deferred arrangement.

(ii) Other employer benefits include, but are not limited to, benefits under a defined benefit plan; nonelective employer contributions under a defined contribution plan; the availability, cost, or amount of health benefits; vacations or vacation pay; life insurance; dental plans; legal services plans; loans (including plan loans); financial planning services; subsidized retirement benefits; stock options; property subject to section 83; and dependent care assistance. Also, increases in salary and bonuses are employer benefits for purposes of this paragraph (e)(6). The ability to make after-tax employee contributions is an employer benefits, but such benefit is not contingent upon an employee's electing to make or not make elective contributions under the arrangement merely because the amount of elective contributions reduces dollar-for-dollar the amount of after-tax employee contributions that can be made. Participation in a nonqualified deferred compensation plan is an employer benefit only to the extent that an employee may receive additional deferred compensation under such nonqualified plan to the extent the employee does not make elective contributions.

(iii) A loan or distribution of elective contributions is not an employer benefit conditioned on an employee's electing to make or not make elective contributions under the arrangement merely because the amount of such loan or distribution is based on the amount of the employee's account balance. Also, a benefit under a defined benefit plan which is contingent upon elective contributions solely by reason of the combined plan fraction of section 415(e) is not an employer benefit. Similarly, for example, any benefit under an excess benefit plan described in section 3(36) of the Employee Retirement Income Security Act of 1974 that is dependent on the employee's electing to make or not to make elective contributions and deferred compensation under a nonqualified plan of deferred compensation that is dependent on an employee's having made the maximum elective deferrals under section 402(g) or having made the maximum elective contributions under section 401(k)(3) are not employer benefits.

(7) *Coordination with other plans.* (i) For plan years beginning after December 31, 1988, or such later date provided in paragraph (h) of this section, except as provided in section 401(k) and section 401(m), a cash or deferred arrangement satisfies this paragraph (e) only if no elective contributions under such arrangement are taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the elective contributions are made) meets the requirements of section 401(a). This paragraph shall not apply for purposes of determining whether a plan meets the requirement of section 410(b)(2)(A)(ii).

(ii) Elective contributions under a cash or deferred arrangement are impermissibly taken into account under paragraph (e)(7)(i) of this section if such elective contributions are used to enable any plan (including the plan to which the elective contributions are made) of the employer to satisfy the minimum contribution and benefit requirements under section 416. Notwithstanding the foregoing, qualified nonelective contributions that are treated as elective contributions for purposes of section 401(k)(3) or as matching contributions for purposes of section 401(m) (under paragraphs (b)(2) and (b)(3) of this section) may be used to enable a plan to satisfy the minimum contribution or benefit requirement under section 416. See § 1.401(m)–1(f)(8) and § 1.416–1, M–19, with respect to contributions that would be matching contributions but for their being used to satisfy the minimum contribution or benefit requirement of section 416.

(8) *Recordkeeping requirements.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (e) only if the employer maintains such records as are necessary to demonstrate compliance with the applicable nondiscrimination requirements of paragraph (b) of this section, including the extent to which qualified nonelective contributions and qualified matching contributions are taken into account.

* * * * *

Par. 8. Section 1.401(k)–1(f) is amended by removing the last two sentences of paragraph (f)(1) and adding new language in lieu thereof, adding a new sentence at the end of paragraph (f)(3)(ii); and adding new paragraphs (f)(3)(iii)(B), (C), (f)(4), (f)(5), (f)(6) and (f)(7) to read as follows:

§ 1.401(k)–1 Certain cash or deferred arrangements

* * * * *

(f) *Correction of excess contributions*—(1) *General rule.* * * * In addition, a cash or deferred arrangement will not be treated as failing to satisfy section 401(k)(3) or paragraph (b)(2) of this section for a plan year with respect to the amount of the elective contributions under the arrangement if, in accordance with the terms of the plan that includes the cash or deferred arrangement, excess contributions on behalf of highly compensated employees are recharacterized in accordance with paragraph (f)(3) of this section or excess contributions (and income allocable thereto) are distributed in accordance with paragraph (f)(4) of this section. Excess contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. See paragraph (f)(6) of this section with respect to the failure to correct excess contributions.

* * * * *

(3) *Recharacterization of excess contributions.* * * *

(ii) *Treatment of recharacterized excess contributions.* * * * The amount of excess contributions included in an employee's gross income shall be reduced as provided under paragraph (f)(5)(i)(B) of this section.

(iii) *Additional requirements.*— * * *

(B) *Employee contributions available.* Excess contributions may not be recharacterized under this paragraph (f)(3) with respect to a highly compensated employee to the extent that such recharacterized excess contributions, in combination with the employee contributions actually made by such highly compensated employee, exceed the maximum amount of employee contributions (determined prior to application of section 401(m)(2)(A)) that such highly compensated employee is permitted to make under the plan in the absence of recharacterization.

(C) *Plan year requirement.* For plan years which begin after December 31, 1988, or such later date provided under paragraph (h)(4) of this section, elective contributions may not be recharacterized under this paragraph (f)(3) unless they are recharacterized under the plan with respect to which the elective contributions were made or under a plan with the same plan year as the plan under which the elective contributions were made.

(4) *Corrective distribution of excess contributions and income*—(i) *General rule.* Excess contributions (and income allocable thereto) are distributed in accordance with this paragraph (f)(4) only if such excess contributions and allocable income are designated by the

employer as a distribution of excess contributions (and income) and are distributed to the appropriate highly compensated employees after the close of the plan year in which the excess contributions arose and within twelve months after the close of such plan year. In the event of the complete termination of the plan during the plan year in which an excess contribution arose, such distributions are to be made after the date of termination of the plan and as soon as administratively feasible, but in no event later than the close of the twelve-month period immediately following such termination.

(ii) *Income allocable to excess contributions*—(A) *General rule.* The income allocable to excess contributions is equal to the sum of the allocable gain or loss for the plan year and the allocable gain or loss for the period between the end of the plan year and the date of distribution. Income includes all earnings and appreciation, including such items as interest, dividends, rent, royalties, gains from the sale of property, appreciation in the value of stock, bonds, annuity and life insurance contracts, and other property, without regard to whether such appreciation has been realized.

(B) *Allocable income for the plan year.* The income allocable to excess contributions for the plan year is determined by multiplying the income for the plan year allocable to elective contributions and amounts treated as elective contributions by a fraction. The numerator of the fraction is the excess contributions by the employee for the plan year. The denominator of the fraction is the total account balance of the employee attributable to elective contributions and amounts treated as elective contributions as of the end of the plan year, reduced by the gain allocable to such total amount for the plan year and increased by the loss allocable to such total amount for the plan year.

(C) *Allocable income for the period between the end of the plan year and distribution.* The income allocable to excess contributions for the period between the end of the plan year and the date of a corrective distribution may be calculated under the fractional method set forth in paragraph (f)(4)(ii)(B) of this section or, alternatively, under the following safe harbor method. Under the fractional method, the income for the period between the end of the plan year and the last day of the month preceding the distribution date that is allocable to elective contributions is multiplied by a fraction determined under the method described in paragraph (f)(4)(ii)(B) of this section. Under the safe harbor method, the allocable income for the period between the end of the plan year and the distribution date is equal to 10 percent of the income allocable to excess contributions for the plan year (as calculated under paragraph (f)(4)(ii)(B)) multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of determining the number of calendar months that have elapsed under the safe harbor method, a distribution occurring on or before the fifteenth day of the month will be treated as having been made on the last day of the preceding month, and a distribution occurring after such fifteenth day of the next month.

(D) *Special rules for plan years which begin in 1987.* For plan years which begin in 1987, plan sponsors may use any reasonable method for computing the income allocable to excess contributions, provided that such method is used consistently for all participants and for all corrective distributions under a plan for that plan year. The closing balance method is a reasonable method for this purpose. Under the closing balance method, the income allocable to the excess contribution is equal to the sum of (*1*) the income allocable to the account containing the excess contributions for the applicable year, and (*2*) the income allocable to such account for the gap period, multiplied by a fraction. The numerator of the fraction is the excess contribution and the denominator is the closing balance (as of the end of the applicable year) of the account containing the excess contribution. The closing balance includes income for the applicable year. A method will not be considered unreasonable if gains or losses between the end of the plan year and the date of distribution ("gap period") are not taken into account.

(iii) *No employee or spousal consent required.* A corrective distribution of excess contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(iv) *Tax treatment.* A corrective distribution of excess contributions (and income) under the terms of the plan is includible in gross income on the earliest dates any elective contributions by the employee during the plan year would have been received by the employee had he originally elected to receive the amounts in cash, or, if distributed more than 2½ months after the plan year for which such contributions were made, in the taxable year of the employee in which distributed. The amount of excess contributions includible in an employee's gross income shall be reduced as provided under paragraph (f)(5)(i)(B) of this section. In addition, such a corrective distribution of excess contributions (and income) is not subject to the early distribution tax of section 72(t) and is not treated as a distribution for purposes of applying the excise tax under section 4981A.

(v) *No reduction of required minimum distribution.* A distribution of excess contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9).

(vi) *Partial correction.* Any distribution of less than the entire amount of excess contributions (and income) is treated as a pro rate distribution of excess contributions and income.

(5) *Special rules*—(i) *Coordination with distribution of excess deferrals.* (A) The amount of excess contributions to be recharacterized under paragraph (f)(3) of this section or distributed under paragraph (f)(4) of this section with respect to an employee for a plan year shall be reduced by any excess deferrals previously distributed to such employee for the employee's taxable year ending with or within such plan year.

(B) The amount of excess deferrals that may be distributed under § 1.402(g)–1(d) with respect to an employee for a taxable year shall be reduced by any excess contributions previously distributed or recharacterized with respect to such employee for the plan year beginning with or within such taxable year. In the event of a reduction under this paragraph (f)(5)(i)(B), the amount of excess contributions includible in the gross income of the employee and the amount of excess contributions reported by the payor or plan administrator as includible in the gross income of the employee shall be reduced by the amount of the reduction under this paragraph (f)(5)(i)(B).

(ii) *Combination of correction methods.* A plan may use qualified nonelective contributions, qualified matching contributions, the recharacterization method, the corrective distribution method, or a combination of these methods, to avoid or correct excess contributions. Thus, for example, with respect to a highly compensated employee who has made excess contributions for a plan year, a portion of the excess contributions may be recharacterized and the remaining portion of the excess contributions may be distributed under this subparagraph.

A plan may require that, upon commencement of participation, a highly compensated employee may elect whether any excess contributions are to be recharacterized or distributed. In addition, a plan may permit a highly compensated employee to have all or a portion of the excess contributions on behalf of such employee for a plan year recharacterization distributed. Any recharacterization or distribution of less than the entire amount of excess contributions with respect to any highly compensated employee is treated as a pro rata recharacterization or distribution of excess contributions and allocable income or loss.

(iii) *Family Members.* The determination and correction of excess contributions of a highly compensated employee whose actual deferral ratio is determined under the family aggregation rules of paragraph (g)(8) of this section is accomplished as follows: If the actual deferral ratio of the highly compensated employee is determined under paragraph (g)(8)(iii)(A)(*1*) of this section, then the actual deferral ratio is reduced as required under paragraph (f)(2) of this section and the excess contributions for the family unit shall be allocated among the family members in proportion to the elective contributions of each family member that are combined to determine the actual deferral ratio. If the actual deferral ratio of the highly compensated employees is determined under paragraph (g)(8)(iii)(A)(*2*), then the actual deferral ratio is reduced as required under paragraph (f)(2) of this section in two steps. First, the actual deferral ratio is reduced as required under paragraph (f)(2), but not below the actual deferral ratio of the group of eligible family members who are not highly compensated employees without regard to family aggregation. Excess contributions are determined by taking into account the contributions of the family members whose contributions were combined to determine the actual deferral ratio of the highly compensated employee under paragraph (g)(8)(iii)(A)(*1*), and shall be allocated among such family members in proportion to each such family member's elective contributions. If further reduction of the actual deferral ratio is required under paragraph (f)(2), excess contributions resulting from this reduction are determined by taking into account the contributions of all the eligible family members and are allocated among such family members in proportion to the elective contributions of each family member.

(6) *Failure to correct.* (i) If a plan does not correct excess contributions within 2½ months after the close of the plan year for which such excess contributions are made, the employer will be liable for a 10 percent excise tax on the amount of the excess contributions. See section 4979 and § 54.4979–1. Qualified nonelective contributions and qualified matching contributions properly taken into account under paragraph (b)(3) of this section for a plan year may permit a plan to avoid having excess contributions even if such contributions are made after the close of the 2½ month period.

(ii) If excess contributions are not corrected before the close of the plan year following the plan year for which they were made, the cash or deferred arrangement will fail to meet the requirements of section 401(k)(3) for the plan year for which the excess contributions are made and all subsequent plan years during which the excess contributions remain in the trust.

(7) *Examples.* The provisions of this paragraph may be illustrated by the following examples.

Example (1). The Y corporation maintains a cash or deferred arrangement described in section 401(k). The plan year is the calendar year. For plan year 1989, all ten of Y's employees are eligible to participate in the plan. The employee's compensation, elective deferrals, and actual deferral percentages are given by the following table.

Employee	Compensation	Elective deferral	Actual deferral percentage
1	160,000	8,000	5.0
2	140,000	7,000	5.0
3	84,000	8,400	10.0
4	70,000	7,000	10.0
5	42,000	2,100	5.0
6	35,000	3,500	10.0
7	28,000	2,800	10.0
8	21,000	700	3.33
9	21,000	0	0
10	21,000	0	0

Employees 1, 2, 3 and 4 are highly compensated employees within the meaning of section 414(g). Employees 5, 6, 7, 8, 9, and 10 are nonhighly compensated employees. The actual deferral percentage for the highly compensated employees is 7.50%. The actual deferral percentage for the nonhighly compensated employees is 4.72%. These percentages do not meet the requirements of section 401(k)(3)(A)(ii).

Excess deferrals of $1000 and $1400 have been distributed to employees 1 and 3 respectively. However, the ADP for employee 1 remains at 5.0 and that for employee 3 remains at 10.00. The ADP for the group of highly compensated employees remains at 7.50.

The ADP for the highly compensated employees must be reduced to 6.72. This is done by reducing the ADP of the highly compensated employees with the highest ADP (employees 3 and 4) to 8.44. This would make employee 3's maximum elective contribution $7089.60. This requires a distribution or recharacterization of $1310.40. But since $1400 has already been distributed as an excess deferral, no additional distribution or recharacterization is required or permitted. Employee 4's elective contribution must be reduced by $1092 ($70,000—.0844 ($70,000)) to $5908 through distribution or recharacterization.

Example (2). A, B, and C are highly compensated employees of Employer R. R maintains a cash or deferred arrangement. For the plan year 1989, A, B, and C each earn $100,000 and contribute $7,000 to the plan during the period January through June. B retires in November of 1989 and makes a withdrawal of his entire account balance of $200,000. In January of 1990, R computes the ADP for his employees and learns that the highly compensated employees should have contributed only 5% of compensation. Since B made a contribution of $7,000 for 1989, his contribution and compensation are used in determining the ADP despite his $200,000 withdrawal. A, B, and C must each withdraw $2,000 in order to meet the ADP test. Since B has already withdrawn his total account balance under the plan, only A and C must receive a distribution of $2,000 each in order for the plan to meet the ADP test of section 401(k)(3)(A)(ii). However, if B had withdrawn less than the total account balance, he would have to withdraw the lesser of $2,000 or the remaining account balance.

Example (3). Individual A has a child, B. Both participate in a 401(k) plan maintained by employer X. A is one of the top ten most highly compensated employees and B is a nonhighly compensated employee. (A) has compensated of $100,000 and defers $7,000 under the 401(k) arrangement; B has compensation of $40,000 and defers $4,000 under the arrangement. The actual deferral ratio of A without regard to family aggregation is 7.00%; aggregating the contributions and compensation of A and B produces an actual deferral ratio of 7.86% ($7,000 + $4,000)/($100,000 + $40,000). Thus, the actual deferral ratio of the family unit is 7.86% (the greater of 7.86% and 7.00%).

For the plan, it is determined that under § 1.401(k)–1(f), the actual deferral ratio of the aggregate family unit must be reduced to 7.20%. Since the actual deferral ratio of the family unit was the actual deferral ratio produced by combining A's and B's contributions and compensation, the reduction required by § 1.401(k)–1(f) is applied to both A's contributions and B's contributions in proportions to those contributions. The excess contributions are $920 ($11,000 total contributions minus (7.20% × $140,000)). A's share of the excess contributions is $585.45 ($7,000/$11,000 × $920) and S has excess contributions of $334.55 ($4,000/$11,000 × $920).

Example (4). The facts are the same as in *Example (3)* except that B makes $2,000 in elective contributions and has an actual deferral ratio of 5.00%. The actual deferral ratio of F without regard to family aggregation is 7.00%; combining the

contributions and compensation of A and B produces an actual deferral ratio of 6.43% ($7,000 + $2,000)/($100,000 + $40,000). Thus, the actual deferral ratio of the family unit is 7.00% (the greater of 7.00% and 6.43%).

For the plan, it is determined that under § 1.401(k)–1(f), the actual deferral ratio of the family unit must be reduced to 6.50%. Since the actual deferral ratio of the family unit was A's actual deferral ratio, the plan must first reduce A to the greater of 6.50% and 5.00% (B's actual deferral ratio). Thus, A would have excess contributions of $500 ($7,000 minus (6.50% × $100,000)). B will have no excess contributions.

Example (5). The facts are the same as in *Example (4)* except that it is determined that under § 1.401(k)–1(f), the actual deferral ratio of the aggregate family unit must be reduced to 4.50%. Since the actual deferral ratio of the family unit was A's actual deferral ratio, the plan must first reduce A to the greater of 4.50% and 5.00% (B's actual deferral ratio). Thus, A would have excess contributions of $2,000 ($7,000 minus (5.00% × $100,000)). After this reduction, the actual deferral ratio of the family unit would be 5.00%. The family unit actual deferral ratio must be further reduced to 4.50%, and this reduction is applied to both A's remaining elective contributions and B's elective contributions in proportion to those contributions. The additional excess contributions are 5.00% minus 4.50% × $140,000 (the sum of A's and B's compensation), or $700. F has additional excess contributions of $500 ($5,000/$7,000 × $7,000), and B has excess contributions of $200 ($2,000/$7,000 × $700).

Example (6). Employer X maintains a section 401(k) plan that covers the following individuals:

Employee	Compensation	Elective contributions	Actual deferral ratios (percentage)
A	$70,000	$7,000	10.00
B	70,000	2,000	2.86
C	50,000	5,000	10.00
D	40,000	2,400	6.00
E	30,000	900	3.00
F	20,000	1,300	6.50

Individuals A, B and C are highly compensated. A, B and E are family members. The ADP for the nonhighly compensated employees is 6.25% (determined by averaging the actual deferral ratios of D and F, and disregarding the actual deferral ratio of E.) The actual deferral ratio for the family unit A, B and E is determined first by combining the compensation and contributions of A and B, producing an actual deferral ratio of 6.43% ($9,000/$140,000). Combining the compensation and contributions of A, B, and E produces an actual deferral ratio of 5.82% ($9,900/$170,000). Thus, the actual deferral ratio of the family unit is 6.43% (the greater of 6.43% and 5.82%). The ADP for the highly compensated group is 8.22% ((10.00% + 6.43%)/2).

Par. 9. Section 1.401(k)–1(g) is revised by adding new language at the end of paragraph (g)(3)(i); adding a new sentence at the end of paragraph (g)(6); adding a new sentence at the end of paragraph (g)(7)(iii); adding a new sentence at the end of paragraph (g)(8)(ii); adding new paragraph (g)(8)(iii); and adding new language at the end of paragraph (g)(9)(ii), to read as follows:

§1.401(k)–1 Certain cash or deferred arrangements.

* * * * *

(g) *Definitions.* * * *

(3) *Eligible employee*—(i) *In general.* * * * An employee who would be eligible to make elective contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan will not fail to be an eligible employee for purposes of section 401(k)(3) for a plan year merely because the employee may not make a cash or deferred election by reason of such suspension. Finally, an employee will not fail to be an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1) or 415(e).

* * * * *

(6) *Matching contributions.* * * * For plan years which begin after December 31, 1986, see § 1.401(m)–1(f)(8) for treatment of contributions made pursuant to certain Internal Revenue Code provisions.

(7) *Qualified matching contributions and qualified nonelective contributions.* * * *

(iii) *Additional requirements* * * * For plan years beginning after December 31, 1988, or such later date provided in paragraph (h) of this section, amounts attributable to such contributions are not distributable merely on account of the employee's hardship.

(8) *Actual deferral percentage.* * * *

(ii) * * * For plan years beginning after December 31, 1988, or such later date provided under paragraph (h) of this section, if a highly compensated employee participates in two or more cash or deferred arrangements that have different plan years, this subdivision shall be applied by treating all cash or deferred arrangements ending with or within the same calendar year as a single arrangement.

(iii) *Aggregation of family members.* (A) For plan years beginning after December 31, 1986, or such later date provided in paragraph (h) of this section, if an eligible highly compensated employee is subject to the family aggregation rules of section 414(q)(6) because such employee is either a five-percent owner or one of the ten most highly compensated employees, the combined actual deferral ratio for the family group (which is treated as one highly compensated employee) shall be the greater of:

(*1*) The actual deferral ratio determined by combining the elective contributions, compensation, and amounts treated as elective contributions of all the eligible family members who are highly compensated without regard to family aggregation, and

(*2*) The actual deferral ratio determined by combining the elective contributions, compensation, and amounts treated as elective contributions of all the eligible family members.

If the amount determined under paragraph (g)(8)(iii)(A) (*1*)of this section exceeds the amount determined under paragraph (g)(8)(iii)(A) (*2*) of this section, then it may be necessary, for purposes of correcting excess contributions of the family members under paragraph (f)(5)(iii) of this section, to calculate an actual deferral ratio for the eligible family members who are not highly compensated employees without regard to family aggregation. This actual deferral ratio is determined by combining the elective contributions, compensation, and amounts treated as elective contributions of these employees.

(B) The elective contributions, compensation, and amounts treated as elective contributions of all family members are disregarded for purpose of determining the actual deferral percentage for the group of nonhighly compensated employees, except to the extent taken into account in paragraph (g)(8)(iii)(A) above.

(C) If an employee is required to be aggregated as a member of more than one family group in a plan, all eligible employees who are members of those family groups that include that employee are aggregated as one family group in accordance with paragraphs (g)(8)(ii) (A) and (B) of this section.

(9) *Compensation* * * *

(ii) *Years after December 31, 1986.* * * * Thus, for such years in the case of an employee who begins, resumes, or ceases to be eligible to make elective contributions during a plan year, the amount of compensation received by the employee during the entire plan year shall be taken into account for such plan year. Also, for plan years beginning after December 31, 1988, or on or after the later date provided in paragraph (h) of this section, in computing the actual deferral ratio for an employee for the first plan year of the cash or deferred arrangement, the amount of

compensation received by such employee during the entire 12-month period ending on the close of such plan year shall be taken into account. * * *

* * * * *

Par. 10. A new § 1.401(m)–0 is added immediately after § 1.401(k)–1 to read as follows:

§ 1.401(m)–0 Employee contributions and matching contributions, table of contents.

This secton contains the captions in §1.401(m)–1.

§ 1.401(m)–1 Employee contributions and matching contributions.

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(2) Qualified nonelective contributions and elective contributions that may be treated as matching contributions.
(3) Actual contribution percentage test.
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(5) Employee and matching contributions taken into account for a plan year.
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§ 1.401(m)–2 Multiple use of alternative limitation.

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(c) Correction of multiple use.
(1) In general.
(2) Treatment of required reduction.
(3) Required reduction.
(4) Exampes.
(d) Effective dates.

Par. 11. A new § 1.401(m)–1 is added immediately after § 1.401(m)–(o) to read as follows:

§ 1.401(m)–1 Employee contributions and matching contributions.

(a) *In general*— (1) *General rule.* A plan satisfies section 401(a)(4) for a plan year only if the amount of employee contributions and matching contributions to the plan for such plan year satisfies section 401(a)(4). For plan years which begin after December 31, 1986, or such later date provided in paragraph (g) of this section, the amount of employee contributions and matching contributions under a plan satisfies section 401(a)(4) only if such contributions satisfy the nondiscrimination requirements of paragraph (b) of this section. See paragraph (c) of this section with respect to the application of section 401(a)(4) to other benefits, rights and features relating to employee contributions and matching contributions under a plan.

(2) *Separate test.* Except as specifically provided otherwise, section 401(m) is the exclusive nondiscrimination test applicable to the amount of employee contributions and matching contributions under a plan. Accordingly, a plan under which employee contributions, matching contributions, or both are made will satisfy section 401(a)(4) only if the amount of such employee contributions and matching contributions, with the exception of certain qualified matching contributions that are treated as elective contributions for purposes of section 401(k)(3), satisfies section 401(m). In addition, except as expressly permitted under section 401(k) and section 401(m), employee contributions and matching contributions may not be taken into account in determining whether any plan (including the plan to which the employee contributions and matching contributions are made) satisfies section 401(a)(4) with respect to the amount of any other contributions or benefits.

(b) *Nondiscrimination requirements*— (1) *General rule.* A plan satisfies this paragraph (b) with respect to the amount of employee contributions and matching contribution only if—

(i) The employee contributions and matching contributions to the plan, or

(ii) The employee contributions and matching contributions to the plan, in combination with qualified nonelective contributions and elective contributions that are treated as matching contributions to the plan, satisfy the actual contribution percentage test of paragraph (b)(3) of this section. Qualified matching contributions used to meet the requirements of section 401(k)(3)(A) are not subject to the requirements of this paragraph (b)(1). Furthermore, qualified matching contributions used to meet the requirements of section 401(k)(3)(A) may not be used to help employee contributions or other matching contributions meet the requirements of this subparagraph.

(2) *Qualified nonelective contributions and elective contributions that may be treated as matching contributions.* For purposes of paragraph (b)(1)(ii) of this section, all or part of the qualified nonelective contributions and elective contributions made with respect to those employees who are eligible employees under the plan of the employer being tested may be treated as

matching contributions provided that each of the following (to the extent applicable) is satisfied:

(i) The nonelective contributions, including those qualified nonelective contributions treated as matching contributions for purposes of the actual contribution percentage test, satisfy the requirements of section 401(a)(4).

(ii) The nonelective contributions, excluding those qualified nonelective contributions treated as matching contributions for purposes of the actual contribution percentage test and those qualified nonelective contributions treated as elective contributions under § 1.401(k)–1(b)(3) for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(iii) The elective contributions, including those treated as matching contributions for purposes of the actual contribution percentage test, satisfy the requirements of section 401(k)(3).

(iv) The elective contributions, excluding those elective contributions treated as matching contributions for purposes of the actual contribution percentage test, satisfy the requirements of section 401(k)(3).

(v) Except as provided in paragraphs (b)(2)(i) and (b)(2)(iii) of this section, the qualified nonelective contributions and the elective contributions treated as matching contributions for purposes of the actual contributions percentage test are not taken into account in determining whether any other contributions or benefits satisfy section 401(a)(4) or 401(k)(3).

(vi) The qualified nonelective contributions are allocated to the employee under the plan as of a date within the plan year (within the meaning of § 1.401(k)–1(b)(6)(i)), and the elective contributions satisfy § 1.401(k)–1(b)(6) with respect to such plan year.

(vii) Qualified nonelective contributions may not be treated as qualified matching contributions if the effect is to increase the difference between the actual contribution percentage for the group of eligible highly compensated employees and the actual contribution percentage for the group of all other eligible employees.

(viii) For plan years which begin after December 31, 1988, or such later date in paragraph (g) of this section, the plan year of the plan which uses qualified nonelective contributions and elective contributions to meet the test of section 401(m)(2)(A) is the same as the plan year of the plans to which the qualified nonelective contributions and elective contributions are made. In the case of a short plan year of the plan being tested, which results from a change in plan years to satisfy the requirements of the preceding sentence, the elective contributions may be taken into account only for the plan year of the plan being tested for which such elective contributions satisfy the requirements of § 1.401(k)–1(b)(6) and the qualified nonelective contributions may be taken into account only for the plan year of the plan being tested for which such contributions satisfy the requirements of § 1.401–1(k)(b)(6)(i) as if such contributions were elective contributions.

(3) *Actual contribution percentage test.* For plan years beginning after December 31, 1986, or such later date as is provided under paragraph (g) of this section, the actual contribution percentage test is satisfied if the plan provides that either of the following tests shall be met and actually satisfies either of such tests:

(i) The actual contribution percentage for the group of eligible highly compensated employees is not more than the actual contribution percentage for the group of all other eligible employees multiplied by 1.25.

(ii) The excess of the actual contribution percentage for the group of eligible highly compensated employees over the actual contribution percentage for the group of all other eligible employees is not more than two percentage points, and the actual contribution percentage for the group of eligible highly compensated employees is not more than the actual contribution percentage of the group of all other eligible employees multiplied by two.

For plan years which begin after December 31, 1988, or such later date provided under paragraph (g) of this section, if any highly compensated employee is eligible to make elective contributions under a cash or deferred arrangement and to make employee contributions or to receive matching contributions under the plan that includes the cash or deferred arrangement or under any other plan of the employer, the disparities between the actual contribution percentages of the respective groups must be reduced as described in § 1.401(m)–2. For purposes of this paragraph (b)(3), the plan may incorporate by reference the provisions of section 401(m), this section, and § 1.401(m)–2.

(4) *Aggregation rules*—(i) *Permissive aggregation.* Two or more plans to which employee contributions, matching contributions or both, are made may be considered as a single plan for purposes of determining whether or not such plans satisfy sections 401(a)(4), 401(m), and 410(b). In such a case, the aggregated plans must satisfy paragraph (b)(1) of this section and section 401(m) with respect to the amount of the employee contributions and matching contributions and must satisfy sections 401(a)(4) and 410(b) as though such aggregated plans were a single plan. If an employee maintains two or more plans that are treated as a single plan for purposes of section 401(a)(4) or 410(b) (other than, for plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, section 410(b)(2)(A)(ii)), all employee contributions and matching contributions are to be treated as made under the same plan for purposes of sections 401(a)(4), 410(b), and 401(m).

(ii) *Impermissible aggregation.* For plan years which begin after December 31, 1988, notwithstanding paragraphs (b)(2) and (b)(3) of this section, contributions and allocations under a plan described in section 4975(e)(7) (an ESOP) generally may not be combined with contributions or allocations under any plan not described in section 4975(e)(7) (non-ESOP) for purposes of determining whether either the ESOP or the non-ESOP satisfies this paragraph (b) and section 401(a)(4), 401(k), and 410(b). See § 54.4975–11(e), which includes an exception to this rule for certain plans in existence on November 1, 1977. See also § 54.4975–11(a)(5), which provides that an ESOP may form a portion of a plan the balance of which includes a qualified pension, profit-sharing, or stock bonus plan which is not an ESOP. Thus, for example, in determining whether matching contributions under the portion of a plan that is not an ESOP satisfy paragraph (b) and section 401(a)(4), and whether nonelective contributions under the portion of the plan that is an ESOP satisfy section 401(a)(4), such matching contributions and nonelective contributions may not be considered together. Thus, with respect to such matching contributions, the nonelective contributions may not be treated as qualified nonelective contributions.

(iii) *Plans must have same plan year.* For plan years which begin after December 31, 1989, or such later date provided in paragraph (g) of this section, plans may be aggregated under this paragraph (b)(4)(iii) only if they have the same plan year.

(5) *Employee and matching contributions taken into account for a plan year*—(i) *Employee contributions.* An employee contribution is taken into account under this paragraph for a plan year in which such amounts are contributed to the trust. Payment by the employee to an agent of the plan shall,

for such purposes, be treated as a contribution to the trust at the time of payment to the agent if the funds so paid are transmitted to the trust within a reasonable period after the payment to the agent. Excess contributions that are recharacterized under § 1.401(k)–1(f)(2) are taken into account as employee contributions for the plan year that includes the time at which such excess contributions are includible in the gross income of the employee under § 1.401(k)–1(f)(2)(ii).

(ii) *Matching contributions.* A matching contribution is taken into account under this paragraph for a plan year only if such contribution is allocated to the employee's account under the terms of the plan as of any date within the plan year, is actually paid to the trust no later than the end of the twelve-month period beginning on the day after the close of such plan year, and is made on behalf of an employee on account of such employee's elective contributions or employee contributions for the plan year. Matching contributions that do not satisfy all of the preceding requirements may not be taken into account under paragraph (b) for any plan year, but instead must satisfy section 401(a)(4) (without regard to the special nondiscrimination rule in this paragraph (b)) for the plan year for which allocated as if they were the only employer contributions for that year.

(c) *Additional requirements*—(1) *Nondiscrimination requirements.* A plan to which employee contributions or matching contributions may be made satisfies section 401(a)(4) only if, in addition to satisfying paragraph (b) of this section with respect to the amount of employee contributions and matching contributions, such plan also satisfies section 401(a)(4) with respect to other benefits, rights and features under the plan, including the availability of employee contributions and the availability of matching contributions. Also, the method of distributing excess aggregate contributions provided in the plan must meet the requirements of section 401(a)(4). See paragraph (e)(4)(ii) of this section. The determination of whether a rate of matching contributions discriminates under section 401(a)(4) shall be made after any corrective distributions of excess deferrals, excess contributions, and excess aggregate contributions. See also § 1.401(a)–4 with respect to optional forms of benefit.

(2) *Recordkeeping requirement.* A plan does not satisfy this section unless the employer maintains such records as are necessary to demonstrate compliance with the applicable rules of section 401(m) and the regulations thereunder. Among other requirements, such records must be sufficient to demonstrate satisfaction of the applicable nondiscrimination requirement of paragraph (b) of this section, including the extent to which qualified nonelective contributions and elective contributions are taken into account.

(d) *Examples.* The provisions of paragraphs (a) through (c) of this section may be illustrated by the following examples. Assume in each case that the employer is a corporation, and that the employer's taxable year and plan year are both the calendar year. Also assume that the employee contributions, elective contributions, matching contributions and qualified nonelective contributions meet the applicable requirements of sections 401(a)(4) and 410. For methods to be used to correct excess aggregate contributions, see paragraph (e) of this section.

Example (1). Employer L maintains a voluntary employee contribution account under a profit-sharing plan. The employer maintains no plan that includes a cash or deferred arrangement. For the 1988 plan year the percentage of compensation contributed to the plan for the highly compensated employees and nonhighly compensated employees is given by the following chart:

	Employee contributions as *percent of compensation*
Highly compensated	10
Nonhighly compensated	5

This plan fails to qualify under either of the tests of section 401(m)(2)(A) because the actual contribution percentage for highly compensated employees exceeds that for nonhighly compensated employees by more than 125 percent and two percentage points. The employer must either reduce the actual contribution percentage for the highly compensated employees to seven percent, (to satisfy the 200 percent/2 percentage point test) or increase the actual contribution percentage of the nonhighly compensated employees to eight percent (to satisfy the 125 percent test).

Example (2). Employer M maintains a plan under which it matches each dollar of employee contributions with $.50 of employer contributions. M maintains no other plan. For the 1988 plan year, the percentage of compensation contributed to the plan for the employees is given by the following chart:

	Employee contributions	Matching contributions (percent)	Contribution percentage
Highly compensated	10	5	15
Nonhighly compensated	5	2.5	7.5

This plan fails to qualify under either of the tests of section 401(m)(2)(A). The employer must either reduce the actual contribution percentage of the highly compensated employees to 9.5 percent (to satisfy the 200 percent/2 percentage point test) or increase the actual contribution percentage of the nonhighly compensated employees to 12 percent (to satisfy the 125 percent test).

Example (3). Employer N maintains a plan that contains a cash or deferred arrangement and that also permits employee contributions. For the 1988 plan year, the percentage of compensation contributed to the plan by the highly compensated and nonhighly compensated employees as elective deferrals and employee contributions is given by the following chart. Elective contributions meet the requirements of paragraph (b)(2) of this section.

	Elective contributions (percent)	Employee contributions (percent)
Highly compensated	10	10
Nonhighly compensated	10	6

This plan fails to meet the requirements of section 401(m) because the actual contribution percentage of highly compensated employees exceeds that of other employees by more than 125 percent and two percentage points.

The plan provides that elective contributions made by nonhighly compensated employees may be used to meet the requirements of section 401(m) to the extent needed under that section. The deferral and contribution percentages would then be as follows:

	Elective contributions (percent)	Employee contributions (percent)
Highly compensated	10	10
Nonhighly compensated	8	8

The actual contribution percentage of employee contributions and elective contributions for highly compensated employees taken into account under section 401(m) then meets the requirements of section 401(m)(2)(A)(i) because it is 125 percent of that for nonhighly compensated employees. The cash or deferred arrangement similarly satisfies the 125 percent test. The plan would also meet the requirements of section 401(m) if all elective contributions were used in the 401(m) test. This is because the actual contribution percentage for the highly

compensated (20 percent) would be the 125 percent of the actual contribution percentage for the nonhighly compensated (16 percent).

Example (4). Employer P maintains a plan that includes a cash or deferred arrangement. Elective contributions, qualified nonelective contributions (QNC's), employee contributions, and matching contributions are made to such plan. The elective contributions and qualified nonelective contributions meet the requirements of paragraph (b)(2) of this section. For the 1989 plan year, the QNC's, elective contributions and employee and matching contributions are given by the following chart:

	QNC's (percent)	Elective contributions (percent)	Employee/ matching contributions (percent)
Highly compensated..	3	5	6
Nonhighly compensated..	3	4	2

The elective contributions meet the test of section 401(k)(3)(A)(ii). The employee contributions and matching contributions, however, do not meet the requirement of section 401(m)(2)(A). This employer may not use any QNC's of the nonhighly compensated employees to meet the requirements of section 401(m)(2)(A) because the remaining QNC's would discriminate in favor of the highly compensated employees. However, the employer could make an additional QNC or matching contribution of 2.0 percent on behalf of nonhighly compensated employees. Alternatively, Employer P could treat all QNC's for all employees and 1 percent of the elective contributions for nonhighly compensated employees as employee/matching contributions and make an additional QNC of 1.2 percent on behalf of nonhighly compensated employees. The actual contribution percentages for highly and nonhighly compensated employees will then be 9 percent and 7.2 percent respectively, thus satisfying the 125 percent test. The actual deferral percentages will be 5 and 3 percent, thus satisfying the 200 percent/2 percentage point test.

Example (5). Employer P maintains a cash or deferred arrangement. Elective contributions, qualified nonelective contributions, employee contributions, and matching contributions are made to such plan. The elective contributions and qualified nonelective contributions meet the requirements of paragraph (b)(2) of this section. For the 1989 plan year, the amount of such contributions is given by the following chart:

	QNC's (percent)	Elective contributions (percent)	Employee/ matching contributions (percent)
Highly compensated..	0	6	6
Nonhighly compensated..	3	3	3

The QNC's may be used in the 401(k) test or the 401(m) test, or both. By treating one-third of the QNC's as elective contributions and two-thirds as matching contributions, the actual deferral percentages for highly compensated and nonhighly compensated employees are 6 and 4 percent respectively, thus satisfying the 200 percent test. Similarly, the actual contribution percentages for the two groups are 6 and 5 respectively, thus satisfying the 125 percent test.

(e) *Correction of excess aggregate contributions.*—(1) *In general.* A plan shall not be treated as failing to meet the requirements of section 401(m) or paragraph (b)(3) of this section with respect to the amount of employee contributions and matching contributions under such plan if the employer, in accordance with the terms of the plan and paragraph (b)(2) of this section, makes qualified nonelective contributions that, in combination with employee contributions or matching contributions for the plan year, satisfy the requirements of paragraph (b)(3) of this section. In addition, a plan subject to the requirements of section 401(m) will not be treated as failing to satisfy section 401(m)(2) or paragraph (b)(3) of this section if, in accordance with the terms of the plan, excess aggregate contributions (and the income allocable to such contributions) are distributed (or, if forfeitable under the terms of the plan, forfeited) in accordance with paragraph (e)(2) of this section. Matching contributions that are vested may not be forfeited to correct excess aggregate contributions. Neither recharacterization of excess aggregate contributions nor the failure to make matching contributions required under the terms of the plan is a permitted method of correction. See paragraph (e)(5) of this section with respect to the failure to correct excess aggregate contributions. Excess aggregate contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year.

(2) *Amount of excess aggregate contributions.* The amount of excess aggregate contributions for a highly compensated employee for a plan year is to be determined by the following leveling method, under which the actual contribution ratio of the highly compensated employee with the highest actual contribution ratio is reduced to the extent required to—

(i) Enable the plan to satisfy the actual contribution percentage test, or

(ii) Cause such highly compensated employee's actual contribution ratio to equal the ratio of the highly compensated employee with the next highest actual contribution ratio.

This process must be repeated until the plan satisfies the actual contribution percentage test. For each highly compensated employee, the amount of excess aggregate contributions is equal to the total employee contributions and matching contributions, plus qualified nonelective contributions and elective contributions treated as matching contributions, on behalf of the employee (determined prior to the application of this paragraph (e)(2)) minus the amount determined by multiplying the employee's actual contribution ratio (determined after application of this paragraph (e)(2)) by his compensation used in determining such ratio. For plan years which begin after 1988, or such later date provided in paragraph (g) of this section, in determining the amount of excess aggregate contributions under this method, actual contribution ratios must be rounded to the nearest one-hundredth of one percent of the employee's compensation. In no case shall the amount of excess aggregate contributions with respect to any highly compensated employee exceed the amount of employee contributions and matching contributions on behalf of such highly compensated employee for such plan year.

(3) *Corrective distribution of excess aggregate contributions (and income).*—(i) *General rule.* Excess aggregate contributions (and income allocable thereto) are corrected in accordance with this paragraph (e)(3) only if such excess aggregate contributions and allocable income are designated by the employer as a distribution of excess aggregate contributions (and income) and are distributed to the appropriate highly compensated employees after the close of the plan year in which the excess aggregate contribution arose and within twelve months after the close of the following plan year. In the event of the complete termination of the plan during the plan year in which an excess aggregate contribution arose, such distributions are to be made after termination of the plan and before the close of the twelve-month period immediately following such termination.

(ii) *Income allocable to excess aggregate contributions.*—(A) *General rule.* The income allocable to excess

aggregate contributions is equal to the sum of the allocable gain or loss for the plan year and the allocable gain or loss for the period between the end of the plan year and the date of distribution. Income includes all earnings and appreciation, including such items as interest, dividends, rent, royalties, gains from the sale of property, appreciation in the value of stocks, bonds, annuity and life insurance contracts, and other property, without regard to whether such appreciation has been realized.

(B) *Allocable income for the plan year.* The income allocable to excess aggregate contributions for the plan year is determined by multiplying the income for the plan year allocable to employee contributions, matching contributions, and amounts treated as matching contributions by a fraction. The numerator of the fraction is the amount of excess aggregate contributions made on behalf of the employee for the plan year. The denominator of the fraction is the total account balance of the employee attributable to employee contributions, matching contributions and amounts treated as matching contributions as of the end of the plan year, reduced by the gain allocable to such total amount for the plan year and increased by the loss allocable to such total amount for the plan year.

(C) *Allocable income for the period between the end of the plan year and date of corrective distribution.* The income allocable to excess aggregate contributions for the period between the end of the plan year and the date of a corrective distribution may be calculated under the fractional method set forth in paragraph (e)(3)(ii)(B) of this section, or alternatively, under the following safe harbor method. Under the fractional method, the income for the period between the end of the plan year and the last day of the month preceding the distribution date that is allocable to employee contributions, matching contributions and amounts treated as matching contributions is multiplied by a fraction determined under the method described in paragraph (e)(3)(ii)(B) of this section. Under the safe harbor method, the allocable income or loss for the period between the end of the plan year and the distribution date is equal to 10 percent of the income or loss allocable to excess aggregate contributions for the plan year (as calculated under paragraph (e)(3)(ii)(B) of this section) multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of determining the number of calendar months that have elapsed under the safe harbor method, a distribution occurring on or before the fifteenth day of the month will be treated as having been made on the last day of the preceding month, and a distribution occurring after such fifteenth day will be treated as having been made on the first day of the next month.

(D) *Allocable income for recharacterized elective contributions.* The income allocable to excess aggregate contributions resulting from the recharacterization of elective contributions shall be determined and distributed as if such recharacterized elective contributions had been distributed as excess contributions.

(E) *Special rules for plan years which begin in 1987.* For plan years which begin in 1987, plan sponsors may use any reasonable method for computing the income allocable to excess aggregate contributions, provided that such method is used consistently for all participants and for all corrective distributions under a plan for that plan year. The closing balance method is a reasonable method for this purpose. Under the closing balance method, the income allocable to the excess aggregate contribution is equal to the sum of (*1*) the income allocable to the account containing the excess aggregate contribution for the applicable year, and (*2*) the income allocable to such account for the gap period, multiplied by a fraction. The numerator of the fraction is the excess aggregate contribution and the denominator is the closing balance (as of the end of the applicable year) of the account containing the excess aggregate contribution. The closing balance includes income for the applicable year. A method will not be considered unreasonable if gains or losses between the end of the plan year and the date of distribution ("gap period") are not taken into account.

(iii) *Treatment of corrective distributions as employer contributions.* Excess aggregate contributions attributable to amounts other than employee contributions, including forfeited matching contributions, shall be treated as employer contributions for purposes of section 404 and 415 even if distributed from the plan.

(iv) *No employee or spousal consent required.* A distribution of excess aggregate contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(v) *Tax treatment.* A corrective distribution of excess aggregate contributions (and income) under the terms of the plan is includible in gross income for the taxable year of the employee ending with or within the plan year for which the excess aggregate contributions were made or, if distributed more than 2½ months after the plan year for which such excess aggregate contributions were made, in the taxable year of the employee in which distributed. The portion of such distribution that is treated as an investment in the contract is to be determined without regard to any plan contributions other than those distributed as excess aggregate contributions. In addition, such a corrective distribution of excess aggregate contributions (and income) is not subject to the early distribution tax of section 72(t) and is not treated as a distribution for purposes of applying the excise tax under section 4981A.

(vi) *No reduction of required minimum distribution.* A distribution of excess aggregate contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfied the minimum distribution requirements of section 401(a)(9).

(vii) *Partial correction.* Any distribution of less than the entire amount of excess aggregate contributions (and income) is treated as a pro rata distribution of excess aggregate contributions and income.

(viii) *Method of distributing excess aggregate contributions.* Any distribution or forfeiture of excess aggregate contributions for any plan year shall be made on the basis of the respective portions of such amounts attributable to each highly compensated employee.

(4) *Special rules*—(i) *Coordination with correction of excess contributions and excess deferrals.* The determination of the amount of excess aggregate contributions with respect to a plan year shall be made after determining the excess contributions, if any, to be treated as employee contributions due to recharacterization under section 401(k) for the plan year of the plan subject to section 401(k) ending with the plan year of the plan being tested under section 401(m).

(ii) *Coordination with section 401(a)(4).* The method of distributing excess aggregate contributions provided in the plan must meet the requirements of section 401(a)(4). Thus, a plan under which employee contributions are distributed under this paragraph (e) to highly compensated employees to the extent needed to meet the requirements of section 401(m)(2), while matching contributions attributable to such employee contributions remain allocated to the highly compensated

employee's account will not meet the requirements of section 401(a)(4). A method of distributing excess aggregate contributions will not be considered discriminatory solely because, in accordance with the terms of the plan, unmatched employee contributions that exceed the highest rate at which employee contributions are matched are distributed before matched employee contributions, or matching contributions are distributed (or forfeited) prior to employee contributions. See Examples (5) and (6) in paragraph (e)(6) of this section.

(iii) *Correction of family members.* The determination and correction of excess aggregate contributions of a highly compensated employee whose actual contribution ratio is determined under the family aggregation rules of paragaph (f)(13) is accomplished as follows: If the actual contribution ratio of the highly compensated employee is determined under paragraph (f)(13)(iii)(*1*) of this section, then the actual contribution ratio is reduced as required under paragraph (e)(2) of this section and the excess aggregate contributions for the family unit shall be allocated among the family members in proportion to the employee contributions and matching contributions of each family member that are combined to determine the actual contribution ratio. If the actual contribution ratio of the highly compensated employee is determined under paragraph (f)(13)(iii)(*2*) of this section, then the actual contribution ratio is reduced as required under paragraph (e)(2) in two steps. First, the actual contribution ratio is reduced as required under paragraph (e)(2), but not below the actual contribution ratio of the group of eligible employees who are members of the family group and are not highly compensated without regard to family aggregation. Excess aggregate contributions are determined by taking into account the contributions of the family members whose contributions were combined to determine the actual contribution ratio of the highly compensated employee under paragraph (f)(13)(iii)(*1*), and shall be allocated among such family members in proportion to each such family member's employee contributions and matching contributions. If further reduction of the actual contribution ratio is required under paragraph (e)(2), excess aggregate contributions resulting from this reduction are determined by taking into account the contributions of all the eligible family members and are allocated among such family members in proportion to the employee contributions and matching contributions of each family member.

(5) *Failure to correct.* (i) If a plan does not correct excess aggregate contributions within 2½ months after the close of the plan year for which such excess aggregate contributions are made, the employer will be liable for a 10 percent excise tax on the amount of the excess aggregate contributions. See section 4979 and § 54.4979–1. Qualified nonelective contributions properly taken into account under paragraph (b)(2) for a plan year may permit a plan to avoid having excess aggregate contributions even if such contributions are made after the close of the 2½ month period.

(ii) If excess aggregate contributions are not corrected by the close of the plan year following the plan year for which they were made, the plan will fail to meet the requirements of section 401(a)(4) for the plan year for which the excess aggregate contributions were made and all subsequent plan years in which the excess aggregate contributions remain in the plan.

(6) *Examples.* The principles of this paragraph may be illustrated by the following examples. Assume in each example that no income or loss is allocable to matching contributions, employee contributions or elective contributions.

Example (1). Employer A maintains a thrift plan under which the actual contribution percentage for nonhighly compensated employees is four percent. A does not maintain a plan that includes a cash or deferred arrangement. The three highly compensated employees who participated have the following actual contribution percentages:

Employee	Compensation	Matching and employee contributions	Contribution percentage
A	100,000	10,000	10
B	90,00	6,300	7
C	75,000	3,750	5
Average			7.33

The maximum amount of matching and employee contributions permitted on behalf of A, B, and C is determined by reducing contributions in order of actual contribution percentages beginning with the highest of such actual contribution percentages. Thus A's contribution is first reduced to $7000 or 7.0 percent. Because the actual contribution percentage after this reduction is still 6.33%, the contributions allocated to A and B must be reduced to 6.5%. This results in an actual contribution percentage of six percent, which meets the 200 percent/2 percentage point test. The excess aggregate contributions for A and B are $3,500 and $450 respectively.

Example (2). Employee A is the sole highly compensated participant in cash or deferred arrangements maintained by unrelated employers X and Y. Plan X provides a fully vested 50% matching contribution. Both plans use the calendar year as the plan year. Plan X corrects excess contributions by recharacterization. For the 1988 plan year, A's compensation from employer X is $58,333 and his elective contributions under the X plan is $7000. A made an elective contribution of $1000 under plan Y. The actual deferral ratios and percentages and actual contribution ratios and percentages of A and other employees under plan X are shown below:

	Actual deferral ratios (percentage)	Actual contribution, ratios, (percentage)
Employee A	12	6
Nonhighly compensated	8	4

In January, A requests and receives a distribution of the $1000 excess deferral from plan X. This does not reduce the amount taken into account in determining A's actual deferral ratio under plan X. In February, employer X determines that A's actual deferral ratio must be reduced to 10%, or $5833, which requires a recharacterization of $1167. The amount required to be recharacterized is reduced by the $1000 previously distributed as an excess deferral. The $167 recharacterized as an employee contribution causes A's actual contribution ratio to exceed the permitted maximum and requires a distribution of $167. This distribution may be made from matching contributions, from unmatched employee contributions or pro rata from employee and matching contributions.

Example (3). Same as *Example* (2), except that A does not request a distribution of excess deferrals until March. In this case Employer X would have already recharacterized $1167 as employee contributions, thus requiring a distribution of $1167 in excess aggregate contributions. Because the amount recharacterized exceeds the amount of excess deferrals and will be distributed as an excess aggregate contribution, no further amounts can or need be distributed.

Example (4). For the 1989 plan year, employee B defers $7000 under plan C and $1000 under plan D. Plans C and D are maintained by unrelated employers; both plans C and D have a calendar year plan year. Plan C provides a 100 percent matching contribution and does not take elective contributions into account under section 401(m) or take matching contributions into account under section 401(k). B timely requests and receives a distribution of the $1000 excess deferral from plan C. Employer C subsequently determines that employee B has an excess contribution of $600, and an excess aggregate contribution of $600. The plan provides that such excess amounts are corrected by distribution. No distribution is

required or permitted to correct the excess contribution because $1000 has been distributed from this plan as excess deferrals. The distribution required to correct the excess aggregate contribution is $600. If B had corrected the excess deferrals of $1,000 by withdrawing $1,000 from plan D, the employer would have had to correct the $600 excess contribution in Plan C by distributing $600 from Plan C and the $600 of excess aggregate contributions n plan C distributing an additional $600 from Plan C.

Example (5). Employee A is the sole highly compensated employee in a thrift plan under which the employer matches 100 percent of the first four percent of employee contributions. For the 1988 plan year, A has compensation of $100,000. A makes an employee contribution of $6,000, or six percent and receives a for percent matching contribution of $4,000. This, A's actual contribution ratio (ACR) is ten percent. The actual contribution percentage for the non-highly compensated employees if four percent, and the employer determines that A's ACR must be reduced to six percent to comply with the rules of section 401(m). In this case, the plan satisfies the requirements of this paragraph if it distributes the unmatched employee contributions ($2,000) plus $1,000 of matched employee contributions with its $1,000 of matching contributions, leaving three percent in employee contributions and three percent in matching contributions for an ACR of six percent. The plan could instead have distributed all matching contributions. The plan would fail to meet the requirements of this paragraph if it distributed $4,000 (four percent) of A's employee contributions and none of A's matching contributions.

Example (6). Employee B is the sole highly compensated employee in a thrift plan under which the employer matches 100 percent of the first two percent of employee contribution and 50 percent of the next four percent of employee contributions. For the 1988 plan year, B has compensation of $100,000. B makes an employee contribution of $7,000, or seven percent, and receives a four percent matching contribution of $4,000. Thus, B's ACR is eleven percent. The actual contribution percentages for the non-highly compensated employees is five percent, and the employer determines that B's ACR must be reduced to seven percent to comply with the rules of section 401(m). In this case, the plan satisfies the requirements of this paragraph if it distributes the unmatched employee contributions of $1,000, and $2,000 of matched employee contributions with their accompanying matches of $1,000. This would leave B with four percent employee contributions, and three percent matching contributions, for an ACR of seven percent. The plan could instead distribute all matching contributions. The plan would fail to meet the requirements of this paragraph if it distributed $4,000 (four percent) of B's employee contributions and none of B's matching contributions.

(f) *Definitions.* The following is a list of terms and definitions to be used for purposes of section 401(m), this section, and § 1.401(m)–2.

(1) *Employee.* The term "employee" means an individual who performs services for the employer and who is either a common law employee of the employer or a self-employed individual treated as an employee pursuant to section 401(c)(1). The term "employee" also includes a leased employee who is treated as an employee of the employer-recipient pursuant to the provisions of section 414(n)(2) or 414(o)(2) (other than individuals covered by a plan described in section 414(n)(5)). Individuals that an employer treats as leased employees under section 414(n), pursuant to the requirements of section 414(o), are considered to be leased employees for purposes of this rule.

(2) *Employer.* The term "employer" means the employer maintaining the plan and those employers required to be aggregated with such employer under sections 414(b), (c), (m), or (o).

(3) *Eligible employee*—(i) *In general.* The term "eligible employee" means an employee who is directly or indirectly eligible to make an employee contribution or to receive an allocation of matching contributions (including matching contributions derived from forfeitures) under the plan for a plan year. For example, if an employee must perform certain acts in order to be eligible to make an employee contribution for a plan year, such employee is an eligible employee for such plan year without regard to whether the employee performs such acts. An employee is an eligible employee if he is unable to make an employee contribution or to receive an allocation of matching contributions merely because his compensation is less than a stated dollar amount. An employee who would be eligible to make employee contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, will not fail to be an eligible employee for purposes of section 401(m) for a plan year merely because the employee may not make an employee contribution or receive an allocation of matching contributions by reason of such suspension. Finally, an employee will not fail to be an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1) or 415(e).

(ii) *Certain one-time elections.* An employee is not an eligible employee merely because such employee, upon commencing employment with the employer or upon the employee's first becoming eligible under any plan, is given the one-time opportunity to elect, and such employee did in fact elect, not to be eligible to make employee contributions or to receive allocations of matching contributions under such plan or any other plan maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer.

(4) *Highly compensated employee.* The term "highly compensated employee" has the meaning set forth in section 414(q).

(5) *Elective contribution.* The term "elective contribution" has the meaning set forth in § 1.401(k)–1(g)(4).

(6) *Nonelective contribution.* The term "nonelective contribution" has the meaning set forth in § 1.401(k)–1(g)(5).

(7) *Employee contributions.* The term "employee contributions" means any contributions to the plan that are designated or treated at the time of deferral or contribution as after-tax employee contributions (e.g., by reporting the contributions as taxable income subject to applicable withholding requirements) and are allocated to a separate account to which the attributable earnings and losses are allocated. See § 1.401(k)–1(a)(2)(ii). Such term includes—

(i) Employee contributions to the defined contribution portion of a plan described in section 414(k),

(ii) Employee contributions to a qualified cost-of-living arrangement described in section 415(k)(2)(B),

(iii) Employee contributions applied to the purchase of whole life insurance protection or survivor benefit protection under a defined contribution plan,

(iv) Amounts attributable to excess contributions within the meaning of section 401(k)(8)(B) which are recharacterized as employee contributions, and

(v) Employee contributions to a contract described in section 403(b).

Such term does not include repayment of loans or buy-backs of benefits described in section 411(a)(7)(C) or employee contributions which are transferred to a plan. For purposes of this paragraph (f), employee contributions described in paragraph (f)(7)(ii) of this section shall be deemed contributed to a defined contribution plan.

(8) *Matching contribution.* The term "matching contribution" means—

(i) Any employer contribution made to a plan on account of an employee contribution to a plan maintained by the employer;

(ii) Any employer contribution made to a plan on account of an elective contribution to a plan maintained by the employer; and

(iii) Any forfeiture allocated on the basis of employee contributions.

matching contributions, or elective contributions.

For purposes of paragraphs (f)(8) (i) and (ii) of this section, whether an employer contribution is made on account of an employee contribution or an elective contribution will be determined on the basis of all relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan. Thus, for example, an employer contribution made to a plan on account of contributions made by an employee under an employer-sponsored savings arrangement that are not held in a plan that is intended to be a qualified plan shall not constitute a matching contribution. Notwithstanding the foregoing, for plan years beginning before January 1, 1989, an employer may elect to take into account as matching contributions, contributions made to a plan pursuant to an arrangement under which the employer makes contributions to the plan on account of either employee contributions to the plan or contributions made by an employee to an employer-sponsored savings arrangement that are not held in the plan, provided that such arrangement was in effect prior to August 8, 1988. For plan years which begin after December 31, 1988, a contribution and/or allocation that is used to meet the minimum contribution or benefit requirement of section 416, is not treated as made on account of an employee or elective contribution and therefore is not a matching contribution.

(9) *Qualified nonelective contributions.* The term "qualified nonelective contributions" has the meaning set forth in § 1.401(k)–1(g)(7)(ii).

(10) *Excess deferrals.*—The term "excess deferrals" has the meaning set forth in § 1.402(g)–1(b)(2).

(11) *Excess contributions.* The term "excess contributions" has the meaning set forth in § 1.401(k)–1(g)(13).

(12) *Excess aggregate contributions.*—The term "excess aggregate contributions" means, with respect to any plan year, the excess of the aggregate amount of the matching contributions and employee contributions (and any qualified nonelective contribution or elective deferrals taken into account in computing the contribution percentage) actually made on behalf of highly compensated employees for such plan year, over the maximum amount of such contributions permitted under the limitations of section 401(m)(2)(A). The amount of excess aggregate contributions for each highly compensated employee is determined by using the method described in paragraph (e)(2) of this section. For purposes of this definition, qualified matching contributions treated as elective contributions in accordance with § 1.401(k)–1(b)(3) shall be disregarded.

(13) *Actual contribution percentage*—(i) *In general.* The term "actual contribution percentage" means the average of the actual contribution ratios (calculated separately for each employee in a specified group) of the sum of—

(A) The matching contributions

(B) The employee contributions,

(C) The qualified nonelective contributions taken into account under paragraph (f)(2) of this section, and

(D) The elective contributions taken into account under paragraph (f)(1) of this section,

for each plan year, divided by the employee's compensation for such plan year. For plan years which begin after December 31, 1988, or such later date provided in paragraph (g) of this section, such actual contribution ratios and the actual contribution percentage for each group shall be calculated to the nearest one-hundredth of one percent. Matching contributions treated as elective contributions shall be taken into account only as provided in § 1.401(k)–1(b)(3).

(ii) *Highly compensated employees.* In the case of a highly compensated employee who is eligible to participate in two or more plans of an employer to which matching contributions, employee contributions, or both, are made, all such contributions on behalf of such highly compensated employee must be aggregated for purposes of determining such employee's actual contribution ratio.

(iii) *Aggregation of family members.* (A) For plan years beginning after December 31, 1986, or such later date provided in paragraph (h) of this section, if an eligible highly compensated employee is subject to the family aggregation rules of section 414(q)(6) because such employee is either a five-percent owner or one of the ten most highly compensated employees, the combined actual contribution ratio for the family group (which is treated as one highly compensated employee) shall be the greater of:

(*1*) The actual contribution ratio determined by combining the employee contributions, matching contributions of all the eligible family members who are highly compensated without regard to family aggregation, and (*2*) The actual contribution ratio determined by combining the employee contributions, compensation, matching contributions and amounts treated as matching contributions of all the eligible family members.

If the amount determined under paragraph (f)(13)(iii)(A) (*1*) of this section exceeds the amount determined under paragraph (f)(13)(iii)(A) (*2*) of this section, then it may be necessary, for purposes of correcting excess aggregate contributions of the family members under paragraph (e)(4)(iii) of this section, to calculate an actual contribution ratio for the group of eligible family members who are not highly compensated without regard to family aggregation. This actual contribution ratio is determined by combining the employee contibutions, compensation, matching contributions and amounts treated as matching contributions of all such employees.

(B) The employee contributions, matching contributions compensation, and amounts treated as matching contributions of all family members are disregarded for purposes of determining the actual contribution percentage for the group of highly compensated employees, and the group of nonhighly compensated employees, except to the extent taken into account in paragraph (f)(13)(iii)(A) of this section.

(C) If an employee is required to be aggregated as a member of more than one family group in a plan, all eligible employees who are members of those family groups that include that employee are aggregated as one family group in accordance with paragraphs (f)(13)(iii) (A) and (B) of this section.

(14) *Compensation.* The term "compensation" has the meaning given such term by section 414(s). For plan years beginning after December 31, 1988, or on or after the later date provided under paragraph (g) of this section, the applicable period under section 414(s) for purposes of applying this section is the plan year for which a determination under paragraph (b) is being made. Thus, in the case of an employee who begins, resumes, or ceases to be eligible to make employee contributions or to receive allocations of matching contributions during a plan year, the amount of compensation received by the employee during the entire plan year shall be taken into account for such plan year. Also for such plan years, in computing the actual contribution ratio for an employee for the first plan year of the plan, the amount of compensation received by such employee during the entire 12-month period ending on the close of such plan year shall be taken into account.

(g) *Effective dates.*—(1) Except as provided in paragraphs (g)(2), (g)(3),

(g)(4), and (g)(5), or as specifically provided otherwise in this section, this section is effective for plan years which begin after December 31, 1986.

(2) In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, this section shall not apply to years beginning before the earlier of—

(i) January 1, 1989, or,

(ii) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986).

(3) In the case of an annuity contract (not maintained pursuant to a collective bargaining agreement) under section 403(b) of the Internal Revenue Code of 1986, this section shall apply to plan years beginning after December 31, 1988.

(4) In the case of an annuity contract described in section 403(b) (maintained pursuant to a collective bargaining agreement described in paragraph (g)(2) of this section) this section shall not apply to years beginning before the earlier of

(i) The later of—

(A) January 1, 1989, or

(B) The date determined under paragraph (g)(2)(ii) of this section, or

(ii) January 1, 1991.

(5)(i) Except as provided in paragraph (g)(5)(ii) of this section, in the case of a plan maintained by a state or local government, the provisions of this section shall apply for plan years which begin after December 31, 1988.

(ii) In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and state or local governments, this section shall not apply to plan years beginning before the earlier of—

(A) The later of—

(*1*) January 1, 1989, or

(*2*) The date on which the last such collective bargaining agreement terminates (determined without regard to any extension thereof after February 28, 1986), or

(B) January 1, 1991.

Par. 12. There is inserted after § 1.401(m)–1 the following new section:

§ 1.401(m)-2. Multiple use of alternative limitation.

(a) *In general.* The rules in this secion prevent the multiple use of the alternative methods of compliance with sections 401 (k) and (m) contained in section 401(k)(3)(A)(ii)(II) and 401(m)(2)(A)(ii) respectively. Paragraph (b) of this section discusses the scope of this section and contains the general rule for determination of a multiple use of the alternative limitation. Paragraph (c) of this section contains rules for the correction of multiple use.

(b) *General rule for determination of multiple use*—(1) *In general.* Multiple use of the alternative limitation occurs if both of the conditions of this paragraph (b)(1) are satisfied.

(i) One or more highly compensated employees of the employer or a related employer (within the meaning of section 414 (b), (c), (m), or (o)) are eligible both in a cash or deferred arrangement subject to section 401(k) and in a plan maintained by such employer subject to section 401(m).

(ii) The sum of the actual deferral percentage of the entire group of eligible highly compensated employees under such arrangement subject to section 401(k) and the actual contribution percentage of the entire group of eligible highly compensated employees under such plan subject to section 401(m) exceeds the aggregate limit of paragraph (b)(3) of this section.

The actual deferral percentage and actual contribution percentage of the group of eligible highly compensated employees shall be determined after use of qualified nonelective contributions and qualified matching contributions to meet the requirements of section 401(k)(3)(A)(ii) and after use of qualified nonelective contributions and elective contributions to meet the requirements of section 401(m)(2)(A), provided that the use of elective contributions to meet the requirements of section 401(m)(2)(A) is limited to the amount necessary to meet the requirements of section 401(m)(2)(A)(ii). The actual deferral percentage and actual contribution percentage of the group of eligible highly compensated employees shall be determined after any corrective distribution of excess deferrals, excess contributions, or excess aggregate contributions and after any recharacterization of excess contributions required without regard to this section. Only plans and arrangements maintained by the same employer or a related employer (within the meaning of section 414 (b), (c), (m), or (o)) are taken into account under this paragraph (b)(1). If the employer maintains two or more cash or deferred arrangements subject to section 401(k) which are not aggregated pursuant to § 1.401(k)–1(b)(5), multiple use shall be tested separately with respect to each such arrangement subject to section 401(k) and each plan or aggregate group of plans subject to section 401(m) maintained by the employer. Similarly, if the employer maintains two or more plans subject to section 401(m) which are not aggregated pursuant to § 1.401(m)–1(b)(4), multiple use shall be tested separately with respect to each sum plan subject to section 401(m) and each arrangement or aggregated group of arrangements subject to section 401(k) maintained by the employer.

(2) *Alternative limitation.* For purposes of this section, the term "alternative limitation" means the alternative methods of compliance with sections 401 (k) and (m) contained in sections 401(k)(3)(A)(ii)(I) and 401(m)(2)(A)(ii) respectively.

(3) *Aggregate limit*—(i) *In general.* For purposes of this section, the aggregate limit is the sum of:

(A) 125 percent of the greater of (*1*) the actual deferral percentage of the group of non-highly compensated employees eligible under the arrangement subject to section 401(k) for the plan year, or (*2*) the actual contribution percentage of the group of non-highly compensated employees eligible under the plan subject to section 401(m) for the plan year beginning with or within the plan year of the arrangement subject to section 401(k), and

(B) Two plus the lesser of paragraph (b)(3)(i)(A) (*1*) or (*2*) above. In no event, however, shall this amount exceed 200 percent of the lesser of paragraph (b)(3)(i)(A) (*1*) or (*2*) above.

(ii) *Examples.* The preceding rule may be illustrated by the following examples.

Example (1). Assume that employer G maintains a plan that contains a cash or deferred arrangement under which the actual deferral percentage of highly compensated and non-highly compensated employees are 5.5 and four percent respectively. The plan also permits employee contributions, and the actual contribution percentages for the two groups are 4.2 and three percent respectively. The multiple use of the alternative limitation is tested as follows:

(1) Greater of actual deferral percentage or actual contribution percentage for non-highly compensated employees. 4.0
(2) 125 percent of (1) 5.0
(3) Lesser of actual deferral percentage or actual contribution percentage for non-highly compensated employees 3.0
(4) (3) plus two percentage points 5.0
(5) Aggregate limit ((2)+(4)) 10.0

In this case, the sum of the actual deferral percentage and the actual contribution percentage of highly compensated employees is 9.70, which is less than the aggregate limit. Therefore, there is no multiple use of the alternative limitation.

Example (2). Employer F maintains a plan subject to section 401(k) with a plan year beginning January 1, and a plan subject to section 401(m) with a plan year beginning July 1. The plan subject to section 401(k) does

not correct excess contributions by recharacterization. The first actual deferral percentage taken into account is that for the plan year that begins January 1, 1989. The first actual contribution percentage taken into account is that for the plan year beginning July 1, 1989.

(c) *Correction of multiple use*—(1) *In general.* If a multiple use of the alternative limitation occurs with respect to two or more plans or arrangements maintained by an employer, such multiple use shall be corrected by reducing the actual deferral percentage or actual contribution percentage of highly compensated employees in the manner described in paragraph (c)(3) of this section.

(2) *Treatment of required reduction.* The required reduction shall be treated as an excess contribution under the arrangment subject to section 401(k) or excess aggregate contribution under the plan subject to section 401(m). However, if an excess contribution arising under this section is recharacterized as an employee contribution, such recharacterized amount shall be treated as an excess aggregate contribution.

(3) *Required reduction.* The amount of the reduction to the actual deferral percentage of the entire group of highly compensated employees eligible in the arrangement subject to section 401(k) shall be calculated in the manner described in § 1.401(k)–1(f)(1)(ii) or the amount of the reduction to the actual contribution percentage of the entire group of highly compensated employees eligible in the plan subject to section 401(m) shall be calculated in the manner described in § 1.401(m)–1(b)(6)(ii), as designated in the plan, so that there is no multiple use of the alternative limitation. The employer may elect to reduce the actual deferral ratios or the actual contribution ratios, as designated in the plan, either for all highly compensated employees under the plan and/or arrangements subject to reduction or for only those highly compensated employees who are eligible in both the arrangment subject to section 401(k) and the plan subject to section 401(m).

(4) *Examples.* The principles of this paragraph may be illustrated by the following examples. In all cases, the employer maintains both an arrangement subject to section 401(k) and a plan subject to section 401(m). Assume that there is no income or loss allocable to the elective contributions, matching contributions or employee contributions.

Example (1). All employees of employer Q are eligible in both an arrangement subject to section 401(k) and a plan subject to section 401(m). Both plans have a calendar plan year. The employer designation provides that multiple use of the alternative limitation will be corrected in the plan subject to section 401(m) and that any required reduction in actual contribution ratios will apply only to employees eligible to participate in both arrangements. Employees X and Y are highly compensated. Each received compensation of $100,000, deferred $6,000, received a $3000 matching contribution, and made employee contributions of $3000. Actual deferral and contribution percentages under the arrangement and plan for the 1989 plan year are shown below. No excess deferrals, excess contributions, or excess aggregate contributions have yet been required to be distributed or recharacterized under the plan.

	Actual deferred percentage	Actual contribution percentage
Highly compensated	6	6
Nonhighly compensated	4	4

The aggregate limit and amount required to be corrected are determined as follows:

Step 1: Determination of aggregate limit

(1) Greater of actual deferral percentage or actual contribution percentage for nonhighly compensated employees—4%
(2) 125 percent of (1)—5%
(3) Lesser of actual deferral percentage or actual contribution percentage for nonhighly compensated employees—4%
(4) (3) plus two percentage points—6%
(5) Aggregate limit ((2) + (4))—11%

Step 2: Calculation of correction amount

(6) Actual deferral percentage of highly compensated—6%
(7) Maximum permitted actual contribution percentage of highly compensated ((5)–(6))—5%
(8) Amount taken into account in determining actual contribution percentage of highly compensated employee X—$6,000
(9) Maximum amount permitted without use of alternative limitation ((7) x compensation of employee X)—$5,000
(10) Excess aggregate contribution ((8) – (9))—$1,000

A similar correction must be made for employee Y.

Example (2). Same as (1), but the plan corrects the multiple use in the arrangement subject to section 401(k) and provides that excess contributions are recharacterized. In this case, the aggregate limit for the plans will be eleven percent. Similarly, the excess contribution for employees X and Y, determined in the same manner as in (1), will be $1,000. This will increase the actual contribution percentage for these employees to seven percent, resulting in an excess aggregate contribution of $1,000 which must be distributed.

Example (3). Same as (1) except that employee Y is not eligible to participate in the arrangement subject to section 401(k). No reduction of Y's actual contribution ratio is required because Y is only in the plan subject to section 401(m). Of course, employee X will continue to have an excess aggregate contribution of $1,000.

(d) *Effective date.* This section shall be effective for plan years which begin after December 31, 1988, or such later date provided in § 1.401(m)–1(g).

Par. 13. A new § 1.402(g)–0 is added immediately before § 1.403(a)–1 to read as follows:

§ 1.402(g)–0 Limitation on exclusion for elective deferrals, table of contents.

This section contains the captions in § 1.402(g)–1.

§ 1.402(g)–1 Limitation on exclusion for elective deferrals.

(a) In general.
(b) Elective deferrals.
(c) Applicable limit.
(1) In general.
(2) Special adjustment for elective deferrals with respect to a section 403(b) annuity contract.
(3) Special adjustment for elective deferrals with respect to a section 403(b) annuity contract for certain long-term employees.
(4) Example.
(d) Treatment of excess deferrals.
(1) Plan qualification.
(2) Correction of excess deferrals after the taxable year.
(3) Correction of excess deferrals during taxable year.
(4) Plan provisions.
(5) Income allocable to elective deferrals
(i) General rule.
(ii) Allocable income for the taxable year.
(iii) Allocable income for the period between the end of the taxable year and time of distribution.
(iv) Special rule for corrective distributions within taxable year.
(v) Special rules for plan years which begin in 1987.
(6) Coordination with distribution or recharacterization of excess contributions.
(7) Other provisions of law.
(8) Tax treatment.
(i) Corrective distribution.
(ii) Other distributions of excess deferrals.
(9) No reduction of required minimum distribution.
(10) Partial correction.
(11) Examples.
(e) Community property laws.
(f) Effective date.
(1) In general.
(2) Deferrals under collective bargaining agreements.

Par. 14. Section 1.402(g)–1 is added after § 1.402(g)–0:

§ 1.402(g)-1 Limitation on exclusion for elective deferrals.

(a) *In general.* The excess of an individual's elective deferrals for any taxable year over the applicable limit for such year may not be excluded from such individual's gross income under sections 402(a)(8), 402(h)(1)(B), 408(k)(6), and 501(c)(18). Thus, an individual's elective deferrals in excess of the applicable limit for a taxable year (i.e., the individual's excess deferrals for such year) must be included in such individual's gross income for such year.

(b) *Elective deferrals.* An individual's elective deferrals for a taxable year are the sum of the following:

(1) Any elective contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent such contribution is not includible in the individual's gross income for the taxable year on account of section 402(a)(8).

(2) Any employer contribution to a simplified employee pension (as defined in section 408(k)) to the extent such contribution is not includible in the individual's gross income for the taxable year on account of section 402(h)(1)(B).

(3) Any employer contribution to an annuity contract under section 403(b) under a salary reduction agreement (within the meaning of section 3121(a)(5)(D)) to the extent such contribution is not includible in the individual's gross income for the taxable year on account of section 403(b).

(4) Any employee contribution designated as deductible under a trust described in section 501(c)(18) to the extent that such contribution is deductible from such individual's income for the taxable year on account of section 501(c)(18). For purposes of this section, such employee contribution shall be treated as though it were excluded from the individual's gross income.

(c) *Applicable limit*—(1) *In general.* Except as adjusted under paragraphs (c)(2) and (c)(3) of this section, the applicable limit for an individual's taxable year beginning in the 1987 calendar year is $7,000. Such amount is to be increased for the taxable year beginning in 1988 and subsequent calendar years in the same manner as the $90,000 amount is adjusted under section 415(d).

(2) *Special adjustment for elective deferrals with respect to a section 403(b) annuity contract.* The applicable limit for an individual who makes elective deferrals described in paragraph (b)(3) of this section for a taxable year is to be adjusted by increasing the applicable limit otherwise determined under paragraph (c)(1) of this section by the amount of the individual's elective deferrals described in paragraph (b)(3) of this section for such taxable year. This adjustment shall not cause the applicable limit for any taxable year to exceed $9,500.

(3) *Special adjustment for elective deferrals with respect to a section 403(b) annuity contract for certain long-term employees.* The applicable limit for an individual who is a qualified employee (as defined in section 402(g)(8)(C)) and has elective deferrals described in paragraph (b)(3) of this section for a taxable year is to be adjusted by increasing the applicable limit otherwise determined under paragraphs (c)(1) and (c)(2) of this section in accordance with section 402(g)(8)(A).

(4) *Example.* The provisions of this paragraph may be illustrated by the following example.

Example. An employer (X) maintains a section 401(k) cash or deferred arrangement and also offers its employees section 403(b) contracts to which elective deferrals may be made. For the 1987 taxable year, three of X's employees, A, B, and C, contribute $3,500, $1,000 and $8,500, respectively, as elective deferrals under the section 403(b) contract. The maximum amounts that A, B, and C may contribute to the section 401(k) cash or deferred arrangement are $6,000, $7,000 and $1,000 respectively.

(d) *Treatment of excess deferrals*—(1) *Plan qualification.* A plan, annuity contract, simplified employee pension, or trust shall not fail to meet the requirements of section 401(a), section 403(b), section 408(k), or section 501(c)(18), respectively, merely because excess deferrals are made with respect to such plan, contract, pension, or trust. For purposes of applying the requirements of section 401(a)(4), 401(k)(3), and 415, to a plan or arrangement, excess deferrals are not to be disregarded merely because they are excess deferrals or because they are distributed in accordance with paragraph (d)(2) of this section. However, excess deferrals by nonhighly compensated employees are not to be taken into account under section 401(k)(3) to the extent such excess deferrals are made under a plan or plans of the same employer.

(2) *Correction of excess deferrals after the taxable year.* A plan may provide that, if any amount is included in the gross income of an individual under paragraph (a) of this section for a taxable year—

(i) Not later than the first April 15 (or such earlier date as the plan may specify) following the close of the individual's taxable year, the individual may notify each plan under which deferrals were made of the amount of the excess deferrals received by such plan, and

(ii) Not later than the first April 15 following the close of the taxable year, each such plan may distribute to the individual the amount specified under paragraph (d)(2)(i) of this section (and any income allocable to such amount).

(3) *Correction of excess deferrals during taxable year.* (i) A plan may provide that an individual who has excess deferrals for a taxable year may receive a corrective distribution of such deferrals during the same year. Such corrective distribution may be made only if all of the following conditions are satisfied.

(A) The individual designates the distribution as an excess deferral.

(B) The correcting distribution is made after the date on which the plan received the excess deferral.

(C) The plan designates the distribution as a distribution of excess deferrals.

(ii) The provisions of this paragraph (d)(3) may be illustrated by the following example:

Example. S is a 62 year old individual who participates in his employer's qualified cash or deferred arrangement. In January, 1989, S withdraws $5,000 from his employer's cash or deferred arrangement. For the period February through November, S defers $800 per month. In January of 1990, S becomes aware of his $1000 excess deferral for 1989. S must make an additional withdrawal of $1,000 before April 15, 1990 to correct the excess deferral. The $5,000 withdrawal did not correct the excess deferral because it occurred before the excess deferral was made.

(4) *Plan provisions.* In order to distribute excess deferrals pursuant to paragraphs (d)(2) or (d)(3) of this section, a plan must contain language permitting distribution of excess deferrals. A plan may require the specification in paragraphs (d) (2) and (3) of this section to be in writing and may require that the employee certify or otherwise establish that the specified amount is an excess deferral. A plan need not permit distribution of excess deferrals.

(5) *Income allocable to excess deferrals*—(i) *General rule.* The income allocable to excess deferrals is equal to the sum of the allocable gain or loss for the taxable year of the individual and the allocable gain or loss for the period between the end of the taxable year and the date of distribution. Income includes all earnings and appreciation, including such items as interest, dividends, rent, royalties, gains from the sale of property, appreciation in the value of

stocks, bonds, annuity and life insurance contracts, and other property, without regard to whether such appreciation has been realized.

(ii) *Allocable income for the taxable year.* The income allocable to excess deferrals for the taxable year of the individual is determined by multiplying the income for the taxable year of the individual allocable to elective deferrals by a fraction. The numerator of the fraction is the amount of excess deferrals made by the employee for the taxable year. The denominator of the fraction is the total account balance of the employee attributable to elective deferrals as of the end of the taxable year, reduced by the gain allocable to such total amount for the taxable year and increased by the loss allocable to such total amount for the taxable year.

(iii) *Allocable income for the period between the end of the taxable year and time of distribution.* The income allocable to excess deferrals for the period between the end of the taxable year and the date of distribution may be calculated under the fractional method set forth in paragraph (d)(5)(ii) of this section or, alternatively, under the following safe harbor method. Under the fractional method, the income for the period between the end of the taxable year and the distribution date that is allocable to elective deferrals is multiplied by a fraction determined under the method described in paragraph (d)(5)(ii) of this section. Under the safe harbor method, the allocable income for the period between the end of the taxable year and the distribution date is equal to 10 percent of the income allocable to excess deferrals for the taxable year (as calculated under paragraph (d)(5)(ii) of this section) multiplied by the number of calendar months that have elapsed since the end of the taxable year. For purposes of determining the number of calendar months that have elapsed under the safe harbor method, a distribution occurring on or before the fifteenth day of the month will be treated as having been made on the last day of the preceding month, and a distribution occurring after such fifteenth day will be treated as having been made on the first day of the next subsequent month.

(iv) *Special rule for corrective distributions within taxable year.* In the case of a corrective distribution of excess deferrals described in paragraph (d)(3) of this section, the income allocable to elective deferrals from the beginning of the taxable year to the date on which the distribution is made shall be determined using the method described in paragraph (d)(5)(iii) of this section.

(v) *Special rules for taxable years which begin in 1987.* For taxable years which begin in 1987, plan sponsors may use any reasonable method for computing the income allocable to excess deferrals, provided that such method is used consistently for all participants and for all corrective distributions under a plan for that plan year. The closing balance method is a reasonable method for this purpose. Under the closing balance method, the income allocable to excess deferrals is equal to the sum of (A) the income allocable to the account containing the excess deferrals for the applicable year, and (B) the income allocable to such account for the gap period, multiplied by a fraction. The numerator of the fraction is the excess deferral and the denominator is the closing balance (as of the end of the applicable year) of the account containing the excess deferral. The closing balance includes income for the applicable year. A method will not be considered unreasonable if income between the end of the taxable year and the date of distribution ("gap period") is not taken into account.

(6) *Coordination with distribution or recharacterization of excess contributions.* The amount of excess deferrals that may be distributed under this paragraph (d) with respect to an employee for a taxable year shall be reduced by any excess contributions previously distributed or recharacterized with respect to such employee for the plan year beginning with or within such taxable year. In the event of a reduction under this paragraph (d)(6), the amount of excess contributions includible in the gross income of the employee and reported by the employer as a distribution of excess contributions shall be reduced by the amount of the reduction under this paragraph (d)(6). See § 1.401(k)–1(f)(5)(i). In no case may an individual receive from a plan as a corrective distribution for a taxable year under paragraph (d)(2) or (d)(3) of this section an amount in excess of the individual's total elective deferrals under the plan for the taxable year.

(7) *Other provisions of law.* A corrective distribution of excess deferrals (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under section 411(a)(11) or 417.

(8) *Tax treatment*—(i) *Corrective distribution.* A corrective distribution of excess deferrals described in paragraph (d)(2) or (d)(3) of this paragraph is excludible from the employee's gross income. However, a corrective distribution of income allocable to excess deferrals is includible in the employee's gross income for the taxable year in which the elective deferrals by the employee would have been received by the employee had he originally elected to receive the amounts in cash. A corrective distribution of excess deferrals (and income) under paragraphs (d)(2) or (d)(3) of this section is not subject to the early distribution tax of section 72(t) and is not treated as a distribution for purposes of applying the excise tax under section 4981A.

(ii) *Other distributions of excess deferrals.* If excess deferrals (and income) for a taxable year are not distributed in accordance with paragraphs (d)(2) and (d)(3) of this section, such amounts are treated when distributed as elective deferrals (and income) that were excludible from the individual's gross income under section 402(g). Thus, any amount includible in gross income for any taxable year under this section which is not distributed by April 15 of the following taxable year shall not be treated as an investment in the contract for purposes of section 72 and shall be includible in the employee's gross income when distributed from the plan.

(9) *No reduction of required minimum distribution.* A distribution of excess deferrals (and income) under paragraphs (d)(2) and (d)(3) of this section is not treated as a distribution for purposes of determining whether the plan meets the minimum distribution requirements of section 401(a)(9).

(10) *Partial correction.* Any distribution under paragraphs (d)(2) or (d)(3) of this section of less than the entire amount of excess deferrals (and income) is to be treated as a pro rata distribution of excess deferrals and income.

(11) *Examples.* The provisions of this paragraph may be illustrated by the following examples. Assume in Example (1) and (2) that there is no income or loss allocable to the elective deferrals.

Example (1). Employee *A* is a 60 year old highly compensated employee who participates in his employer's section 401(k) arrangement. During the period of January through September of 1988, A contributed $7500 to the arrangement in elective deferrals. In December of 1988, A made a withdrawal of $1,000 but did not designate this as a withdrawal of an excess deferral. In January of 1989, A discovers the excess deferral of $500 for 1988. To correct excess deferrals, A must withdraw an additional $500 even though he has already withdrawn $1,000 for 1988. A may exclude from income in 1988 only $7,000. However, if the $500 is

distributed by April 15, 1989, the distribution is excludible from A's gross income. Even if A withdraws the $500, the employer must take into account the entire $7,500 in computing A's actual deferral percentage for 1988.

Example (2). Corporation X maintains a cash or deferred arrangement described in section 401(k). The plan year is the calendar year. For plan year 1989, all ten of X's employees are eligible to participate in the plan. The employees' compensation, contributions, and actual deferral percentages are given by the following table:

Employee	Compensation	Contribution	Actual deferral percentage
1	$140,000	$7,000	5.0
2	70,000	7,000	10.0
3	70,000	7,000	10.0
4	45,000	2,250	5.0
5	40,000	4,000	10.0
6	35,000	1,750	5.0
7	35,000	350	1.0
8	30,000	3,000	10.0
9	17,500	0	0
10	17,500	0	0

Employees 1, 2, and 3 are highly-compensated employees within the meaning of section 414(q). Employees 4, 5, 6, 7, 8, 9 and 10 are nonhighly compensated employees. The actual deferral percentage for the highly compensated employees and nonhighly compensated employees are 8.33% and 4.43% respectively. These percentages do not satisfy the requirements of section 401(k)(3)(A)(ii). The actual deferral percentage for the highly compensated employees cannot exceed 6.43%. This was done by reducing the actual deferral percentage of employees 2 and 3 to 7.14 and distributing $2002 ($7000 – .0714 ($70,000)) to employees 2 and 3, respectively in January of 1990. Section 401(k)(3)(A)(ii) was therefore satisfied.

In February of 1990, employees 2 informs Corporation X that he made elective deferrals of $2,000 under a 401(k) plan maintained by an unrelated employer in 1989 and requests distribution of $2,000 from the Corporation X plan. However, since employee 2 has already received a distribution of $2,002 to meet the ADP test, no additional amounts can or need be distributed as excess deferrals by this plan. However, the employer must report $2000 as a distribution of an excess deferral and $2 as a distribution of an excess contribution.

Example (3). Employee T has excess deferrals of $1,000. The income attributable to such deferrals is $100. Employee T properly requests a distribution of the excess deferral (and income) on February 1. The plan distributes $1,000 to the employee by April 15. Because the plan did not distribute income, $909 is treated as a distribution of excess deferrals, and $91 is treated as a distribution of earnings. With respect to amounts remaining in the account, $91 is treated as an elective deferral, and, because it was not distributed by the required date, will be includible in gross income upon distribution as well as in the year of deferral.

Example (4). Participant A made an elective contribution of $30,000 to a qualified cash or deferred arrangement under section 401(k) during 1987, resulting in an excess deferral for 1987 of $23,000. A had an opening account balance of $80,000. The gain allocable for the calendar year to the elective contribution account is $15,000. The gain allocable for the gap period, January 1, 1988 to March 1, 1988 (the date of distribution), is $5,000. The 1987 closing elective deferral account balance for A is $125,000, determined as follows: $80,000 opening account balance plus $15,000 gain earned through the end of the taxable year plus the $30,000 elective contribution. Under the closing balance method, the income allocable to the excess deferral for the 1987 taxable year is $2,760 ($15,000 multiplied by 23,000/125,000). The income for the gap period is $920 ($5,000 multiplied by 23,000/125,000). Thus, under the closing balance method, the income allocable to the excess deferral is $3,680 ($2,760 plus 920). The same result would be obtained by multiplying the combined income for the applicable year and gap period ($20,000) by the closing balance method fraction ($23,000/125,000). In either case, the amount of income subject to distribution is $3,680. Thus, the amount of income required to be distributed is $26,680 ($23,000 excess plus $3,680 income).

Example (5). Assume the facts set forth in Example (4). The elective deferral account balance for the end of the year is $125,000. Under the adjusted balance method, the denominator of the fraction, $110,000 is computing by subtracting from the account balance ($125,000), the gain allocable to the account, ($15,000). Thus, the income allocable to the excess deferral for the 1987 taxable year is $3,136.36 ($15,000 income multiplied by 23,000/110,000). For purposes of computing the gap period income under the adjusted balance method, the elective deferral account balance on the date of distribution is $130,000 ($125,000 opening balance on January 1, 1988 plus $5,000 earnings through the date of distribution). The denominator of the fraction is $125,000 ($130,000 minus $5,000). The income allocable to the excess deferral for the gap period under the adjusted balance method is $920 ($5,000 multiplied by 23,000/125,000). Thus, under the adjusted balance method, the total income allocable to the excess deferral in this example is $4,056.36 ($3,136.36 plus $920). The amount required to be distributed is $27,056.36 ($23,000 excess plus $4,056.36 income).

Example (6). Assume the same facts as in Example (4), except that gap period income will be computed pursuant to the Ten-Percent Method. The gap period income allocable to the excess amount described in Example (4) is $552.00 (10% of $2,760.00 multiplied by the number of months (two) between the end of the year and the date of the corrective distribution). The total income allocable to the excess amount using the Ten-Percent Method is conjunction with the closing balance method is $3,312.00 ($2,760.00 plus $552). Accordingly, the amount required to be distributed is $26,312.00 ($23,000 excess plus $3,312.00 income).

Example (7). Assume the same facts as in Example (5), except that gap period income will be computed pursuant to the ten-percent method. The gap period income allocable to the excess amount described in Example 2 is $627.27 (10% of 3,136.36 multiplied by the number of months (two) between the end of the year and the date of the corrective disribution). The total income allocable to the excess amount using the ten-percent method in conjunction with the adjusted balance method is $3,763.63 ($3,136.36 plus $627.27). Accordingly, the amount required to be distributed is $26,763.63 ($23,000 excess plus $3,763.63 income).

(e) *Community property laws.* This section shall be applied without regard to community property laws.

(f) *Effective date*—(1) *In general.* Except as otherwise provided, the provisions of this section are effective for taxable years which begin after December 31, 1986.

(2) *Deferrals under collective bargaining agreements.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, the provisions of this section shall not apply to contributions made pursuant to such an agreement for taxable years beginning before the earlier of—

(i) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986), or

(ii) January 1, 1989.

Such contributions shall be taken into account for purposes of applying this section to elective deferrals under plans not described in this paragraph (f)(2).

Par 15. Section 1.414(q)-1T is amended by adding a new sentence at the end of Q&A–14(b)(1) and by adding a new paragraph

(e) to Q&A–15 to read as follows:

§ 1.414(q)–1T Highly compensated employee (Temporary).

* * * * *

Q–14 What periods must be used for determining who is a highly compensated employee for a determination year?

A–14 * * *

(b) *Calendar year calculation election*—(1) *In general.* * * * Alternatively, in such case, the employer may elect to make the look-back year calculation on the basis of the calendar year immediately preceding the calendar year determination year and the determination year calculation on the basis of the calendar year determination year.

* * * * *

Q–15 Is there any transition rule in determining the group of highly

compensated employees for 1987 and 1988?

A–15 * * *

(e) *Special transition rule.* No penalties or plan disqualification will result from an error in the amount of excess contributions (sec. 401(k)) or excess aggregate contributions (sec. 401(m)) if the following requirements are met:

(1) Such failure or error resulted solely from an error in determining the group of highly compensated employees that reflected a reasonable interpretation of the provisions of section 414(q) relied upon by the employer in defining highly compensated employee, and

(2) The excess contributions and excess aggregate contributions are with respect to plan years commencing with or during the 1987 calendar year and ending prior to July 1, 1988. The following examples illustrate potential sources of differences in determining the group of highly compensated employees that will generally be considered reasonable interpretations of section 414(q) for purposes of this paragraph (e):

(i) exclusion of collective bargaining employees in determining the number of employees in the top-paid group;

(ii) determination of the number of employees in the top-paid group on the basis of the total number of active employees at the end of the determination year and look-back year, respectively;

(iii) use of the employer's fiscal year ending in the plan year for the determination year and use of the preceding fiscal year for the look-back year; and

(iv) use of the 1986 and 1987 calendar years for the lookback year and determination year, respectively.

Par. 16. Section 1.415–6 is amended by revising paragraph (b)(1) to read as follows:

§ 1.415–6 Limitation for defined contribution plans.

* * * * *

(b) *Annual additions*—(1) *In general*—(i) *Limitation years beginning before January 1, 1987.* For limitation years which begin before january 1, 1987, or such later date provided in paragraph (b)(l)(iii) of this section, the term "annual addition" means, for purposes of this section, the sum, credited to a participant's account for any limitation year, of—

(A) Employer contributions,

(B) The lesser of the amount of employee contributions in excess of 6 percent of his compensation (as defined in paragraph (a)(3) of this section) for the limitation year, or one-half of the employee contributions for that year, and

(C) Forfeitures.

(ii) *Limitation years beginning after December 31, 1986.* For limitation years which begin after December 31, 1986, or such later date provided in paragraph (b)(1)(iii) of this section, the term "annual addition" means, for purposes of this section, the sum, credited to a participant's account for any limitation year, of—

(A) Employer contributions,

(B) Employee contributions, and

(C) Forfeitures.

Contributions do not fail to be annual additions merely because such contributions are excess deferrals, excess contributions, or excess aggregate contributions or merely because such excess deferrals and excess contributions are corrected through distribution or recharacterization.

(iii) In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, the date specified in this paragraph is the earlier of—

(A) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986), or

(B) January 1, 1989, in the case of paragraph (b)(1)(i) of this section, and December 31, 1988 in the case of paragraph (b)(1)(ii) of this section.

* * * * *

Par. 17. Section 1.416–1 is amended by adding new questions and answers M–18, M–19, and M–20, to read as follows:

§ 1.416–1 Questions and answers on top-heavy plans.

* * * * *

M–18 Q. May qualified nonelective contributions described in section 401(m)(4)(C) be treated as employer contributions for purposes of the minimum contribution or benefit requirement of section 416?

A. Yes. This is the case even if the qualified nonelective contributions are treated as elective contributions under § 1.401(k)–1(b)(2) and (3) or as matching contributions under § 1.401(m)–1(b)(1) and (2).

M–19 Q. May matching contributions described in section 401(m)(4)(A) be treated as employer contributions for purposes of the minimum contribution or benefit requirement of section 416?

A. Matching contributions allocated to key employees are treated as employer contributions for purposes of determining the minimum contribution or benefit under section 416. However, if a plan utilizes contributions allocated to employees other than key employees on the basis of employee contributions or elective contributions to satisfy the minimum contribution requirement, such contributions are not treated as matching contributions for purposes of applying the requirements of sections 401(k) and 401(m) for plan years which begin after December 31, 1988. Thus, such contributions must meet the nondiscrimination requirements of section 401(a)(4) without regard to section 401(m). See sesction 401(k)(4)(C) and the regulations thereunder.

M–20 Q. May elective contributions be treated as an employer contribution for purposes of satisfying the minimum contribution or benefit requirement of section 416(c)(2)?

A. Elective contributions on behalf of key employees are taken into account in determining the minimum required contribution under section 416(c)(2). However, elective contributions on behalf of employees other than key employees may not be treated as employer contributions for purposes of the minimum contribution or benefit requirement of section 416. See section 401(k)(4)(C) and the regulations thereunder. This Question and Answer is effective for plan years which begin after December 31, 1988.

PART 54—[AMENDED]

Par. 18. The authority citation of Part 54 continues to read:

Authority: 26 U.S.C. 7805.

Par. 19. There is added immediately after § 54.4978–1T new § 54.4979–0 to read as follows:

§ 54.4979–0 Excise tax on certain excess contributions and excess aggregate contributions, Table of Contents

This section contains the caption in § 54.4979–1.

§ 54.4979–1 Excise tax on certain excess contributions and excess aggregate contributions.

(a) In general.

(1) General rule.

(2) Liability for tax.

(3) Due date and form for payment of tax.

(4) Special rule for simplified employee pensions.

(b) Definitions

(1) Excess aggregate contributions.

(2) Excess contributions.

(3) Plan.

(c) No tax when excess distributed within 2½ months of close of year or additional employer contributions made.

(1) General rule.

(2) Tax treatment of distributions.

(3) Income.

(d) Effective date.

Par. 20. There is added immediately after § 54.4979–1 to read as follows:

§ 54.4979–1 Excise tax on certain excess contributions and excess aggregate contributions.

(a) *In general*—(1) *General rule.* In the case of any plan (as defined in paragraph (b)(3) of this section), there is hereby imposed a tax for the employer's taxable year equal to 10 percent of the sum of—

(i) Any excess contributions under a plan for the plan year ending in such taxable year, and

(ii) Any excess aggregate contributions under the plan for the plan year ending in such taxable year.

(2) *Liability for tax.* The tax imposed by paragraph (a)(1) of this section shall be paid by the employer.

(3) *Due date and form for payment of tax.* (i) The tax described in paragraph (a)(1) of this section is due at the same time as the employer's income tax for the taxable year with or within which the plan year ends for which the tax was incurred.

(ii) An employer which owes the tax described in paragraph (a)(1) of this section must file the form prescribed by the Commissioner for the payment of such tax.

(4) *Special rule for simplified employee pensions.* (i) An employer which maintains a simplified employee pension (SEP) that accepts elective contributions is exempted from the tax of section 4979 and paragraph (a)(1) of this section if it notifies its employees of the fact and tax consequences of excess contributions within two and one-half months following the plan year for which excess contributions are made. The notification must meet the standards of subdivision (ii) of this paragraph (a)(4).

(ii) The employer's notification to each affected employee of the excess SEP contributions must specifically state, in a manner calculated to be understood by the average plan participant: the amount of the excess contributions attributable to that employee's elective deferrals; the calendar year for which the excess contributions were made; that the excess contributions are includible in the affected employee's gross income for the specified calendar year; and that failure to withdraw the excess contributions and income attributable thereto by the due date (plus extensions) for filing the affected employee's tax return for the preceding calendar year may result in significant penalties.

(iii) If an employer does not notify its employees by the last day of the twelve-month period following the year of excess SEP contributions, the SEP will no longer be considered to meet the requirements of section 408(k)(6) of the Code.

(b) *Definitions.* The following is a list of terms and definitions to be used for purposes of section 4979 and this section.

(1) *Excess aggregate contributions.* The term "excess aggregate contributions" has the meaning set forth in § 1.401(m)–1(b)(6).

(2) *Excess contributions.* The term "excess contributions" has the meaning given such term by sections 401(k)(8)(B), 403(b), 408(k)(6)(C)(ii) and 501(c)(18). See, e.g., § 1.401(k)–1(g)(13).

(3) *Plan.* The term "plan" means—

(i) A plan described in section 401(a) which includes a trust exempt from tax under section 501(a),

(ii) Any annuity plan described in section 403(a),

(iii) Any annuity contract described in section 403(b),

(iv) A simplified employee pension of an employer which satisfies the requirements of section 408(k), and

(v) A plan described in section 501(c)(18).

Such term includes any plan which, at any time, has been determined by the Secretary to be such a plan.

(c) *No tax when excess distributed within 2½ months of close of year or additional employer contributions made*—(1) *General rule.* No tax shall be imposed under this section on any excess contribution or excess aggregate contribution, as the case may be, to the extent such contribution (together with any income allocable thereto) is corrected before the close of the first 2½ months of the following plan year. Qualified nonelective contributions and qualified matching contributions properly taken into account under § 1.401(k)–1(b)(3) or qualified nonelective contributions or elective contributions properly taken into account under § 1.401(m)–1(b)(3) for a paln year may permit a plan to avoid excess contributions or excess aggregate contributions, respectively, even if such contributions are made after the close of the 2½ month period. See, e.g., § 1.401(k)–1(g)(13).

(2) *Tax treatment of distributions.* See § 1.401(k)–1(f)(3)(ii) and (4)(iv) for rules for determining the tax consequences to a participant of a distribution or recharacterization of excess contributions and income allocable thereto. See § 1.401(m)–1(e)(3)(v) for rules for determining the tax consequences to a participant of a distribution of excess aggregate contributions and income allocable thereto.

(3) *Income.* See § 1.401(k)–2(f)(2)(iv) for rules for determining income allocable to excess contributions. See § 1.401(m)–1(f)(3) for rules for determining income allocable to excess aggregate contributions.

(d) *Effective date.* (1) Except as provided in paragraphs (d)(2), (d)(3), (d)(4), and (d)(5), this section is effective for plan years which begin after December 31, 1986.

(2) In the case of a plan maintained pursuant to one or more collective bargaining agreements between an employee representative and one or more employers ratified before March 1, 1986, this section shall not apply to years beginning before the earlier of—

(i) January 1, 1989, or

(ii) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986).

(3) In the case of an annuity contract under section 403(b) of the Internal Revenue Code of 1986, this section shall apply to plan years beginning after December 31, 1988.

(4) Notwithstanding paragraphs (d)(3) and (d)(5) of this section, in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and state or local governments (ratified before March 1, 1986) or, an annuity contract (described in paragraph (d)(3)) under section 403(b) (maintained pursuant to a collective bargaining agreement described in subparagraph (2)) the amendments made by this section shall not apply to years beginning before the earlier of—

(i) The later of—

(A) January 1, 1989, or

(B) The date determined under subdivision (2)(ii) of this paragraph, or

(ii) January 1, 1991.

(5) In the case of a plan maintained by a state or local government, the provisions of this section shall apply for plan years which begin after December 31, 1988.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 88–17721 Filed 8–5–88; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

Ohio Permanent Regulatory Program; Coal Exploration; Reopening of Public Comment Period

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

ACTION: Proposed rule; reopening of public comment period.

SUMMARY: OSMRE is reopening the public comment period on the adequacy of proposed amendments to the Ohio permanent regulatory program (hereinafter referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendments concern the filing of notices of intent to conduct coal exploration operations and the issuance of coal exploration permits under the Ohio program.

This notice sets forth the times and locations that the Ohio program, the proposed amendments to that program, and supporting information in the Administration Record will be available for public inspection. This notice also sets forth the comment period during which interested persons may submit written comments on the proposed amendments.

DATES: Written comments must be received on or before 4:00 p.m. on August 23, 1988.

ADDRESSES: Written comments should be mailed or hand-delivered to Ms. Nina Rose Hatfield, Director, Columbus Field Office, at the address listed below. Copies of the Ohio program, the proposed amendments, supporting information in the Administrative Record, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive, free of charge, one copy of the proposed amendments by contacting OSMRE's Columbus Field Office.

Office of Surface Mining Reclamation and Enforcement, Columbus Field Office, 2242 South Hamilton Road, Room 202, Columbus, Ohio 43232, Telephone: (614) 866-0578.

Office of Surface Mining Reclamation and Enforcement, 1100 "L" Street, NW., Room 5131, Washington DC 20240, Telephone: (202) 343-5492.

Ohio Department of Natural Resources, Division of Reclamation, Fountain Square, Building B-3, Columbus, Ohio 43224, Telephone: (614) 265-6675.

FOR FURTHER INFORMATION CONTACT: Ms. Nina Rose Hatfield, Director, Columbus Field Office, (614) 866-0578.

SUPPLEMENTARY INFORMATION:

I. Background

On August 16, 1982, the Secretary of the Interior conditionally approved the Ohio program. Information on the general background of the Ohio program submission, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Ohio program, can be found in the August 10, 1982 **Federal Register** (47 FR 34688). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 935.11, 935.12, 935.15, and 935.16.

II. Discussion of the Proposed Amendments

By letter dated March 8, 1988 (Administrative Record No. OH-1019), the Ohio Department of Natural Resources, Division of Reclamation (Ohio) submitted proposed amendments to the Ohio program at Ohio Administrative Code (OAC) Section 1501:13-4-02. The proposed changes were initiated by Ohio and concerned advanced notice by persons conducting exploratory activities, drilling activities which do not constitute a substantial disturbance of the ground surface, and the expiration of notices of intent to explore.

On April 11, 1988, OSMRE published a notice in the **Federal Register** (53 FR 11887) announcing receipt of the proposed amendments and inviting public comment on their adequacy. The public comment period ended on May 11, 1988. The public hearing scheduled for May 6, 1988 was not held because no one requested an opportunity to testify.

On July 1, 1988 (Administrative Record No. OH-1066), Ohio submitted further revisions to OAC Sections 1501:13-4-02(B)(1)(b) and (B)(1)(c) and to Administrative Record supporting the proposed amendments. These revisions are summarized below:

(1) OAC Section 1501:13-4-02(B)(1)(b) would be revised to allow the listing of the name, address, and telephone number of the representative to be present at the exploration site or of the person responsible for conducting the exploration.

(2) OAC Section 1501:13-4-04(B)(c) would be revised to substitute the word "area" for "site" in reference to the location of the exploration activities. This substitution would be for consistency in the terminology used to described exploration areas.

(3) The Administrative Record supporting the proposed amendments would be revised to reduce the rate of inspection by Ohio of proposed notices of intent to conduct exploratory activities. The inspection rate would be reduced from one inspection per two notices to one inspection per ten notices.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSMRE is now seeking comment on whether the amendments and supporting information proposed by Ohio satisfy the applicable program approval criteria of 30 CFR 732.15. If the amendments are deemed adequate, they will become part of the Ohio program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and including explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Columbus Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

List of Subjects in 30 CFR Part 935

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: July 28, 1988.

Carl C. Close,

Assistant Director, Eastern Field Operations.

[FR Doc. 88-17826 Filed 8-5-88; 8:45 am]

BILLING CODE 4310-05-M

National Park Service

36 CFR Part 13

Katmai National Park and Preserve, Alaska; Fishing Regulations

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to modify the fishing regulations for the Brooks River in Katmai National Park and Preserve. These proposed regulations would allow a bag limit of one fish per day, regardless of species. In addition, a minor change would be made to existing regulations that reference dates for an open bait season on that portion of the Naknek River within the park; the purpose being to remain consistent with changing State regulations. These

proposed regulations are necessary to continue safely accommodating use of the popular Brooks River fishery by anglers, while maintaining a healthy fishery for bear populations which feed there. Current bag limits of 5 salmon and 2 trout—the two species for which the river is popular—encourage many anglers to keep fish in their immediate possession or in the nearby area while seeking to fill these catch limits. By providing less opportunity for anglers to retain large bag limits of fish in the area, there will be less chance of bear/human conflicts caused by bears associating humans with food. The effect of these proposed regulations will be to reduce the potential for conflicts between bears and humans in the area, while protecting the natural fish resources available to bears along the Brooks River. This is a primary goal of park management, as stated in the park's General Management Plan (GMP).

DATES: Written comments will be accepted through October 7, 1988.

ADDRESS: Comments should be addressed to: Superintendent, Katmai National Park and Preserve, P.O. Box 7, King Salmon, AK 99613.

FOR FURTHER INFORMATION CONTACT: Stephen Hurd, Chief Ranger, Katmai National Park and Preserve, P.O. Box 7, King Salmon, AK 99613, Telephone (907) 246–3305.

SUPPLEMENTARY INFORMATION

Background

This proposed regulation change addresses a specific management problem involving bear and human interactions along the popular Brooks River. It is not proposed as a result of any known depletion in fish populations or fisheries habitat impairment. It also corrects a conflict between State and Federal laws and regulations regarding bait fishing along those portions of the Naknek River within the park.

In the summer of 1987 the National Park Service submitted a proposal to the State Board of Fisheries for a change in the State fishing regulations. Current State regulations affecting the Brooks River fishery allow for a bag and possession limit of 5 salmon and 2 rainbow trout during the summer fishing season. The National Park Service proposal had the same objectives as this proposed rulemaking, but differed by being applicable to all rivers within the park and preserve, and by changing bag limits for salmon only to two instead of the current proposal of one. Changes were not proposed to bag limits for any other species of fish. It also did not address changes to bait fishing regulations for the Naknek River. The Board failed to approve this proposal, based in part on a determination from the Alaska Department of Fish and Game that the fishery was healthy and that the proposed action addressed other management considerations not in the purview of the Board. The Board also expressed concern about the large area covered by the proposal and some confusion about the objectives. It was recognized by the Department of Fish and Game at the Board meeting that the National Park Service had the authority to promulgate regulations to address the problem:

> Mr. Chairman, this is a proposal put in by the park service that encompasses a fairly large chunk of real estate * * * most of which has fairly limited angling pressure. Salmon stocks, particularly in the Naknek drainage, appear to be healthy and staff (Department of Fish and Game) see no biological reason to further limit the sport bag limits there. They're presently five a day, five in possession in much of that area. The park service has the authority to do this if they need to * * * (transcript from taped proceedings of State Fish Board meeting, December 17, 1987; Anchorage, Alaska).

Consequently, the bag limit provision of this proposed rulemaking is a modified version of the earlier submission to the State and is specific to the Brooks River.

The Brooks River and its surrounding aquatic resources are major habitats for a diversity of fish and wildlife species. Rainbow trout and salmon are the most abundant fish species in Brooks River. Arctic grayling and Arctic char, as well as other species, are also present. This source of high-protein food is of critical importance to bear populations during their short feeding season before hibernation.

Because of this diverse ecosystem, the Brooks River is well-known and popular among both park anglers and visitors interested in being able to view the Alaska brown bear in its natural habitat. Park managers in Katmai have always been conscious of and concerned about the management of this important area. The Alaska National Interest Lands Conservation Act (ANILCA—Pub. L. 96–487), which added further acreage to the area, mandated that the new park is "to be managed for the following purposes, among others: To protect habitats for, and populations of, fish and wildlife including * * * high concentrations of brown/grizzly bears * * * and * * * to maintain unimpaired the water habitat for significant salmon populations * * *." (section 202(2) of ANILCA; 16 U.S.C. 410hh–1(2)).

Congress also determined that Katmai should be managed to protect "recreational features". Sport fishing is permitted within national park areas in Alaska (section 1314 of ANILCA; 16 U.S.C. 3202; 36 CFR 2.3, 13.21). Providing for the use of the Brooks River by recreational anglers and natural predator activities of the area's brown bears pose both a resource management problem affecting the bears and a safety concern for humans.

The General Management Plan (GMP) for the park, prepared pursuant to section 1301 of ANILCA (16 U.S.C. 3191), addresses specific management responsibilities and objectives regarding Brooks River. The plan notes that:

> Visitors have traditionally come to the Brooks Camp developed area to fish, visit the Valley of Ten Thousand Smokes, and watch Alaska brown bears in their natural environment. This development and the associated activities intrude on prime bear habitat. The result has been potentially dangerous conflicts between bears and humans in this area. The issue is how to reduce this hazardous situation and potential impacts on bears while still providing for visitor activities in this portion of the park.

The objectives of the bear management plan for Katmai, as stated in the GMP,

> * * * are to retain a naturally regulated population of brown bears in the park and to preclude the food-reinforced attraction of bears to people and thereby minimize confrontations between bears and people. The plan calls for * * * minimizing human impacts on bear behavior and patterns of habitat use * * *."

With the Brooks River being such an important habitat for bear populations and the nearby Brooks Camp being the major overnight visitor use area in the park, these objectives are of specific and immediate importance to this area.

Sport fishing along the Brooks River, as well as elsewhere within the park, is regulated by appropriate National Park Service regulations in 36 CFR 2.3, 13.21, 13.66 and by applicable State of Alaska fishing regulations. Current State regulations affecting the Brooks River fishery allow for a bag and possession limit of 5 salmon and 2 rainbow trout during the summer fishing season. Park policy requires that any fish kept is to be immediately taken to a nearby fish cleaning house away from the river to be cleaned and stored. This policy reduces the chance of bears obtaining fish caught by people, thereby learning to associate the easy acquisition of fish with human fishermen and disrupting the bears' natural feeding cycle.

However, an increasing number of anglers, some who travel into the Brooks River area specifically to fish for the maximum legal limit, often do not take their fish directly to the cleaning house,

and instead cache fish they have caught along the shore—a practice that cannot be prevented by any but the most aggressive and costly of law enforcement measures. Bears are then attracted to this food source, encouraging dangerous bear/human interactions.

This proposed rulemaking would amend section 36 CFR 13.66, which is specific to Katmai National Park and Preserve, by establishing a total daily bag limit of one fish, regardless of species, on the Brooks River. A minor amendment to 36 CFR 13.66(b)(1) would also be made to remove the dates during which bait fishing is allowed along the Naknek River to conform with changing State regulations.

Effects of Proposed Rulemaking

These changes will have the effect of eliminating the opportunity for anglers to store their catch along the river banks, which tempts bears to feed on the fish, and will help to maintain a healthy fishery for the bears. The immediate effect will be to cause those anglers who fish the Brooks River mainly to acquire food to procure their fish elsewhere. Numerous other areas rich in fish resources are available in the nearby vicinity for these anglers. Sport fishing for enjoyment will not be restricted, and one fish, regardless of species, can still be retained if desired. Human safety and the protection of natural bear populations, both in the short and long term, should be greatly improved. Long term effects will be a continued healthy fishery resource, a lessening of the chances for bear/human confrontations, and an improvement in the natural feeding habitat for bears. By removing the dates from the National Park Service regulation for bait fishing the Naknek River bait fishing season will conform with any changes in State law for bait fishing.

Options Considered

Other management options based on stated management objectives in the GMP were also considered in development of this proposed rulemaking. These options include closing all or portions of the area to human use, restricting the Brooks River to catch-and-release angling only, or eliminating angling along the river during certain time periods or seasons. The current proposed rulemaking is in accordance with stated overall management objectives and is less restrictive than other options.

Public Participation

The policy of the National Park Service is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule to the address noted at the beginning of this rulemaking.

Drafting Information

The primary author of these regulations is Tony Sisto, Park Ranger, Alaska Regional Office, National Park Service, Anchorage.

Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance With Other Laws

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 (February 19, 1981), 46 FR 13193, and 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 economic effects of this rulemaking are local in nature and negligible in scope. No person will be prohibited from fishing on the Brooks River under applicable regulations.

The National Park Service has determined that this rulemaking will not have a significant effect on the quality of the human environment, health, and safety because it is not expected to:

(a) Change public angling habits to the extent of adversely affecting the aquatic or other natural ecosystem;

(b) Introduce noncompatible uses which might compromise the nature and characteristics of the area, or cause physical damage to it;

(c) Conflict with adjacent ownerships or land uses; or

(d) Cause a nuisance to adjacent owners or occupants.

Based on this determination, this proposed rulemaking is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental regulations in 516 DM 6 (49 FR 21438). As such, neither an Environmental Assessment nor an Environmental Impact Statement has been prepared.

List of Subjects in 36 CFR Part 13

National parks, Reporting and recordkeeping requirements.

PART 13—[AMENDED]

In consideration of the foregoing, it is proposed to amend 36 CFR Chapter 1 as follows:

Subpart A—National Park System Units in Alaska

1. The authority citation for Part 13 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 462(k), 3101 *et seq.*; § 13.65(b) also issued under 16 U.S.C. 1361, 1531.

2. By revising § 13.66 to read as follows:

§ 13.66 Katmai National Park and Preserve.

(a) [Reserved].

(b) Fishing is allowed in accordance with § 13.21 of this chapter, but only with artificial lures and with the following additional exceptions:

(1) Bait, as defined by State law, may be used only on the Naknek River during times and dates established by the Alaska Department of Fish and Game, and only from markers located just above Trefon's Cabin downstream to the park boundary.

(2) Flyfishing only is allowed on the Brooks River between Brooks Lake and the posted signs near Brooks Camp.

(3) On the Brooks River the bag limit is one (1) fish per day. The one fish retained may be of any species.

William P. Horn,

Assistant Secretary for Fish Wildlife and Parks.

Date: June 9, 1988.

[FR Doc. 88-17799 Filed 8-5-88; 8:45 am]

BILLING CODE 4310-70-M

POSTAL SERVICE

39 CFR PART 111

Second-Class Publication; Requirements for Reentry

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: This proposal would amend postal regulations concerning applications to reenter a publication at second-class mailing rates on a different frequency of issuance, at a new office of publication, or under a new title. Experience has shown that an application for reentry on one or more of these grounds sometimes indicates a modification or change in the nature of a publication of such a character as to cause later issues to be ineligible for mailing as second-class mail. The proposed amendments would provide that the Postal Service would reevaluate the publication's eligibility for second-class postage rates when considering such a reentry application. This reevaluation would help to prevent use

of the reentry process to mail publications, or issues of publications, at rates of postage for which they are not eligible.

DATE: Comments must be received on or before September 7, 1988.

ADDRESS: Director, Office of Classification and Rates Administration, U.S. Postal Service, 475 L'Enfant Plaza, West, SW., Washington, DC 20260–5360. Copies of all written comments will be available for inspection and photocopying between 9 a.m. and 4 p.m. Monday through Friday in Room 8430, at the above address.

FOR FURTHER INFORMATION CONTACT: Leo F. Raymond, (202) 268–5199.

SUPPLEMENTARY INFORMATION: Based upon recent experience, the reentry of a publication with a new frequency, a new title, or a different office of publication, may signal a substantial modification to the publication or change in the nature of the publication sufficient to make some or all "issues" produced thereafter ineligible for second-class mail privileges. The proposed rule would confirm that the Postal Service will review publications which request a modification to their current title, office of original entry, or frequency of issuance to ensure that such amendments will not result in either the publication or some of its "issues" being ineligible for second-class mail privileges. If a publication, as modified by a requested reentry, is found to maintain compliance with postal requirements, the reentry request will be granted. If it is determined, however, that the publication as reentered will not maintain compliance with second-class mailing requirements, the reentry will be denied. If a reentry is denied, the publisher would have the option of abandoning the reentry request, or paying for subsequent mailings at another rate of postage for which the publication might qualify while pursing an appeal of the denial.

For example, the Postal Service would expect to deny a reentry application if one of the following situations existed:

1. A reentry is requested to change a publication's frequency from "Monday-Friday" to "Monday-Saturday." Verification of the publisher's records indicates that the Saturday issue will not be in compliance with second-class requirements.

2. A reentry is requested to change publication's office of original entry. Verification of the publisher's records reveals that the circulation of the publication would change to being primarily to nonsubscribers.

3. A reentry is requested to change publication's title. Verification indicates that the publication, as modified, would be a section or imcomplete copy of a separate second-class publication.

Specifically, the Postal Service proposes to amend DMM section 444.4 to set forth the qualification requirements for the granting of an application for reentry, the procedures for consideration of such an application, and the mailing status of the publication while the initial application is pending. The proposal would allow the publisher to continue to mail at second-class rates while an application for reentry is pending, until the initial decision is made by the Rates and Classification Center. The expectation is that the vast majority of such applications will be granted.

The Postal Service also proposes to revise section 444.5 to set forth the rules that govern an appeal of an initial denial of a reentry application. This section would provide that, where evidence indicates that the reentered publication would not comply with second-class requirements, a publisher who appeals a denial would have to pay postage at the applicable third- or forth-class rate of postage pending a decision on the appeal, because an initial decision will have been made that the publication, or some of its issues, as revised, would not qualify for second-class mail privileges. If the publisher prevails on appeal, a refund will be made of the difference between the postage paid at the third- or forth-class rates and the postage which would have been due at the second-class rates, provided that records demonstrating the amount of the refund due have been submitted.

An amendment would also be made to section 447 that would require verifications in support of applications for reentry to be performed by postal personnel.

Although exempt from the notice and comment provisions of the Administrative Procedure Act (5 U.S.C. 553(b), (c)), regarding proposed rulemaking by 39 U.S.C. 410 (a), the Postal Service invites public comments on the following proposed amendments to the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations. See 39 CFR Part 111.

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation for Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 5001.

PART 444—APPLICATION FOR REENTRY

2. Revise 444.4 to read as follows:

444.4 Application review process

444.41 Responsibility. The General Manager, Rates and Classification Center (RCC) that serves the known office of publication issues the initial decision on all reentry applications. Before taking action on an application, the General Manager may ask the publisher for additional information or evidence to complete or clarify the application. The publisher's failure to furnish such information is sufficient grounds for denying the application.

444.42 Mailing While Application is Pending. Copies of an authorized second-class publication will be accepted for mailing at the second-class rates while an application for reentry is pending an initial decision by the General Manager, RCC.

444.43 Review of Continued Qualification. In reviewing a reentry application, the Postal Service will examine the qualification of the publication, as reentered, for second-class entry. Publishers must be able to substantiate, to the satisfaction of the Postal Service, that the publication, as reentered under the application, will continue to comply with all applicable second-class requirements.

444.44 Evidence of Qualification and Supporting Documentation. As part of the evidence of continued qualification that must be made available in support of the application for reentry, the publisher may be required to produce circulation records (such as those described in 447.21 and 447.3) to permit verification by postal personnel that all issues or editions of the publication, as reentered, will comply with all applicable second-class requirements (see also 447.54). Other documentation, including circulation records for other issues or editions, must be made available upon request. Refusal or failure to produce such evidence will be sufficient grounds to deny the reentry request.

444.45 Granting an Application. If the General Manager, RCC, grants the application, he will notify the publisher and the postmaster at the original entry office, who will then notify any additional entry offices.

444.46 Denying an Application. If the verification required by 444.43 and 447.54 reveals that the publication (as modified by the requested reentry) will not comply with applicable second-class requirements, the General Manager, RCC, will deny the reentry application,

and notify the publisher in writing, specifying the reasons for the denial. Within 15 days of receipt of such notice, the publisher may elect to: (1) Return to the publication status that existed before the application for reentry was submitted; or (2) pursue an appeal under 444.5. If no appeal is filed under 444.5, the denial will become effective 15 days from the publisher's receipt of the General Manager's decision.

444.5 Appeal of a denial of reentry

444.51 Procedures. All appeals of denials of reentry applications must be filed with the Director, Office of Classification and Rates Administration, USPS Headquarters, Washington, DC 20260–5360. The Director may ask the publisher for additional information or evidence to supplement or clarify the appeal. The publisher's failure to furnish such information is sufficient grounds for denying the appeal. Upon completing a review of the appeal and the General Manager's decision, the Director will issue a written decision which will be sent to the publisher, the RCC and the office of publication. The Director will issue the final agency decision on appeals concerning changes of name, frequency, or known office of publication under 444.1. The Director's decision concerning a change in qualification category under 444.2 or 444.3 may be appealed in accordance with 441.23.

444.52 Mailings deposited while appeal is pending

444.521 Applicable Rates During Appeal Period. If a publication is denied reentry under 444.1 to change its title, frequency of issuance, or known office of publication, copies of any issues of the publication found to be unqualified for second-class mail privileges will be accepted in a pending status at the applicable third- or fourth-class rates. "Pending status," for purposes of this section, begins on the date the appeal is filed and continues until the conclusion of the appeal process. If a publication is denied reentry under 444.2 or 444.3 to change its qualification category, copies of the publication will be accepted at the currently applicable second-class rate during the consideration of the appeal.

444.522 Mailing Statements. The publisher must submit Form 3541, *Statement of Mailing—2nd Class Pubs Except Requester Publications* [or, as appropriate, Form 3541A, *Statement of Mailing—Second-Class/Requester Publications)*, and Form 3602, Statement of Mailing with Permit Imprints, with each mailing of the publication submitted in a pending status while the appeal of the denial of reentry is pending. The publisher's failure to submit these forms will be sufficient grounds to deny a refund of postage under 444.523.

444.523 Refunds of Postage. If the reentry application is approved on appeal, the publisher will be refunded the difference between the applicable second-class postage and the third- or fourth-class postage paid during the period that the appeal was pending, provided records to substantiate the amount of the refund have been submitted by the publisher. If the reentry application is denied on appeal, no refund will be provided.

* * * * *

PART 447—MAINTENANCE AND VERIFICATION OF PUBLISHER RECORDS

447.5 Verification procedures

* * * * *

§ 447.51 [Amended]

3. Amend 447.51 by adding "Except as provided by 447.54," to the beginning of the section.

4. Add a new 447.54 to read as follows:

447.54 Verifications performed in support of an application for reentry must be performed by postal personnel. For such verifications, reports by independent audit bureaus may not be substituted as acceptable alternatives to postal verification.

* * * * *

An appropriate amendment to 39 CFR 111.3 to reflect these changes will be published if the proposal is adopted.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 88–17796 Filed 8–5–88; 8:45 am]

BILLING CODE 7710–12–M

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39 CFR Part 232

Inspection of Items Entering or Leaving Postal Property; Unauthorized Possession of Controlled Substances; Nondiscrimination

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: This proposal would amend regulations concerning inspection of items brought onto or taken off of postal property. It would add possession of a controlled substance to the list of prohibited actions on that propoerty.

This would bring postal regulations on this subject into full harmony with existing state and federal laws prohibiting the unauthorized possession of controlled substances. Finally, it would amend postal regulations against discrimination by adding prohibitions against discrimination based on age (at least 40 years of age), reprisal, or physical or mental handicap. This would make this provision reflect more recent statutes.

DATE: Comments must be received on or before September 7, 1988.

ADDRESS: Written coments should be addressed to the Manager, Legal Liaison Branch, Room 3847, Inspection Service, U.S. Postal Service, 475 L'Enfant Plaza, West, SW., Washington, DC 20260–2181. Copies of all written comments will be available for inspection and pohotocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, in Room 3847 at the above address.

FOR FURTHER INFORMATION CONTACT: H.J. Bauman, (202) 268–4415.

SUPPLEMENTARY INFORMATION: Section 232.1(b) of Title 39, Code of Federal Regulations, now deals generally with admission of individuals to Postal Service property when it is closed to the public, and does not address the inspection requirements. The Postal Service currently inspects items entering or leaving postal property pursuant to Item C.3. of Poster 7, entitled "Rules and Regulations Governing Conduct on Postal Property." This proposal would amend and incorporate Item C.3 into § 232.1(b).

Paragraph (g) of § 232.1 prohibits the sale or use of controlled substances on postal property, except as medically authorized. It is proposed to include among these prohibitions the unauthorized possession of controlled substances. This would bring § 232.1)g) into conformity with existing federal and state statutes prohibiting such possession of controlled substances.

Paragraph (m) of § 232.1 presently forbids discrimination against persons based on race, creed, color, sex or national origin. To make this provision reflect more recent statutes, it is proposed to amend these regulations by adding prohibitions against discrimination based on age (at least 40 years of age), reprisal, or physical or mental handicap.

Accordingly, 39 CFR Part 232 is amended as follows:

List of Subjects in 39 CFR Part 232

Law enforcement, Postal Service.

PART 232—[AMENDED]

1. The authority citation for Part 232 is revised to read as set forth below:

Authority: 39 U.S.C. 401, 403(b)(3), 404(a)(7); 40 U.S.C. 318, 318a, 318b, 318c; sec. 609, Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. 100-202; 18 U.S.C. 13, 3061; 21 U.S.C. 802, 844.

2. In § 232.1, paragraphs (b), (g) and (m) are revised to read as follows:

§ 232.1 Conduct on postal propoerty.

* * * * *

(b) *Inspection, Recording presence.* (1) Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. A full search of a person may accompany an arrest.

(2) Except as otherwise ordered, properties must be closed to the public after normal working hours. Properties also may be closed to the public in emergency situations and at such other times as may be necessary for the orderly conduct of business. Admission to properties during periods when such properties are closed to the public may be limited to authorized individuals who may be required to sign the register and display identification documents when requested by security force personnel or other authorized individuals.

* * * * *

(g) *Alcoholic beverages and drugs.* A person under the influence of an alcoholic beverage or any drug which has been defined as a "controlled substance" may not enter postal property or operate a motor vehicle on postal property. The possession, sale, or use of any "controlled substance" (except one that is medically approved) or the sale or use of any alcoholic beverage on postal premises is prohibited. The term "controlled substance" is defined in section 802 of title 21, U.S.C.

* * * * *

(m) *Nondiscrimination.* There must be no discrimination by segregation or otherwise against any person or persons because of race, color, religion, national origin, sex, age (at least 40 years of age), reprisal, or physical or mental handicap, in furnishing, or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided thereby on postal property.

* * * * *

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 88-17797 Filed 8-5-88; 8:45 am]

BILLING CODE 7710-12-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 86-470; RM-5440]

Radio Broadcasting Services; Lake Lorraine, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; denial of petition.

SUMMARY: This document dismisses the petition of Michael J. Pollack to allot Channel 227A to Lake Lorraine, Florida, as a first FM service (published at 52 FR 2565; January 23, 1987). Petitioner did not respond to the *Further Notice* in this proceeding soliciting additional information regarding the status of Lake Lorraine as a community. With this action, this proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 86-470, adopted June 29, 1988, and released July 28, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

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

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-17676 Filed 8-5-88; 8:45 am]

BILLING CODE 6712-01-M

Notices

Federal Register
Vol. 53, No. 152
Monday, August 8, 1988

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

Forest Service

Intent To Prepare an Environmental Impact Statement (EIS) on Mining Activities Proposed by Steven L. Reilly, Jefferson City, MT, In the Wilson Creek Drainage of the Elkhorn Mountains, Helena National Forest, MT

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Department of Agriculture, Forest Service will prepare an Environmental Impact Statement to analyze and disclose the environmental impacts of proposed mineral exploration by Steven L. Reilly within the Elkhorn Mountains on the Helena Ranger District, Helena National Forest, Jefferson County, Montana. The agency invites written comments and suggestions on the proposed activity, potential impacts and management alternatives or actions which should be considered. In addition, the agency gives notice of the full environmental analysis and decision making process that will occur on the proposal so that interested and affected parties are aware how they may participate and contribute to the final decision.

DATE: Comments concerning the scope of the analysis must be received by September 30, 1988.

ADDRESS: Submit written comments and suggestions on the scope of the analysis to Ernest R. Nunn, Forest Supervisor, Helena National Forest, 301 S. Park, Room 328, Helena, MT 59626.

FOR FURTHER INFORMATION CONTACT: Direct comments on the proposed action and the environmental impact statement should be made to John Padden, Minerals Staff Officer, Helena National Forest, 301 S. Park, Drawer 10014, Room 328, Helena, MT 59626.

SUPPLEMENTARY INFORMATION: The Forest Service will prepare an EIS in response to a Plan of Operations submitted by Steven L. Reilly of Jefferson City, Montana. Mr. Reilly is proposing mineral exploration in the Elkhorn Mountains, Helena Ranger District, Helena National Forest. The Chrysos and Gold Bar placer claims are located in the vicinity of Wilson Creek, Sections 7, 8, 16, 17, 18, Township 7 North, Range 2 West, P.M.M., Jefferson County, Montana. Exploration activities will consist of construction of a 200 x 300 x 4 feet storage/settling pond, construction of a small dam on Wilson Creek, excavation of 42 test holes approximately 5 x 5 feet and extending to bedrock, and removal of up to 36,500 tons of placer materials. Exploration activities are projected to occur in 1989.

Public participation will be important during the analysis. The first point of public participation is during the scoping process (40 CFR 1501.7). The Forest Service will be seeking information, comments, and assistance from Federal, State, and local agencies and other individuals or organizations who may be interested in or affected by the proposed action. This input will be used in preparation of the draft environmental impact statement (DEIS). The scoping process includes:

1. Identifying potential issues.
2. Identifying issues to be analyzed in depth.
3. Eliminating insignificant issues or those which have been covered by a relevant previous environmental analysis.
4. Identifying additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e., direct, indirect, and cumulative effects, and connected actions).
6. Determining potential cooperating agencies and task assignments.

Scoping has been initiated through a site inspection on June 22, 1988 with Forest Service resource specialists, Montana Department of State Lands specialists, and Mr. Reilly. Several discussions have taken place with interested individuals, groups, and the news media. Additional public involvement will include release of the draft alternatives for public review and comment in January, 1989.

The draft environmental impact statement (DEIS) is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in January, 1989. At that time, EPA will publish a notice of availability of the DEIS in the **Federal Register**.

The comment period on the draft environmental impact statement will be 45 days from the date the EPA's notice of availability appears in the **Federal Register.** It is very important that those interested in management of mineral activity in Elkhorn Mountain area participate at that time. To be most helpful, comments on the DEIS should be as specific as possible and may address the adequacy of the statement or the merits of the alternatives discussed (see the Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3). In addition, Federal court decisions have established that reviewers of draft EIS's must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewers' position and contentions, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978) and that environmental objections that could have been raised at the draft stage may be waived if not raised until after completion of the final environmental impact statement. *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). The reason for this is to ensure that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

After the comment period ends on the DEIS, the comments will be analyzed and considered by the Forest Service in preparing the final environmental impact statement. The final EIS is scheduled to be completed by March, 1989. In the final EIS the Forest Service is required to respond to the comments received (40 CFR 1503.4). The responsible official will consider the comments, responses, environmental consequences discussed in the EIS, and applicable laws, regulations, and policies in making a decision regarding this proposal. The responsible official will document the decision and reasons for the decision in the Record of Decision. That decision will be subject

to review under applicable Forest Service regulations.

Ernest R. Nunn, Supervisor of the Helena National Forest, is the Responsible Official.

Date: August 1, 1988.

Ernest R. Nunn,

Forest Supervisor, Helena National Forest.

[FR Doc. 88-17788 Filed 8-5-88; 8:45 am]

BILLING CODE 3410-11-M

Soil Conservation Service

Canandaigua Lake P.L. 566 Watershed Project, New York; Finding of No Significant Impact

AGENCY: Soil Conservation Service.

ACTION: Notice of a finding of no significant impact.

SUMMARY: Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR Part 1500); and the Soil Conservation Service Guidelines (7 CFR Part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Canandiagua Lake P.L. 566 Watershed Project, Ontario and Yates Counties, New York.

FOR FURTHER INFORMATION CONTACT: Paul A. Dodd, State Conservationist, Soil Conservation Service, James M. Hanley Federal Building, 100 S. Clinton Street, Room 771, Syracuse, New York 13260, telephone (315) 423-5521.

SUPPLEMENTARY INFORMATION: The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Paul A. Dodd, State Conservationist, has determined that the preparation of an environmental impact statement is not needed for this project.

The project concerns a plan for accelerated conservation treatment of farmland in the Canandaigua Lake Watershed. Conservation practices will be implemented on an estimated 8,620 acres of cropland. The planned practices include no-till, contour stripcropping, conservation systems, diversions, and permanent seeding in vineyards. Benefits, attributable to reduced soil erosion, will be derived from maintaining long-term productivity on cropland and helping to protect water quality in Canandaigua Lake.

The Notice of Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various Federal, State and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment is one file and may be reviewed by contacting Paul A. Dodd.

No administrative action on implementation of the proposal will be taken until September 7, 1988.

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.904—Watershed Protection and Flood Prevention Program. Office of Management and Budget Circular A-95 regarding state and local clearinghouse review of federal and federally assisted programs and projects is applicable.)

Paul A. Dodd,

State Conservationist.

Date: July 27, 1988.

[FR Doc. 88-17775 Filed 8-5-88; 8:45 am]

BILLING CODE 3410-16-M

Silver Springs Flood Control Project, Nevada; RC&D Measure Plan

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of a finding of no significant impact.

SUMMARY: Pursuant to section 102(2)(C) of the National Evironmental Policy Act of 1969; the Council on Environmental Quality Rules (40 CFR Part 1500); and the Soil Conservation Service Rules (7 CFR Part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Silver Springs Flood Control Project (RC&D Measure Plan), Lyon County, Nevada.

FOR FURTHER INFORMATION CONTACT: Charles R. Adams, State Conservationist, Soil conservation Service, 1201 Terminal Way, Room 219, Reno, Nevada, 89502, 702-784-5863.

SUPPLEMENTARY INFORMATION: The environmental evaluation of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Charles R. Adams, State Conservationist, has determined that the preparation and review of an environmental impact statement are not needed for this project.

The project concerns RC&D measure plan for flood prevention. The planned works of improvement include the construction of flood conveyance channel and a dike embankment.

The Notice of a Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various Federal, State, and local agencies and interested parties. A limited number of copies if the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental evaluation are on file and may be reviewed by contacting Charles R. Adams. No administrative action on implementation of the proposal will be taken until September 7, 1988.

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.901, Resource Conservation and Development, and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with state and local officials.)

Date: July 28, 1988.

Charles R. Adams,

State Conservationist.

[FR Doc. 88-17785 Filed 8-5-88; 8:45 am]

BILLING CODE 3410-16-M

COMMISSION ON CIVIL RIGHTS

Vermont Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Vermont Advisory Committee to the Commission will convene at 7:30 p.m. on August 25, 1988, in the Adirondack Room of the Windjammer Conference Center, 1076 Williston Road, South Burlington, Vermont.

The purposes of the meeting are to orient new members, discuss the recently enacted legislation to establish a state human rights commission, and plan activities for Fiscal Year 1988-89.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Eloise R. Hedbor (802/372-6917) in Vermont or John I. Binkley, Director of the Eastern Regional Division (202/523-5264; TDD 202/376-8117) in Washington, D.C. Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Division at least five (5) working days before the scheduled date of the meeting. The meeting will be conducted pursuant to the provisions of the Rules and Regulations of the Commission.

Dated at Washington, DC, July 28, 1988.
Susan J. Prado,
Acting Staff Director.
[FR Doc. 88-17774 Filed 8-5-88; 8:45 am]
BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket No. 26-88]

Foreign-Trade Zone 49—Newark/Elizabeth, NJ; Application for Subzone Agfa-Gevaert West Caldwell, NJ; Specialty Photographic Paper Plant

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Port Authority of New York and New Jersey, grantee of FTZ 49, requesting special-purpose subzone status for the specialty photographic paper manufacturing plant of the Peerless Photo Products Division of Agfa-Gevaert, Inc. (AGI), a subsidiary of Agfa-Gavaert NV of Belgium, located in the Township of West Caldwell, New Jersey, within the Newark Customs port of entry. 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 July 28, 1988.

The AGI plant (15 acres with 93,000 sq. ft. of building space) is located at 8 Henderson Drive in the West Essex Industrial Park. The facility employs 200 persons and is used to produce several kinds of high quality photographic papers used in advertising and industrial graphic operations. Approximately 50 percent of the value of the components will be sourced abroad, such as photographic emulsions and chemicals, photographic base paper, photographic gelatin, carbon black and plastic containers chiefly used for packing.

Zone procedures would exempt AGI from duty payments on the foreign components used in its exports. On its domestic sales, the company will be able to elect the duty rate that applies to finished photographic paper. The duty rates on the major components range from 0.0 to 8.5 percent, whereas the rate for the finished photographic paper is 3.7 percent. The application indicates that zone savings will improve the plant's international competitiveness.

In accordance with the Board's regulations, an examiners committee has been appointed to investigate the application and report to the Board. The committee consists of: Dennis Puccinelli (Chairman), Foreign-Trade Zones Staff, U.S. Department of Commerce, Washington, D.C. 20230; Peter J. Baish, Area Director, U.S. Customs Service, New York Region, Airport International Plaza, Room 210A, Newark, New Jersey 07114; and Colonel Marion L. Caldwell, District Engineer, U.S. Army Engineer District New York, 26 Federal Plaza, New York, New York 10278–0090.

Comments concerning the proposed subzone are invited in writing from interested parties. They shall be addressed to the Board's Executive Secretary at the address below and postmarked on or before September 16, 1988.

A copy of the application is available for public inspection at each of the following locations:

Area Director's Office, U.S. Customs Service, Airport International Plaza, Room 210A, Newark, New Jersey 07114

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 1529, 14th and Pennsylvania Avenue, NW., Washington, DC 20230

Dated: August 1, 1988.
Dennis Puccinelli,
Acting Executive Secretary.
[FR Doc. 88-17793 Filed 8-5-88; 8:45 am]
BILLING CODE 3510-05-M

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: International Trade Administration/Import Administration Commerce.

ACTION: Notice of opportunity to request administrative review of antidumping or countervailing duty order, finding, or suspended investigation.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party as defined in section 771(9) of the Tariff Act of 1930 may request, in accordance with section 353.53a or 355.10 of the Commerce Regulations, that the Department of Commerce ("the Department") conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Opportunity To Request a Review

Not later than August 31, 1988, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in August for the following periods:

Antidumping Duty Proceeding	Period
Belgium: Industrial Phosphoric Acid (A-423-602)	04/20/87-07/31/88
France: Nitrocellulose (A-427-009)	08/01/87-07/31/88
Israel: Industrial Phosphoric Acid (A-508-604)	04/20/87-07/31/88
Italy: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished (A-475-603)	02/06/87-07/31/88
Japan: Acrylic Sheet (A-588-055)	08/01/87-07/31/88
Japan: Cadmium (A-588-035)	08/01/87-07/31/88
Japan: High-Capacity Pagers (A-588-007)	08/01/87-07/31/88
Japan: Tapered Roller Bearings, 4 Inches and Under (A-588-054)	08/01/87-07/31/88
People's Republic of China: Petroleum Wax Candles (A-570-504)	08/01/87-07/31/88
Taiwan: Clear Sheet Glass (A-583-023)	08/01/87-07/31/88
Thailand: Malleable Cast Iron Pipe Fittings (A-549-601)	02/13/87-07/31/88
Turkey: Acetysalicylic Acid (Aspirin) (A-489-602)	04/15/87-07/31/88
Union of Soviet Socialist Republics: Titanium Sponge (A-461-008)	08/01/87-07/31/88
Yugoslavia: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished (A-479-601)	02/06/87-07/31/88

Countervailing Duty Proceeding	Period
New Zealand: Low-Fuming Brazing Copper Rod and Wire (C-614-501)	08/01/87-07/31/88
Thailand: Pipes and Tubes (C-549-501)	01/01/87-12/31/87
Canada: Live Swine (C-122-404)	04/01/87-03/31/88

Countervailing Duty Proceeding	Period
Zimbabwe: Wire Rod (C-796-601)	01/01/87-12/31/87
Israel: Industrial Phosphoric Acid (C-508-605)	02/05/87-12/31/87
Turkey: Acetylsalicylic Acid (Aspirin) (C-489-603)	03/03/87-12/31/87

Seven copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room B-099, U.S. Department of Commerce, Washington, DC 20230.

The Department will publish in the Federal Register a notice of "Initiation of Antidumping (Countervailing) Duty Administrative Review," for requests received by August 31, 1988.

If the Department does not receive by August 31, 1988 a request for review of entries covered by an order or finding listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute, but is published as a service to the international trading community.

Dated August 1, 1988.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88-17794 Filed 8-5-88; 8:45 am]

BILLING CODE 3510-DS-M

North Carolina State University; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 88-179. *Applicant:* North Carolina State University, Raleigh, NC 27695. *Instrument:* Isotope Ratio Mass Spectrometer, Model Delta E. *Manufacturer:* Finnigan-MAT, West Germany. *Intended Use:* See notice at 53 FR 20153, June 2, 1988. Reasons for this decision: The foreign instrument provides automated multiple collector for high precision analysis (i.e. precision of 0.01% on 4μ mol CO_2) of $^{13}C/^{12}C$, $^{15}N/^{14}N$, $^{18}O/^{16}O$, $^{34}S/^{32}S$ in sequence without breaking vacuum.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. The capability of the foreign instrument described above is pertinent to the applicant's intended purposes. We know of no instrument or apparatus being manufactured in the United States which is of equivalent scientific value to the foreign instrument.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 88-17795 Filed 8-5-88; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Permits; Foreign fishing

This document publishes for public review a summary of applications received by the Secretary of State requesting permits for foreign vessels to fish in the exclusive economic zone under the Magnuson Fishery Conservation and Management Act (Magnuson Act, 16 U.S.C. 1801 *et seq.*)

Send comments on applications to: Fees, Permits and Regulations Division (F/TS21), National Marine Fisheries Service, Department of Commerce, Washington, DC 20235.

or, send comments to the Fishery Management Council(s) which review the application(s), as specified below:

Douglas G. Marshall, Executive Director, New England Fishery Management Council, 5 Broadway (Route 1), Sagus, MA 01906, 617/231-0422

John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, Federal Building Room 2115, 320 South New Street, Dover, DE 19901, 302/674-2331

Robert K. Mahood, Executive Director, South Atlantic Fishery Management Council, Southpark Building, Suite 306, 1 Southpark Circle, Charleston, SC 29407, 803/571-4366

Omar Munoz-Roure, Executive Director, Caribbean Fishery Management Council, Banco De Ponce Building, Suite 1108, Hato Rey, PR 00918, 809/753-4926

Wayne E. Swingle, Executive Director, Gulf of Mexico Fishery Management Council, Lincoln Center, Suite 881, 5401 West Kennedy Blvd., Tampa, FL 33609, 813/228-2815

Lawrence D. Six, Executive Director, Pacific Fishery Management Council, Metro Building, Suite 420, 2000 SW First Avenue, Portland, OR 97201, 503/221-6352

Jim H. Branson, Executive Director, North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, 907/274-4563

Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council, 1164 Bishop Street, Room 1405, Honolulu, HI 96813, 808/523-1368

For further information contact John D. Kelly or Shirley Whitted (Fees, Permits, and Regulations Division, 202-673-5319).

The Magnuson Act requires the Secretary of State to publish a notice of receipt of all applications for such permits summarizing the contents of the applications in the FEDERAL REGISTER. The National Marine Fisheries Service, under the authority granted in a memorandum of understanding with the Department of State effective November 29, 1983, issues the notice on behalf of the Secretary of State.

Individual vessel applications for fishing in 1988 have been received from the Governments shown below.

Carmen J. Blondin,

Deputy Assistant Secretary for International Interest, National Marine Fisheries Service, NOAA.

Fishery codes and designation of Regional Fishery Management Councils which review applications for individual fisheries are as follows:

Code and Fishery	Regional Fishery Management Councils
ABS Atlantic Billfishes and Sharks.	New England. Mid Atlantic. South Atlantic. Gulf of Mexico. Caribbean.
BSA Bering Sea and Aleutian Islands Groundfish.	North Pacific.
GOA Gulf of Alaska	North Pacific.

Code and Fishery	Regional Fishery Management Councils
NWA Northwest Atlantic Ocean.	New England.
	Mid-Atlantic.
SNA Snails (Bering Sea)	North Pacific.

Code and Fishery	Regional Fishery Management Councils
WOC Pacific Groundfish (Washington, Oregon and California).	Pacific.

Code and Fishery	Regional Fishery Management Councils
PBS Pacific Billfishes and Sharks.	Western Pacific.

Vessel (vessel type)	Application/ permit No.	Fishery-activity (* = joint venture)
PELARSARID (Large stern trawler)	DA-88-0052	NWA-1*
LUTTEN KLEIN (Cargo/transport vessel)	GC-88-0026	NWA-3
COSETTA (Medium stern trawler)	IT-88-0005	NWA-2*
DE GIOAS GIUSEPPE (Medium stern trawler)	IT-88-0016	NWA-2*
MARIA C (Medium stern trawler)	IT-88-0021	NWA-2*
MARIA MICHELA (Medium stern trawler)	IT-88-0024	NWA-2*
TONTINI PESCA QUARTO (Large stern trawler)	IT-88-0003	NWA-2*
AKASHI MARU NO. 11 (Pair trawler)	JA-88-1530	GOA-2* BSA-2*
AKASHI MARU NO. 12 (Pair trawler)	JA-88-1531	GOA-2* BSA-2*
AKASHI MARU NO. 18 (Pair trawler)	JA-88-0178	GOA-2* BSA-2*
AKASHI MARU NO. 63 (Pair trawler)	JA-88-0166	GOA-2* BSA-2*
AKASHI MARU NO. 65 (Pair trawler)	JA-88-0167	GOA-2* BSA-2*
AKASHI MARU NO. 66 (Pair trawler)	JA-88-0168	GOA-2* BSA-2*
AKASHI MARU NO. 67 (Pair trawler)	JA-88-0169	GOA-2* BSA-2*
AKASHI MARU NO. 68 (Pair trawler)	JA-88-0170	GOA-2* BSA-2*
AKASHI MARU NO. 69 (Pair trawler)	JA-88-0171	GOA-2* BSA-2*
AKASHI MARU NO. 71 (Pair trawler)	JA-88-0172	GOA-2* BSA-2*
AKASHI MARU NO. 72 (Pair trawler)	JA-88-0173	GOA-2* BSA-2*
AKASHI MARU NO. 73 (Pair trawler)	JA-88-0174	GOA-2* BSA-2*
AKASHI MARU NO. 75 (Pair trawler)	JA-88-0175	GOA-2* BSA-2*
AKASHI MARU NO. 76 (Pair trawler)	JA-88-0176	GOA-2* BSA-2*
AKASHI MARU NO. 77 (Pair trawler)	JA-88-0177	GOA-2* BSA-2*
AKASHIA MARU (Cargo/transport vessel)	JA-88-1156	SNA-3 NWA-3 GOA-3 BSA-3
AKEBONO MARU NO. 18 (Medium stern trawler)	JA-88-0315	GOA-2* BSA-2*
AKEBONO MARU NO. 22 (Medium stern trawler)	JA-88-0317	GOA-2* BSA-2*
AKEBONO MARU NO. 31 (Medium stern trawler)	JA-88-0306	GOA-2* BSA-2*
AKEBONO MARU NO. 32 (Medium stern trawler)	JA-88-0307	GOA-2* BSA-2*
AKEBONO MARU NO. 72 (Large stern trawler)	JA-88-0338	GOA-2* BSA-2*
AKEBONO MARU NO. 77 (Large stern trawler)	JA-88-0157	GOA-2* BSA-2*
AKEBONO MARU NO. 1 (Medium stern trawler)	JA-88-1153	GOA-2* BSA-2*
AKISHIO MARU (Cargo/transport vessel)	JA-88-0096	NWA-3 GOA-3 BSA-3
ALBATROSS (Cargo/transport vessel)	JA-88-0081	NWA-3 GOA-3 BSA-3
ANYO MARU NO. 1 (Medium stern trawler)	JA-88-1552	GOA-2* BSA-2*
ANYO MARU NO. 11 (Medium stern trawler)	JA-88-0541	BSA-2*
ANYO MARU NO. 15 (Medium stern trawler)	JA-88-0104	GOA-2* BSA-2*
ANYO MARU NO. 18 (Medium stern trawler)	JA-88-1175	GOA-2* BSA-2*
ANYO MARU NO. 21 (Longline fishing vessel)	JA-88-0621	GOA-1 BSA-1
ANYO MARU NO. 22 (Longline fishing vessel)	JA-88-0622	GOA-1 BSA-1
AOSHIMA MARU (Cargo/transport vessel)	JA-88-0155	NWA-3 GOA-3 BSA-3
AOYAGI MARU (Cargo/transport vessel)	JA-88-0026	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
ATAGO MARU (Cargo/transport vessel)	JA-88-0195	SNA-3 NWA-3 GOA-3 BSA-3
BAINBRIDGE REEFER (Cargo/transport vessel)	JA-88-1159	SNA-3 NWA-3 GOA-3 BSA-3
BANYO MARU (Cargo/transport vessel)	JA-88-0099	WOC-2 SNA-2 NWA-2 GOA-2 BSA-2
BIYO MARU (Cargo/transport vessel)	JA-88-0598	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
BIZEN REFFER (Cargo/transport vessel)	JA-88-0037	SNA-3 NWA-3 GOA-3 BSA-3
BLUE ARROW (Cargo/transport vessel)	JA-88-0916	SNA-3 NWA-3 GOA-3 BSA-3
BUNGO REEFER (Cargo/transport vessel)	JA-88-0038	SNA-3 NWA-3 GOA-3 BSA-3
CHIKUBU MARU (Large stern trawler)	JA-88-0336	GOA-2* BSA-2*
CHIKUZEN MARU (Large stern trawler)	JA-88-0199	WOC-2 GOA-2* BSA-2*
CHITOSE MARU (Cargo/transport vessel)	JA-88-0180	SNA-3 NWA-3 GOA-3 BSA-3
CHIYO MARU (Large stern trawler)	JA-88-0197	GOA-2* BSA-2*
CHOYO MARU NO. 81 (Longline fishing vessel)	JA-88-0615	GOA-1 BSA-1
CHOYO MARU (Cargo/transport vessel)	JA-88-0574	SNA-3 NWA-3 GOA-3 BSA-3
DAIAN MARU NO. 128 (Small stern trawler)	JA-88-1573	BSA-1
DAIAN MARU NO. 188 (Medium stern trawler)	JA-88-0553	GOA-3 BSA-2*
DAIGEN MARU (Cargo/transport vessel)	JA-88-1147	NWA-3 GOA-3 BSA-3
DAIKAN MARU (Cargo/transport vessel)	JA-88-0033	NWA-3 GOA-3 BSA-3
DAIKICHI MARU NO. 1 (Small stern trawler)	JA-88-1198	GOA-2* BSA-2*
DAIKICHI MARU NO. 5 (Small stern trawler)	JA-88-0187	GOA-2* BSA-2*
DAIKICHI MARU NO. 51 (Medium stern trawler)	JA-88-0484	GOA-2* BSA-2*
DAIKOH MARU (Cargo/transport vessel)	JA-88-0021	NWA-3 GOA-3 BSA-3
DAISHIN MARU NO. 28 (Large stren trawler)	JA-88-0569	GOA-2* BSA-2*
DAISHO MARU (Cargo/transport vessel)	JA-88-0035	NWA-3 GOA-3 BSA-3
DAITO MARU NO. 68 (Small stern trawler)	JA-88-1565	BSA-1
DOUGLAS (Cargo/transport vessel)	JA-88-2028	NWA-3 GOA-3 BSA-3
EASTERN REEFER (Cargo/transport vessel)	JA-88-0600	SNA-3 NWA-3 GOA-3 BSA-3
EBISU FONTAINE (Cargo/transport vessel)	JA-88-0589	NWA-3 GOA-3 BSA-3
EBISU MARU NO. 88 (Longline fishing vessel)	JA-88-0118	GOA-1 BSA-1
EIHO MARU (Cargo/transport vessel)	JA-88-1062	SNA-3 GOA-3 BSA-3
EIKYU MARU NO. 12 (Longline fishing vessel)	JA-88-0124	GOA-1 BSA-1
EIKYU MARU NO. 2 (Medium stern trawler)	JA-88-0299	BSA-1
EIKYU MARU NO. 3 (Medium stern trawler)	JA-88-1174	BSA-1

Vessel (vessel type)	Application/ permit No.	Fishery-activity (* = joint venture)
EIKYU MARU NO. 5 (Medium stern trawler)	JA-88-1549	BSA-1
EIKYU MARU NO. 6 (Medium stern trawler)	JA-88-1550	BSA-1
EIKYU MARU NO. 75 (Small stern trawler)	JA-88-1541	BSA-1
EIKYU MARU NO. 8 (Medium stern trawler)	JA-88-1571	BSA-1
EIKYU MARU NO. 81 (Medium stern trawler)	JA-88-0082	BSA-1
EIKYU MARU NO. 82 (Longline fishing vessel)	JA-88-0607	GOA-1 BSA-1
EIKYU MARU NO. 86 (Small stern trawler)	JA-88-1186	BSA-1*
EIWA MARU NO. 38 (Pot fishing vessel)	JA-88-1568	SNA-1
EIYO MARU (B) (Cargo transport vessel)	JA-88-0109	SNA-2 NWA-2 GOA-2 BSA-2
ENA MARU (Cargo/transport vessel)	JA-88-0577	NWA-2 GOA-2 BSA-2
ENYOH MARU (Cargo/transport vessel)	JA-88-0086	SNA-3 NWA-3 GOA-3 BSA-3
ETSUYOH MARU (Cargo/transport vessel)	JA-88-0089	SNA-3 NWA-3 GOA-3 BSA-3
FALCON (Cargo/transport vessel)	JA-88-0918	NWA-3 GOA-3 BSA-3
FUJISHIO MARU (Cargo/transport vessel)	JA-88-0594	NWA-3 GOA-3 BSA-3
FUKUCHO MARU NO. 11 (Small stern trawler)	JA-88-1537	BSA-1
FUKUCHO MARU NO. 38 (Pot fishing vessel)	JA-88-3669	SNA-1
FUKUHO MARU NO. 78 (Small stern trawler)	JA-88-1548	GOA-3 BSA-2*
FUKUSHIN MARU NO. 8 (Medium stern trawler)	JA-88-0555	GOA-3 BSA-2*
FUKUSHIO MARU (Cargo/transport vessel)	JA-88-1539	NWA-3 GOA-3 BSA-3
FUKUYOSHI MARU NO. 26 (Longline fishing vessel)	JA-88-0644	GOA-1 BSA-1
FUKUYOSHI MARU NO. 38 (Medium stern trawler)	JA-88-0304	GOA-2* BSA-2*
FUKUYOSHI MARU NO. 58 (Small stern trawler)	JA-88-1536	GOA-2* BSA-2*
FUKUYOSHI MARU NO. 8 (Longline fishing vessel)	JA-88-0624	GOA-1 BSA-1
FUYO MARU (Cargo/transport vessel)	JA-88-0925	SNA-3 NWA-3 GOA-3 BSA-3
HAKKO BOOMERANG (Cargo/transport vessel)	JA-88-0881	NWA-3 GOA-3 BSA-3
HAKKO FONTAINE (Cargo/transport vessel)	JA-88-0587	NWA-3 GOA-3 BSA-3
HAKUREI MARU (Pair trawler)	JA-88-0013	GOA-2* BSA-2*
HAKUYO MARU (Cargo/transport vessel)	JA-88-0570	SNA-3 NWA-3 GOA-3 BSA-3
HAMANASU MARU (Cargo/transport vessel)	JA-88-0883	SNA-3 NWA-3 GOA-3 BSA-3
HAMAYOSHI MARU NO. 63 (Medium stern trawler)	JA-88-1187	BSA-1
HANAZONO MARU (Cargo/transport vessel)	JA-88-0147	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
HATSUE MARU NO. 68 (Longline fishing vessel)	JA-88-0562	GOA-1 BSA-1
HEKIFU (Cargo/transport vessel)	JA-88-0196	SNA-3 NWA-3 GOA-3 BSA-3
HIKARI MARU NO. 8 (Cargo/transport vessel)	JA-88-0142	NWA-3 GOA-3 BSA-3
HIYO MARU (Cargo/transport vessel)	JA-88-2025	SNA-2 NWA-2 GOA-2 BSA-2
HIYOSHI MARU (Cargo/transport vessel)	JA-88-0075	SNA-3 NWA-3 GOA-3 BSA-3
HOKKAI MARU (Pair trawler)	JA-88-0012	GOA-2* BSA-2*
HOKKAI MARU (B) (Cargo/transport vessel)	JA-88-0922	SNA-3 NWA-3 GOA-3 BSA-3
HOKKO MARU NO. 137 (Small stern trawler)	JA-88-1199	BSA-1
HOKUSHIN MARU (Pair trawler)	JA-88-0014	GOA-2* BSA-2*
HOKUSHIN MARU (Cargo/transport vessel)	JA-88-0138	SNA-3 NWA-3 GOA-3 BSA-3
HOKUTO MARU (Pair trawler)	JA-88-0015	GOA-2* BSA-2*
HOKUYU MARU NO. 68 (Medium stern trawler)	JA-88-1177	BSA-1
HONAI MARU (Cargo/transport vessel)	JA-88-0648	SNA-3 NWA-3 GOA-3 BSA-3
HOYO MARU (Factory ship)	JA-88-0190	BSA-2
HOYO MARU NO. 30 (Pot fishing vessel)	JA-88-1511	SNA-1
HOYO MARU NO. 78 (Pot fishing vessel)	JA-88-1527	SNA-1
HOZAN MARU (Cargo/transport vessel)	JA-88-0194	NWA-3 GOA-3 BSA-3
ISHIKARI MARU (Cargo/transport vessel)	JA-88-0595	SNA-3 NWA-3 GOA-3 BSA-3
ISOKAZE MARU (Cargo/transport vessel)	JA-88-1038	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
IZUMO REEFER (Cargo/transport vessel)	JA-88-0053	SNA-3 NWA-3 GOA-3 BSA-3
JAMES (Cargo/transport vessel)	JA-88-0584	NWA-3 GOA-3 BSA-3
JINKYU MARU No. 21 (Longline fishing vessel)	JA-88-0191	ABS-1
JUKYU MARU No. 58 (Small stern trawler)	JA-88-0635	BSA-1
KAIUN MARU No. 65 (Medium strern trawler)	JA-88-2010	BSA-1
KAIYO MARU No. 15 (Medium stern trawler)	JA-88-1176	BSA-1
KAIYO MARU (Cargo transport vessel)	JA-88-0088	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
KAIYO MARU No. 11 (Medium stern trawler)	JA-88-0313	GOA-2*BSA-2*
KAIYO MARU No. 18 (Small stern trawler)	JA-88-0079	BSA-1
KAIYO MARU No. 28 (Medium stern trawler)	JA-88-1544	BSA-1
KAIYO MARU No. 8 (Pot fishing vessel)	JA-88-1137	SNA-1
KAIYO MARU No. 5 (Pot fishing vessel)	JA-88-0849	SNA-1
KAKUYO MARU No. 1 (Pair trawler)	JA-88-0210	BSA-1
KAKUYO MARU No. 11 (Pair trawler)	JA-88-2008	BSA-1
KAKUYO MARU No. 12 (Pair trawler)	JA-88-2009	BSA-1
KAKUYO MARU No. 17 (Pair trawler)	JA-88-1575	BSA-1
KAKUYO MARU No. 18 (Pair trawler)	JA-88-1574	BSA-1
KAKUYO MARU No. 2 (Pair trawler)	JA-88-0211	BSA-1
KAKUYO MARU No. 7 (Pair trawler)	JA-88-0214	BSA-1
KAKUYO MARU No. 8 (Pair trawler)	JA-88-0215	BSA-1
KAMUI MARU (Cargo/transport vessel)	JA-88-0223	SNA-3 GOA-3 BSA-3
KASHIMA MARU (Factory ship)	JA-88-0001	SNA-3 NWA-3 GOA-2*BSA-2
KASHIMA MARU No. 8 (Small stern trawler)	JA-88-0183	BSA-1
KASHIMA REEFER (Cargo/transport vessel)	JA-88-0054	SNA-3 NWA-3 GOA-3 BSA-3
KASHIWAGI MARU (Cargo/transport vessel)	JA-88-0019	SNA-3 NWA-3 GOA-3 BSA-3
KASHIWAGI MARU No. 1 (Cargo/transport vessel)	JA-88-0884	SNA-3 BSA-3
KASUGA MARU (Cargo/transport vessel)	JA-88-0181	SNA-32 NWA-3 GOA-3 BSA-3
KASUGA REEFER (Cargo/transport vessel)	JA-88-0055	SNA-3 NWA-3 GOA-3 BSA-3
KATAH (Cargo/transport vessel)	JA-88-0148	GOA-3 BSA-3
KAZU MARU No. 8 (Cargo/transport vessel)	JA-88-0143	NWA-3 GOA-3 BSA-3
KEIFU MARU (Cargo/transport vessel)	JA-88-0572	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3

Vessel (vessel type)	Application/ permit No.	Fishery-activity (* = joint venture)
KEIYO MARU (Cargo/transport vessel)	JA-88-0102	WOC-3 NWA-3 GOA- BSA-3
KINYO MARU (Cargo/transport vessel)	JA-88-0103	SNA-2 NWA-2GOA-2 BSA-2
KISARAGI MARU (Cargo/transport vessel)	JA-88-0929	SNA-3 GOA-3 BSA-3
KIYO MARU No. 55 (Longline fishing vessel)	JA-88-0602	GOA-1 BSA-1
KOEI MARU No. 10 (Longliner gillnet)	JA-88-0149	BSA-1
KOEI MARU No. 20 (Small stern trawler)	JA-88-1576	BSA-1
KOEI MARU No. 56 (Longline fishing vessel)	JA-88-0618	GOA-1 BSA-1
KOEI MARU No. 15 (Medium stern trawler)	JA-88-1396	BSA-1
KOEI MARU No. 51 (Medium stern trawler)	JA-88-1173	BSA-1
KOHFU MARU (Cargo/transport vessel)	JA-88-0641	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
KOHOKU MARU No. 18 (Pot fishing vessel)	JA-88-0839	SNA-1
KOHOKU MARU No. 7 (Small stern trawler)	JA-88-1191	GOA-3 BSA-2*
KOHSHO MARU (Cargo/transport vessel)	JA-88-0579	NWA-3 GOA-3 BSA-3
KOMEI MARU (Cargo/transport vessel)	JA-88-0139	SNA-3 NWA-3 GOA-3 BSA-3
KORYO MARU No. 52 (Medium stern trawler)	JA-88-1580	BSA-1
KOSHIN MARU No. 18 (Medium stern trawler)	JA-88-0425	GOA-2*
KOSHIN MARU No. 21 (Medium stern trawler)	JA-88-0525	GOA-2* BSA-2*
KOSHIN MARU No. 3 (Medium stern trawler)	JA-88-0192	GOA-2* BSA-2*
KOTOKU MARU (Cargo/transport vessel)	JA-88-1035	NWA-3 GOA-3 BSA-3
KOYO MARU (Cargo/transport vessel)	JA-88-0383	WOC-3 NWA-3 GOA-3 BSA-3
KOYO MARU No. 2 (Large stern trawler)	JA-88-0297	GOA-2* BSA-2*
KOYO MARU No. 3 (Large stern trawler)	JA-88-0343	WOC-2* BSA-2*
KUNASHIRI MARU (Cargo/transport vessel)	JA-88-1151	NWA-3 GOA-3 BSA-3
KUNISAKI (Cargo/transport vessel)	JA-88-0899	NWA- GOA-3 BSA-3
KUREHA (Pair trawler)	JA-88-0011	GOA-2 BSA-2
KUROSHIMA MARU (Cargo/transport vessel)	JA-88-1582	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
KYOKUSHIN MARU (Cargo/transport vessel)	JA-88-1161	SNA-3 NWA-3 GOA-3 BSA-3
KYOWA MARU No. 1 (Medium stern trawler)	JA-88-1578	BSA-1
KYOWA MARU No. 8 (Pot fishing vessel)	JA-88-0901	SNA-1
MABAH (Cargo/transport vessel)	JA-88-0108	GOA-3 BSA-3
MANRYO MARU No. 52 (Small stern trawler)	JA-88-1189	BSA-1
MARINE ACE (Cargo/transport vessel)	JA-88-0002	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
MASHU MARU (Cargo/transport vessel)	JA-88-0154	NWA-3 GOA-3 BSA-3
MATSUEI MARU No. 88 (Longline fishing vessel)	JA-88-0609	GOA-1 BSA-1
MEISHO MARA NO. 128. (Medium stern trawler)	JA-88-1581	BSA-1
MEIYO-MARU (Cargo/transport vessel)	JA-88-1133	SNA-3 NWA-3 GOA-3 BSA-3
MINESHIMA MARU (Factory ship)	JA-88-0080	GOA-2* BSA-2*
MITO MARU NO. 82 (Longline fishing vessel)	JA-88-0611	GOA-1 BSA-1
MIYAJIMA MARU (Factory ship)	JA-88-1540	WOC-1* GOA-2* BSA-2*
MIYOSHIMA MARU (Cargo/transport vessel)	JA-88-0025	WOC-2 SNA-2 NWA-2 GOA-2 BSA-2
NICHIYO MARU (Cargo/transport vessel)	JA-88-1167	SNA-3 NWA-3 GOA-3 BSA-3
NIITAKA MARU (Large stern trawler)	JA-88-0289	GOA-2* BSA-2*
NIPPONHAM MARU NO. 1 (Cargo/transport vessel)	JA-88-1082	SNA-3 NWA-3 GOA-3 BSA-3
NISSEI MARU (Cargo/transport vessel)	JA-88-0914	SNA-3 NWA-3 GOA-3 BSA-3
NISSHIN MARU NO. 51 (Medium stern trawler)	JA-88-1188	BSA-1
NOJIMA MARU (Cargo/transport vessel)	JA-88-1096	SNA-2 NWA-2 GOA-2 BSA-2
OHTORI MARU (Large stern trawler)	JA-88-0342	GOA-2* BSA-2*
OHYO MARU (Cargo/transport vessel)	JA-88-0158	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
OKUSHIRI (Cargo/transport vessel)	JA-88-0580	SNA-3 NWA-3 GOA-3 BSA-3
ORIENTAL CRANE (Tanker fuel/water)	JA-88-0184	SNA-3 GOA-3 BSA-3
ORION (Cargo/transport vessel)	JA-88-0591	NWA-3 GOA-3 BSA-3
ORION (Cargo/transport vessel)	JA-88-0642	NWA-2 GOA-2 BSA-2
OTOHA MARU (Pair trawler)	JA-88-0010	GOA-2* BSA-2*
OTOWA MARU (Cargo/transport vessel)	JA-88-1538	SNA-3 NWA-3 GOA-3 BSA-3
PALOMA (Cargo/transport vessel)	JA-88-0098	NWA-3 GOA-3 BSA-3
PEGASAS (Cargo/transport vessel)	JA-88-0152	NWA-3 GOA-3 BSA-3
PHOENIX (Cargo/transport vessel)	JA-88-0917	NWA-3 GOA-3 BSA-3
POHAH (Cargo/transport vessel)	JA-88-0206	GOA-3 BSA-3
REEFER BEAVER (Cargo/transport vessel)	JA-88-1145	SNA-3 NWA-3 GOA-3 BSA-3
REEFER FRESH (Cargo/transport vessel)	JA-88-2029	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
RIKUZEN MARU (Large stern trawler)	JA-88-0340	WOC-2* GOA-2* BSA-2*
RISHIRI (Cargo/transport vessel)	JA-88-0027	SNA-3 NWA-3 GOA-3 BSA-3
ROKUNOSHIMA MARU NO. 18 (Longline fishing vessel)	JA-88-1553	ABS-1
RYOAN MARU NO. 21 (Medium stern trawler)	JA-88-1172	BSA-1
RYOAN MARU NO. 35 (Small stern trawler)	JA-88-1195	BSA-1
RYOUN MARU NO. 2 (Pot fishing vessel)	JA-88-0877	SNA-1
RYOUN MARU NO. 6 (Pot fishing vessel)	JA-88-0850	SNA-1
RYOYO MARU (Cargo/transport vessel)	JA-88-1024	SNA-2 NWA-2 GOA-2 BSA-2
RYUHO MARU NO. 38 (Longline fishing vessel)	JA-88-0557	GOA-1 BSA-1
RYUHO MARU NO. 51 (Small stern trawler)	JA-88-1572	GOA-3 BSA-2*
RYUJIN MARU NO. 21 (Small stern trawler)	JA-88-0634	BSA-1
RYUO MARU NO. 28 (Longline fishing vessel)	JA-88-1373	ABS-1
RYUSEI MARU (Cargo/transport vessel)	JA-88-0083	SNA-3 NWA-3 GOA-3 BSA-3
RYUSHO MARU NO. 15 (Longliner/gillnet)	JA-88-0619	BSA-1
RYUSHO MARU NO. 18 (Longline fishing vessel)	JA-88-0620	GOA-1 BSA-1
RYUYO MARU (Large stern trawler)	JA-88-0280	GOA-2* BSA-2*
SACHISHIO MARU (Cargo/transport vessel)	JA-88-0097	NWA-3 GOA-3 BSA-3
SAGAMI MARU (Cargo/transport vessel)	JA-88-0146	WOC-2 SNA-2 NWA-2 GOA-2 BSA-2
SAKAE MARU (Cargo/transport vessel)	JA-88-0647	SNA-3 NWA-3 GOA-3 BSA-3
SANKICHI MARU NO. 23 (Pot fishing vessel)	JA-88-0848	SNA-1
SANUKI MARU (Cargo/transport vessel)	JA-88-0915	NWA-3 GOA-3 BSA-3

Vessel (vessel type)	Application/ permit No.	Fishery-activity (* = joint venture)
SANWA FONTAINE (Cargo/transport vessel)	JA-88-0590	NWA-3 GOA-3 BSA-3
SANYO MARU (Cargo/transport vessel)	JA-88-0924	NWA-3 GOA-3 BSA-3
SAPPORO MARU (Cargo/transport vessel)	JA-88-0585	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SEAGULL (Cargo/transport vessel)	JA-88-0034	NWA-3 GOA-3 BSA-3
SEIJU MARU NO. 28 (Medium stern trawler)	JA-88-0465	BSA-1
SEISHIN MARU (Cargo/transport vessel)	JA-88-0645	SNA-3 NWA-3 GOA-3 BSA-3
SEITOKU MARU NO. 106 (Medium stern trawler)	JA-88-0411	BSA-1
SEIYOH MARU (Cargo/transport vessel)	JA-88-0583	SNA-3 NWA-3 GOA-3 BSA-3
SEKI REX (Cargo/transport vessel)	JA-88-1148	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SHIDAKA MARU (Cargo/transport vessel)	JA-88-0179	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SHIKISHIMA MARU (Cargo/transport vessel)	JA-88-0030	SNA-2 NWA-2 GOA-2 BSA-2
SHIN SAKURA (Cargo/transport vessel)	JA-88-0153	NWA-3 GOA-3 BSA-3
SHINASAHI MARU (Cargo/transport vessel)	JA-88-0578	SNA-3 NWA-3 GOA-3 BSA-3
SHINBUNGO MARU (Cargo/transport vessel)	JA-88-0047	NWA-2 GOA-2 BSA-2
SHINEI MARU NO. 18 (Longline fishing vessel)	JA-88-1555	ABS-1
SHINEI MARU NO. 63 (Small stern trawler)	JA-88-1196	GOA-3 BSA-2*
SHINEI MARU NO. 81 (Longline fishing vessel)	JA-88-1554	ABS-1
SHINEI MARU NO. 88 (Longline fishing vessel	JA-88-1458	ABS-1
SHINKO MARU NO. 11 (Longline fishing vessel)	JA-88-0119	GOA-1 BSA-1
SHINMEI MARU (Cargo/transport vessel)	JA-88-0207	SNA-3 NWA-3 GOA-3 BSA-3
SHINNICHI MARU NO. 38 (Medium stern trawler)	JA-88-0563	GOA-3 BSA-2*
SHINNICHI MARU NO. 68 (Medium stern trawler)	JA-88-0308	GOA-2* BSA-2*
SHINSEI MARU (Cargo/transport vessel)	JA-88-0890	NWA-2 GOA-2 BSA-2
SHINSHO MARU (Cargo/transport vessel)	JA-88-0640	SNA-3 NWA-3 GOA-3 BSA-3
SHINTAKARA MARU (Cargo/transport vessel)	JA-88-0046	NWA-2 GOA-2 BSA-2
SHINTOKU MARU NO. 25 (Longline fishing vessel)	JA-88-0613	GOA-1 BSA-1
SHINWA MARU (Cargo/transport vessel)	JA-88-0137	SNA-3 NWA-3 GOA-3 BSA-3
SHINYO MARU (Cargo/transport vessel)	JA-88-0074	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SHOEI MARU NO. 5 (Small stern trawler)	JA-88-0639	BSA-1
SHOJU MARU (Cargo/transport vessel)	JA-88-0134	SNA-3 NWA-3 GOA-3 BSA-3
SHOKEN MARU (Cargo/transport vessel)	JA-88-0930	SNA-3 NWA-3 GOA-3 BSA-3
SHOSHIN MARU NO. 20 (Medium stern trawler)	JA-88-1178	BSA-1
SHOTOKU MARU NO. 63 (Small stern trawler)	JA-88-1194	BSA-1
SHOUN DYNASTY (Tanker fuel/water)	JA-88-0208	SNA-3 GOA-3 BSA-3
SHOUN MARU NO. 11 (Tanker fuel/water)	JA-88-0209	SNA-3 GOA-3 BSA-3
SHOUTOKU MARU (Cargo/transport vessel)	JA-88-0028	SNA-3 NWA-3 GOA-3 BSA-3
SHOYO MARU (A) (Medium stern trawler)	JA-88-1394	BSA-1
SHOYO MARU (B) (Cargo/transport vessel)	JA-88-1563	SNA-3 NWA-3 GOA-3 BSA-3
SHUNYO MARU (Cargo/transport vessel)	JA-88-0136	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SHUNYOO MARU NO. 118 (Medium stern trawler)	JA-88-0564	GOA-3 BSA-2*
SINGAPORE FONTAINE (Cargo/transport vessel)	JA-88-0586	NWA-3 GOA-3 BSA-3
SKY REEFER (Cargo/transport vessel)	JA-88-0907	SNA-3 NWA-3 GOA-3 BSA-3
SKYLARK (Cargo/transport vessel)	JA-88-0023	NWA-3 GOA-3 BSA-3
SOUTHERN CROSS (Cargo/transport vessel)	JA-88-0156	NWA-3 GOA-3 BSA-3
SOUTHERN REEFER (Cargo/transport vessel)	JA-88-0145	SNA-3 NWA-3 GOA-3 BSA-3
SOYO MARU (Factory ship)	JA-88-0240	GOA-2* BSA-2*
SOYOKAZE MARU (Cargo/transport vessel)	JA-88-1040	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
STARLING (Cargo/transport vessel)	JA-88-0024	NWA-3 GOA-3 BSA-3
SUIYO MARU (Cargo/transport vessel)	JA-88-0575	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SUMI MARU NO. 18 (Longline fishing vessel)	JA-88-1491	ABS-1
SUMI MARU NO. 8 (Longline fishing vessel)	JA-88-1546	ABS-1
SUMIYOSHI MARU NO. 53 (Longline fishing vessel)	JA-88-0608	GOA-1 BSA-1
SUN BEAUTY (Cargo/transport vessel)	JA-88-0129	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SUN FIELD (Cargo/transport vessel)	JA-88-0130	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SUNBIRD (Cargo/transport vessel)	JA-88-0576	NWA-3 GOA-3 BSA-3
SUOH (Cargo/transport vessel)	JA-88-0893	NWA-3 GOA-3 BSA-3
SURUGA MARU (Cargo/transport vessel)	JA-88-2014	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
SUZURAN MARU (Cargo/transport vessel)	JA-88-1152	SNA-3 NWA-3 GOA-3 BSA-3
SWALLOW (Cargo/transport vessel)	JA-88-0032	NWA-3 GOA-3 BSA-3
TAISEI MARU NO. 21 (Medium stern trawler)	JA-88-1579	BSA-1
TAISEI MARU NO. 101 (Cargo/transport vessel)	JA-88-1144	WOC-2 SNA-2 NWA-2 GOA-2 BSA-2
TAISEI MARU NO. 15 (Cargo/transport vessel)	JA-88-0205	WOC-2 SNA-3 NWA-3 GOA-2 BSA-2
TAISEI MARU NO. 3 (Cargo/transport vessel)	JA-88-0085	WOC-2 SNA-2 NWA-2 GOA-2 BSA-2
TAISEI MARU NO. 35 (Medium stern trawler)	JA-88-0636	BSA-1
TAISEI MARU NO. 52 (Cargo/transport vessel)	JA-88-1055	WOC-2 SNA-2 NWA-2 GOA-2 BSA-2
TAISEI MARU NO. 87 (Cargo/transport vessel)	JA-88-1053	SNA-2 NWA-2 GOA-2 BSA-2
TAISEI MARU NO. 98 (Cargo/transport vessel)	JA-88-1054	SNA-2 NWA-2 GOA-2 BSA-2
TAISETSU MARU (Cargo/transport vessel)	JA-88-0193	SNA-3 NWA-3 GOA-3 BSA-3
TAIYO (Cargo/transport vessel)	JA-88-1032	SNA-3 NWA-3 GOA-3 BSA-3
TAKACHIHO MARU (Large stern trawler)	JA-88-0291	GOA-2* BSA-2*
TAKATOYO MARU NO. 18 (Longline fishing vessel)	JA-88-1331	ABS-1
TAKATSUKI MARU (Cargo/transport vessel)	JA-88-2022	SNA-3 NWA-3 GOA-3 BSA-3
TAKUYO MARU (Cargo/transport vessel)	JA-88-0029	SNA-3 NWA-3 GOA-3 BSA-3
TAMA MARU (Cargo/transport vessel)	JA-88-1027	GOA-2 BSA-2
TEISHO MARU NO 68 (Small stern trawler)	JA-88-1547	GOA-3 BSA-2*
TENKAI MARU (Tanker fuel/water)	JA-88-0894	SNA-3 GOA-3 BSA-3
TENSHUN MARU (Tanker fuel/water)	JA-88-0182	SNA-3 GOA-3 BSA-3
TENYO MARU (Large stern trawler)	JA-88-0352	GOA-2* BSA-2*
TENYO MARU NO. 2 (Large stern trawler)	JA-88-0332	GOA-2* BSA-2
TENYO MARU NO. 3 (Large stern trawler)	JA-88-0333	GOA-2* BSA-2
TENYO MARU NO. 5 (Large stern trawler)	JA-88-0334	GOA-2* BSA-2*

Vessel (vessel type)	Application/ permit No.	Fishery-activity (* = joint venture)
TENYOSHI MARU (tanker fuel/water)	JA-88-1577	SNA-3 GOA-3 BSA-3
TENYU MARU NO. 37 (Longline fishing vessel)	JA-88-0606	GOA-1 BSA-1
TENYU MARU NO. 57 (Small stern trawler)	JA-88-0637	BSA-1
TOKACHI MARU (B) (Cargo transport vessel)	JA-88-0359	WOC-3 NSA-3 NWA-3 GOA-3 BSA-3
TOKIWA MARU (Cargo transport vessel)	JA-88-031	SNA-3 NWA-3 GOA-3 BSA-3
TOKUKO MARU (Cargo transport vessel)	JA-88-0593	NWA-3 GOA-3 BSA-3
TOKURYU MARU (Cargo transport vessel)	JA-88-0592	NWA-3 GOA-3 BSA-3
TOKYO REEFER (Cargo transport vessel)	JA-88-1135	WOC-3 SNA-3 NWA-3 GOA-3 BSA-3
TOMI MARU NO. 21 (Longline fishing vessel)	JA-88-1476	ABS-1
TOMI MARU NO. 51 (Small stern trawler)	JA-88-1197	GOA-2* BSA-2*
TOMI MARU NO. 55 (Small stern trawler)	JA-88-0437	GOA-2* BSA-2*
TOMI MARU NO. 58 (Medium stern trawler)	JA-88-0643	GOA-2* BSA-2*
TOMI MARU NO. 81 (Small stern trawler)	JA-88-1192	GOA-2* BSA-2*
TOMI MARU NO. 82 (Small stern trawler)*	JA-88-1193	GOA-2* BSA-2*
TOMI MARU NO. 83 (Medium stern trawler)	JA-88-1170	GOA-2* BSA-2*
TOMI MARU NO. 85 (Medium stern trawler)	JA-88-0282	GOA-2* BSA-2*
TOMI MARU NO. 86 (Medium stern trawler)	JA-88-0222	GOA-2* BSA-2*
TOMI MARU NO. 87 (Medium stern trawler)	JA-88-0198	GOA-2* BSA-2*
TOMI MARU NO. 88 (Longline fishing vessel)	JA-88-0612	GOA-1 BSA-1
TORA MARU NO. 58 (Small stern trawler)	JA-88-1190	BSA-1
THSHIN MARU (Cargo transport vessel)	JA-88-0056	SNA-3 NWA-3 GOA-3 BSA-3
TSUDA MARU (Large stern trawler)	JA-88-0337	GOA-2* BSA-2*
TSUNE MARU NO. 31 (Longline fishing vessel)	JA-88-0601	GOA-1 BSA-1
TSURUSAKI (Cargo transport vessel)	JA-88-0630	SNA-3 NWA-3 GOA-3 BSA-3
WESTERN REEFER (Cargo transport vessel)	JA-88-0599	SNA-3 NWA-3 GOA-3 BSA-3
WORLD FONTAINE (Cargo/transport vessel)	JA-88-0588	NWA-3 GOA-3 BSA-3
YAGISHIRI (Cargo/transport vessel)	JA-88-0581	SNA-3 NWA-3 GOA-3 BSA-3
YAHATA MARU NO. 58 (Medium stern trawler)	JA-88-0632	BSA-1
YAKUSHI MARU NO. 51 (Medium stern trawler)	JA-88-1184	BSA-1
YAMASAN MARU NO. 101 (Small stern trawler)	JA-88-1184	BSA-1
YAMASAN MARU NO. 102 (Small stern trawler)	JA-88-1185	BSA-1
YAMATO MARU ((Large stern trawler)	JA-88-0339	GOA-2* BSA-2*
YASAKA REEFER (Cargo/transport vessel)	JA-88-0052	SNA-3 NWA-3 GOA-3 BSA-3
YAYOI MARU (Cargo/transport vessel)	JA-88-0018	SNA-3 NWA-3 GOA-3 BSA-3
YOHTEI MARU (Cargo/transport vessel)	JA-88-0076	SNA-3 NWA-3 GOA-3 BSA-3
YOKO MARU (Cargo/transport vessel)	JA-88-0087	SNA-3 NWA-3 GOA-3 BSA-3
ZUIFU (Cargo/transport vessel)	JA-88-0646	NWA-3 GOA-3 BSA-3
ZUIHOO MARU NO. 28 (Medium stern trawler)	JA-88-0565	GOA-3 BSA-2*
ZUIYO MARU (Large stern trawler)	JA-88-0335	GOA-2* BSA-2*
ZUIYO MARU NO. 3 (Large stern trawler)	JA-88-0331	GOA-2* BSA-2*
NO. 101 HYUN IL (Cargo/transport vessel)	KS-88-0151	GOA-3 BSA-3
CALAFIA (Cargo/transport vessel)	NL-88-0037	WOC-3 NWA-3 GOA-3 BSA-3
CASABLANCA (Cargo/transport vessel)	NL-88-0038	WOC-3 NWA-3 GOA-3 BSA-3
INCA (Cargo/transport vessel)	NL-88-0040	WOC-3 NWA-3 GOA-3 BSA-3
JAN WILLEM (Cargo/transport vessel)	NL-88-0039	WOC-3 NWA-3 GOA-3 BSA-3
LAURA CHRISTINA (Cargo/transport vessel)	NL-88-0036	WOC-3 NWA-3 GOA-3 BSA-3
MAGDALENA (Cargo/transport vessel)	NL-88-0033	WOC-3 NWA-3 GOA-3 BSA3
MATHILDA (Cargo/transport vessel)	NL-88-0035	WOC-3 NWA-3 GOA-3 BSA-3
MAYA (Cargo/transport vessel)	PL-88-0034	WOC-3 NWA-3 GOA-3 BSA-3
ANDROMEDA (Long stern trawler)	PL-88-0088	NWA-1*
M/V KURPIE (Cargo/transport vessel)	PL-88-0120	WOC-3 NWA-3 GOA-3 BSA-3
PIENINY 2 (Tanker Fuel/water)	PL-88-0110	WOC-3 GOA-3 BSA-3
PLOCK (Cargo/transport vessel)	PL-88-0109	WOC-3 GOA-3 BSA-3
POWISLE (Cargo/transport vessel)	PL-88-0119	WOC-3 GOA-3 BSA-3
TATRY (Tanker fuel/water)	PL-88-0108	WOC-3 GOA-3 BSA-3
WINETA (Cargo/transport vessel)	PL-88-0061	WOC-3 GOA3 BSA-3
ZONDA (Cargo/transport vessel)	PL-88-0102	WOC-3 NWA-3 BSA-3
ZULAWY (Cargo/transport vessel)	PL-88-0041	WOC-3 GOA-3 BSA-3
ZYRARDOW (Cargo/transport vessel)	PL-88-0089	WOC-3 GOA-3 BSA-3
18 SYEZD VLKSM (Large stern trawler)	UR-88-0617	WOC-2*
ALEKSANDROVSK (Large stern trawler)	UR-88-0207	WOC-2*
ANTON LOPATIN (Large stern trawler)	UR-88-0813	WOC-1*
ARDATOV (Large stern trawler)	UR-88-0314	WOC-2*
ARHIMED (Large stern trawler)	UR-88-0810	WOC-2*
DALNEVOSTOCHNYI (Cargo/transport vessel)	UR-88-0796	WOC-3 GOA-3 BSA-3
DELEGAT (Tanker fuel/water)	UR-88-0762	WOC-3 GOA-3 BSA-3
ICHINSKY (Cargo/transport vessel)	UR-88-0807	GOA-3 BSA-3
IZUMRUDNYI (Large stern trawler)	UR-88-0747	WOC-2*
KURILSK (Cargo/transport vessel)	UR-88-0808	WOC-3 BSA-3
MIHAIL SHOLOHOV (Passenger ship (crew transfer))	UR-88-0809	WOC-3 GOA-3 BSA-3
NADEZHDA (Large stern trawler)	UR-88-0061	WOC-2*
PASVALIS (Large stern trawler)	UR-88-0811	WOC-2*
POLEVOD (Large stern trawler)	UR-88-0626	WOC-2*
RUBINOVYI (Large stern trawler)	UR-88-0716	WOC-2*
SEMIOZERNOE (Large stern trawler)	UR-88-0313	BSA-1*
TALNIKI (Cargo/transport vessel)	UR-88-0741	WOC-3 GOA-3 BSA-3
TATARSTAN (Cargo/transport vessel)	UR-88-0803	WOC-3 BSA-3
VASILY GRECHISHNIKOV (Large stern trawler)	UR-88-0812	WOC-1*
ZERKALNYI (Cargo/transport vessel)	UR-88-0779	WOC-3 BSA-3

Activity code	Fishing operations
1	Catching, processing and other support.
2	Processing and other support.
3	Other support only.
*	Vessel(s) in support of U.S. vessels (joint venture).
**	Cargo transport vessels with fish finding equipment on board will receive an activity code 2 to enable them to perform both scouting as well as support activities.

[FR Doc. 88-17825 Filed 8-5-88; 8:45 am]
BILLING CODE 3510-22-M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Open Meeting

In accordance with section 10a(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB).

Dates of Meeting: 23 August 1988.

Time: 0830-1600 hours.

Place: The Society of American Engineers, 607 Prince Street, Alexandria, VA 22320-2289.

Agenda: The Army Science Board Effectiveness Review Panel of the US Belvoir Research, Development and Engineering Center will meet in a working session to assimilate information from panel members, discuss conclusions, and develop their final draft report. This meeting is open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permited by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039/7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 88-18004 Filed 8-5-88; 10:15 am]
BILLING CODE 3710-08-M

Corps of Engineers, Department of the Army

Intent To Prepare a Revised Draft Environmental Impact Statement (RDEIS) for the Lower San Joaquin River and Tributaries, California, Clearing and Snagging Project

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent to prepare a RDEIS.

SUMMARY: The action being taken is channel clearing and snagging for the Lower San Joaquin River from Stockton, California, to Friant Dam. This also includes portions of the Middle River and Kings River North tributaries. The reason for the action is to reduce flood damages caused by high flows during major storm events. The project will remove accumulated sand and gravel debris and riparian vegetation, or another alternative, in and adjacent to the previously completed project levees and other project areas. Construction was authorized in 1983.

FOR FURTHER INFORMATION CONTACT: Questions regarding the RDEIS should be addressed to Mr. Fred Walasavage, Planning Division, Corps of Engineers, 650 Capitol. Mall, Sacramento, California, 95814-4794, telephone (916) 551-1880.

SUPPLEMENTARY INFORMATION:

1. Proposed Action

Plans and designs for flood protection for the Lower San Joaquin River and the Middle River and Kings River North tributaries are being prepared as authorized by section 10 of the Flood Control Act of 1944, Pub. L. 534 as modified by the Supplemental Appropriations Act of 1983, Pub. L. 98-63 and by Continuing Appropriations, Fiscal Year 1988, Pub. L. 100-202. Authorization allows for clearing and snagging as a part of this project. The 1988 action further allows for clearing and snagging on Kings River North, funding for fish and wildlife mitigation, and rip-rapping as may be necessary to prevent erosion from the clearing and snagging project. In addition, authorization of funds for the project have been increased from $5 million to $8 million. The California State Reclamation Board is the non-Federal sponsor and is responsible for providing lands, easements, rights-of-ways, cost-sharing of construction, and maintaining the completed work.

2. Alternatives

Four alternatives are being considered and will be addressed in the RDEIS. These include: (1) No action, (2) the authorized plan of clearing and snagging, (3) modification of reservoir operations, and (4) purchase of flowage easements.

3. Scoping Process

a. Two previous Draft EIS's were completed in May 1985 and January 1987. The RDEIS is being prepared to include the work authorized in the Continuing Appropriations, Fiscal Year 1988, Pub. L. 100-202.

b. Close coordination is being maintained with Federal, State, and

local agencies; environmental organizations; and concerned individuals. This is being accomplished through public meetings, public notices and inter-agency coordination. Through this Notice of Intent all segments of the affected public and agencies will be invited to participate in the planning process.

c. Significant issues that will be discussed in the RDEIS include impacts on water quality, agriculture, fisheries, vegetation (riparian and wetlands), wildlife, endangered species, aesthetics, recreation, cumulative impacts, and investigation requirements.

d. The United States Fish and Wildlife Service will provide a Fish and Wildlife Coordiantion Act Report to accompany the RDEIS.

e. A 45-day review period will be allowed for all interested agencies and individuals to review and comment on the RDEIS. All interested persons are encouraged to respond to this notice and provide a current address if you wish to be contacted about the RDEIS.

4. Meeting Schedule

Twenty-four public meetings and workshops have been conducted since 1985 for the specific purpose of scoping and coordination of potential impacts on the environment. Additional public meetings or workshops can be held if interest is expressed and specific reasons for such meetings are provided.

5. Availability

The RDEIS is scheduled to be available for public review and comment in late 1988.

Date: July 25, 1988.

Robert A Bauman,

Lieutenant Colonel, Corps of Engineers, Acting District Engineer.

[FR Doc. 88-17773 Filed 8-5-88; 8:45 am]

BILLING CODE 3710-GH-M

Department of the Navy

Board of Advisors to the President, Naval War College, Newport, R.I., Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. app.), notice is given that the Board of Advisors to the president, Naval War College, will meet on September 1, 1988, in Room 210, Conolly Hall, Naval War College, Newport, Rhode Island. The meeting will commence at 8:30 a.m., and the purpose is to elicit the advice of the Board on educational, doctrinal, and research policies and programs. The agenda will consist of presentations and discussions on the curriculum, programs and plans of the college, and is open to the pubic. for further information contact: Mrs. Mary E. Guimond, Executive Assistant to the Dean of Academics, Naval War College, Newport, Rhode Island 02841-5010. Telephone number (401) 841-3589.

Dated: August 2, 1988.

Jane M. Virga,

Lieutenant, JAGC, U.S. Naval Reserve, Alternate Federal Register Liaison Officer.

[FR Doc. 88-17840 Filed 8-5-88; 8:45 am]

BILLING CODE 3810-AE-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. QF88-488-000 et al.]

CCPC Chemical Inc., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

August 1, 1988.

Take notice that the following filing have been made with the Commission:

1. CCPC Chemical Inc.

[Docket No. QF88-448-000]

On July 13, 1988, CCpC Chemical Inc. (Applicant), of 1501 McKinzie Road, Corpus Christi, Texas 78413 submitted for filing an application for certification of a facility as a qualifying congeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located adjacent to the Applicant's existing olefins plant in Nuecess County, Texas. The facility will consist of a combustion turbine generator and a heat recovery steam generator, equipped with supplementary firing. Thermal energy recovered from the facility will be used in an olefin manufacturing process. The electric power production capacity of the facility will be 37,880 KW. The primary source of energy will be natural gas. Construction of the facility is scheduled to begin August 1988.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

2. Edison Sault Electric Company

[Docket No. EC88-18-000]

Take notice that on July 22, 1988, Edison Sault Electric Company tendered for filing a Supplement No. 1 to Application for an Order Granting Authorization to Reorganize (Supplement) with exhibts.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this document.

3. CP National Corporation

[Docket No. EC88-26-000]

Take notice that on July 26, 1988, CP National Corporation (CP National) tendered for filing an application pursuant to Section 302 of the Federal Power Act, 16 U.S.C. 824b (1982), for Commission authorization to sell to Oregon Trail Electric Consumers Cooperative, Inc., CP National's Eastern Oregon Electric system in the State of Oregon.

CP National, incorporated in the State of California, provides electric, telephone and natural gas distribution services in Arizona, California, Nevada, New Mexico, Oregon, Texas and Utah.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this notice.

4. Northern States Power Company

[Docket No. ER88-347-000]

Take notice that on July 11, 1988, Northern States Power Company (NSP) tendered for filing clarifications and explanations concerning NSP's initial rate filing dated April 11, 1988.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this notice.

5. Centel Corporation

[Docket No. ER88-469-000]

Take notice that on July 26, 1988, Centel Corporation (Centel) tendered for filing an amendment to the original filing of ER88-469-000 on June 15, 1988 in regard to the Electric Sales and Transmission Contract between Centel and Kansas Electric Power Cooperatives, Inc. (KEPCo). This amendment includes: Item A-Service Schedules and Exhibit E; Item B-Service Schedules.

Item A

Service Schedule 88-CWh-2 with a proposed effective date of May 16, 1988 will supersede 85-CWh-2 (Rate Schedule FERC Nos. 74 through 83). Service Schedule 85-TSv-1 with a proposed effective date of May 16, 1988 will supersede 85-TSv-1 (Rate Schedule FERC No. 114) and 85-TSv-2 (Rate Schedule FERC No. 115).

These Service Schedules will reflect wording and phrase changes to reflect the terminology relative to the contract. An Exhibit E has been added to the contract to delineate the applicable scheduling constraints of each power

resource. No changes have been made to rates and they will remain the same as those found under the Schedules being replaced.

Item B

The Service Schedules enclosed under "Item B" contain the same rates as filed in Docket ER88-261-000 on February 22, 1988. However, the Service Schedules have been modified so as to conform to the Electric Sales Transmission and Service Contract between Centel Corporation (Centel) and Kansas Electric Power Cooperative Inc. (KEPCo). Pursuant to FERC order issued April 21, 1988 these Service Schedules are to become effective September 23, 1988 subject to refund.

Copies of the filing were served upon the Kansas Electric Power Cooperative, Inc., and the Utilities Division, Kansas Corporation Commission, Topeka, KS.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this notice.

6. Montana-Dakota Utilities Co.

[Docket No. ER88-476-001]

Take notice that on July 19, 1988, Montana-Dakota Utilities Co. (Montana-Dakota) tendered for filing an amendment to the executed agreement between Western Area Power Administration (Western) and Montana-Dakota. The change is contained in Article 23, page 24 or 28, of the agreement and states that the minimum rate level will be no lower than Montana-Dakota's incremental cost of producing or acquiring the energy.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this notice.

7. Southern California Edison Company

[Docket No. ER88-482-000]

Take notice that on July 22, 1988, Southern California Edison Company (Edison) tendered for filing, pursuant to Section 35.15 of the Federal Energy Regulatory Commission's Regulations (18 CFR 35.15) under the Federal Power Act, an Amended Notice of Cancellation of the Agreement for Interim Operating Procedures with the following entities (Cities):

Entity	Rate schedule FERC No.
1. City of Anaheim	95.11
2. City of Azusa	144.8
3. City of Banning	145.8
4. City of Colton	146.8
5. City of Riverside	94.13

Copies of this filing have been served upon all parties affected by this proceeding.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this notice.

8. Pacific Gas and Electric Company

[Docket No. ER88-302-001]

Take notice that on July 11, 1988, Pacific Gas and Electric Company (PG&E) tendered for filing as a compliance filing to the Commission's order of July 5, 1988 in Docket No. ER88-302-000, the price ceiling methodology for Coordination Transmission Service that was accepted by the Commission in Docket No. ER88-219-001. This price ceiling shall replace the ceiling price for Coordination Transmission Service in the Agreement. In addition, PG&E has requested that the ceiling price not be allowed to exceed 15 mills per kilowatt-hour.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this notice.

9. Iowa Public Service Company

[Docket No. ER88-444-000]

Take notice that on July 15, 1988, Iowa Public Service Company (IPS) tendered for filing amendments to its Full Requirements Wholesale—Service Schedule No. 2 Original Issue Sheets Nos. 5 and 6, and executed Full Requirements Power Agreements filed on May 31, 1988, to permit the following Iowa municipalities to receive services pursuant to the filed rates: Auburn, Denver, Hudson, Livermore, Pocahontas, Rockford, and Sergeant Bluff.

IPS states its amendments add an additional municipality, Estherville, Iowa, which has signed a Full Requirements Power Agreement, and clarify four aspects of its original filing.

First, the Agreements permit IPS to supply capacity and energy to the municipalities pursuant to third party purchase agreements. Should IPS make third Party purchases for the purpose of supplying these municipalities, IPS shall charge then in accordance with its approved Order 84 rate, approved in Docket No. ER88-320-000. That rate allows recovery of "* * * the supplying party's purchase cost plus 2.91 mills/kWh to recover fixed transmisson related costs, a 1 mill component to recover difficulties to quantify costs and a separate charge for transmission losses."

Second, IPS's proposed tariff, which is intended to contain the same price terms as exist in the Agreements, also has been amended to allow for energy pricing in accordance with IPS's Order 84 rate, when applicable.

Third, the 4% charge for transmission losses referenced in the energy price section of the Agreements applies to the energy charge and not the transmission charge.

Fourth, the Agreements are self-contained, and thus do not incorporate by reference the proposed tariffs.

IPS requests a waiver of the Commission's regulations and allow the Agreements to become effective as of their respective operative dates. The earliest operative date is May 1, 1987.

These amendments have been served on all the affected municipalities and the Iowa Utilities Board.

Comment date: August 15, 1988, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol 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 this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17823 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

Public Meetings With Respect to a Supplement to the Draft Environmental Impact Statement (DEIS) for the Twin Falls (FERC No. 18), Milner (FERC No. 2899), Auger Falls (FERC No. 4797), and Star Falls (FERC No. 5797) Hydroelectric Projects on the Mainstem of the Snake River, Idaho

August 2, 1988

In the matter of Public Meetings With Respect to a Supplement to the Draft

Environmental Impact Statement (DEIS) for the Twin Falls (FERC No. 18), Milner (FERC No. 2899), Auger Falls (FERC No. 4797), and Star Falls (FERC No. 5797), Hydroelectric Projects on the Mainstem of the Snake River, Idaho.

In accordance with the notice of intent to prepare a Supplement to the DEIS, issued July 15, 1988, this document outlines the new circumstances and new information made available since the DEIS was issued. In addition, the staff has developed some potential project alternatives, and requests comments from the public on these alternatives.

Public meetings will be held on August 18, 1988, as described in the notice. Interested agencies, officials, and members of the public are invited to review and comment on the new information and proposals that have been developed since the DEIS was issued. The public meetings are to be held at the Holiday Inn Convention Center, 1350 Blue Lakes Boulevard North, Twin Falls, Idaho 83301. The first meeting will be held from 1:00 p.m. to 4:00 p.m.; the second meeting will be held from 7:00 p.m. to 10:00 p.m. For further information, contact Kathleen Sherman at (202) 376–9527.

New Circumstances

Implementation of Comprehensive Planning

1. Federal Energy Regulatory Commission: Electric Consumers Protection Act of 1986 (Amended the Federal Power Act)

(a) Amended section 10(a)(A) of the Federal Power Act requires the Commission, in its hydropower licensing decisions, to consider, among other things, the extent to which the proposed project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by:

(i) An agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) The State in which the facility is or will be located.

(b) In Order No. 481–A, Order on Rehearing, issued April 27, 1988, the Commission found that the Northwest Power Planning Council's Columbia River Basin Fish and Wildlife Program and the Northwest Conservation and Electric Power Plan are comprehensive plans.

2. Northwest Power Planning Council (NWPPC): Protected Areas

(a) The NWPPC is proposing to amend the Columbia River Basin Fish and Wildlife Program and Northwest Conservation and Electric Power Plan to incorporate "protected area" designation to protect critical fish and wildlife habitat from new hydroelectric development; the final rule is expected to be implemented in August, 1988.

(b) A proposed protected area within the reach of the Snake River included in the DEIS, begins at Vinyard Creek located at the headquarters of Twin Falls reservoir, and extends to the mouth of the Snake River; proposed designated protection is for wild resident fish habitat, wintering waterfowl, and bald eagles.

(c) The proposed Milner and Star Falls projects are upstream of Vinyard Creek, so they would not be affected by the proposed rulemaking, however, the proposed Auger Falls project is within the designated reach.

(d) The Twin Falls project would not be affected by the proposed protected areas designation, according to the NWPPC's draft rule dated May 2, 1988, which states that the proposed amendments would apply only to new hydropower projects, not to existing dams.

3. State of Idaho: Comprehensive State Water Plan/Interim Protected Rivers (effective July 1, 1988)

(a) Designates a portion of the Snake River within the study area as an interim protected river, pursuant to section 42–1734H of the Idaho Code, which includes the Star Falls and Auger Falls project sites.

(b) The proposed Milner project is upstream of the designated reach.

(c) The existing Twin Falls project is not affected because any designation of waterways as interim protected rivers or protected rivers does not affect the operation or relicensing of hydropower projects, including but not limited to the expansion of capacity which does not enlarge existing boundaries or project impoundments.

Proposed Amended Star Falls Application

1. Proposed Schedule for Filing

(a) The amended application is scheduled to be filed on November 17, 1988, as stated by letter from the applicant to the Commission dated June 30, 1988, which proposes Alternative 1 as described in their filing of April 1, 1988, and described below.

(b) The proposed schedule includes appropriate agency consultation under § 4.38 of the Commission's regulations.

2. Proposed Changes in Project Configuration and Operation

(a) Project features would be moved away from Star Falls by moving the dam upstream, and by using a buried penstock instead of an open canal, to reduce impacts to visual quality and cultural resources.

(b) The dam, would be higher than originally proposed, and the reservoir would be capable of storing and releasing water to enhance conditions for whitewater boating downstream of the project, including the 14-mile-long Murtuagh reach which ends at the Twin Falls reservoir.

(c) The buried penstock would be on the north side of the river, so wetlands on the south side of the river that would have been crossed by the open canal which was originally proposed, would not be disturbed by project construction.

(d) The powerhouse would be located on the north side of the river, and would be placed in an excavation about 20 feet below the surrounding terrain.

(e) No excavation in the river channel would be made for the tailrace, so rapids below Star Falls used by whitewater boaters which would have been excavated for the tailrace at the original powerhouse location, would not be affected.

(f) The bypassed reach between the dam and the powerhouse would be shorter with the new proposed configuration, so the length of river, and related aquatic resources, that would be affected by reduced flows from project operation would be less when compared to the original project configuration.

New Information Since the Deis was Issued

Filing by the applicant for the Milner Project (March 31, 1988)

1. New Proposals

(a) Minimum flow for fisheries are proposed to be 58 cfs leakage from the dam during the irrigation season, and an additional 92 cfs during the non-irrigation for a total of 150 cfs.

(b) Upland habitat would be developed and donated to Idaho Department of Fish and Game.

(c) New proposals for recreation include: Building an interpretive center with picnic facilities; building additional water ski dock(s) on Milner reservoir; further development of public facilities at a Bureau of Land Management Wildlife Habitat Management Area; building a kayak launch; and developing a communication network to quickly inform kayakers of flow conditions below Milner dam.

2. Information Previously Unavailable to the Staff

(a) Operations and physical constraints of Milner reservoir with respect to releasing flows for whitewater boating were described; releasing the flows over the dam at levels recommended in the DEIS is not possible under present spillway gating conditions, and if providing flows for whitewater recreation required the dewatering of irrigation diversions on weekends, as much as 5 days thereafter would be required to re-regulate irrigation deliveries to 450,000 acres.

(b) Information on project economics was provided, including the cost of building a new dam without the project, and an economic analysis of lost irrigation water to provide staff-recommended flows for fisheries and whitewater recreation.

(c) Information was provided concerning water rights and the implementation of state water law with respect to flows which may be diverted from the Snake River if the proposed Milner Project is not built.

Filing by the Applicant for the Twin Falls Project (March 31, 1988)

1. New Proposals

(a) The applicant proposes two alternative plans for flows to be released over Twin Falls; Plan A would provide 140 cfs during daylight hours on weekends and holidays all year, and Plan B would provide 140 cfs during daylight hours on weekends and holidays from September to March and provide 140 cfs during daylight hours daily from April to August.

(b) A small weir would be constructed at the top of the falls to direct the water over both sides of the falls, to create a similar visual impression from a flow of 140 cfs, as is seen with flows of 300 and 500 cfs.

2. Information Previously Unavailable to the Staff

(a) A series of photographs were presented which show Twin Falls at 80 cfs, 140 cfs, 300 cfs, and 500 cfs, and a graph showing the number of viewers seeing flows of 140 cfs or more under existing conditions, the project as originally proposed, and with Plans A and B described above.

(b) Graphs showing average monthly and average daily visitor use at the project were presented.

(c) Results of a cooperative study with the Bureau of Land Management were provided, which concerned the effects of construction activities on nesting raptors, conducted on the Snake River Birds of Prey Natural Area in association with the reconstruction of the Swan Falls dam spillway.

(d) Results of electrofishing efforts at Shoshone Falls, located downstream of Twin Falls, were presented to further characterize the fish species present in the study reach.

(e) Actual operations and maintenance costs, insurance costs, and tax estimates based on historical local costs and current federal tax statutes were provided to more precisely estimate project costs.

Water Quality Data (To Be Analyzed in the Supplement to the DEIS)

1. Water quality data filed jointly by all four applicants on September 29, 1987, includes: Diel dissolved oxygen (DO) and temperature data for the Milner, Star Falls, and Twin Falls projects collected July 27–29, 1987, and August 24–26, 1987; DO and other water quality parameters for all four projects collected July 30, 1987, and August 26, 1987; and sediment analyses for pesticides, heavy metals, and PCB's for samples collected above Milner dam, above Star Falls, and above Twin Falls on August 26, 1987.

2. Water quality data filed September 29, 1987, which was collected for the Snake River as required by the NPDES discharge permit for the J.R. Simplot Company and Ore-Ida Foods, Inc.; this includes temperature and DO profiles for Milner reservoir on May 29, 1987, June 10, 1987, June 24, 1987, July 28–29, 1987, August 10, 1987, August 24, 1987, September 7–8, 1987, and September 21–22, 1987 (this information was filed by Ralston Associates, a consultant which collected the data filed jointly by the applicants).

3. Water quality data filed March 31, 1988, by Idaho Power Company which provided a comparison of DO measurements in Milner reservoir and Twin Falls reservoir collected in 1983; this filing also included a partial DO and temperature profile for Twin Falls reservoir collected during June to September 1983.

New Staff Alternatives

1. Milner Alternative

(a) In order to provide power generation from project-specific mitigative flow releases and increase the operating range of the project, a small turbine would be installed at the dam in addition to the 44 MW turbine at the powerhouse location proposed by the applicant.

2. Auger Falls Alternative

(a) In order to reduce impacts on visual quality and recreation, prevent raptor collision with the transmission line, and minimize impacts on sturgeon habitat in the pool below the powerhouse from blasting for the penstock trenches and powerhouse, an underground powerhouse and transmission line would be constructed, and tunnels would be used to convey water from the canal to the powerhouse instead of surface penstocks.

3. Comprehensive Water Block (CWB)

(a) Since the Snake River is a regulated system, an objective of the CWB is to ensure that water will be available to provide project-specific mitigative flows to be set by license articles.

(b) Another objective of the CWB is to maximize consistency with the State Water Plan and minimize potential conflicts with existing water rights.

(c) The licensees could potentially lease water for the CWB from the Water Supply Bank, described in Policy 4B of the State Water Plan, which also states that use of the Water Supply Bank created by Idaho Code 42–1762 shall be encouraged.

(d) It is the staff's intent to recognize the physical limitations of the system so that flows for project-specific mitigation would be released so as to minimize interference with irrigation operations and also minimize the potential for flooding of low-lying areas.

(e) Flows to be released for project-specific flow requirements could be accounted for when the water is released from American Falls reservior, and measured below Milner dam.

(f) The CWB could be an accounting mechanism for the licensees, to equitably share the responsibility for providing mitigation flows, since water which is released for American Falls reservoir would flow through all the proposed projects.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17822 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. CP88–592–000 et al.]

Tennessee Gas Pipeline Company et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Tennessee Gas Pipeline Company

[Docket No. CP88–592–000]

July 29, 1988.

Take notice that on July 19, 1988, Tennessee Gas Pipeline Company (Applicant) filed in Docket No. CP88–

592–000 a request pursuant to § 284.223 of the Commission's regulations, for authority to transport natural gas for Citizens Gas Supply Corporation (Citizens) under Applicant's blanket certificate issued in Docket No. CP87–115–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the petition which is on file with the Commission and open to public inspection.

Applicant states that pursuant to a transportation agreement dated June 23, 1988, it proposes to transport peak day volumes of 100,000 dekatherms (dt), average day volumes of 3,341 dt and annual volumes of 1,219,465 dt. Applicant states that transportation under the agreement commenced June 24, 1988 as reflected in its initial report in Docket No. ST88–4700, filed July 13, 1988. Applicant states it would receive Citizens' gas in Starr County, Texas and redeliver equivalent volumes in The Magnolia City Plan, in Pennsylvania.

Comment date: September 12, 1988, in accordance with Standard Paragraph G at the end of this notice.

2. Michigan Consolidated Gas Company Interstate Storage Division

[Docket No. CP88–600–000]

July 29, 1988.

Take notice that on July 21, 1988, Michigan Consolidated Gas Company-Interstate Storage Division (ISD), 500 Griswold Street, Detroit, Michigan 48226, filed in Docket No. CP88–600–000 a request pursuant to §§ 157.205 and 157.213 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 18 CFR 157.213) for authority to provide a gas storage service for Michigan Gas Utilities Company (MGU). ISD proposes to provide the storage service under its blanket certificate issued November 24, 1982, in Docket No. CP82–532–000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

ISD proposes to store, in its Taggart Storage Field located in Montcalm and Mecosta Counties, Michigan, up to 1,600,000 Mcf of gas for MGU pursuant to a gas storage agreement, dated July 1, 1988. It is stated that the storage service would commence with first deliveries and continue through March 31, 1993.

MGU will cause ANR Pipeline Company (ANR) to deliver gas to ISD at interconnections with ANR in Washtenaw and Mecosta Counties, Michigan, and at an interconnection of ISD and Consumers Power Company (CPC) in Wayne County, Michigan. It is stated that ISD will store the gas and redeliver for MGU's account, equivalent quantities of gas less compressor fuel at interconnections with Michigan Consolidated Gas Company's Utility Division (UD), ANR and CPC, in Washtenaw County, Michigan, Mecosta County, Michigan, and Wayne County, Michigan, respectively.

MGU will pay ISD a storage charge of 48.66 cents per Mcf of storage contract demand pursuant to ISD's Rate Schedule S–6, it is stated. The revenues received by ISD will be refunded to its customers in accordance with a stipulation and agreement which the Commission approved by letter order dated January 11, 1985, in Docket No. RP84–13–000.

Comment date: September 12, 1988, in accordance with Standard Paragraph G at the end of this notice.

3. Natural Gas Pipeline Company of America

[Docket No. CP88–594–000]

July 29, 1988.

Take notice that on July 20, 1988, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP88–594–000, a request pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport, on an interruptible basis, up to a maximum of 50,000 MMBtu of natural gas per day (plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS) for Natural Gas Clearinghouse, Inc. (NGC), a marketer of natural gas, under its blanket certificate issued in Docket No. CP86–582–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Natural states that pursuant to an Interruptible Transportation Service Agreement dated May 17, 1988, Natural is obligated to accept for transportation, on an interruptible basis, no more than 50,000 MMBtu per day for NGC. Natural further states that NGC may request and Natural may agree to accept additional quantities as overrun gas. Natural states that NGC has advised it that the volumes anticipated to be transported on an average day would be 2,500 MMBtu. Natural further states that based on that average day figure, the annual volumes to be transported would be 912,000 MMBtu. Natural indicates that the receipt points and the delivery point would be located offshore Texas.

Natural indicates that it commenced the transportation of natural gas for NGC on May 25, 1988, at Docket No. ST88–4715, for a one hundred and twenty (120) day period ending September 21, 1988, pursuant to § 284.223(a)(1) of the Commission's Regulations (18 CFR 284.223(a)(1)) and the blanket certificate issued to Natural in Docket No. CP86–582–000.

Comment date: September 12, 1988, in accordance with Standard Paragraph G at the end of this notice.

4. Tennessee Gas Pipeline Company

[Docket No. CP88–628–000]

August 2, 1988.

Take notice that on July 26, 1988, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP88–628–000 a request pursuant to § 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas for Endevco Oil & Gas Company (Endevco), a marketer, under the certificate issued in Docket No. CP87–115–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Tennessee proposes to transport up to 10,000 Dth of natural gas per day for Endevco on an interruptible basis pursuant to a transportation agreement dated June 28, 1988, between Tennessee and Endevco. Tennessee states that it would receive the gas for Endevco's account in the state of Louisiana and that it would deliver the gas for the account of Citizens in the state of Pennsylvania.

Tennessee states that the estimated average daily quantity would be 6,000 Dth and that the annual quantity would be 2,190,000 Dth. It is further stated that service under Section 284.223(a) commenced July 2, 1988, as reported in Docket No. ST88–4811. Tennessee indicates that the service would have a term of two years and continue on a monthly basis thereafter. Tennessee proposes to charge Endevco a rate pursuant to Tennessee's currently effective Rate Schedule IT. No new facilities are proposed herein.

Comment date: September 16, 1988, in accordance with Standard Paragraph G at the end of this notice.

5. Tennessee Gas Pipeline Company

[Docket No. CP88–630–000]

August 2, 1988.

Take notice that on July 26, 1988, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP88–630–000 a request pursuant to § 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas for Loutex Energy,

Inc. (Loutex), a marketer, under the certificate issued in Docket No. CP87–115–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Tennessee proposes to transport up to 60,000 Dth of natural gas per day for Loutex on an interruptible basis pursuant to a transportation agreement dated June 21, 1988, between Tennessee and Loutex. Tennessee states that it would receive the gas for Loutex's account in offshore Louisiana and the states of Louisiana, Alabama and New York. Tennessee indicates that it would deliver natural gas for the account of Loutex to various points located in various states.

Tennessee states that the estimated average daily quantity would be 554 Dth and that the annual quantity would be 202,210 Dth. It is further stated that service under § 284.223(a) commenced July 1, 1988, as reported in Docket No. ST88–4814. Tennessee indicates that the service would have a term of two years and continue on a monthly basis thereafter. Tennessee proposes to charge Loutex a rate pursuant to Tennessee's currently effective Rate Schedule IT. No new facilities are proposed herein.

Comment date: September 16, 1988, in accordance with Standard Paragraph G at the end of this notice.

6. Tennessee Gas Pipeline Company

[Docket No. CP88–626–000]

August 2, 1988.

Take notice that on July 25, 1988, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP88–626–000 a request pursuant to § 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas for Citizens Gas Supply Corporation (Citizens), a marketer, under the certificate issued in Docket No. CP87–115–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Tennessee proposes to transport up to 105,000 Dth of Natural gas per day for citizens on an interruptible basis pursuant to a transportation agreement dated June 21, 1988 between Tennessee and Citizens. Tennessee states that it would receive the gas for Citizen's account in offshore Louisiana and the states of Louisiana, Mississippi, Alabama, and Texas. Tennessee indicates that it would redeliver natural gas for the account of Citizens in the states of Alabama and Mississippi.

Tennessee states that the estimated average daily quantity would be 1,230 Dth and that annual quantities would be 448,950 Dth. It is further stated that service under § 284.223(a) commenced July 6, 1988, as reported in Docket No. ST88–4812. Tennessee indicates that the service would have a term of two years and continue on a monthly basis thereafter. Tennessee proposes to charge Citizens a rate of pursuant to Tennessee's currently effective Rate Schedule IT. No new facilities are proposed herein.

Comment date: September 16, 1988, in accordance with Standard Paragraph G at the end of the notice.

7. United Gas Pipeline Company

Docket No. CP88–632–000]

August 2, 1988.

Take notice that on July 27, 1988, United Gas Pipeline Company (United), P.O. Box 1478, Houston, Texas 77251, filed in Docket No. CP88–609–000 a request pursuant to § 284.223 of the Regulations under the Natural Gas Act for authorizaton to transport natural gas under the blanket certificate issued in Docket No. CP88–6–000 pursuant to section 7(c) of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

United proposes to transport natural gas for American Cyanamid Company (American Cyanamid). United explains that service commenced July 1, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST88–4771. United explains that the peak day quantity would be 12,360 dekatherms, the average daily quantity would be 12,360 dekatherms, and that the annual quantity would be 4,511,400 dekatherms. United explains that it would receive natural gas for American Cyanamid's account at points of receipt in the states of Texas and Lousiana. United states that it would redeliver the gas for American Cyanamid's account at an existing interconnection between United and American Cyanamid in Santa Rosa County, Florida.

Comment date: September 16, 1988, in accordance with Standard Paragraph G at the end of the notice.

8. Tennessee Gas Pipeline Company

[Docket No. CP81–296–015]

August 2, 1988.

Take notice that on July 18, 1988, Tennessee Gas Pipeline Company (Applicant), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP81–296–015 an application to amend the certificate issued in Docket No. CP81–296–000, pursuant to section 7(c) of the Natural Gas Act, seeking authorization (1) to deliver 3,000 Dth per day of Boundary gas to Connecticut Light & Power's Norwalk delivery point in lieu of the existing Wallingford delivery point and (2) to replace 0.84 miles of 4" pipeline lateral with 10" pipeline and appropriate measurement facilities necessary to effect these increased deliveries to the Norwalk delivery point. Tennessee further requests that the costs of these pipelines and metering facilities be rolled in with the incremental cost of the Boundary facilities. Applicant estimates the total cost of this pipeline replacement project to be $1,502,000.

Comment date: August 23, 1988, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

9. Black Marlin Pipeline Company

[Docket No. CP88–598–000]

August 1, 1988.

Take notice that on July 21, 1988, Black Marlin Pipeline Company (Black Marlin), 1400 Smith Street, Houston, Texas 77002, filed in Docket No. CP88–598–000 an application pursuant to section 7(c) of the Natural Gas Act for authrorization to provide an interruptible transportation service of natural gas for Shell Offshore Inc. (SOI) and/or Shell Gas Trading Company (Shell), under a new Rate Schedule T–4, from the High Island Area of Offshore Texas, to points of delivery near Texas City, Galveston County, Texas, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Black Marlin proposes the interruptible transportation of up to 150,000 Mcf of gas per day that is produced by Shell from the offshore area of Texas, High Island (HI) Blocks 135, 136, 160 and 161 comprising the Den Field and HI Blocks A–6/201 comprising the Glenda Field. It is stated that Shell will deliver to Black Marlin's offshore pipelines, at existing receipt points located at or near SOI's platforms in HI Block A–6 and HI Block 136, gas that is produced from the Glenda Field and the Den Field, respectively. Black Marlin will transport the gas onshore for redelivery at existing interconnections, located near the terminus of Black Marlin's pipeline system at Texas City, Galveston County, Texas, with Houston Pipeline Company (HPL), Amoco Gas Company (Amoco) and Union Carbide Corporation (Union Carbide). Volumes of gas delivered to HPL will be

transported by HPL under section 311 of the Natural Gas Policy Act.

It is stated, that pursuant to a precedent agreement dated June 24, 1988, with Shell, Black Marlin proposes to transport the gas for a two year period commencing on the date of initial deliveries and continuing thereafter unless terminated by either party of 30 days of prior written notice.

Black Marlin proposes to charge Shell 5 cents [1] per Mcf of gas transported pursuant to a new Rate Schedule T–4, that Black Marlin states will be filed within 30 days subsequent to the issuance of the certificate requested in the subject docket.

Comment date: August 22, 1988, in accordance with Standard Paragraph F at the end of the notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washingotn, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intevene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17824 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[1] 5 cent rate was approved by the Commission in Docket No. RP81–67–000, issued August 27, 1982.

[Docket No. GP87–57–000]

Burk Royalty Co. v. Trunkline Gas Co.; Complaint

August 4, 1988.

On June 11, 1987, Burk Royalty Company (Burk) filed a complaint pursuant to 18 CFR 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Burk requests that the Production-Related Costs Board (Board) find that Trunkline Gas Company (Trunkline) is in violation of 18 CFR 271.1104 by refusing to reimburse Burk for production-related costs incurred between August, 1980 through February, 1986.

Burk states that by invoice dated April 28, 1987, Trunkline was billed for production-related costs due under a contract dated January 26, 1949, covering the Poole "B" Well No. 1 in Colorado County, Texas. Burk claims that Trunkline responded to the invoice by stating that production-related costs are prospective only, from May 1, 1987, and Burk was precluded from collections between August, 1980 through February, 1986 because the invoice was dated after December 31, 1984.

Burk asserts that the issue in this case is whether 18 CFR 271.1104 bars Burk from collecting production-related costs incurred prior to May, 1987, because it did not submit an invoice to Trunkline until after 1984. Burk believes that the Commission did not intend for its regulations to operate in the manner asserted by Trunkline, but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

Burk requests that the Board issue an order finding Trunkline in violation of 18 CFR 271.1104 for failure to pay Burk for production-related costs incurred for the period prior to May 1, 1987. In the alternative, Burk requests a waiver, if one is required, of the time frame for requesting collection of production-related costs incurred prior to May 1, 1987.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Trunkline must file an answer to Burk's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted. Trunkline shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register.**

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register.** 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17857 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. GP87–56–000]

Burk Royalty Co. v. Texas Eastern Transmission Corp., Complaint

August 4, 1988.

On June 11, 1987, Burk Royalty Company (Burk) filed a complaint pursuant to 18 CFR 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Burk requests that the Production-Related Costs Board (Board) find that Texas Eastern Transmission Corporation (Texas Eastern) is in violation of 18 CFR 271.1104 by refusing to reimburse Burk for production-related

costs incurred between August, 1980 through December, 1985.

Burk states that by invoice dated April 28, 1987, Texas Eastern was billed for production-related costs due under a contract dated February 4, 1959, covering the F.S. Browder Well No. 1 in San Jacinto County, Texas. Burk claims that Texas Eastern responded to the invoice by stating that Burk was ineligible for such production-related costs because Burk failed to notify Texas Eastern of its claim within a reasonable time period that would permit retroactive collection.

Burk asserts that the issue in this case is whether 18 CFR 271.1104 bars Burk from collecting production-related costs incurred after July, 1980, because it did not submit an invoice to Texas Eastern until after 1984. Burk believes that the Commission did not intend for its regulations to operate in the manner asserted by Texas Eastern, but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

Burk requests that the Board issue an order finding Texas Eastern in violation of 18 CFR 271.1104 for failure to pay Burk for production-related costs incurred between August, 1980 and December, 1985. In the alternative, Burk requests a waiver, if one is required, of the time frame for requesting collection of production-related costs incurred for the period August, 1980 through December, 1985.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Texas Eastern must file an answer to Burk's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted. Texas Eastern shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register**.

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register**. 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17858 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. GP88-25-000]

Cobra Oil & Gas Corp. v. Texas Eastern Transmission Corp.; Complaint

August 4, 1988.

On July 5, 1988, Cobra Oil & Gas Corporation (Cobra) filed a complaint pursuant to 18 CFR 271.1105(d)(3)(ii) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Cobra requests that the Production-Related Costs Board (Board) find that Texas Eastern Transmission Corporation (Texas Eastern) is in violation of 18 CFR 271.1104 by refusing to reimburse Cobra for production-related costs.

Cobra states that by invoice dated July 13, 1987, Texas Eastern was billed $26,700.66 for production-related costs due under a contract dated September 15, 1982, covering the H. Robinson No. 1 well in Claiborne Parish, Louisiana. Cobra claims that Texas Eastern responded to the invoices by stating that the bills were furnished beyond the time period prescribed in the regulations.

Cobra asserts that the issue in this case is whether 18 CFR 271.1104 bars it from collecting production-related costs invoiced after December 31, 1984. Cobra believes that the Commission did not intend for its regulations to operate in the manner asserted by Texas Eastern but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

Cobra requests that the Board issue an order finding Texas Eastern in violation of 18 CFR 271.1104 for failure to pay Cobra $26,700.66 in production-related costs.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Texas Eastern must file an answer to Cobra's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted. Texas Eastern shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register**.

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register**. 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17859 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. GP88-23-000]

Cobra Oil & Gas Corp. v. ANR Pipeline Co.; Complaint

August 4, 1988.

On June 10, 1988, Cobra Oil & Gas Corporation (Cobra) filed a complaint pursuant to 18 CFR 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Cobra requests that the Production-Related Costs Board (Board) find that ANR Pipeline Company (ANR) is in violation of 18 CFR 271.1104 by refusing to reimburse Cobra for production-related costs.

Cobra states that ANR was billed $63,864.69 for production-related costs due under contracts dated December 21, 1978, April 24, 1979, and November 2, 1979. Cobra claims that ANR responded to the invoices by stating that the bills were furnished beyond the time period prescribed in the regulations.

Cobra asserts that the issue in this case is whether 18 CFR 271.1104 bars Cobra from collecting production-related costs invoiced after December 31, 1984. Cobra believes that the Commission did not intend for its regulations to operate in the manner asserted by ANR but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

Cobra requests that the Board issue an order finding ANR in violation of 18 CFR 271.1104 for failure to pay Cobra $63,864.69 in production-related costs.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), ANR must file an answer to Cobra's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered

in default, and all relevant facts stated in such complaint may be deemed admitted. ANR shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register.**

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register.** 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17860 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER88-531-000]

Commonwealth Edison Co. of Indiana, Inc.; Submittal

August 3, 1988.

Take notice that on July 25, 1988, a Consent Settlement Agreement executed by the Commission Trial Staff (Staff) Commonwealth Edison Company of Indiana, Inc. (formerly Chicago District Generating Corporation and hereafter referred to as "Chicago District"), and Commonwealth Edison Company ("Edison") was filed with the Commission. The Consent Settlement Agreement provides for a decrease in rates under the Electric Service Agreement (dated July 1, 1941, as amended) and the Transmission Service Agreement (dated May 1, 1958, as amended) between Chicago District and Edison.

The signatories request an effective date of January 1, 1988.

Copies of this filing were served upon Chicago District and Edison.

Any person desiring to be heard regarding said submittal should file comments with the Federal Energy Regulatory Commission, 825 North Capitol 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 comments should be filed on or before September 2, 1988. All signatories to the Consent Settlement Agreement may file reply comments on or before September 21, 1988. Comments will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make entities who file comments parties to the proceedings. Any person wishing to become a party must file a motion to intervene. A copy of the Consent Settlement Agreement is published with this notice.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17866 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. GP88-6-000]

El Ran, Inc. v. Transwestern Pipeline Co.; Complaint

August 4, 1988.

On November 23, 1987, El Ran, Inc. (El Ran) filed a complaint pursuant to 18 CFR 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. El Ran requests that the Production-Related Costs Board (Board) find that Transwestern Pipeline Company (Transwestern) is in violation of 18 CFR 271.1104 by refusing to reimburse El Ran for production-related costs incurred between August, 1980 through December, 1985.

El Ran states that by invoices dated September 21, 22, and 30, 1987, Transwestern was billed $40,023.12 for production-related costs due under seven contracts. El Ran claims that Transwestern responded to the invoice by stating that the bills were furnished beyond the time period prescribed in the regulations.

El Ran asserts that the issue in this case is whether 18 CFR 271.1104 bars El Ran from collecting production-related costs invoiced after December 31, 1984. It believes that the Commission did not intend for its regulations to operate in the manner asserted by Transwestern but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

El Ran requests that the Board issue an order finding Transwestern in violation of 18 CFR 271.1104 for failure to pay El Ran $40,023.12 in production-related costs.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Transwestern must file an answer to El Ran's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted. Transwestern shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register.**

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register.** 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17861 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP88-165-002 and TQ88-2-4-001]

Granite State Gas Transmission, Inc.; Proposed Changes in Rates and Tariff Provisions

August 3, 1988.

Take notice that on July 27, 1988, Granite State Gas Transmission, Inc. (Granite State), 120 Royall Street, Canton, Massachusetts 02021, tendered for filing with the Commission the following revised tariff sheets in its FERC Gas Tariff, First Revised Volume No. 1, containing changes in rates and tariff provisions for effectiveness on the dates shown below:

Revised tariff sheet	Proposed effective date
Substitute Fourth Substitute Twenty-First Revised Sheet No. 7.	Jan. 15, 1988.
Second Substitute Seventh Revised Sheet No. 7-A.	Jan. 15, 1988.
Substitute Fifth Substitute Twenty-First Revised Sheet No. 7.	Apr. 1, 1988.
Substitute Sixth Substitute Twenty-First Revised Sheet No. 7.	May 1, 1988.
Substitute Seventh Substitute Twenty-First Revised Sheet No. 7.	June 1, 1988.
Third Substitute Second Revised Sheet No. 69.	June 1, 1988.
Fourth Substitute Fourth Revised Sheet No. 70.	June 1, 1988.
Fourth Substitute Second Revised Sheet No. 75-A.	June 1, 1988.
Third Revised Sheet No. 76	June 1, 1988.
Fifth Substitute First Revised Sheet No. 82.	June 1, 1988.
Second Substitute Original Sheet No. 82-A.	June 1, 1988.

Revised tariff sheet	Proposed effective date
Substitute Eighth Substitute Twenty-First Revised Sheet No. 7	July 1, 1988.

According to Granite State, the revised tariff sheets are filed: (1) To comply with a letter order of the Commission issued June 30, 1988 in Docket Nos. RP88–165–000 and TQ88–1–4–000 which required certain chanages in the revised purchased gas cost adjustment procedures filed in the foregoing dockets on May 5, 1988 to comply with the provisions of Order Nos. 483 and 483–A; (2) to revise the method of calculating the Transportation Cost Adjustment in the sales rates by annualizing the costs of the underlying transporter's rates instead of on an estimated quarterly basis as Granite State had proposed in Docket No. RP88–165–000 in connection with the revisions in its purchased gas cost adjustment procedures; (3) to reflect a correction in the Transportation Cost Adjustment due to an error in reflecting the cost of an underlying transporter's rate in the sales rates beginning January 15, 1988; and (4) a revision in the quarterly purchased gas cost adjustment, for effectiveness on July 1, 1988, to reflect the appropriate annualized Transportation Cost Adjustment in the sales rates required by the letter order of the Director of Pipeline and Producer Regulation, dated June 23, 1988, in Docket No. TQ88–2–4–000. The quarterly purchased gas cost adjustment also reflects revised estimates of purchased gas costs and sales.

Granite State further states that copies of its filing were served upon its customers, Bay State Gas Company and Northern Utilities, Inc., and the regulatory commissions of the States of Maine, Massachusetts, and New Hampshire.

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, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Sections 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before August 10, 1988. 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.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17841 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. GP87–52–000]

Murchison Trust v. Transcontinental Gas Pipe Line Corp.; Complaint

August 4, 1988.

On May 21, 1987, Murchison Trust (Murchison) filed a complaint pursuant to 18 CFR 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Murchison requests that the Production-Related Costs Board (Board) find that Transcontinental Gas Pipe Line Corporation (Transco) is in violation of 18 CFR 271.1104 by refusing to reimburse Murchison for $107,259.29 in production-related costs incurred between July 25, 1980 through March 7, 1983 (retroactive period).

Murchison states that by invoice dated March 5, 1987, Transco was billed $107,259.29 in production-related costs due under two contracts dated February 22, 1979 and January 3, 1980, respectively. These sales cover the Hubberd wells in Liz Field, Webb County, Texas and the S. J. Martin wells in Moritas Creek Field, Webb County, Texas. Murchison claims that Transco responded to the invoice by stating that Murchison was precluded from making retroactive collections because the invoice was dated after December 31, 1984.

Murchison asserts that the issue in this case is whether 18 CFR 271.1104 bars Murchison from collecting production-related costs incurred prior to March 7, 1983, because it did not submit an invoice to Transco until after 1984. It believes that the Commission did not intend for its regulations to operate in the manner asserted by Transco, but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

Murchison requests that the Board issue an order finding Transco in violation of 18 CFR 271.1104 for failure to pay Murchison $107,259.29 in production-related costs. In the alternative, Murchison requests a waiver, if one is required, of the time frame for requesting collection of production-related costs incurred prior to March 7, 1983.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Transco must file an answer to Murchison's complaint with Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted. Transco shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register.**

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register.** 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17862 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. GP88–5–000]

Newman Brothers Drilling Co. v. Williston Basin Interstate Pipeline Co.; Complaint

August 4, 1988.

On November 16, 1987, Newman Brothers Drilling Company (Newman) filed a complaint pursuant to 18 CFR 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Newman requests that the Production-Related Costs Board (Board) find that Williston Basin Interstate Pipeline Company (Williston) is in violation of 18 CFR 271.1104 by refusing to reimburse Newman for production-related costs incurred between July, 1980 through October, 1986.

Newman states that by invoice dated January 8, 1987, Williston was billed $36,649.41 for production-related costs due under a contract dated May 7, 1967, covering the Federal #1–14 well in Big Horn County, Wyoming. Newman claims that Williston responded to the invoice by stating that it has a company policy not to pay production-related costs even though contract authorization exists and the Commission regulations allow the collection of such costs.

Newman asserts that the issue of this complaint is whether Williston has an obligation to perform under Commission Order No. 94–A.

Newman requests that the Board issue an order finding Williston in violation of 18 CFR § 271.1104 for failure to pay Newman $36,649.41 in production-related costs.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Williston must file an answer to Newman's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted. Williston shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register.**

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register.** 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17863 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CI85–513–009]

Tenngasco Gas Supply Co. et al. v. Southland Royalty Co. et al. Proposes Stipulation and Agreement in Partial Settlement of Proceedings

Issued: August 3, 1988.

Take notice that on July 15, 1988, Chevron U.S.A. Inc., Enforcement Staff of the Federal Energy Regulatory Commission, Southern California Gas Company, Pacific Gas and Electric Company, Southwest Gas Corporation, and Southern Union Gas Company (hereinafter the "Sponsoring Parties") filed with the Commission an offer of settlement and a Stipulation and Agreement (Stipulation) in partial settlement of proceedings in the above-captioned docket.

This proceeding was initiated by a complaint filed June 18, 1985, by HT Gathering Company, Tenngasco Gas Supply Company, Houston Natural Gas Corporation, and Intratex Gas Company (HT *et al.*). The complainants alleged that some or all of the gas sold in intrastate commerce by Gulf Oil Corporation (Gulf) and/or Warren Petroleum Company (Warren), a division of Gulf, to HT Gathering from the Waddell Ranch, Crane County, Texas may have been dedicated to El Paso Natural Gas Company (El Paso) in interstate commerce. On July 1, 1985, Chevron U.S.A. Inc. merged with Gulf Oil Corporation, with the resulting corporate entity being Chevron U.S.A. Inc. (Chevron). The Sponsoring Parties have negotiated a settlement which resolves all issues in the captioned proceeding with respect to Gulf/Warren-Chevron as to the gas produced from the Waddell lease acreage. Additionally, the Stipulation resolves and settles issues not involved in Docket No. CI85–513–000 concerning certain other acreage (non-term lease acreage) as set forth in the Stipulation.

The Stipulation resolves all claims which were or could be raised in the captioned docket against the Sponsoring Parties with respect to the Waddell lease acreage and the non-term lease acreage, including issues relating to the production, gathering, processing, treating, conditioning, purchase, sale, resale, transfer, delivery and/or exchange, accounting, and allocation of the subject gas due to the activities described in the Stipulation.

According to the Stipulation, Chevron shall make refunds to El Paso for distribution to both its jurisdictional and non-jurisdictional customers. The Stipulation delineates how certain of the Chevron gas will be made available to el Paso and what Chevron gas may be sold to other purchasers. In addition, the Stipulation includes a request for certificate, abandonment, and all other authorizations and waivers necessary to implement its provisions, including but not limited to authorizations under the Natural Gas Act and waiver of §§ 157.18 and 157.23 *et seq.* of the Commission's regulations.

Any person not a party and desiring to be heard with respect to the offer of settlement should file a petition to intervene on or before August 29, 1988, with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with section 211 and 214 of the Commission's rules of practice and procedure.

Comments should be filed with the Secretary of the Commission. Initial comments should be filed on or before August 29, 1988, and reply comments on or before September 7, 1988.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17856 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP88–164–002]

West Texas Gas, Inc.; Filing

August 2, 1988.

Take notice that on July 25, 1988, West Texas Gas, Inc. (WTG) filed Second Revised Sheet No. 21e to its FERC Gas Tariff, Original Volume No. 1, to be effective July 25, 1988.

WTG states that this filing is submitted in accordance with the Commission's Letter Order of June 28, 1988, which directed WTG to revise its May 3, 1988 filing in accordance with Order Nos. 483 and 483–A. WTG states that specifically it was directed to revise section 19.8 of its tariff to define the "cumulative adjustment" as the difference between the current weighted average cost of gas sold and the base cost of gas of the most recent base tariff rate.

WTG requests that the Commission waive its filing fee requirements and refund the filing fee payment of $4,320. WTG recognizes that it cannot claim the economic hardship normally required for a waiver of Commission fees; however, WTG believes that a waiver is appropriate and necessary to aviod an inequitable application of the Commission's filing fee regulations.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1987)). All such motions or protests should be filed on or before August 10, 1988. 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.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17842 Filed 8–5–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP88-139-001]

Williams Natural Gas Co.; Proposed Changes in FERC Gas Tariff

August 3, 1988.

Take notice that Williams Natural Gas Company (WNG) on July 27, 1988 tendered for filing the following tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

Second Revised First Revised Sheet Nos. 74 and 75
Second Revised Second Revised Sheet Nos. 78 and 79

WNG states that the foregoing tariff sheets are being filed in compliance with the Commission's letter order issued July 1, 1988 in Docket No. RP88-139-000. WNG was directed to file within 30 days of the issuance of the letter order to reflect the corrections enumerated in the Appendix to the letter order.

WNG states that Second Revised First Revised Sheet No. 74 is being filed to change Article 21.2 from "Computation of Cumulative Rate Adjustment" to "Computation of Current Rate Adjustment" per direction Nos. 1 and 2 of the Appendix to the letter order and discussion with Commission Staff. Second Revised First Revised Sheet No. 75 is filed to amend Article 21.22 to insert "months of deferral period" in place of "billing periods" per direction No. 3 of the Appendix. Second Revised Second Revised Sheet No. 78 is filed to amend Article 21.33 to explain the methodology used to price storage inventory per direction No. 4 of the Appendix. Second Revised Second Revised Sheet No. 79 is filed to amend Article 21.4, Para. 3, to reflect a refund trigger of 1 cent per Mcf instead of 1 cent per MMBTU per direction No. 5 of the Appendix.

WNG states that copies of its filing were served on all jurisdictional customers and interested state commissions.

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, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before August 10, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17843 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. GP87-49-000]

Wintergreen Energy Corp. v. Transcontinental Gas Pipe Line Corp.; Complaint

August 4, 1988.

On May 13, 1987, Wintergreen Energy Corporation (Wintergreen) filed a complaint pursuant to 18 CFR § 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Wintergreen requests that the Production-Related Costs Board (Board) find that Transcontinental Gas Pipe Line Corporation (Transco) is in violation of 18 CFR 271.1104 by refusing to reimburse Wintergreen for $16,094.51 in production-related costs incurred between July 25, 1980 through March 7, 1983 (retroactive period).

Wintergreen states that by invoice dated February 20, 1987, Transco was billed $16,094.51 in production-related costs due under a contract dated January 3, 1980, covering the S. J. Martin wells in Moritas Creek Field, Webb County, Texas. Wintergreen claims that Transco responded to the invoice by stating that Wintergreen was precluded from making retroactive collections because the invoice was dated after December 31, 1984.

Wintergreen asserts that the issue in this case is whether 18 CFR 271.1104 bars Wintergreen from collecting production-related costs incurred prior to March 7, 1983, because it did not submit an invoice to Transco until after 1984. Wintergreen believes that the Commission did not intend for its regulations to operate in the manner asserted by Transco, but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

Wintergreen requests that the Board issue an order finding Transco in violation of 18 CFR 271.1104 for failure to pay Wintergreen $16,094.51 in production-related costs. In the alternative, Wintergreen requests a waiver, if one is required, of the time frame for requesting collection of production-related costs incurred prior to March 7, 1983.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Transco must file an answer to Wintergreen's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted. Transco shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register.**

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protests or motions should be filed not later than 15 days after publication of this notice in the **Federal Register.** 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17864 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. GP87-50-000]

Wintergreen Energy Corp. v. Transcontinental Gas Pipe Line Corp.; Complaint

August 4, 1988.

On May 13, 1987, Wintergreen Energy Corporation (Wintergreen) filed a complaint pursuant to 18 CFR 271.1105(d)(3) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206. Wintergreen requests that the Production-Related Costs Board (Board) find that Transcontinental Gas Pipe Line Corporation (Transco) is in violation of 18 CFR 271.1104 by refusing to reimburse Wintergreen for $20,263.59 in production-related costs incurred between July 25, 1980 through March 7, 1983 (retroactive period).

Wintergreen states that by invoice dated March 5, 1987, Transco was billed $20,263.59 in production-related costs due under a contract dated February 22, 1979, covering the Hubberd wells in Liz Field, Webb County, Texas. Wintergreen claims that Transco responded to the invoice by stating that Wintergreen was precluded from retroactive collections because the invoice was dated after December 31, 1984.

Wintergreen asserts that the issue in this case is whether 18 CFR 271.1104 bars Wintergreen from collecting production-related costs incurred prior to March 7, 1983, because it did not submit an invoice to Transco until after 1984. Wintergreen believes that the Commission did not intend for its regulations to operate in the manner asserted by Transco, but was merely one recovery mechanism to avoid a huge lump sum payment by pipelines.

Wintergreen requests that the Board issue an order finding Transco in violation of 18 CFR 271.1104 for failure to pay Wintergreen $20,263.59 in production-related costs. In the alternative, Wintergreen requests a waiver, if one if required, of the time frame for requesting collection of production-related costs incurred prior to March 7, 1983.

Under Rules 206(b) and 213(a), 18 CFR 385.206(b) and 385.213(a), Transco must file an answer to Wintergreen's complaint with the Commission unless otherwise ordered by the Commission. Under Rule 213(e), 18 CFR 385.213(e), any person failing to answer a compliant may be considered in default; and all relevant facts stated in such complaint may be deemed admitted. Transco shall file its answer with the Commission not later than 15 days after publication of this notice in the **Federal Register.**

Any person desiring to be heard or to protest said filing should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214, 18 CFR 385.211 and 385.214. All such protest or motions should be filed not later than 15 days after publication of this notice in the **Federal Register.** 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell

Acting Secretary.

[FR Doc. 88-17865 Filed 8-5-88; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3426-3]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and is available to the public for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

FOR FURTHER INFORMATION CONTACT: Carla Levesque at EPA, (202) 382-2740.

SUPPLEMENTARY INFORMATION:

Office of Solid Waste and Emergency Response

Title: Uniform Hazardous Waste Manifest for Generators, Transporters and Disposal Facilities. (EPA ICR #0801).

Abstract: All shipments of hazardous waste made by generators of greater than 100 kg/month must be accompanied by copies of the Uniform Hazardous Waste Manifest form. Copies of the manifest must then be signed and retained by all transporters and the designated disposal facility. The disposal facility must also check the manifest against the shipment and file a discrepancy report if necessary and return a signed copy of the manifest to the generator.

Burden Statement: Public reporting burden for this collection of information is estimated to average 0.2 to 2.0 hours for generators, 6.7 hours for transporters, and 0.5 to 28.6 hours for disposal facilities per response. This estimate includes the time for reviewing instructions, gathering and maintaining the data needed and completing and reviewing the collection of information.

Respondents: Owners and operators that generate, transport or dispose hazardous waste being shipped off site.

Estimated No. of Respondents: 288,640

Frequency of Collection: One per shipment

Total Estimated Annual Burden: Generators: 666,980; Transporters: 80,030; Disposal Facilities: 164,830 = 911,840 total.

Send comments regarding the burden estimates, or any other aspects of this collection of information, including suggestions for reducing these burdens, to:

Carla Levesque, U.S. Environmental Protection Agency, Information Policy Branch (PM-223), 401 M St., SW., Washington, DC 2046

and

Marcus Peacock, Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, NW., Washington, DC 20503 (Telephone (202) 395-3084)

OMB Responses to Agency PRA Clearance Requests

EPA ICR# 1359; RCRA Financial Responsibility Requirements for Underground Storage Tanks; was approved 07/15/88; OMB# 2050-0066; expires: 07/31/91.

EPA ICR# 1356; Pilot Investigation of Soil Ingestion (Amendment: Follow-up); was approved 07/13/88; OMB# 2080-0029; expires: 09/30/88.

EPA ICR# 0807; RCRA Closure and Post Closure (Amendment—Delay of Closure); was approved 07/15/88; OMB# 2050-0008; expires 01/31/89.

EPA ICR# 1449; Maricipa County, Arizona Federal Implementation Plan—Information Requirements; withdrawn at Agency request.

Date: August 2, 1988.

Odelia Funke,

Acting Director, Information and Regulatory Systems Division.

[FR Doc. 88-17803 Filed 8-5-88; 8:45 am]

BILLING CODE 6560-50-M

[FRL 3425-1]

Emergency Planning and Community Right to Know; Labat-Anderson, Incorporated; Access to Trade Secret Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized Labat-Anderson, Incorporated of Arlington, Virgina for access to trade secret information which has been submitted to EPA pursuant to section 322 of the Emergency Planning and Community Right-to-Know Act of 1986, also known as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). Specifically, access is with regard to trade secrecy claims by industry under sections 303, 311, 312, and 313 submittals.

DATE: Access to the trade secret information submitted to EPA will occur no sooner than August 18, 1988.

FOR FURTHER INFORMATION CONTACT: Toy Jover, Preparedness Staff, Office of Solid Waste and Emergency Response, WH-562A, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (202-382-2387).

SUPPLEMENTARY INFORMATION: Under Title III, facilities must send trade

secrecy claims regarding their Section 303, 311, 312, and 333 submittals to EPA.

Under contract number 68–W8–0108, Labat-Anderson, Incorporated, will assist the Preparedness Staff (Office of Solid Waste and Emergency Response) in receiving and processing the information submitted by industry. EPA has determined that Labat-Anderson, Incorporated will require access to trade secret information, and in so doing, Labat-Anderson, Incorporated will follow all required security procedures.

EPA is issuing this notice to inform all submitters of trade secret information under the aforementioned Title III sections that EPA will provide Labat-Anderson Incorporated access to these trade secret materials. Upon termination of their contract, or prior to termination of their contract at EPA's request, Labat-Anderson, Incorporated will return all materials to EPA.

Clearance to access to Title III trade secret information under this contract is scheduled to expire on July 14, 1991.

James L. Makris,

Director, Preparedness Staff, Office of Solid Waste and Emergency Response.

[FR Doc. 88–17804 Filed 8–5–88; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Senior Performance Review Board Membership

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Listing names of the members of the Senior Executive Service Performance Review Board.

DATE: August 1, 1988.

FOR FURTHER INFORMATION CONTACT: Denise R. Yachnik, Programs Division, Office of Personnel and Equal Opportunity, 500 C Street, SW., Washington, DC 20472.

The names of the members of the FEMA Senior Executive Service Performance Review Board established pursuant to 5 U.S.C. 4314 (c) are:

Members

Frank H. Thomas,
William K. Chipman,
John D. Hwang,
George H. Orrell,
John W. McKay,
Laura A. Buchbinder, and
John R. Curran, Sr.

George W. Watson,

Acting General Counsel.

[FR Doc. 88–17786 Filed 8–5–88; 8:45 am]

BILLING CODE 6718–01–M

GENERAL SERVICES ADMINISTRATION

[GSA Bulletin FPMR A–40, Supp. 28]

Changes to Federal Travel Regulations

AGENCY: Federal Supply Service, GSA.

ACTION: Notice of changes to Federal Travel Regulations (FTR).

SUMMARY: The General Services Administration (GSA) has issued GSA Bulletin FPMR A–40, Supplement 28, transmitting changed pages to amend the Federal Travel Regulations (FTR), FPMR 101–7, to increase the mileage rate from 21 cents to 22.5 cents per mile for use of privately owned automobiles when authorized as advantageous to the Government and to incorporate the provisions of an amendment to the Federal Information Resources Management Regulation (FIRMR) clarifying the policy regarding the authorized use of Government telephone systems while on official travel.

EFFECTIVE DATES:

a. The increase to the POV mileage rate for automobiles is effective for travel performed on or after August 14, 1988.

b. The changes in Chapter 1, Part 6, relating to the policy regarding authorized use of Government telephone systems are effective January 4, 1988, or upon implementation of the policies in individual agency directives, whichever is later.

FOR FURTHER INFORMATION CONTACT: Raymond F. Price, Jr., Travel and Transportation Regulations Staff (FBR), FTS 557–1256 or Commercial (703) 557–1256.

SUPPLEMENTARY INFORMATION: GSA has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more, a major increase in costs to consumers or others; or significant adverse effects. GSA has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

Background Information

a. The Travel Expense Amendments Act of 1975 (Pub. L. 94–22, May 19, 1975) authorizes the Administrator of General Services to issue regulations prescribing, within statutory limits, mileage allowance rates. GSA is required by law to periodically investigate the cost of operating privately owned vehicles (automobiles, airplanes, and motorcycles) to employees while on official travel and report the results of these investigations to the Congress. GSA reported the results of the November 1987 investigations to the Congress indicating that the governing regulations would be revised to reflect an increase in the mileage allowance for use of privately owned automobiles. Necessary adjustments are reflected in this change to the FTR.

b. The FIRMR (41 CFR 201–38.007) was amended to incorporate several new provisions regarding the use of Government telephone systems and to furnish examples of permissible official business calls. A final rule (FIRMR Amendment 11) was published in the **Federal Register** on November 4, 1987 (52 FR 42292).

Explanation of Changes

a. Paragraph 1–4.2a(2) and 1–4.2c (1) and (2) are revised to reflect an increase in the mileage rate from 21 cents per mile to 22.5 cents per mile for use of privately owned automobiles when such use is advantageous to the Government.

b. Chapter 1, Part 6 of the FTR is amended to incorporate the recent policy clarification concerning use of Government telephone systems while on official Government travel. Authorization or approval of employees' use of Government telephone systems during official travel is totally dependent upon agency directions implementing FIRMR Amendment 11 as required by 41 CFR 201–38.007–6. In addition, several editorial and clarifying changes have been made to update provisions in Part 6 relating to the use of other communication services while on official business.

Accordingly, the FTR are amended as follows:

Chapter 1, Travel Allowances

Part 4. Reimbursement for use of Privately Owned Conveyances

1. **Authority:** (Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); 5 U.S.C. 5707; Executive Order 11609, July 22, 1971).

2. Part 1–4 is amended by revising paragraphs 1–4.2a(2) and 1–4.2c (1) and (2) to read as follows:

1–4.2 *When use of a privately owned conveyance is advantageous to the Government.*

a. * * *

(2) For use of a privately owned automobile: 22.5 cents per mile.

* * * * *

c. * * *

(1) *Round trip when instead of taxicab to carrier terminals.* Instead of using a taxicab under 1–2.3c, payment on a mileage basis at the rate of 22.5 cents per mile and other allowable costs as set forth in 1–4.1c shall be allowed for the round-trip mileage of a privately owned automobile used by an employee going from either the employee's home or place of business to a terminal or from a terminal to either the employee's home or place of business. However, the amount of reimbursement for the round trip shall not in either instance exceed the taxicab fare, including tip, allowable under 1–2.3c for a one-way trip between the applicable points.

(2) *Round trip when instead of taxicab between residence and office on day of travel.* Instead of using a taxicab under 1–2.3d (in connection with official travel requiring at least one night's lodging), payment on a mileage basis at the rate of 22.5 cents per mile and other allowable costs as set forth in 1–4.1c shall be allowed for round-trip mileage of a privately owned automobile used by an employee going from the employee's residence to the employee's place of business or returning from place of business to residence on a day travel is performed. However, the amount of reimbursement for the round trip shall not exceed the taxicab fare, including tip, allowable under 1–2.3d for a one-way trip between the points involved.

* * * * *

Part 6. Communications Services

3. Chapter 1, Part 6 of the FTR is revised to read as follows:

1–6.1. Authorization.

When necessary, telephone, teletype, telegraph, cable, and radio service may be used on official business.

1–6.2. Type of service used.

a. *Government equipment.* Whenever possible, official long distance telephone calls and other communications services shall be through the use of Government-owned and -leased equipment.

b. *Use of commercial services.* If Government services are not available, the least expensive practicable type and class of commercial service shall be used.

1–6.3. Written messages.

When necessary, written messages may be used while on official business. However, care shall be exercised in preparing messages to provide only those words, figures, and punctuation necessary to the meaning of the message.

1–6.4. Official communications.

a. *Local calls.* Charges for local telephone calls on official business shall be allowed as a transportation expense. (See 1–11.5a(1) regarding entry of such calls on travel vouchers as a transportation expense.)

b. *Reservation of accommodations.* Charges for commercial communication services when necessary for reserving airplane, train, or other transportation accommodations for official business are transportation expenses and may be allowed when supported by a satisfactory explanation.

c. *Use of Government telephone systems during official travel.* The Federal Telecommunications System (FTS) intercity network and other Government-provided long distance telephone services are to be used only to conduct official business; i.e., if the call is necessary in the interest of the Government (31 U.S.C. 1348(b)). These networks are to be used for placement of calls instead of the commercial toll network to the maximum extent practicable (see 1–6.2). Authorization or approval of employees' use of the Government telephone systems (including calls over commercial systems which will be paid for by the Government) during official travel shall be in accordance with agency directives issued pursuant to the Federal Information Resources Management Regulation (FIRMR) (41 CFR 201–38.007 through 201–38.007–7).

1–6.5. Supporting statement.

Charges for official commercial telephone calls, telegrams, cablegrams, or radiograms on official business may be allowed provided a statement is furnished showing the points between which service was rendered, the date, the amount paid for each telephone call, telegram, cablegram, or radiogram, and that they were required on official business. When the public interest so requires, the points between which telephone service was rendered need not be stated in the official travel voucher, but may be stated in confidence to the administrative official.

1–6.6. Charges for telegraph, cable, and radio services.

a. *Collect service.* Official telegrams, cablegrams, and radiograms sent to Government offices having authorized charge accounts shall be endorsed by the sender as "Official Business-Collect" unless otherwise directed by a designated authority. All others shall be prepaid.

b. *Cash payment.* When "collect" service is refused, payment of the amount demanded shall be made. A report of the circumstances and a receipted copy of the message shall be sent to the administrative office.

c. *Words chargeable.* All messages shall be subject in all respects to the prevailing commercial count of chargeable words. In addition, collect messages may include a surcharge.

1–6.7. Priority of official messages.

All Government communications by telegraph, cable, or radio shall have priority over all other business, except radio communications or signals which are given absolute priority under the Communications Act of 1934, as amended, and shall be subject to the prevailing classifications, practices, and regulations applicable to the corresponding commercial communications. Employees sending such communications shall endorse thereon the words "official business." Complaints may be filed with the Federal Communications Commission in accordance with section 208 of the Communications Act of 1934, as amended.

Dated: July 14, 1988.

John Alderson,

Acting Administrator of General Services.

[FR Doc. 88–17772 Filed 8–5–88; 8:45 am]

BILLING CODE 6820–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 88N–258L]

Prescription Drug Marketing Act of 1987; Availability of Letter Setting Forth Agency Policies

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a letter to industry discussing the Prescription Drug Marketing Act of 1987, and advising the public of the agency's plans to develop implementing regulations. As part of this letter, the agency is receiving comments on any proposed rulemaking which might be necessary for implementing the law.

DATE: Written comments by October 7, 1988.

ADDRESS: Written requests for copies of this letter should be submitted to the

Division of Regulatory Affairs (HFD–360), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send two self-addressed adhesive labels to assist the Division in processing your request. Written comments should be submitted to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Richard L. Arkin, Center for Drug Evaluation and Research (HFD–362), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–295–8046.

SUPPLEMENTARY INFORMATION: On April 22, 1988, the President signed into law the Prescription Drug Marketing Act of 1987 (the new law) (Pub. L. 100–293, 102 Stat. 95), which amends the Federal Food, Drug, and Cosmetic Act (the act) to: (1) Require State licensing of wholesale drug distributors under Federal guidelines that include minimum standards for storage, handling, and recordkeeping; (2) ban the reimportation of prescription drugs produced in the United States, except when reimported by the manufacturer or for emergency use; (3) ban the sale, purchase, or trade of drug samples; (4) ban trafficking in or counterfeiting of drug coupons; (5) mandate storage, handling, and recordkeeping requirements for drug samples; (6) require practitioners to request drug samples in writing; (7) prohibit with certain exceptions the resale of prescription drugs purchased by hospitals or health care facilities; and (8) set forth criminal and civil penalties for violations of these provisions.

Most provisions of the new law became effective July 22, 1988, although the provisions relating to drug samples will become effective October 20, 1988. FDA is required to publish a final rule establishing minimum standards, conditions, and terms for State licensing of wholesale drug distributors no later than October 20, 1988, and the requirement for State licensing of wholesale drug distributors will become effective 2 years after FDA publishes that final rule.

FDA has issued a letter to regulated industry and other interested persons on the new law. Until regulations are finalized, the information in this letter may be relied upon with assurance of its acceptability to FDA. The letter, however, does not state legal requirements beyond those found in the statute and existing regulations. Nor does the letter bind FDA should events occur prior to the issuance of a rule that require a change in FDA's policy. Changes in FDA policy will be announced in future letters or notices.

Interested persons may, on or before October 7, 1988, submit to the Dockets Management Branch (address above) written comments regarding implementation of the new law and the information in the letter. Comments should be identified with the docket number found in the heading of this document and on the cover page of the letter. Comments should be submitted in duplicate, except individuals may submit one copy. Comments and other information on this topic have been placed on file with the Branch and may be seen between 9 a.m. and 4 p.m., Monday through Friday.

Written requests for a single copy of the letter should be sent to the Division of Regulatory Affairs (address above).

Dated: August 2, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–17817 Filed 8–5–88; 8:45 am]

BILLING CODE 4160–01–M

Public Meeting; Issues Concerning Heat Susceptor Packaging

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a forthcoming public meeting to discuss issues concerning the use of heat susceptors in food packaging intended for the microwave cooking of food.

DATE: The meeting will be held September 22, 1988, 9:30 a.m. to 12 m.

ADDRESS: The meeting will be held in the auditorium of the Health and Human Services North Bldg. (Cohen Bldg.), 330 Independence Ave. SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Edward J. Machuga, Center for Food Safety and Applied Nutrition (HFF–335), Food and Drug Administration, 200 C St., SW., Washington, DC 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION: The meeting is being sponsored by FDA to discuss issues concerning the use of heat susceptors in food packaging intended for microwave cooking of food. These issues are raised by information indicating that adhesives, polymers, paper, and other food packaging components may be degraded during use in structures utilizing heat susceptors. Of particular concern to the agency is whether the components of these food packages have been tested to ensure safety at the temperatures obtained with heat susceptor packaging in microwave ovens.

FDA is holding this meeting to ensure industrywide notification of the agency's concerns and to provide uniform guidance regarding the generation of data suitable to evaluate the safety of the use of heat susceptors and packaging materials used with heat susceptors. The agency is inviting all persons involved in the fabrication or the use of food packaging utilizing heat susceptors, as well as other interested persons, to participate in this meeting.

Dated: August 1, 1988

Richard J. Ronk,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 88–17818 Filed 8–5–88; 8:45 am]

BILLING CODE 4160–01–M

National Institutes of Health

National Institutes of Health and Alcohol, Drug Abuse and Mental Health Administration; Industry Collaboration Forum

With the passage of the Federal Technology Transfer Act of 1986 (FTTA), incentives have been provided that encourage collaboration between government scientists and industry in the hope that some of these endeavors may lead to a mutually profitable patent or license agreement.

As part of a government-wide effort to implement the FTTA, the National Institute of Health (NIH) and the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA) will sponsor an NIH/ADAMHA-Industry Collaboration Forum, to be held on Tuesday, October 25, 1988, at the Omni Shoreham Hotel in Washington, DC. Although eligibility for registration is unrestricted, the forum will be most useful to those for-profit organizations with capabilities and resources to conduct research with biomedical or behavioral applications. The registration fee is $150.00.

The forum will begin at 8:30 a.m. with a brief plenary session, followed by a poster session displaying the goals and research capabilities of various NIH and ADAMHA laboratories. Due to space availability, early registration is strongly encouraged. Deadline for registration is October 1, 1988. Requests for registration after this date may not be honored. To obtain registration information, call (202) 639–4940 or write to: Pat Davenport, Courtesy Associates, Inc., Suite 300, 655 15th Street, NW., Washington, DC 20005, (202) 639–4940.

Dated: July 28, 1988.
James B. Wyngaarden,
Director, NIH.
[FR Doc. 88-17867 Filed 8-5-88; 8:45 am]
BILLING CODE 4140-01-M

Social Security Administration

Statement of Organization, Functions and Delegations of Authority

Part S of the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (DHHS) covers the Social Security Administration (SSA). Notice is given that Part S, as published in the **Federal Register** on January 8, 1986, is being amended to reflect changes in the organizational designations and functional responsibilities for the Office of Hearings and Appeals (OHA). Accordingly, Chapter S is being amended to show the reorganization of OHA.

The revisions are as follows:

Section S.20 *The Social Security Administration*—(Functions):

Chapter S3G *The Office of Hearings and Appeals.*

Delete:

Section SG.00 *The Office of Hearings and Appeals*—(Mission): in its entirety.

Section SG.10 *The Office of Hearings and Appeals*—(Organization): in its entirety.

Section SG.20 *The Office of Hearings and Appeals*—(Functions): in its entirety.

Add:

Section S3G.00 *The Office of Hearings and Appeals*—(Mission):

The Office of Hearings and Appeals (OHA), under direct delegation from the Secretary of the Department of Health and Human Services, administers the nationwide hearings and appeals program for the Social Security Administration (SSA). The Office of Hearings and Appeals issues the final decision of the Secretary on highly complex appealed determinations involving retirement, survivors, disability, health insurance, black lung, and supplemental security income benefits. OHA provides the basic mechanisms through which individuals and organizations dissatisfied with determinations affecting their rights to and amounts of benefits or their participation in programs under the Social Security Act may administratively appeal these determinations in an impartial and unbiased forum in accordance with the requirements of the Administrative Procedure and Social Security Acts. OHA includes a nationwide field organization staffed with Administrative Law Judges (ALJs) who conduct impartial hearings and make decisions on appeals filed by claimants, attorneys, providers-of-service institutions and others under the Social Security Act. The Appeals Council of OHA impartially reviews ALJ decisions, either on the Appeals Council's own motion or at the request of the claimant, and renders the Secretary's final decision when review is taken. OHA reviews new court cases to determine whether the case should be defended on the record or the Secretary should seek voluntary remand, and reviews final court decisions in light of the programmatic and administrative implications involved and makes recommendations as to whether appeal should be sought. Provides advice and recommendations on Social Security Administration program policy and related matters, including proposed Social Security Rulings.

Section S3G.10 *The Office of Hearings and Appeals*—(Organization): The Office of Hearings and Appeals, under the leadership of the Associate Commissioner for Hearings and Appeals, includes:

A. The Associate Commissioner for Hearings and Appeals (S3GA).

B. The Deputy Associate Commissioner for Hearings and Appeals (S3GA).

C. The Immediate Office of the Associate Commissioner for Hearings and Appeals (S3GA) which includes:

1. The Executive Secretariat (S3GA1).
2. The Special Counsel Staff (S3G4).

D. The Office of the Chief Administrative Law Judge (S3GJ).

1. The Division of Field Operations and Liaison (S3GJ1).
2. The Division of Field Practices and Procedures (S3GJ2).
3. The Vocational Expert and Medical Advisor Staff (S3GJ4).

E. The Offices of the Regional Chief Administrative Law Judges (S3G-FX—S3G-F9).

F. The Office of Appellate Operations (S3GC), which includes the Executive Director, the Appeals Council and its members, and a Deputy Director for Operations. Units within the Office of Appellate Operations include:

1. The Operations Management, Analysis and Coordination Staff (S3GC3).
2. The Administrative Support Staff. (S3GC4).
3. The Retirement and Survivors Insurance, Health Insurance and Supplemental Security Income Staff (S3GC5).
4. Program Review Branch 1 (S3GC6).
5. Program Review Branch 2 (S3GC7).
6. Program Review Branch 3(S3GC8).
7. Program Review Branch 4 (S3GC9).
8. Program Review Branch 5 (S3GC11).
9. Program Review Branch 6 (S3GC12).
10. Program Review Branch 7 (S3GC13).
11. Program Review Branch 8 (S3GC14).
12. Program Review Branch 9 (S3GC15).
13. Program Review Branch 10 (S3GC16).
14. Program Review Branch 11 (S3GC17).
15. Program Review Branch 12 (S3GC18).
16. Program Review Branch 13 (S3GC19).
17. Program Review Branch 14 (S3GC21).
18. Program Review Branch 15 (S3GC22).
19. Program Review Branch 16 (S3GC23).

G. The Office of Civil Actions (S3GL).

1. The Division of Litigation Analysis and Coordination (S3GL1).
2. Division I (S3GL2).
3. Division II (S3GL3).
4. Division III (S3GL4).
5. Division IV (S3GL5).
6. Division V (S3GL6).

H. The Office of Management (S3GQ).

1. The Operational Planning and Analysis Staff (S3GQ3).
2. The Equal Opportunity Staff (S3GQ4).
3. The Division of Congressional and Public Inquiries (S3GQ5).
4. The Division of Budget and Financial Management (S3GQ6).
5. The Division of Human Resources (S3GQ7).
6. The Division of Materiel Resources (S3GQ8).
7. The Division of Systems Resources (S3GQ9).

I. The Office of Policy, Planning and Evaluation (S3GP).

1. The Division of Planning and Evaluation (S3GP).
2. The Division of Policy (S3GP5).

Section S3G.20. *The Office of Hearings and Appeals*—(Functions):

A. The Associate Commissioner of Hearings and Appeals (S3GA) is directly responsible to the Commissioner of Social Security for carrying out OHA's mission of holding hearings and rendering decisions on appeals filed under Titles II, XVI, and XVIII of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. The Associate Commissioner is a principal SSA executive and serves as advisor and consultant to the Commissioner of

Social Security, the Deputy Commissioner for Programs, and the Secretary of Health and Human Services on the full range of SSA policies, concerns and activities relating to the hearings and appeals process, including current and proposed legislation which directly or indirectly affects that process. The Associate Commissioner is responsible for planning, directing, managing, coordinating, and maintaining the integrity of the nationwide SSA hearings and appeals system by directing the planning, development, and promulgation of regulations, policies, and procedures governing the hearings and appeals program of the Social Security Administration. The Associate Commissioner is responsible for maintaining a hearings and appeals system which is impartial and which supports the tenets of fairness and equal treatment under the law. The Associate Commissioner provides executive leadership to, and administrative and management support functions for, the field organization which holds hearings and renders decisions under the Social Security Act. As Chair of the Appeals Council, the Associate Commissioner is responsible for the decisions issued at the final administrative level of the Social Security Administration. Following Appeals Council action, dissatisfied claimants or organizations may file civil actions in the United States District Courts. As Chair of the Appeals Council, the Associate Commissioner directs and coordinates the program for reviewing decisions issued by Administrative Law Judges under the Social Security Act. The Associate Commissioner monitors decisions rendered in the courts and provides recommendations as to appeal and/or interpretations for use by SSA in policymaking. The Associate Commissioner provides executive leadership and direction to the major components of OHA by establishing specific objectives, standards, and management and program policies with respect to the organizational responsibilities of these components.

B. The Deputy Associate Commissioner for Hearings and Appeals (S3GA) is an alter ego to the Associate Commissioner. As such the Deputy Associate Commissioner shares responsibility with the Associate Commissioner for the operations of the Office of Hearings and Appeals. The Deputy Associate Commissioner assists the Associate Commissioner in carrying out his/her OHA-wide responsibilities and performs other duties as the Associate Commissioner may prescribe.

C. The Immediate Office of the Associate Commissioner for Hearings and Appeals (S3GA) assists the Associate Commissioner and the Deputy Associate Commissioner by providing a full range of staff services to assist them in carrying out their duties.

1. The Executive Secretariat (S3GA1) maintains liaison and coordination between the Office of the Associate Commissioner and major OHA components. Communicates the objectives, priorities and standards of the Associate Commissioner to individuals charged with preparing official OHA correspondence and/or publications, and ensures that communications signed or approved by the Associate Commissioner are consistent with those standards and objectives. Reviews and analyzes memoranda and other communications directed to the Associate Commissioner for adequacy of coordination and clearances, clarity and conciseness of presentation, timeliness, necessary follow-through, consistency with stated policy and other elements of completed staff work. Assigns responsibility for action on requests made by or to the Associate Commissioner and monitors the status of assigned projects and tasks. Prepares and/or coordinates the preparation of briefing material for meetings attended by the Associate Commissioner. Attends meetings held by the Associate Commissioner to record decisions and action requests and follows through to ensure they are implemented. Provides guidance to OHA executive staff in the area of communications. Through regularly printed communications distributed to OHA employees in the field and at headquarters, plans, develops, and administers a comprehensive communications network designed to provide general information about OHA activities to employees; to promote favorable attitudes towards the agency by OHA employees; and to highlight SSA/OHA's policies, programs, or procedural requirements. Improves OHA's overall image with the public by writing or editing articles, publications, speeches, or news releases that are definitive expressions and/or explanations of the agency's policies, programs, or procedural requirements. Plans and directs the development of internal communications policies, techniques and practices for use throughout OHA.

2. The Special Counsel Staff (S3GA4) serves as professional legal advisor to the Associate Commissioner, OHA, and to other members of the OHA executive staff on all matters pertaining to the legislative process, labor relations law, ethics and administrative law, with special emphasis on the Administrative Procedure Act. Provides advice and recommendations regarding problem areas which have far-reaching implications to SSA in general and to the hearings and appeals process in particular. Develops trial strategies and supervises the presentation of cases involving court and administrative hearings which raise unique, precedential or novel issues. Responsible for preparing and trying administrative hearings in disciplinary proceedings against Administrative Law Judges before the Merit Systems Protection Board. Responsible for attorney sanction matters for the Office of Hearings and Appeals. Represents OHA in liaison activities with Congress, the American Bar Association, the Administrative Conference of the United States, and other governmental organizations, with special emphasis on pending, proposed, and prospective legislation pertaining to the Administrative Procedure Act. Provides recommendations for modification of prospective legislation which could adversely affect the hearings and appeals process. Serves as technical advisor to the Department of Health and Human Services (DHHS) representatives on the Administrative Conference of the United States. Conducts studies in the field of administrative law and of the more complex problems arising in the hearings and appeals process and provides recommendations as to improvements as a result of these studies. Reviews regulations and procedures for legality and conformity to SSA/OHA policy. Acts as ethics officer for OHA headquarters. Conducts or coordinates investigations of allegations of misconduct, waste, fraud or abuse by OHA employees in the field and at headquaters.

D. The Office of the Chief Administrative Law Judge (S3GJ) serves as the principal consultant and advisor to the Associate Commissioner on all matters concerning the Adminstrative Law Judge (ALJ) hearing function. Under the executive leadership of the Associate Commissioner, the Chief Administrative Law Judge manages and administers a hearings organization consisting of 132 hearing offices and 10 regional offices nationwide. Plans, directs manages, coordinates and evaluates for the Associate Commissioner, the nationwide hearings process of the Social Security Administration. In coordination with the Director of Management, is responsible

for staffing and other resources needed to achieve organizational objectives. With the assistance of seven Regional Chief Administrative Law Judges (RCALJs), oversees the hearings process conducted by OHA's ALJs, who conduct hearings and render decisions in cases in which claimants disagree with reconsidered and revised determinations issued under the provisions of the Social Security Act. These determinations involve claims for retirement, survivors, disability, health insurance, and supplemental security income benefits under Title II, XVI and XVIII of the Social Security Act, as amended, including claims by hospitals, skilled nursing facilities, and independent laboratories seeking certification or continued certification under the Social Security Act, and disability and survivors insurance benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. The Chief Administrative Law Judge formulates and develops broad policies and objectives and establishes program goals for OHA's ALJ corps. The Chief Administrative Law Judge has primary responsibility for maintaining effective channels of communication between the Associate Commissioner and the RCALJs and the ALJ corps. The Chief Administrative Law Judge maintains a continuous review of all aspects of OHA field operations, and implements improvements where needed. Responsible for developing and maintaining the procedures for effective operation of the hearings process. Directs a professional staff engaged in providing liaision services to field personnel with respect to implementing substantive policy, program and procedural matters; provides management oversight for all administrative and managerial functions involved in the day-to-day operations of field activities; coordinates hearing office activities; and conducts liaison with other government and private agencies on issues falling within the Office's area of responsibility.

1. The Division of Field Operations and Liaison (S3GJ1) serves as liaison for the field with all headquarters components, and provides advice, guidance, and counsel to field units in all areas of identified needs. Serves as the field's main point of contact with OHA headquarters. Through telephone, mail, and on-site contact with field personnel, maintains an indepth knowledge of regional and hearing office operations. Keeps abreast of field problems in the respective areas of program, administration, management, and operations; develops alternative remedies or solutions to these problems, and makes appropriate recommendations to responsible components. Assists the Chief Administrative Law Judge in setting field office objectives to meet the management and operations goals established by the Associate Commissioner, the Chief Administrative Law Judge or other OHA management officials. Reviews field requests for allocation of resources, including staffing, equipment, training, and travel. Analyzes resource needs and ensures resource allocation to the regions according to OHA's Full-Time Equivalent (FTE) allocation system. Responsible for day-to-day monitoring of field operations, including problem identification and resolution, assessment of progress in meeting the established goals of SSA/OHA, compliance with established policies and procedures, etc. Prepares briefing reports for top management and agendas for major field conferences. Tracks implementation of initiatives arising from national and regional field conferences. Identifies the need for special studies or management reviews related to field operations. Represents the field on ongoing or ad hoc workgroups, task forces, etc.

2. The Division of Field Practices and Procedures (S3GJ2) formulates, develops, and oversees field practices and procedures governing the conduct of the hearing process and other program operations issues in response to the Associate Commissioner, the Chief Administrative Law Judge, or other OHA management officials, as well as a result of court orders and /or changes in the law and regulations. Coordinates with the Division of Field Operations and Liaison in developing and maintaining a system for communicating field practices and procedures through such means as operational manuals, handbooks, or instructional notices. On an ongoing basis reviews and, when necessary, revises existing field practices and procedures. Reviews and recommends revisions to forms and notices related to the hearings process. Reviews and comments on a wide variety of policies and procedures prepared by components both within and outside of OHA. Provides recommendations on policies and/or procedures which may effect the field, assessing the appropriateness, clarity practicability, comprehensiveness, and the probable effect of such on field operations, workloads, and staffing. Maintains an ongoing liaison with OHA, SSA, Health Care Financing Administration (HCFA), and Office of General Counsel (OGC) components regarding the hearings process and field needs.

E. Each Office of the Regional Chief Administrative Law Judge (S3G–FX–S3G–F9) acts on behalf of the Associate Commissioner and the Chief Administrative Law Judge at the respective regional levels on all matters involving the hearings process, and is directly reponsible for the effective execution of the hearings process within the region. Provides direction, leadership, management and guidance to the regional office staff and to the hearing offices in the region, including Administrative Law Judges (ALJs) and their staffs. Responsible for the regional implementation of national policies, goals, objectives, and procedures pertaining to the hearings process, and formulates policies, goals, and objectives for the ALJs and support staff in the region. Plans, organizes and administers regional programs for scheduling and conducting independent and impartial hearings on appealed determinations involving claims for retirement, survivors, disability and health insurance benefits; supplemental security income; and black lung benefits. Develops and recommends OHA action with respect to allegations of unfair hearings within the region. Responsible for evaluating the effectiveness of regional and hearing office management, including workload, personnel, and overall resource management; and executing and making critical evaluations and necessary revisions of applicable regional objectives, policies, practices, and procedures. Reviews hearing practices and procedures to detect trends, training needs, and operational problems. Investigates allegations of improper ALJ conduct, and makes recommendations as to necessary corrective action. Responsible for the acquisition and distribution of human and materiel resources within the region; directs the preparation of the regional budget; and justifies the fiscal requirements needed to carry out the hearings program within the region. Coordinates operation and administrative activities with DHHS regional offices, other SSA regional components, State Agencies, and others, as necessary. Establishes a program to maintain ongoing communication with congressional offices on issues of mutual interest and ensures timely and accurate responses to congressional inquiries. Ensures that court remands are processed efficiently within the region, and coordinates with the Office of the Chief Counsel in the region to

foster OHA compliance with court requirements. Directs regional activities to ensure effective consultation and communication between the field and headquarters to enhance the effectiveness of hearing office operations. Serves as an expert advisor on substantive issues within the region, and upon request by ALJs, provides advice and guidance in matters relating to adjudicating cases under the provisions of the Social Security Act, as amended. Reviews and analyzes fee petitions from attorneys and representatives of claimants for the provision of services at the hearing level, and authorizes payment of fees in those cases where the fees are beyond the authority of a hearing office Administrative Law Judge.

F. The Office of Appellate Operations (S3GC) consists of the Appeals Council and its support staff. In accordance with a direct delegation of authority from the Secretary of Health and Human Services, the Appeals Council is the final level of administrative review under the Administrative Procedure Act for claims filed under Titles II, XVI, and XVIII of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. The Director of the Office of Appellate Operations is responsible for the day-to-day operations of a program of administrative review of ALJ decisions issued under the provisions of the Social Security Act. Upon claimant request or on the Appeals Council's own motion, the Office of Appellate Operations reviews ALJ decisions and dismissals involving claims for benefits filed under Titles II and XVI of the Social Security Act, as amended, health insurance cases under Title XVIII of the Act, including claims for individual enrollment to participate under Parts A and/or B of Title XVIII and claims by hospitals, skilled nursing facilities and independent laboratories seeking certification or continued certification under the Act, and claims under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, to determine if jurisdiction exists, and, if so, takes appropriate action. The Office of Appellate Operations prepares documents to implement such actions while analyzing the appeals process to identify problem areas. The Appeals Council identifies cases which represent broad policy matters or have national impact and acts to resolve the issues in such cases, establishing binding adjudicatory standards and decisional principles that govern OHA's adjudicatory process. The Appeals Council identifies and recommends appropriate improvements in the appeals process. The Appeals Council, through its Members, participates in ALJ conferences, training programs, visits to hearing offices, and public relations activities designed to improve the hearings and appeals process. The Director of the Office of Appellate Operations is a member of the OHA Executive Staff and, as such, is a key advisor to the Associate Commissioner on program operations matters, adjudicative trends at both the administrative appeals level and the court level, and related OHA functions. In conjunction with other Executive Staff members, the Director provides leadership in the development and implementation of new or revised adjudicatory policies, procedures, and evidentiary and decisional techniques. Participates with other OHA Executive Staff members in considering broad aspects of program policy, in formulating long-range policies and guidelines for the administration of the hearings and appeals program, and in the establishing an OHA position on broad matters of operational, administrative, program and legislative planning. The Director of the Office of Appellate Operations maintains liaison with the Offices of the U.S. Attorneys and the Office of the General Counsel, including its Chief Counsels in the regions, to ensure their understanding of the hearings and appeals operating functions and procedures. The Director also maintains close liaison with OHA regional offices to promote a uniform interpretation and implementation of OHA, SSA and DHHS program policies. To assure high quality and uniformity in case adjudication and overall case processing, the Office of Appellate Operations conducts ongoing reviews and evaluations of the substantive aspects of Appeals Council actions and those of its support staff, and recommends corrective actions where appropriate.

1. The Operations Management, Analysis and Coordination Staff (S3GC3) provides a comprehensive program of management analysis and evaluative services to assist the Appeals Council Members in adjudicating cases, to assist the Director of the Office of Appellate Operations, and to assist the support staff of the Appeals Council in performing their program review function. Maintains an effective system of written instructions and prepares new procedures consistent with changes in the law and regulations and statements of SSA/OHA policy. Analyzes proposed procedural and administrative changes in the appeals process. Conducts a quality review program and, based on the results of the progam, recommends corrective action and training.

2. The Administrative Support Staff (S3GC4) under the direction of the Deputy Director for Operations of the Office of Appellate Operations, provides support services to Appeals Council Members, including maintenance of files received in OHA headquarters, reconstruction of lost claim files and receiving and analyzing fee petitions.

3. The Retirement and Survivors Insurance, Health Insurance and Supplemental Security Income Staff (S3GC5) serves as support staff for the Appeals Council in reviewing ALJ decicions and dismissals involving claims to establish entitlement to retirement and survivors insurance benefits; claims to establish dependency status under Title II of the Act; non-disability Title XVI cases; and health insurance cases under Title XVIII of the Act, including claims for individual enrollment to participate under Parts A and/or B of Title XVIII and claims by hospitals, skilled nursing facilities and independent laboratories seeking certification or continued certification under the Act. Advises the Appeals Council on all matters relating to entitlement to benefits under the Social Security Act, as amended, for retirement and survivors insurance benefits, non-disability Title XVI claims, and health insurance claims, and supports the Appeals Council in all phases of its review function as the final step in the administrative appeals process. Acting on behalf of the Appeals Council, the staff undertakes necessary development and responds to such administrative matters as requests for an extension of time to submit additional evidence, requests for copies of exhibits from the claim file and requests for a copy of the hearing cassette or transcript of the hearing. Following an analysis of the record and any additional evidence and/or argument submitted, and applying a thorough knowledge of applicable case law, the staff examines hearing decisions and other final actions of the Administrative Law Judge, and requests for Appeals Council review, and makes recommendations to the Appeals Council Member as to what action should be taken on cases pending before the Council. The staff recommendations include: (a) Whether own motion review should be taken or review granted and (b) the appropriate course of action if jurisdiction is assumed, including issuing a decision, dismissal, or remand of the case to an Administrative Law Judge. The staff

initiates implementing action on behalf of the Appeals Council Members, including drafting comprehensive decisions and orders.

4. The Program Review Branches (S3GC6- S3GC23) serve as support staff for the Appeals Council in reviewing ALJ decisions and dismissals involving claims for benefits filed under Titles II and XVI of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. The Program Review Branches advise the Appeals Council on all matters relating to entitlement to benefits under the applicable provisions of the Social Security Act and Title IV of the Federal Coal Mine Health and Safety Act, and support the Appeals Council in all phases of its review function as the final step in the administrative appeals process. Acting on behalf of the Appeals Council, the staff in the program review branches undertake necessary development and respond to such administrative matters as requests for an extension of time to submit additional evidence or to file a civil action, requests for copies of exhibits from the claim file, and requests for a copy of the hearing cassette or transcript of the hearing. Following an analysis of the record and any additional evidence and/or argument submitted, and applying a thorough knowledge of applicable case law, the staff in the program review branches examine hearing decisions and other final actions of the Administrative Law Judges, and requests for Appeals Council review, and make recommendations to the Appeals Council Members as to what action should be taken on cases pending before the Council. The staff recommendations include: (a) Whether own motion review should be taken or review granted and (b) the appropriate course of action if jurisdiction is assumed, including issuing a decision, dismissal, or remand of the case to an Administrative Law Judge. The Program Review Branches initiate implementing action on behalf of the Appeals Council Members, including drafting comprehensive decisions and orders.

G. The Office of Civil Actions (S3GL) is headed by a Director who is also a Member of the Appeals Council, and is responsible for OHA action on cases in which a civil suit has been filed, including new court case review, acting on requests for voluntary remand, and recommending whether appeal should be sought when an adverse decision has been made by a federal court. Serves as lead OHA component responsible for formulating, implementing, and evaluating the Associate Commissioner's litigation management strategy, and is the focal point for representing that strategy to other SSA, DHHS, and Department of Justice components. Provides professional and technical advice to the Associate Commissioner, the Appeals Council, the Chief Administrative Law Judge and other OHA officials in all litigated cases involving claims for benefits filed under Titles II, XVI and XVIII of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended; claims to establish dependency status under Title II of the Act; claims for individual enrollment to participate under Parts A and/or B of Title XVIII of the Act; and claims by hospitals, skilled nursing facilities and independent laboratories seeking certification or continued certification under the Social Security Act. Develops and issues instructions for implementing class action court orders and precedential court decisions. Tracks and analyzes court case trends and disseminates information to guide adjudicators with respect to case law, to implement an effective appeals strategy, and to identify areas and make recommendations as to policies which need to be developed and/or clarified, new regulations need to be developed, or clarifying legislation should be sought.

1. The Division of Litigation Analysis and Implementation (S3GL1), working with other OHA components, develops and implements an appeals strategy which identifies the issues and types of cases which OHA believes should be appealed. Captures court trend information for dissemination to other components to assist in formulating the agency's litigation strategy and in improving adjudication. Develops and maintains a compendium of circuit court case law with systems-based access. Tracks pending class actions, forecasts potential workload impact, and makes recommendations to workload components regarding workload impact. Uses court trend information to identify and make appropriate recommendations with respect to areas in which policies need to be developed and/or clarified, new regulations need to be developed, or clarifying legislation should be sought. Prepares and updates significant court case requirements used in reviewing court cases. Uses court trend information to identify areas where additional training is needed or other measures are needed to improve defensibility. Advises the Associate Commissioner, the Chief Administrative Law Judge, and other OHA officials, as appropriate, of significant cases and trends, and of litigation issues which may require revision of operating instructions, and assists with the preparation of instructions. Coordinates OHA's views on proposed Social Security Acquiescence Rulings. In response to OHA-identified cases, and to requests for appeals recommendations from the Litigation Staff, Office of the Deputy Commissioner for Programs, obtains the views of affected OHA components and formulates an OHA position on appeal. Maintains liaison with the Office of General Counsel (OGC) and the Litigation Staffs of the Office of the Deputy Commissioner for Programs and the Office of Disability to coordinate class action implementation. In coordination with the Office of the Chief Administrative Law Judge and other OHA components, develops instructions for OHA implementation of class action orders. Monitors class action implementation within OHA. Serves as a focal point for questions from OHA adjudicators concerning class action orders. Acts as contact point for OGC and Litigation Staff (SSA) requests for information regarding OHA's procedures, statistics, and other information with respect to OHA operations requested in the course of litigation. Coordinates OHA's response to discovery requests, including maintaining a central file of information disclosed. Administers and coordinates the Freedom of Information Act and Privacy Act provisions for OHA. Develops and maintains internal operating procedures for the Office of Civil Actions.

2. Divisions I–V (S3GL2–S3GL6) provide professional and technical advice to the Associate Commissioner, the Director of the Office of Civil Actions, other Members of the Appeals Council, and other OHA officials in all litigated cases involving claims for benefits filed under Titles II, XVI and XVIII of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended; claims to establish dependency status under Title II of the Act; claims for individual enrollment to participate under Parts A and/or B of Title XVIII of the Act; and claims by hospitals, skilled nursing facilities and independent laboratories seeking certification or continued certification under the Social Security Act. Analyze and recommend action on cases referred by the Office of General Counsel (OGC) for consideration of whether remand should be requested on the Secretary's motion. Within published guidelines,

recommend to OGC defense on the record of certain litigated cases if further administrative action is not warranted. Analyze and recommend action on cases remanded by the courts. As appropriate, conduct defensibility review of decisions issued by ALJs. Prepare remand orders, affidavits, and related correspondence on behalf of the Director and other Appeals Council Members, and, as necessary, prepare comprehensive decisions for the Director and other Members of the Appeals Council in civil action cases.

3. The Program Support Staff (S3GL7) provides translation services for documents to be entered into the certified record, and performs necessary translation services in support of the Office of Appellate Operations. Provides reprographics services in preparation of the official answer to civil actions filed against the Secretary of DHHS under Titles II, XVI, and XVIII of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. Manages equipment, personnel and facilities necessary to ensure timely provision of reprographic services. Performs audit functions for hearing transcripts returned from private contractor. Provides mail distribution services to the operating division of the Office of Civil Actions and prepares sequential filing of all certified transcripts. Purges court transcripts as scheduled and oversees teletype system to receive notification of suit.

H. The Office of Management (S3GQ) provides administrative support to the Associate Commissioner for all management related activities for OHA. Coordinates with the Chief Administrative Law Judge with respect to management support functions which affect field operations. Has direct line authority for all management and administrative support functions for the headquarters and field components of the Office of Hearings and Appeals, including 10 regional offices and 132 hearing offices nationwide. Is directly responsible for the formulation and interpretation of goals, objectives, and policies governing the development and implementation of OHA's resource support programs. Plans, directs and administers a comprehensive human resource development and utilization program to enable OHA to carry out its programmatic functions. Provides personnel administration and management services to OHA headquarters and field employees. Develops and administers an OHA-wide program to identify training needs; develops mechanisms to meet identified training needs; and assesses the effectiveness of the OHA training program in meeting the training needs of managers, supervisors and employees. Directs the policy development and implementation of a comprehensive budget formulation and financial management program to include formulation and execution of budget requirements and controls in the areas of resource management, work measurement and workload forecasting; administrative cost allocation; cost benefit analysis; pay and travel; and position ceiling control and contract services. Provides administrative support services to enable OHA to carry out its nationwide programmatic and operational functions. Executes the full range of policies and activities relating to the resource operations of OHA. Responsible for space and property management and planning, including maintenance of space and equipment and procurement of supplies and other materiel which supports the hearings and appeals process. Plans, develops and administers a program of systems support and data base management for the design and programming of OHA's ADP systems and OHA's management information and statistical reporting activities. Develops and maintains operational planning systems, including analysis of management reports, and formulates management plans, objectives, and priorities for OHA. Coordinates and integrates the management programs and administrative planning initiatives of OHA into the long-range goals and objectives of SSA and DHHS. Monitors OHA's progress toward meeting established agency goals and makes recommendations for needed adjustments to enable OHA to meet these goals. Plans, directs, and implements an equal employment opportunity program within OHA. Plans, directs, administers, and evaluates the congressional and public inquiries activities for OHA.

1. The Operational Planning and Analysis Staff (S3GQ3) provides support to the Director of Management and to the Office of the Associate Commissioner for OHA's operational planning activities. Provides advice and recommendations to the executive management staff of OHA in the formulation of program and administrative plans. Analyzes management reports submitted by OHA headquarters and field components to assess progress in accomplishing SSA/OHA goals and objectives, prepares recommendations for meeting those goals and objectives, and prepares periodic reports of OHA accomplishments. Formulates a planning system for OHA, and coordinates and integrates the management, program, and administrative planning initiatives into the goals and objectives of SSA and DHHS. Analyzes plans submitted by OHA headquarters components, provides guidance and recommendations for improvements in the plans submitted, and recommends Associate Commissioner approval or disapproval of the plans. Develops, implements and maintains continuing responsibility for the Associate Commissioner's management review system. Provides oversight and coordination of the collection and distribution of management information reports and provides advice and guidance to management staff for streamlining OHA's management reports system. Assesses the effectiveness of OHA's internal controls in preventing integrity problems and, as appropriate, recommends ways of strengthening these controls or improving integrity monitoring of susceptible processes.

2. The Equal Opportunity Staff (S3GQ4) is responsible for OHA's equal opportunity program. Plans, develops, implements, and monitors OHA's affirmative action program, and administers the Equal Employment Opportunity (EEO) complaint process for OHA headquarters. Provides guidance for and monitoring of OHA regional EEO programs. Attempts to resolve informal complaints of discrimination made by OHA employees, and evaluates issues in complaints after Departmental investigation. Provides recommendations to SSA's Office of Civil Rights and Equal Opportunity with respect to the development of equal opportunity policies and procedures, and ensures that OHA's EEO policies, procedures, standards and guidelines are consistent with SSA's standards.

3. The Division of Congressional and Public Inquiries (S3GQ5) formulates policies, procedures, and guidelines for use in responding to high priority correspondence from the public and congressional offices. Coordinates with other OHA components to obtain information needed to respond to congressional and public inquiries, and prepares and reviews OHA responses to congressional and public inquiries. Evaluates correspondence for conformance with OHA and SSA standards, policies and procedures, and for determining necessary action. Serves as the correspondence liaison staff with the Commissioner's Office, the Office of

Public Inquiries, and other SSA and DHHS components.

The Division of Budget and Financial Management (S3GQ6) plans, develops and coordinates OHA's budget and financial management programs, advising the Director of Management and/or the Associate Commissioner of the financial impact of all decisions which affect OHA. Advises OHA officials on all budget decisions which may affect the program and administrative operations of the agency. Formulates, justifies and presents OHA's annual and multi-year budget submissions. Controls the collection, recording, and reporting of all financial data in connection with the budget formulation and execution functions. Provides technical and policy guidance to OHA officials in headquarters and the field on the formulation and presentation phases of the budget process. Reviews and analyzes budget requests submitted by OHA components and formulates OHA's financial operating plans and budget projections. Responsible for presenting OHA's budget submissions and the justifications for these submissions to SSA officials, and for the assessment of and response to SSA's reviews of these submissions. Administers cost allocation functions of the budget process. Works with SSA budget officials to obtain the resources necessary to meet OHA goals and objectives. Develops all necessary applications for generating budget data and financial management reports. Responsible for the execution of OHA's budget. Executes and administers a financial management system, integrating resource management controls in the followng areas: workload forecasting; work measurement and productivity; employment ceiling control; cost benefit analysis; administrative cost allocation; payroll and travel; and fiscal operations. Provides technical and policy guidance to regional offices and headquarters components on the execution of OHA's budget. Monitors workload projections for budget execution and control purposes, and monitors and controls employment and fiscal resources based on analyses of work measurement, productivity, cost benefit, and resource utilization. Ensures that employment ceilings and obligations and expenditures of funds are in conformance with authorized allotments and allowances. Performs periodic reviews of budget execution and financial management practices in OHA offices. Maintains liaison with SSA to integrate OHA's financial management system with the financial management system at SSA. Administers the travel and payroll function for all OHA headquarters components and ALJs nationwide.

5. The Division of Human Resources (S3GQ7) plans, develops and administers OHA's human resources management program, including recruitment and placement; position management; classification; pay administration; employee awards; organizational management; labor management and employee relations. Provides advice to the Director of Management and/or the Associate Commissioner on all matters related to the utilization of OHA's human resources. Is the principal advisor to the Director of Management and the Associate Commissioner on OHA's delegations of administrative authority. Effectuates the Associate Commissioner's decisions with respect to delegations of authority. Prepares and maintains documentation with respect to the organizational structure of OHA. Conducts classification and organizational surveys and studies, and develops responses to classification appeals. Administers OHA's position classification and organization management programs in a way that ensures that organization and/or position proposals may by OHA are within established OPM, DHHS, SA, and OHA goals and objectives. Secures and maintains personnel records for all ALJs and headquarters employees. Develops and reviews qualification standards for OHA positions. Maintains and oversees position descriptions for OHA, including writing and/or assisting in the preparation of position descriptions; reviewing OHA position descriptions to determine correct title, series and grade; and recommending corrective action where necessary. Exercises appointment authority for headquarters positions, and acts on behalf of the Associate Commissioner to recruit and appoint ALJs in manner consistent with DHHS/SSA/OPM policies and procedures. Evaluates the effectiveness of OHA's personnel management functions and activities and prepares recommendations for the resolution of personnel management and employee relations issues. Administers OHA's flextime program to ensure compliance with government-wide regulations and OHA policy. Develops and sets national policy for field-interaction with the National Treasury Employees Union (NTEU) regarding labor relations, and administers the American Federation of Government Employees (AFGE) National Agreement. Outlines and disseminates to OHA headquarters and field components general policies for disciplinary and adverse actions, reprimands, etc. Prepares recommendations as to arbitration of employee and contract grievances. Administers OHA's human resource development and training programs to ensure their educational validity, timeliness and appropriateness. Participates with other OHA components in planning, scheduling and preparing materials for training OHA headquarters and field staff. Locates appropriate sources for outside training or consultant services for internal programs to resolve OHA training needs. Counsels employees on career development opportunities, including staff development, executive development and other development programs. Coordinates with other OHA officials in the preparation of on-the-job training and provides support for orientation training needs of vocational and medical consultants. Coordinates training activities with SSA headquarters and regional components.

6. The Division of Material Resources (S3GQ8) plans, directs and provides administrative support services in the areas of space planning and management; forms and records management; property management; equipment control and maintenance; graphic arts; safety and self-protection, including emergency planning; security; procurement and supply; laboring services; mail and messenger services; motor vehicle operations; communications systems management; and library reference. Organizes, controls and coordinates procurement and property management activities, including development of specifications and requisitions for procurement of property, inspections of property owned or leased by the U.S. Government, and property accountability. Maintains liaison with other government officials and private concerns to obtain the latest available information and advice on current trends and development in facilities planning and management. Coordinates administrative support services provided to OHA by SSA, DHHS, OPM, GSA, and other agencies, including such services as building maintenance, alterations, and inventory management. Develops and administers a comprehensive space management program for the assignment and utilization of offices in OHA. Plans, directs, and coordinates the acquisition and installation of a communications network system for OHA. Provides advice and assistance to OHA officials regarding alterations, renovations,

repairs, etc. Assures contractual completion of all work requested for headquarters components. Identifies and maintains property and equipment management requirements, including storing and securing supplies and equipment; identifying the need for maintenance, repair, or replacement of equipment; and maintaining catalogs, brochures and sources of technical data to ensure that OHA's current and future supply requirements are met. Revises procurement procedures as necessary to ensure that the supply needs of OHA field and headquarters components are met. Administers an occupational health and safety program in compliance with established health and safety concepts, regulations, standards and procedures. Administers security programs and inspections, and coordinates with local law enforcement officials to ensure protection of OHA property and personnel.

7. The Division of Systems Resources (S3GQ9) is the focal point for all OHA systems-related activities. Provides office automation and data processing support to all OHA components. Develops OHA's long-range systems goals and objectives. Provides computer programming and systems support for the planning, design, development, and implementation of all OHA ADP systems. Serves as liaison with the Office of Systems, SSA, on all matters pertaining to systems, and ensures that OHA systems efforts are undertaken, that projects underway are carried out successfully, and that OHA participates fully in the SSA systems strategy. Ensures that OHA systems-related projects are integrated within SSA's Systems Modernization Plan, and analyzes the impact of SSA's Claims Modernization Program upon OHA programs and processes. Maintains an indepth knowledge of SSA system development activities and advises the Director of Management of changing plans and strategies with respect to systems. Prepares data for the OHA ADP/TC budget submission, and evaluates OHA user requests for ADP services. Ensures that OHA systems meet user needs and management information requirements, and resolves automation problems of systems users. Responsible for the OHA Case Control System, including the integrity of the management information resulting from that system. Maintains management plans for all automation projects. Develops plans, strategies and user data requirements to respond to OHA's automation needs. Develops proposed automation initiatives in response to user needs and new legislative requirements. Develops and maintains the systems configuration management plan and strategy. Monitors OHA's Information Technology Services (ITS) procurements through the SSA procurement cycle and ensures that they progress through critical processing points. Provides policy and operational guidance in the development of long and short-range systems planning. Identifies OHA training needs with respect to systems activities, and coordinates with responsible OHA/SSA components to ensure that these needs are met. Responsible for the logical and physical structure of all OHA databases, including the establishment and maintenance of the OHA Data Dictionary, coordination with SSA Database Administrators, and mapping OHA database designs against the OHA strategic plan. In compliance with the Privacy Act, ensures that necessary documentation is published for OHA ADP systems changes. Responsible for the security, maintenance and integrity of the ADP equipment inventory. Identifies the functions, policies and related personnel needs to support and manage word/data processing and telecommunications systems. Provides technical support for the nationwide OHA telecommunications network, and ensures efficient and effective implementation and operation of the various telecommunications networks used by OHA and of the telecommunications host. Develops, implements and maintains applications systems for OHA.

I. The Office of Policy, Planning and Evaluation (S3GP) plans, analyzes and develops OHA-wide policy for the hearings, appeals and civil actions processes. Manages the overall OHA policy communications system. Responsible for OHA activity with respect to Social Security regulations, including developing the regulations governing OHA processes and developing an OHA position with respect to program regulations proposed by SSA components. Monitors OHA's implementation of program regulations governing the hearings and appeals process. Plans and conducts a comprehensive OHA-wide evaluation program designed to support OHA policy and regulatory initiatives and measure the overall effectiveness of the nationwide hearings and appeals process. Provides advice and guidance throughout OHA on matters involving program policies, planning, and evaluation. Coordinates policy, planning and evaluation matters within OHA, with other SSA components, and with Health Care Financing Administration (HCFA), Office of General Counsel (OGC), and other Department of Health and Human Services (DHHS) components, other Federal agencies and private organizations. Responsible for SSA policy with respect to claimant representation and the fees charged for these services. Develops and coordinates program training in conjuction with appropriate OHA, SSA, HCFA, DHHS, and OGC components.

1. The Division of Planning and Evaluation (S3GP1) plans, develops, coordinates, and conducts a comprehensive OHA-wide program of studies and analyses of the application of, and compliance with, SSA and OHA policies and procedures in all phases of OHA's hearings and appeals processes and the quality of results achieved. Provides advice and assistance to other OHA components in designing and implementing appropriate systems and procedures for collecting, recording, analyzing and evaluating data pertinent to assessing the quality of work emanating from the hearings and appeals processes. Conducts studies of policy implementation within OHA. Conducts special studies and analyses of claims processes that impact on the quality, quantity and timeliness of the hearings and appeals process or OHA workloads to develop OHA recommendations for SSA policy and procedural changes or other corrective managerial initiatives. Identifies problem areas and deficiencies in policies, policy application, methods and procedures, and recommends corrective action. Develops techniques and systems for conducting evaluations of the substantive and technical aspects of claims processing throughout OHA. Designs and conducts a variety of program evaluation studies and analyses in support of OHA program policy and administrative initiatives. Develops long-range program related plans for OHA. Responsible for strategic planning for OHA, including managing implementation of strategic initiatives and coordinating OHA action on initiatives for simplifying the appeals process, for exploring the feasibility of two-way video hearings, for modernized information architecture, for electronic storage and retrieval of evidentiary materials, and for exploring the applicability of expert systems for OHA, including full implementation of available automated processes. Designs and conducts various program integrity studies and analyses of OHA processes and operations to ensure that OHA programs, policies and practices are consistent with the highest standards of integrity and equity. Analyses the

results of OHA's evaluation systems to determine deviations from statutory, regulatory, policy, or procedural requirements and/or from established administrative quality standards. Assesses the compatibility of operating results with program philosophy and objectives, and recommends corrective action to program managers and other OHA officials.

2. The Division of Policy (S3GP2) is responsible for policy matters related to the hearings and appeals process and for SSA program-related policy matters for the Office of Hearings and Appeals. Plans, develops, and coordinates the preparation of regulations, policies, and guidelines for the hearings, appeals and claimant representation processes under Titles II, XVI, and XVIII of the Social Security Act, as amended, and under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. Ensures that operating procedures and instructions developed to implement the hearings and appeals process conform with national SSA and OHA policy. Provides advisory services, consultation, and staff assistance to other components of OHA. Maintains an effective system for communicating policy positions through program guides and directives and informational notices necessary for an effective hearings and appeals process. Develops and maintains publications, informational materials, references and forms on the hearings, appeals, claimant representation and civil actions processes. Maintains ongoing liaison with SSA, HCFA, DHHS, OGC and others with respect to program, legislative, and policy matters. Develops and coordinates benefit program policy and regulatory activity for OHA. Responds to inquiries on OHA program policy matters. Reviews, coordinates, develops and comments on program regulations, rulings, and other program instructions emanating from SSA, DHHS and other administrative law bodies that may influence or impact on OHA policy areas. Reviews current and developing trends in administrative law and litigation; analyzes and prepares policy recommendations; and develops long-range and short-range plans for hearings and appeals policy matters and OHA's implementation of benefit program policy matters. Develops and coordinates program training in conjunction with other OHA components and SSA, HCFA, DHHS and OGC program components.

Dated: July 19, 1988.

Dorcas R. Hardy,

Commissioner of Social Security.

[FR Doc. 88-17780 Filed 8-5-88; 8:45 am]

BILLING CODE 4190-11-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Advisory Council On Historic Preservation; SES Performance Review Board

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of SES Performance Review Board appointments.

SUMMARY: This notice provides the names of those individuals who have been appointed by the Chairman of the Advisory Council on Historic Preservation to serve as members of the Advisory Council's SES Performance Review Board. Pursuant to the Memorandum of Understanding between the Advisory Council and the Department of the Interior, the SES performance appraisal plan for the Department has been adopted for use by the Advisory Council. The Performance Review Board will review the appraisal, award, and bonus recommendations for the SES members of the Advisory Council staff, and recommend final action to the Chairman. This notice is processed on behalf of the Advisory Council, as required by 5 U.S.C. 4314(c)(4).

DATE: These appointments are effective August 15, 1988.

FOR FURTHER INFORMATION CONTACT: J. Lynn Smith, Personnel Officer, Office of the Secretary (PMSP), Department of the Interior, Washington, DC 20240, Telephone number: 343-6702.

The names of the SES Performance Review Board members are:

Ms. Gail D. Niedernhofer (Noncareer), Special Assistant for Programs, Department of the Interior

Mr. Peter J. Basso (Career), Deputy Chairman for Management, National Endowment for the Arts

Mr. Jerry L. Rogers (Career), Associate Director for Cultural Resources, Department of the Interior

Dated: July 29, 1988.

Rick Ventura,

Assistant Secretary, Policy, Budget and Administration.

[FR Doc. 88-17769 Filed 8-5-88; 8:45 am]

BILLING CODE 4310-10-M

Bureau of Land Management

[UT-020-88-4830-12; 1784]

District Multiple Use Advisory Council Meeting and Tour; Salt Lake District

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of District Multiple Use Advisory Council Meeting and Tour.

SUMMARY: Notice is hereby given in accordance with Pub. L. 94-463, that a meeting of the Salt Lake District Multiple Use Advisory Council will be held on August 18 and 19, 1988, beginning at 8:30 a.m. in the Conference Room in the Salt Lake District Office, 2370 South 2300 West, Salt Lake City.

On August 18, following a morning meeting to discuss the proposed decisions in the Resources Management Plan for the Pony Express Resource Area (Tooele and Utah Counties), the Council will depart for a tour of the West Desert. There, they will inspect the proposed site for the APTUS hazardous waste incinerator, a waterfowl habitat improvement project, and public lands utilized during the recent Firex 88 military exercises.

On August 19, the Council will reconvene in the Salt Lake District Office Conference Room (8:30 a.m.) to discuss current issues. Key agenda items include: Drought effects on livestock grazing; an update on the 1988 wild horse adoptions; and a progress report regarding land exchanges.

The public is invited to attend the morning meetings or to file written statements for the Council's consideration. Those wishing to make oral statements must notify the Salt Lake District Manager by August 15, 1988.

FOR FURTHER INFORMATION CONTACT: Deane H. Zeller, District Manager, Bureau of Land Management, Salt Lake District, 2370 South 2300 West, Salt Lake City, Utah 84119, (801) 524-5348.

John H. Stephenson,

Acting Salt Lake District Manager.

[FR Doc. 88-17792 Filed 8-5-88; 8:45 am]

BILLING CODE 4310-DQ-M

Fish and Wildlife Service

Issuance of Permit for Marine Mammals; University of Oregon, PRT #693357

On May 16, 1988, a notice was publishd in the **Federal Register** (Vol. 53, FR No. 94) that an application had been filed with the Fish and Wildlife Service by University of Oregon Visual Arts,

Resources Center, Eugene, Oregon (PRT# 693357) for a permit to reimport from Canada, 40 Eskimo dolls, some of which are partially constructed from walrus ivory and various seal and walrus parts.

Notice is hereby given that on July 29, 1988, as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C.1361–1407), and the Endangered Species Act of 1972 (16 U.S.C. 1539), the Fish and Wildlife Service issued a permit subject to certain conditions set forth therein.

The permits are available for public inspection during normal business hours at the Office of Management Authority, Room 403, 1375 K Street, NW., Washington, DC, 20005.

Dated: August 3, 1988.

R. K. Robinson,

Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 88–17782 Filed 8–5–88; 8:45 am]

BILLING CODE 4310–DN–M

Office of Surface Mining Reclamation and Enforcement

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirements should be made directly to the Bureau clearance officer and to the Office of Management and Budget Interior Department Desk Officer, Washington, DC 20503, telephone 202–395–7340.

Title: Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information 30 CFR Part 778.

OMB Number: 1029–0034.

Abstract: Section 507(b) Pub. L. 95–87 provides that persons conducting coal mining activities submit to the regulatory authority all relevant information regarding ownership and control of the property to be affected, their compliance status and history. This information is used to ensure all legal, financial and compliance requirements are satisfied prior to issuance or denial of a permit.

Bureau Form Number: None.

Frequency: Every five years.

Description of Respondents: Coal Mine Operators.

Annual Responses: 2,420.

Annual Burden Hours: 95,752.

Estimated Completion Time: 40 hours.

Bureau clearance officer: Nancy Ann Baka (202) 343–5981.

Date: July 29, 1988.

Andrew F. DeVito,

Acting Chief, Regulatory Development and Issues Management Office.

[FR Doc. 88–17784 Filed 8–5–88; 8:45 am]

BILLING CODE 4310–05–M

INTERSTATE COMMERCE COMMISSION

[Docket No. AB–299X]

Exemption; Oregon & Northwestern Railroad Co.; Abandonment of Railroad in Grant and Harney Counties, OR

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its line of railroad between milepost 3.5 in Burns, Harney County, OR, and milepost 50.2 in Seneca, Grant County, OR.

Applicant has certified that (1) no local traffic has moved over the line for at least 2 years and that overhead traffic is not moved over the line or may be rerouted, and (2) no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complainant with the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, the exemption will be effective September 7, 1988 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve environmental issues[1] and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2)[2] must be filed by August 18, 1988 and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by August 28, 1988 with:

Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative:

Wendell Gronso, 709 Ponderosa Village, Burns, OR 97720.

If the notice of exemption contains false or misleading information, use of the exemption is void ab- initio.

Applicant has filed an environmental report which addresses environmental or enegry impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmetal assessment (EA). SEE will serve the EA on all parties by August 15, 1988. Other interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275–7316.

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: July 26, 1988.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 88–17548 Filed 8–5–88; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to Clean Air Act; Asbestos Safety, Inc.

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See* Ex Parte No. 274 (Sub-No. 8), *Exemption of Out-of-Service Rail Lines* (not printed), served March 8, 1988.

[2] *See Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, 4 I.C.C. 2d 164 (1987), and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440–48446).

given that a proposed consent decree in *United States* v. *Asbestos Safety, Inc.*, Civil Action No. 87 C 3945, was lodged with the United States District Court for the Northern District of Illinois, in the Eastern Division on July 26, 1988. This agreement resolves a judicial enforcement action brought by the United States against the defendant which alleged violations of the Clean Air Act and the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) at several sites in Illinois.

The proposed consent decree provides for compliance with the Clean Air Act and NESHAP and payment of $15,000 in settlement of the action.

The Department of Justice will receive for a period up to and including September 7, 1988, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Asbestos Safety, Inc.*, D.J. Ref. 90–5–2–1–1053.

The proposed consent decree may be examined at the office of the United States Attorney, Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois and at the Region 5 Office of the Environmental Protection Agency, Office of Regional Counsel, 230 South Dearborn Street, Chicago, Illinois 60604. Copies of the consent decree may be examined at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1517, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed consent decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of $1.90 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88–17833 Filed 8–5–88; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Consent Decree Pursuant to Clean Water Act; City of Bayou La Batre, AL

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on July 21, 1988, a proposed Consent Decree in *United States* v. *City of Bayou La Batre, Alabama*, Civil Action No. 88–0620–P–C, was lodged with the United States District Court for the Southern District of Alabama. The Complaint filed by the United States sought injunctive relief and the assessment of civil penalties under the Clean Water Act, as amended (the Act), against the City of Bayou La Batre, Alabama, and three seafood processors, namely, QF, Inc., International Oceanic Enterprises of Alabama, Inc. (IOE), and Sea Pearl Seafood Company, Inc. The Complaint alleged that the City discharged pollutants from its sewage treatment plant in violation of its National Pollutant Discharge Elimination System (NPDES) permit and the Act. The Complaint alleged that each of the defendant seafood processors discharged pollutants into the City's sewage treatment plant in violation of pretreatment standards and the Act. The Complaint further alleged that defendants QF and IOE discharged pollutants into the Bayou La Batre without an NPDES permit, in violation of the Act.

Under the proposed Consent Decree, the City will pay a civil penalty of $6,000, and each of the seafood processors will pay a civil penalty of $20,000. The Decree requires the City to undertake numerous remedial measures to ensure that is complies with the Act in its operation of its sewage treatment plant. The Decree also requires the seafood processors to stop discharging their wastewater into the City's sewage treatment plant or into the Bayou La Batre.

The Department of Justice will receive for a period up to and including September 7, 1988, comments concerning the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States* v. *City of Bayou La Batre, Alabama*, D.J. Ref. 90–5–1–1–2945.

The proposed Consent Decree may be examined at any of the following offices: (1) The United States Attorney for the Southern District of Alabama, Room 305, United States Courthouse, 113 St. Joseph Street, Mobile, Alabama; (2) the U.S. Environmental Protection Agency, Region 4, 345 Courtland Street, N.E., Atlanta, Georgia; and (3) the Environmental Enforcement Section, Land & Natural Resources Division, U.S. Department of Justice, 10th & Pennsylvania Avenue, N.W. Washington, D.C. Copies of the proposed Decree may be ontained by mail from the Environmental Enforcement Section of the Department of Justice, Land and Natural Resources Division, P.O. Box 7611, Benjamin Franklin Station, Washington, DC 20044–7611, or in person at the U.S. Department of Justice Building, Room 1517, 10th Street and Pennsylvania Avenue, NW., Washington, DC. Any request for a copy of the proposed Consent Decree should be accompanied by a check for copying costs totalling $2.70 ($0.10 per page) payable to "United States Treasurer."

Roger J. Marzulla,

Assistant Attorney General, Land & Natural Resources Division.

[FR Doc. 88–17834 Filed 8–5–88; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Consent Decree Pursuant to the Clean Water Act; City of Joliet

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on June 30, 1988, a proposed consent decree in *United States* v. *City of Joliet*, Civil Action No. 88 C 5661, was lodged with the United States District Court for the Northern District of Illinois. The proposed consent decree resolves a judicial enforcement action brought by the United States against the city of Joliet for violations of the Clean Water Act.

The proposed consent decree requires the City of Joliet to attain and, thereafter, maintain compliance with the Clean Water Act and comply with its NPDES permit. To ensure compliance with the final effluent limits, the proposed consent decree requires Joliet to construct a secondary treatment plant upgrade and a single-stage nitrification facility at the east Side Sewage Treatment Plant. The proposed consent decree also requires Joliet to take specified measure to ensure that the East Side Sewage Treatment Plant is property operated and maintained. Finally, the consent decree requires Joliet to pay a civil penalty of $160,000.

The Department of Justice will receive for a period up to and including September 7, 1988, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resource Division, United States Department of Justice, Washington, DC 20530, and should refer to *United States* v. *City of Joliet*, D.J. Ref. 90–5–1–1–3155.

The proposed consent decree may be examined at the office of the United States Attorney, 219 South Dearborn Street, Chicago, Illinois and at the office of Regional Counsel, Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois.

Copies of the consent decree may be examined at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1517, Ninth and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed consent decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of $2.00 (10 cents per page reproduction costs) payable to the Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-17835 Filed 8-5-88; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree, Morton Thiokol, Inc., et al.

In accordance with the policy of the Department of Justice, 28 CFR 50.7, notice is hereby given that three proposed consent decrees in *United States* v. *Morton Thiokol, Inc., et al.*, Civil Action No. 83-4787, were lodged with the United States District Court for the District of New Jersey on July 29, 1988. The action was filed pursuant to section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607. The complaint sought the recoverly of costs incurred by the United States in connection with federal clean-up and investigative activities at the "Goose Farm" site in New Egypt, New Jersey.

The most significant of the three consent decrees requires the primary settling defendant to fund and implement the remedial action for the permanent cleanup of the Site. The remedial action plan includes treatment of groundwater contamination and removal of PCB-contaminated soil. This defendant and one other defendant will together pay $4.8 million to the United States and the State of New Jersey for costs incurred in conducting removal and investigation activities at the Site.

The Department of Justice will receive comments relating to the proposed consent decrees for a period up to and including September 7, 1988. Comments should be addressed to the Assistant Attorney General of the Land and Natural resources Division, U.S. Department of Justice, 10th Street and Pennsylvania Avenue, NW., Washington, DC 20530. All comments should refer to *United States* v. *Morton Thiokol, Inc. et al.*, DOJ Reference No. 90-11-2-38.

The proposed consent decrees may be examined at the following offices of the United States Attorney and the Environmental Protection Agency ("EPA"):

U.S. Attorney's Office, District of New Jersey, 401 Market Street, Camden, New Jersey 08101, Contact: Paul Blaine, (609) 757-5026.

U.S. EPA, Region II, Office of Regional Counsel, 26 Federal Plaza, New York, New York 10278, Contact: Robert Carr, (212) 264-3415.

Copies of the proposed consent decrees may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, Room 1515, 10th Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed consent decrees may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy of the decrees, please enclose a check for copying costs in the amount of $12.30 payable to Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-17783 Filed 8-5-88; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree; Rohm & Haas Co. et al.

In accordance with 28 CFR 50.7, notice is hereby given that on July 28, 1988, a proposed partial consent decree in *United States* v. *Rohm and Haas Company, Inc. et al.*, Civil Action No. 85-4386, was lodged with the United States District Court for the District of New Jersey. This partial consent decree settles a portion of a lawsuit filed on September 10, 1985, in which an amended complaint was filed on July 28, 1988, pursuant to section 107 of CERCLA, 42 U.S.C. 9607, for the recovery of response costs incurred by the United States with respect to the Lipari Landfill in Gloucester county, New Jersey. The complaints alleged, among other things, that the defendants generated and/or transported hazardous substances that are located at the landfill, and that the United States has incurred and will continue to incur response costs in response to the release or threat of release of hazardous substances.

The settling defendants are Triangle Publications, Inc., The Glidden Company, E.I. Dupont deNemours & Co., Allied Paper, Inc., Betz Laboratories, Inc., Hercules Incorporated, Owens-Corning Fiberglas Corporation, SPS Technologies, Inc., The Gilbert-Spruance Company and CBS, Inc. Under the terms of the proposed partial consent decree, the settling defendants agree to pay $2.586 million to the United States and $287,000 to the State of New Jersey for reimbursement of response costs. The *de minimis* settlors will pay an additional $161,000 to address any future State natural resource damages. In exchange for these payments, the *de minimis* settlors will receive a covenant not to sue for future liability under sections 106 and 107 of CERCLA and section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973. The decree contains a covenant not to sue for any natural resource damages within the trusteeship of the Department of Interior and the State of New Jersey.

The United States is entering into the decree under the authority of sections 122(g) and 107 of CERCLA. Section 122(g) authorizes early settlements with *de minimis* parties to allow them to resolve their liabilities at Superfund sites without incurring substantial transaction costs. Under this authority, the decree proposes to settle with parties who are responsible for less than one percent of the waste volume at the landfill.

The Department of Justice will receive comments relating to the proposed partial consent decree for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. All comments should refer to *United States* v. *Rohm and Haas Company, Inc. et al.*, D.J. Ref. 90-11-3-86.

The proposed partial consent decree may be examined at the following offices of the United States Attorney and the Environmental Protection Agency ("EPA"):

EPA Region II

Contact: Helene Cohen, Office of Regional Counsel, U.S. Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York 10278 (212) 264-3645.

United States Attorney's Office

Contact: James Woods, Assistant United States Attorney, 970 Broad Street, Room 502, Newark, New Jersey (201) 621–2700.

Copies of the proposed partial consent decree may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, Room 1515, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed partial consent decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of $2.30 (reproduction charge) payable to the Treasurer of the United States. Additional background information relating to the settlement is available for review at the EPA's Region II, Office of Regional Counsel.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88–17837 Filed 8–5–88; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Consent Decree Pursuant to CERCLA; Russell Martin Bliss et al.

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on July 14, 1988, a proposed consent decree in *United States* v. *Russell Martin Bliss, et al.*, Civil No. 84–2086–C–1; *United States* v. *Russell Martin Bliss, Primerica, et al.*, Civil No. 87–1558–C–1; *State of Missouri* v. *Russell Martin Bliss*, Civil No. 84–1148–C–1; and *State of Missouri* v. *Grover Callahan*, Civil No. 84–2092–C–1, was lodged with the United States District Court for the Eastern District of Missouri, Eastern Division.

Four civil actions were brought by the United States and the State of Missouri pursuant to section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), 42 U.S.C. 9607, for reimbursement of certain costs incurred by the United States and Missouri in connection with the release of hazardous substances, pollutants and contaminants (hazardous substances) at two waste disposal sites in Ballwin, St. Louis County, Missouri, known as the "Callahan Site" and the "Rosalie Site."

The Consent Decree was entered into between the United States, the State of Missouri, and Grover and Jean Callahan (hereinafter referred to as the Settling Callahan Defendants). Litigation continues against other defendants in these civil actions. The consent decree, subject to certain re-opener provisions, resolves the governmental claims against the Settling Callahan Defendants. Within (5) years of the entry of this consent decree, the Settling Callahan Defendants shall pay to the United States the sum of $27,000.00 in installments in satisfaction of multiple civil claims. Of that amount, $25,000.00 shall be in settlement of Civil No. 84–2086–C–1, and $2,000.00 shall be in settlement of Civil No. 87–1558–C–1. Within thirty (30) days of the entry of the consent decree, the Settling Callahan Defendants shall also pay the sum of $3,000.00 to the State of Missouri for settlement of civil claims as alleged in Civil No. 84–1148–C–1 and Civil No. 84–2092–C–1. Of that amount, $2,500.00 shall be in settlement of Civil No. 84–1148–C–1 and $500.00 shall be in settlement of Civil No. 84–2092–C–1.

The proposed consent decree may be examined at the office of the United States Attorney for the Eastern District of Missouri, 1114 Market Street, St. Louis, Missouri 63101; at the Region VII office of the Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101; and at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1515, 10th and Pennsylvania Avenue, Washington, DC 20530.

The Department of Justice will receive written comments relating to the proposed partial consent decree for a period of thirty (30) days from the date of this notice. Comments should be addressed to Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Russell Martin Bliss, et al.*, Civil No. 84–2086–C–1; *United States* v. *Bliss, Primerica, et al.*, Civil No. 87–1558–C–1; *State of Missouri* v. *Russell Martin Bliss*, Civil No. 84–1148–C–1; and *State of Missouri* v. *Grover Callahan*, Civil No. 84–2092–C–1 Department of Justice Reference Nos. 90–11–2–42; 90–11–3–155.

In requesting a copy please enclose a check in the amount of $1.70 (10 cents per page reproduction charge) payable to the Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88–17836 Filed 8–5–88; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Child Labor Advisory Committee, Subcommittee on Hazardous Occupations Order No. 10

A meeting of the Child Labor Advisory Committee, Subcommittee on Hazardous Occupations Order No. 10 (HO 10), will be held on August 31, 1988, from 9:00 a.m. to 5:00 p.m. This meeting will be held in Room N5437B, Frances Perkins Building, Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

The Subcommittee will consider whether power-driven meat slicers used in retail establishments should be covered by HO 10.

Members of the public are invited to attend these proceedings; however, since these are work sessions, seating is limited. Written data, reviews or arguments pertaining to the business before the Subcommittee must be received by the Committee Coordinator on or before August 17, 1988. Twenty-six copies are needed for distribution to the members and for inclusion in the Subcommittee Report.

Telephone inquiries and communications concerning this meeting should be directed to Ms. Nila Stovall, Coordinator for the Child Labor Advisory Committee, Room S3028, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: area code (202) 523–7640.

Signed at Washington, DC, this 3rd day of August 1988.

Paula V. Smith,

Administrator.

[FR Doc. 88–17765 Filed 8–5–88; 8:45 am]

BILLING CODE 4510–27–M

Employment and Training Administration

[TA–W–18,678]

Bass Enterprises Production Co., Fort Worth, TX; Public Hearing

Pursuant to a court order from the U.S Court of International Trade (USCIT) in *Former Employees of Bass Enterprises Production Company* v. *Secretary of Labor* (USCIT 87–04–00584) on May 27, 1988, a public hearing is scheduled for 1:30 pm on August 29, 1988 in Room 501 in the Federal Building at 525 S. Griffin Street, Dallas, Texas.

The public hearing is for petitioners or any other persons showing a substantial interest in the proceedings to furnish additional testimony and evidence of a relevant and material nature bearing upon the investigation regarding petition TA-W-18,678 filed on behalf of workers and former workers of Bass Enterprises Production Company, Fort Worth, Texas.

Such individuals who desire to furnish additional testimony as evidence should inform the Director, Office of Trade Adjustment Assistance of their intention to appear not later than August 19, 1988. Mr. Marvin M. Fooks, Director, Office of Trade Adjustment Assistance can be reached in Washington, DC at (202) 376-2646. The Director's Office is in Room 6434, 601 D Street NW., Washington, DC 20213.

Signed at Washington, DC, this 4th day of August 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 88-17913 Filed 8-5-88; 8:45 am]

BILLING CODE 4510-30-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-368]

Arkansas Power and Light Co.; Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 86 to Facility Operating License No. NPF-6, to Arkansas Power and Light Company, which revised the Technical Specifications for operation of the Arkansas Nuclear One, Unit No. 2, located in Pope County, Arkansas. The amendment was effective as of the date of its issuance.

The amendment approved a reduction in the required differential pressure produced by the high pressure safety injection pumps during surveillance testing. The revised differential pressure specification enhances operational flexibility by allowing for greater variation in pump performance.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Amendment and Opportunity for Prior Hearing in connection with this action was published in the **Federal Register** on December 28, 1987 (52 FR 48887). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment and Finding of No Significant Impact related to the action and has concluded that an environmental impact statement is not warranted because this action will not have a significant environmental impact.

For further details with respect to this action, see (1) the application for amendment dated October 28, 1987, (2) Amendment No. 86 to Facility Operating License No. NPF-6, and (3) the Environmental Assessment and Finding of No Significant Impact (53 FR 27091). All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC, and at the Tomlinson Library, Arkansas Technical University, Russelville, Arkansas 72801. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III, IV, V and Special Projects.

Dated at Rockville, Maryland, this 28th day of July 1988.

For the Nuclear Regulatory Commission.

C. Craig Harbuck,

Project Manager, Project Directorate—IV Division of Reactor Projects—III, IV, V and Speical Projects Office of Nuclear Reactor Regulation.

[FR Doc. 88-17810 Filed 8-5-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-317 and 50-318]

Baltimore Gas and Electric Co.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Prior Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating Licenses Nos. DPR-53 and DPR-69, issued to the Baltimore Gas and Electric Company (the licensee), for operation of the Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, located in Calvert County, Maryland.

The proposed amendments would modify the Units 1 and 2 Technical Specifications 5.6.1, "Criticality-Spent Fuel," and 5.6.2, "Criticality-New Fuel," by increasing the maximum fuel enrichment limit to 5.0 weight percent U-235 from the current limit of 4.1 weight percent U-235.

This proposed TS revision is in response to the licensee's application for amendments dated June 9, 1988.

Prior to issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By September 7, 1988, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference schedule in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene, which must include a list of the contentions that are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW Washington, DC, by the above date. Where petitions are filed during the last ten days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 325–6000 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Robert A. Capra: Petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to D.A. Brune, Jr., General Counsel, Baltimore Gas & Electric Company, P.O. Box 1475, Baltimore, Maryland 21203, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards considerations in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated June 9, 1988, which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC 20555, and at the Local Public Document Room, Calvert County Library, Prince Frederick, Maryland.

Dated at Rockville, Maryland, this 2nd day of August, 1988.

For the Nuclear Regulatory Commission.

Scott Alexander McNeil,

Project Manager, Project Directorate I–1, Division of Reactor Projects I/II.

[FR Doc. 88–17811 filed 8–5–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–261]

Carolina Power & Light Co.; Exemption

I.

Carolina Power & Light Company (the licensee is the holder of Facility Operating License No. DPR–23, which authorizes operation of the H. B. Robinson Steam Electric Plant, Unit 2. The license provides, among other things, that the facility is subject to all rules, regulations and Orders of the Nuclear Regulatory Commission (the Commission) now or hereafter in effect.

II.

Section 103(c)(2) to 10 CFR Part 20 requires a determination by a physician at least once every 12 months that an individual is physically able to use the respiratory protective equipment in an environment containing airborne radioactive material.

By letter dated January 30, 1986, the licensee requested an exemption from 10 CFR 20.103(c)(2) with regard to the interval for the administration of a physical examination for users of respiratory equipment. Specifically, the licensee requested an exemption to permit the physicals to be administered at an interval of every 9 to 15 months rather than the currently scheduled 8 to 12 months. In support of its request, the licensee notes that the exemption would provide greater flexibility in scheduling of examinations and would preclude the need for administration of two examinations in the same calendar year.

The acceptability of the exemption request is discussed below.

III.

In order to satisfy the 10 CFR 20.103(c)(2) requirement of "at least once every 12 months," the licensee has to administratively schedule the physical examinations every 8 to 12 months because of the large number of workers for whom these examinations have to be scheduled. Therefore, over a period of a few years, a substantial number of workers would receive two physical examinations within one calendar year. This would result in an unnecessary expenditure of the licensee's resources. On the other hand, according to the licensee's proposed schedule of a physical examination of every 9 to 15 months, it would be possible for a worker to average fewer than one examination every year over an extended period of time, for example, only four examinations in five years. This practice clearly does not meet the intent of the regulation.

In order to provide the licensee with administrative flexibility and yet meet the intent of the regulation to provide one physical examination every year, the staff has determined that an exemption to 10 CFR 20.103(c)(2), as requested by the licensee, with a provision that the total time over any three consecutive physical examination periods will not exceed 39 months, should be granted.

IV.

The Commission has determined that, pursuant to 10 CFR 20.501, this exemption is authorized by law, and will not result in undue hazard to life or property. Accordingly, the Commission hereby grants an exemption related to the time interval requirement of 10 CFR 20.103(c)(2) on physical examinations from "at least once every 12 months" to "every 9 to 15 months, provided that the total time over any three consecutive physical examination periods does not exceed 39 months." Pursuant to 10 CFR 51.32, the Commission has determined that granting this exemption will have no significant impact on the environment (53 FR 25553).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 29th day of July 1988.

For The Nuclear Regulatory Commission.

Steven A. Varga,

Director, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88–17812 Filed 8–5–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50-424]

Georgia Power Co. et al.; Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 7 to Facility Operating License No. NPF-68, issued to Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and City of Dalton, Georgia (the licensee) which revised the Technical Specifications for operation of the Vogtle Electric Generating Plant, Unit 1, located in Burke County, Georgia. The amendment was effective as of the date of its issuance.

The amendment modified the Technical Specifications to revise the volume limits for the containment spray additive tank.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** on April 4, 1988 (53 FR 10959). No request for a hearing or petition for leave to intervene was filed following the notice.

The Commission has prepared an Environmental Assessment and Finding of No Significant Impact related to the action and has determined not to prepare an environmental impact statement. Based upon the Environmental Assessment, the Commission has concluded that the issuance of this amendment will not have a significant effect on the quality of the human environment.

For further details with respect to the action see (1) the application for amendment dated February 4, 1988, (2) Amendment No. 7 to License No. NPF-68, and (3) the Commission's related Safety Evaluation and Environmental Assessment. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., and at the Burke County Library, 412 Fourth Street, Waynesboro, Georgia 30830. A copy of items (2) and (3) may be obtained upon request addressed to the U. S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects I/II.

Dated at Rockville, this 2nd day of August 1988.

For The Nuclear Regulatory Commission.

Jon B. Hopkins,

Project Manager, Project Directorate II-3, Division of Reactor Projects I/II.

[FR Doc. 88-17813 Filed 8-5-88; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF STATE

[Public Notice 1075]

Convening Accountability Review Board on the Murder of the Defense Attache in Athens

Pursuant to section 301 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (22 U.S.C. 4831 *et seq.*), I have determined that the murder on June 28, 1988 of the Defense Attache at the United States Embassy in Athens, Captain William E. Nordeen, USN, involves loss of life related to a United States Government mission abroad. Therefore, I am convening an Accountability Review Board, as required by that statute, to examine the facts and circumstances of the loss of life in Athens and report to me such findings and recommendations as it deems appropriate, in keeping with their mandate.

I have appointed the Honorable Leonard H. Marks as Chairperson of the Board. He will be assisted by the Honorable John E. Reinhardt, the Honorable Jane A. Coon, Mr. James C. McGrath, III and Mr. John W. Berg. The members will bring to their deliberations distinguished backgrounds in government service and private life.

I have asked the Board to submit its conclusions and recommendations to the Secretary within sixty days of its first meeting, unless the Chairperson determines a need for additional time. Appropriate action will be taken and reports submitted to Congress on any recommendations made by the Board.

Anyone with information relevant to the Board's examination of this incident should contact the Board promptly on 647-8456.

John C. Whitehead,

Acting Secretary.

July 25, 1988.

[FR Doc. 88-17767 Filed 8-5-88; 8:45 am]

BILLING CODE 4710-01-M

[Public Notice 1074; Delegation of Authority No. 169]

Delegation of Authority to the Assistant Secretary for Oceans and International Environmental and Scientific Affairs

By virtue of the authority vested in me by section 4 of the Act of May 26, 1949 (63 Stat. 111; 22 U.S.C. 2658), as amended, I hereby delegate to the Assistant Secretary for Oceans and International Environmental and Scientific Affairs the functions vested in the Secretary of State by the following sections of the South Pacific Tuna Act of 1988 (Pub. L. 100-330):

Section 3
Section 4
Section 8 (a) and (e)
Section 9 (b) and (g)
Section 10 (a), (b)(1), (c)(1) and (c)(2)
Section 11 (a) and (b)
Section 15
Section 16
Section 18
Section 19.

The Assistant Secretary for Oceans and International Environmental and Scientific Affairs may redelegate to officers and employees under his direction and supervision any of the functions delegated to him above, except those required by law to be approved by higher authority.

Date: July 26, 1988.

George P. Shultz,

Secretary of State.

[FR Doc. 88-17768 Filed 8-5-88; 8:45 am]

BILLING CODE 4710-09-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Receipt of Noise Compatibility Program Revision No. 2 and Request for Review, Hartsfield Atlanta International Airport, Atlanta, GA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces that it is reviewing a revised noise compatibility program that was submitted for the Hartsfield Atlanta International Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96-193) (hereinafter referred to as "the Act") and 14 CFR Part 150 by the City of Atlanta. This revised program was submitted subsequent to a

determination by the FAA that associated noise exposure maps submitted under 14 CFR Part 150 for the Hartsfield Atlanta International Airport were in compliance with applicable requirements effective May 29, 1985. The revised noise compatibility program will be approved or disapproved on or before January 21, 1989.

DATES: The effective date of the start of FAA's review of the revised noise compatibility program is July 25, 1988. The public comment period ends September 23, 1988.

FOR FURTHER INFORMATION CONTACT: Charles V. Prouty, Program Manager, Atlanta Airports District Office, Suite 310, 3420 Norman Berry Drive, Hapeville, Georgia 30354, telephone (404) 763–7631. Comments on the revised noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA is reviewing a proposed noise compatibility program revision for Hartsfield Atlanta International Airport which will be approved or disapproved on or before January 21, 1989. This notice also announces the availability of this program for public review and comment.

This revision will expand the geographical area of noise treatment measures, originally constrained by funding limitations, and will add sound attenuation treatment for private schools, churches, and tenant-occupied single-family residences. A public hearing will not be held because this program extension was covered as future strategies in the original program which was coordinated in conformance with FAR Part 150 and publicized through numerous public information sessions.

An airport operator who has submitted noise exposure maps that are found by the 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 proposed for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

The FAA has formally received the noise compatibility program revision for the Hartsfield Atlanta International Airport, effective on July 25, 1988. It was requested that the FAA review this material and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under Section 104(b) of the Act. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before January 21, 1989.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR Part 150, § 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evalution of the maps, and the proposed noise compatibility program are available for examination at the following locations:

Federal Aviation Administration, Room 617, 800 Independence Avenue, SW., Washington, DC 20591;

Federal Aviation Administration, Atlanta Airports District Office, Suite 310, 3420 Norman Berry Drive, Hapeville, Georgia 30354;

Airport Commissioner's Office, Hartsfield Atlanta International Airport, Atlanta, Georgia 30320.

Questions may be directed to the individual named above under the heading, **"FOR FURTHER INFORMATION CONTACT."**

Issued in Atlanta, Georgia, July 25, 1988.

Samuel F. Austin,

Manager, Atlanta Airports District Office.

[FR Doc. 88–17808 Filed 8–5–88; 8:45 am]

BILLING CODE 4910–13–M

[Summary Notice No. PE–88–31]

Petition 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 (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), 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 regualtory 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.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before August 29, 1988.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC–204), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: 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–10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202)X267–3636.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on August 3, 1988.

Debbie E. Swank,

Acting Manager, Program Management Staff.

PETITIONS FOR EXEMPTION

Docket No.	Petitioner	Regulations affected	Description of relief sought
25030	Pan Am Express Airlines	14 CFR 93.123, 93.125, 93.129	Petitioner requests an extension of current Exemption No. 4777, which permits two additional commuter operations in four of the five high density hours at John F. Kennedy Airport (JFK) and further requests an additional two slots in the remaining high density hour at JFK. The additional slots may be used only by STOL aircraft under the Separate Access Landing System. Continuation of the exemption would permit further evaluation RNAV approaches to the cross runways at JFK.

[FR Doc. 88-17809 Filed 8-5-88; 8:45 am]
BILLING CODE 4910-13-M

[Summary Notice No. PE-88-30]

Petition 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 (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), 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.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before August 29, 1988.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No. , 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION: 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-10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on August 1, 1988.

Deborah E. Swank,

Acting Manager, Program Management Staff.

PETITIONS FOR EXEMPTION

Docket No.	Petitioner	Regulations affected	Description of relief sought
25585	Gerald A. McGinnis	14 CFR 91.42(a)(1)	To allow flight instruction for hire to take place using designated home-built amphibious seaplanes.
25644	Wings West Airlines, Inc., dba American Eagle.	14 CFR 135.293, 135.297, and 135.351(c).	To permit pilots of petitioner to substitute the satisfactory completion of an approved course of training in a visual simulator for the recurrent pilot competency and instrument proficiency check requirements of Part 135 on an alternating basis. Further, to permit satisfactory completion of the entire recurrent pilot competency and instrument proficiency check requirements of Part 135 in an approved simulator if the pilot being checked accomplishes at least two landings in the appropriate airplane during a line check or other check conducted by a pilot check airman.

PETITIONS FOR EXEMPTION

Docket No.	Petitioner	Regulations affected	Description of relief sought disposition
21518	Type rating training	14 CFR 61.63(d) (2) and (3) and 61.157(d)(1).	To extend Exemption No. 4683 that allows students of petitioner who are applicants for a type rating to be added to any grade of pilot certificate, in Boeing 727 and 737 and McDonnell Douglas DC-9 and DC-10 airplanes, to complete a portion of that practical test in an airplane simulator. Grant, July 28, 1988, Exemption No. 4683A.
23854	Airways Training Institute, Inc., dba Airline Training Institute.	14 CFR 61.63(d) (2) and (3); 61.157(d) (1) and (2); and Part 61, Appendix A.	To extend Exemption No. 4691 that allows petitioner to use the FAA-approved visual simulators to meet certain training and testing requirements of the FAR. Grant, July 28, 1988, Exemption No. 4691A.

[FR Doc. 88-17759 Filed 8-5-88; 8:45 am]
BILLING CODE 4910-13-M

Federal Railroad Administration

Petitions for Exemption or Waiver; Ohio Central Railroad et al.

In accordance with 49 CFR 211.9 and 211.41, notice is hereby given that three railroads have petitioned the Federal Railroad Administration (FRA) for a waiver of compliance with the provisions of the Hours of Service Act (83 Stat. 464, Pub. L. 91–169, 45 U.S.C. 64a(e)).

The Hours of Service Act currently makes it unlawful for a railroad to require specified employees to remain on duty for a period in excess of 12 hours. However, the Hours of Service Act contains a provision that permits a railroad which employs not more than 15 employees who are subject to the statute to seek an exemption from the 12-hour limitation.

Ohio Central Railroad (OCR)

FRA Waiver Petition Docket No. HS–88–12

The OCR seeks this exemption so that it may permit certain employees to remain on duty not more than 16 hours in any 24-hour period. The OCR states that it is not its intention to employ a train crew over 12 hours per day under normal operating conditions, but that, if granted, this exemption would help its operation if it encountered unusual operating conditions or circumstances. The OCR provides service on over 70 miles of track designated as the Brewster-Zanesville Subdivision. Operations commenced on April 9, 1988, and the operation is based out of Sugar Creek, Ohio. Interline connections and interchanges are located at Brewster, Ohio with the Norfolk Southern, Coshocton, Ohio with Conrail, and Zanesville, Ohio with CSX.

The petitioner indicates that granting the exemption is in the public interest and will not adversely affect safety. Additionally, the petitioner asserts that it employs not more than 15 employees and has demonstrated good cause for granting this exemption.

Central Indiana & Western (CIW)

FRA Waiver Petition Docket No. HS–88–13

The CIW seeks this exemption so that it may permit certain employees to remain on duty not more than 16 hours in any 24-hour period. The CIW states that it is not its intention to employ a train crew over 12 hours per day under normal operating conditions, but that, if granted, this exemption would help the CIW's operation if it encountered unusual operating conditions or circumstances. The CIW provides freight service on over nine miles of track between Anderson and Lapel all within the State of Indiana. Interchange is made with Conrail at Conrail's South Anderson Yard. The CIW has trackage rights over three miles of Conrail trackage in order to effect the interchange of cars.

The petitioner indicates that granting the exemption is in the public interest and will not adversely affect safety. Additionally, the petitioner asserts that it employs not more than 15 employees and has demonstrated good cause for granting this exemption.

Sandersville Railroad (SAN)

FRA Waiver Petition Docket No. HS–88–14

The SAN seeks this exemption so that it may permit certain employees to remain on duty not more than 16 hours in any 24-hour period. The SAN states that it is not its intention to employ a train crew over 12 hours per day under normal operating conditions, but that, if granted, this exemption would help its operation if it encountered unusual operating conditions or circumstances. The SAN provides service on over nine miles of track between Tennille and Sandersville, which are located in the State of Georgia.

The petitioner indicates that granting the exemption is in the public interest and will not adversely affect safety. Additionally, the petitioner asserts that it employs not more than 15 employees and has demonstrated good cause for granting this exemption.

Interested persons are invited to participate in these proceedings by submitting written views and comments. FRA has not scheduled an opportunity for oral comment since the facts do not appear to warrant it. If any interested party desires an opportunity for oral comment, he or she should notify FRA, in writing, before the end of the comment period and specify the basis for his or her request. Any communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number HS–87–20) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

Communications received before September 23, 1988 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All comments received will be available for examination both before and after the closing date for comments during regular business hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

Issued in Washington, DC, on July 26, 1988.

J. W. Walsh,

Associate Administrator for Safety.

[FR Doc. 88–17638 Filed 8–5–88; 8:45 am]

BILLING CODE 4910–06–M

Petition for Exemption or Waiver of Compliance; Terre Haute, Brazil and Eastern Railroad, et al.

In accordance with 49 CFR 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for an exemption from or waiver of compliance with a requirement of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provision involved, and the nature of the relief being requested.

Interested parties are invited to participate in this proceeding by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with this proceeding since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning this proceeding should identify the appropriate docket number (e.g., Waiver Petition Docket Number RST–84–21) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590. Communications received before September 23, 1988 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning this proceeding are available for examination during regular business hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590

The individual petition seeking an exemption or waiver of compliance are as follows:

Terre Haute, Brazil and Eastern Railroad (Waiver Petition Number RSGM–88–1)

The Terre Haute, Brazil and Eastern Railroad (TBER) seek a permanent

waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for two locomotives and six cabooses. The equipment operates over approximately 50 miles of track between Terre Haute and Limedale, Indiana. The area of operation is rural sparsely populated agricultural and mining region of the state. The TBER states that there have been no reported acts of vandalism against the railroad, or known problems in the area where the equipment operates. The carrier feels that the installation of certified glazing would be an unnecessary financial burden to its operation.

The Huntsville and Madison County Railroad Authority (Waiver Petition Number RSGM–88–2)

The Huntsville and Madison County Railroad Authority (HMCR) seeks a permanent waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for one locomotive. The locomotive operates over approximately 13 miles of track which connects with the Southern Railway in downtown Huntsville. The HMCR operates one train per day, three days a week. The maximum authorized speed is 15 mph, and the average operating speed is 7 mph. The HMCR states that there have been no reported acts of vandalism or accidents involving glazing. The carrier feels that the installation of certified glazing would be an unnecessary financial burden to its operation.

Knox and Kane Railroad Company (Waiver Petition Docket Number RSGM–88–3)

The Knox and Kane Railroad Company (KKRR) seeks a permanent waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for four locomotives, four cabooses and eight passenger cars. The equipment operates on approximately 83 miles of track near Gettysburg, Pennsylvania. A major portion of the track is located through rural orchard land that is posted against hunting. The KKRR states that there have been no reported incidents of vandalism against the equipment. The carrier indicates that the equipment is operated the majority of the time with the windows open and feels that the installation of certified glazing would be an unnecessary financial burden to its operation.

Arcade and Attica Railroad Corporation (Waiver Petition Docket Number RSGM–88–4 and SA–88–3)

The Arcade and Attica Railroad Corporation (ARA) seeks a permanent waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) and the Safety Appliance Standards (49 CFR Part 231) for one locomotive. The locomotive operates over approximately 15 miles of track between North Java and Arcade, New York. The area of operation is a rural county with one small town. The ARA has been operating two other locomotives under an existing FRA glazing waiver, RSGM–80–57 without problems with acts of vandalism or accidents involving glazing. The carrier feels that the installation of cerified glazing would, therefore, be an unnecessary financial burden to its operation. The ARA also seeks a permanent waiver of compliance with § 231.30 for corner switching steps. The carrier states that the locomotive cannot be retrofitted to meet the standard.

Dunn-Erwin Railway Corporation (Waiver Petition Docket Number RSGM–88–5)

The Dunn-Erwin Railway Corporation (DER) seeks a permanent waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for one locomotive. The locomotive operates over approximately 5.5 miles of track between Dunn and Erwin, North Carolina. The DER operates an average of three trains or less per week. The locomotive operates at speeds of less than 15 mph. The area of operation is rural and includes two residential and light business sections. The carrier has been operating since November 1987, and states that the area of operation has no record of vandalism or stoning of railroad equipment. The carrier feels that the installation of certified glazing would be an unnecessary financial burden to its operation.

New York and Lake Erie Railroad (Waiver Petition Docket Number RSGM–88–6)

The New York and Lake Erie Railroad (NYLE) seeks a permanent waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for two locomotives and four passenger cars. The equipment operates over segments of track located between Salamanca and Dayton, New York and between Conewango Valley and Gowanda, New York for a total distance of approximately 51 miles. The areas of operation are through rural countryside and small communities. An average of three round trip freight trains are operated weekly. Additionally, during the warm season, an average of four round trip excursion trains are run. The NYLE states that it has never had problems with window breakage due to vandalism nor has it had to replace glazing due to breakage from flying objects. The petitioner feels that the installation of certified glazing would be an unnecessary financial burden to its operation.

Tulsa Port of Catoosa (Waiver Petition Docket Numbers RSGM–88–8 and SA–88–2)

The Tulsa Port of Catoosa seeks a permanent waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for two locomotives and of the Safety Appliance Standards (49 CFR Part 231) for one of the locomotives. The locomotives operate over approximately 12 miles of track wholly within the confines of the Port in Tulsa, Oklahoma. The locomotives perform yard switching operations at a maximum speed of 10 mph during daylight hours. The Port maintains its own security force and is closed to the general public between the hours of 6 p.m. and 6 a.m. daily. The petitioner states that since the Port began operations in 1971, there have been no major incidents affecting either the general security of the Port or the safety of its rail system. The petitioner states that the locomotives cannot be modified to meet the requirements of either §§ 223.11 or 231.30 (switching steps), without the incurrence of prohibitive costs. The petitioner feels that the use of these locomotives in their present condition will not materially affect the public interest, safety or welfare, or the personnel who are engaged in the operation thereof.

Buffalo and Pittsburgh Railroad, Inc. (Waiver Petition Docket Number RSGM–88–9)

The Buffalo and Pittsburgh Railroad, Inc. (BPRR) seeks a temporary waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for two locomotives being leased from the Genesee and Wyoming Railroad Company. The two units will be operated on approximately 16 miles of track between Bradford, Pennsylvania and Salamanca, New York. The area of operation is through rural countryside. The BPRR feels that the cost to install certified glazing in these leased locomotives for temporary

service would present an unnecessary financial burden to their operation.

Middletown and Hummelstown Railroad Company (Waiver Petition Docket Number RSGM–88–10)

The Middletown and Hummelstown Railroad Company (MIDH) seeks a permanent waiver of compliance with certain provisions of the Safety Glazing Standards (49 CFR Part 223) for two locomotives. One locomotive will operate over approximately 6.5 miles of track between Middletown and Hummelstown, Pennsylvania. The second locomotive will operate over approximately 2.5 miles of track near West Hempfield Township in Lancaster County, Pennsylvania. Both areas of operation are rural, and the maximum speed is 15 mph. The MIDH states that it has not had any locomotive windows broken or stoned by vandals while in operation since it began operation 12 years ago. The petitioner feels that the installation of certified glazing would be an unnecessary financial burden to its operation.

Issued in Washington, DC, on July 28, 1988.

J.W. Walsh,

Associate Administrator for Safety.

[FR Doc. 88–17839 Filed 8–5–88; 8:45 am]

BILLING CODE 4910–06–M

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

[Docket No. 666; Ref: ATF O 1100.77I]

Delegation Order; Authority to Affix the Seal of the Department of the Treasury

1. Purpose. This order sets forth delegation of authority to affix the seal of the Department of the Treasury.

2. Cancellation. ATF O 1100.77H, Delegation Order—Authority to Affix the Seal of the Department of the Treasury, dated February 29, 1988, is canceled.

3. Delegation. Authority has been delegated to the Director, Bureau of Alcohol, Tobacco and Firearms by Treasury Department Directive 12–51, dated January 29, 1987, to affix the seal of the Department of the Treasury to authenticate originals and copies of books, records, papers, writings, and documents of the Department, for all purposes, including the purposes authorized by 28 U.S.C. 1733(b). Such authority is hereby redelegated as follows:

a. To the officials listed below, without restriction:

(1) Associate Director (Compliance Operations).

(a) Chief, Industry Compliance Division.

(b) Chief, Product Compliance Branch.

(c) Chief, Alcohol Import/Export Branch.

(d) Chief, Revenue Programs Division.

(e) Chief, Wine and Beer Branch.

(f) Chief, Distilled Spirits and Tobacco Branch.

(g) Chief, Tax Compliance Branch.

(h) Chief, Firearms and Explosives Division

(i) Chief, National Firearms Act Branch.

(j) Chief, Firearms and Explosives Import Branch.

(k) Regional Directors (Compliance).

(l) Chiefs, Technical Services.

(2) Associate Director (Law Enforcement).

(a) Chief, Planning and Analysis Staff.

(b) Chief, Special Operations Division.

(c) Chief, Firearms Division.

(d) Chief, Explosives Division.

(e) Special Agent in Charge, Firearms Tracing Branch.

(f) Supervisor, ATF Records Repository.

(3) Comptroller.

(a) Director (Laboratory Services).

b. To the officials listed below, with restrictions as indicated:

(1) Supervisor, Special Tax and Revenue Accounting Section, to authenticate records pertaining to special occupational tax.

(2) Supervisor, Special Tax Processing Unit, to authenticate records pertaining to special occupational tax.

(c) This authority may not be redelegated.

(4) For Information Contact. Pauline C. Ashe, Tax Compliance Branch, Bureau of Alcohol, Tobacco and Firearms, 1200 Pennsylvania Avenue, NW. Washington, DC 20226 (202) 566–7602.

5. Effective Date. This delegation order becomes effective on August 8, 1988.

6. Approval. July 25, 1988.

Stephen E. Higgins,

Director.

[FR Doc. 88–17848 Filed 8–5–88; 8:45 am]

BILLING CODE 4810–31–M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported For Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit "A Prosperous Past: Dutch Still Life Paintings from the Golden Age" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. I also determine that the temporary exhibition or display of the listed exhibit objects at the Kimbell Art Museum, Fort Worth, Texas beginning on or about December 10, 1988 to on or about February 4, 1989, is in the national interest.

Public notice of this determination is ordered to be published in the Federal Register.

Date: August 1, 1988.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 88–17766 Filed 8–5–88; 8:45 am]

BILLING CODE 8230–01–M

[1] A copy of this list may be obtained by contacting Ms. Lorie Nierenberg of the Office of the General Counsel, USIA. The telephone number is (202) 485–8827, and the address is Room 700, U.S. Information Agency, 301–4th Street, SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 53, No. 152
Monday, August 8, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL MARITIME COMMISSION

TIME AND DATE: 10:00 a.m., August 11, 1988.

PLACE: Hearing Room One, 1100 L Street, NW., Washington, DC 20573-0001.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Section 19 Petition of Navios Management, Inc., d/b/a Pacific America Line—Shipping Conditions in the U.S./Korea Trade—Consideration of Comments.
2. Section 15 Inquiry into Laws, Regulations and Policies of the Republic of Korea Affecting Shipping in the U.S./Korea Trade—Consideration of Comments.
3. Docket No. 87-10—Halstead Industrial Products, Inc. v. Sea-Land Service, Inc.—Consideration of the Record.

CONTACT PERSON FOR MORE INFORMATION: Joseph C. Polking, Secretary, (202) 523-5725.

Joseph C. Polking,

Secretary.

[FR Doc. 88-17853 Filed 8-3-88; 4:59 pm]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 53 FR 28755, July 29, 1988.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Approximately 12:00 noon, Wednesday, August 3, 1988, following a recess at the conclusion of the open meeting.

CHANGES IN THE MEETING: Addition of the following closed item(s) to the meeting: Employment of consultants and related administrative issues regarding the development of the Board's compensation program.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: August 3, 1988.

James McAfee,

Associate Secretary of the Board.

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Notice forwarded to Federal Register on August 3, 1988.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Wednesday, August 10, 1988.

CHANGES IN THE MEETING:

1. Revisions to Item 2: Proposals concerning Regulation CC (Availability of Funds and Collection of Checks): (1) Preemption determinations regarding funds availability laws of Illinois and New York (proposed earlier for public comment; Docket No. R-0640); and (2) publication for comment of proposed preemption determinations for Connecticut, Rhode Island, New Mexico, California, and Massachusetts.

2. Addition of the Following Open Item to the Meeting: Proposed Electronic Clearinghouse Study to be distributed to Congress under the Expedited Funds Availability Act. (This matter will be considered on the Summary Agenda.)

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Date: August 4, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-17970 Filed 8-4-88; 4:06 pm]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10:00 a.m., Friday, August 12, 1988.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: August 4, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-17971 Filed 8-4-88; 4:06 pm]

BILLING CODE 6210-01-M

NATIONAL SCIENCE BOARD

DATE AND TIME: August 19, 1988—8:30 a.m. Closed Session, 9:00 a.m. Open Session.

PLACE: National Science Foundation, 1800 G Street, NW, Room 540, Washington, DC 20550.

STATUS: Most of this meeting will be open to the public. Part of this meeting will be closed to the public.

MATTERS TO BE CONSIDERED AUGUST 19:

Closed Session (8:30 a.m. to 9:00 a.m.)

1. Minutes—June 1988 Meeting
2. NSB and NSF Staff Nominees
3. Grants, Contracts, and Programs

Open Session (9:00 a.m. to 12:00 noon)

4. Grants, Contracts and Programs
5. Chairman's Report
6. Minutes—June 1988 Meeting
7. Director's Report
8. Fiscal Year 1990 NSF Budget
9. Presentation by Dr. Frederick P. Brooks, Jr.: "Grasping Reality Through Illusion—Interactive Graphics Serving Science"
10. NSB Discussion: "Positioning NSF for the 1990's"
11. Other Business

Thomas Ubois,

Executive Officer.

[FR Doc. 88-17855 Filed 8-3-88; 5:06 p.m.]

BILLING CODE 7555-01-M

Corrections

Federal Register
Vol. 53, No. 152
Monday, August 8, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control

Population Base Used for Distribution of Preventative Health and Health Services Block Funds for Rape Prevention and Services

Correction

In notice document 88-16530 beginning on page 27766 in the issue of Friday, July 22, 1988, make the following corrections:

1. On page 27766, in the table, in the entry for "Alabama", under "Percent change", "-2.888" should read "-2.268"; in the entry for "Arizona", under "Funding 1988", "41,438" should read "41,348"; and in the entry for "Kentucky", under "Percent change", "5.237" should read "-5.237".

2. On page 27767, in the table, in the entry for "Oklahoma", under "Funding 1989", "46,432" should read "46,342"; and in the entry for "S. Carolina", under "Percent change", "2.23" should read "2.223".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY-930-08-4220-11; WYW 0105362, WYW 042188, WYW 49110]

Proposed Continuation of Forest Service Withdrawals; Wyoming

Correction

In notice document 88-16723 beginning on page 28070 in the issue of Tuesday, July 26, 1988, make the following corrections:

1. On page 28071, in the first column, in the land description under T. 57 N., R. 89 W., under Sec. 29, the second line should read "NW¼NW¼, S½NW¼, N½SE¼, N½".

2. On the same page, in the same column, in the land description under T. 51 N., R. 84 W., the first line should read "Sec. 12 NE¼, E½NW¼, and NE¼SE¼".

3. On the same page, in the same column, the fifth line from the bottom should read "entry under the mining laws, and from".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR-943-08-4220-11; GP-08-119; OR-3530 (WASH), ORE-016849 (WASH)]

Proposed Continuation of Withdrawals; Washington

Correction

In notice document 88-8120 appearing on page 12478 in the issue of April 14, 1988, make the following correction:

In the first column, the second line from the bottom should read "sec. 33; and T. 11 N., R. 45 E., W.M. sec.".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA 943-08-4220-10; CA 17849]

Proposed Withdrawal and Opportunity for Public Meeting; California

Correction

In the issue of Monday, June 27, 1988, on page 24171 in the first and second columns and in the issue of Tuesday, July 19, 1988, in the third column, a correction to FR Doc. 88-11820 appeared incorrectly and should have appeared as follows:

In the second column, under T. 11 N., R. 2 W., in Sec. 10, the second line should read "S½S½SE¼".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88-ACE-02]

Designation of Transition Area-Fairmont, NE

Correction

In rule document 88-17206 beginning on page 28861 in the issue of Monday, August 1, 1988, make the following correction:

On page 28861, in the third column, the heading should read as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 191 and 195

[Docket No. PS-96, Amdts. 191-6, 192-59, 193-5, 195-39]

Reporting Unsafe Conditions on Gas and Hazardous Liquid Pipelines and Liquefied Natural Gas Facilities

Correction

In rule document 88-14758 beginning on page 24942 in the issue of Friday, July 1, 1988, make the following corrections:

§ 191.25 [Corrected]

1. On page 24950, in the first column, in § 191.25(b)(8), the fourth line should read "and the planned follow-up or future".

§ 195.55 [Corrected]

2. On the same page, in the third column, in § 195.55(b)(2), in the fourth line, "filling" should read "filing".

§ 195.56 [Corrected]

3. On the same page, in the same column, in § 195.56, in the first line of the section heading, "Filling" should read "Filing".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8216]

Income Taxes; Definition of a Controlled Foreign Corporation and Foreign Personal Holding Company Income of a Controlled Foreign Corporation After December 31, 1986

Correction

In rule document 88-16205 beginning on page 27469 in the issue of Thursday, July 21, 1988, make the following corrections:

1. On page 27490, in the second column, in the eighth line, "anti-base" should read "anti-abuse".

§ 1.954-2T [Corrected]

2. On page 27499, in the second column, in § 1.954-2T(a)(3)(ii), in *Example (2)*, in the fifth line, "paragraph (f)(e)(iii)" should read "paragraph (f)(3)(iii)".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8215]

Special Allocation Rules for Certain Asset Acquisitions

Correction

In rule document 88-16095 beginning on page 27035 in the issue of Monday, July 18, 1988, make the following corrections:

1. On page 27036, in the second column, in the last paragraph, in the third line "or" should read "of".

2. On page 27038, in the fourth complete paragraph, in the seventh line, after "statements" insert "or supplemental asset acquisition statements".

§ 1.1060-1T [Corrected]

3. On page 27039, in the third column, in § 1.1060-1T(b)(3), in *Example (1)*, in the ninth line, "not" should read "no".

4. On page 27042, in the second column, in § 1.1060-1T(g), in *Example (3)* paragraph (v), in the first line "and like-kind" should read "are like-kind".

5. On page 27044, in the third column, in "Par. 6", in the second line, "§ 1.103(d)-1T" should read "§ 1.1031(d)-1T".

BILLING CODE 1505-01-D

Federal Register

Monday
August 8, 1988

Part II

Department of Justice

Immigration and Naturalization Service

8 CFR Parts 100, 103, 245a, 264, and 299
Adjustment of Status for Certain Aliens and Applicant Processing for the Legalization Program; Proposed Rules

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 245a

[INS Number 1022R-88]

Adjustment of Status for Certain Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: Section 201 of the Immigration Reform and Control Act of 1986 (IRCA) provides for the legalization of certain aliens who have been residing illegally in the United States since before January 1, 1982. This section directs the Attorney General to adjust the status of a temporary resident alien to that of an alien lawfully admitted for permanent residence if the alien meets certain requirements. This proposed rule addresses the adjustment of status of temporary resident aliens to that of aliens lawfully admitted for permanent residence.

DATES: Comments must be received on or before September 7, 1988.

ADDRESSES: Written comments should be mailed in triplicate to Terrance M. O'Reilly, Deputy Assistant Commissioner, Legalization, Immigration and Naturalization Service, 425 "I" Street, NW., Washington, DC 20536, or delivered to Room 5250 at the same address.

FOR FURTHER INFORMATION CONTACT: Terrance M. O'Reilly, Deputy Assistant Commissioner, Legalization, (202) 786-3658.

SUPPLEMENTARY INFORMATION: The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603 was enacted on November 6, 1986. The Service published implementing regulations at 52 FR 16205, May 1, 1987, and amending regulations at 52 FR 43843, November 17, 1987, 53 FR 9274, March 21, 1988, 53 FR 9862, March 28, 1988, and at 53 FR 23382, June 22, 1988. This proposed rule outlines the procedures the Immigration and Naturalization Service will use to adjust the status of temporary resident aliens to permanent residence. For the convenience of the public, the Service is combining in this proposed rule the regulations at stated in the May 1, 1987 final rule, and as amended in the November 17, 1987 interim rule, and the June 22, 1988 final rule regulations with respect to the regulations at 245a.3.

At 53 FR 18096, May 20, 1988, the Service published in the **Federal Register** a notice making available to the public the preliminary working draft regulations. More than 170 copies of the preliminary working draft were forwarded to requesters. As a result, 135 individuals and interested organizations submitted written comments. The comments were reviewed and given serious consideration. The Service appreciates the time and effort put forth by all concerned parties.

Under the provisions of the Immigration Reform and Control Act of 1986 a temporary resident alien who has resided in the United States for a period of eighteen (18) months may make application for permanent resident status during the twelve month period beginning on the day after the temporary residence period has been completed. Since the beginning date of the application period falls on a weekend, the Service will, for the mutual convenience of all concerned, begin accepting applications on November 7, 1988, the first workday after November 6, 1988. The Service realizes that an application could be received at Regional Processing Facilities prior to November 7, 1988 or prior to the date an alien would be considered eligible to file an application. Therefore, as a convenience to the public, the Service intends to hold such applications up to 60 days prior to the alien's eligibility date. In these instances, the application will be considered as "filed" on the applicant's eligibility date.

The Service proposes to process applications for adjustment of status to permanent residence by temporary resident aliens by utilizing a processing method that features direct mail of applications to four Regional Processing Facilities located at Williston, Vermont (Eastern); Lincoln, Nebraska (Northern); Dallas, Texas (Southern); and Laguna Niguel, California (Western). After preliminary processing of applications at the Regional Processing Facilities, applicants will be interviewed at selected Service offices throughout the country.

Several commentors addressed the processing method outlined in the preliminary working draft and suggested that the Service should allow filing of applications at legalization and other field offices. The Service considered this as an option to direct mail of applications to the Regional Processing Facilities (RPF), but to do so would mean an increase in operational costs. In order to offset these costs, an increase in the application fees would be necessary. The Service does not wish to set an application fee above the absolute minimum needed to successfully fund the permanent resident phase of the program. In addition, the Service has enjoyed success in the direct mailing of applications to Regional Service Centers. Consequently, the Service proposes to utilize the processing method described in the previous paragraph. However, district offices may choose to permit drop-off services for persons who wish to present their applications in person. These applications will be forwarded to the RPF with fee, and will not be considered filed until received at the RPF. No interview will be conducted at the drop-off site.

The following summarizes the proposed processing method. The adjustment of status of temporary resident aliens to permanent residence is to consist of five major segments: Pre-submission of applications; Regional Processing Facility processing (pre-interview); INS field and legalization office processing; Regional Processing Facility processing (post-interview); and Immigration Card Facility (ICF) processing.

In the pre-submission of applications segment the Service will distribute information and forms for the adjustment to permanent resident phase of the legalization program. The Service will conduct a public information campaign and outreach activities. This is in addition to outreach and education efforts by various public and private organizations.

In the RPF processing (pre-interview) segment, all pre-interview processing tasks (e.g., data entry, fee receipting, etc.) will take place.

The applicants will be interviewed as well as processed for an Alien Registration Card (I-551) during the INS field and legalization office processing segment. The interview may also consist of an English language/U.S. history and government examination for those applicants who wish to demonstrate their abilities in this area.

In the RPF processing (post-interview) segment, appeal processing and other post-interview procedures will occur.

In the final segment, the ICF processing segment, Alien Registration Card (I-551) production will be completed and the card will be mailed to the address specified by the alien, which may be the address of his or her authorized representative.

Summary of the Proposed Rule

Section 245a.1(h) is being amended to permit intending residents to fulfill employment duties abroad without having their absence from the United States affect their ability to meet

applicable residence requirements for adjustment from temporary resident to permanent resident status. A few commentors suggested expanding the definition. These comments were considered and the definition will be changed to allow the Service the flexibility to permit brief and casual absences from the United States that reflect an intention on the part of the alien to adjust to permanent residence. Section 245a.3(b)(2) will also be amended to reflect this change.

New § 245a.1(r) is being added to define the term in "good-standing" as used in referring to qualified designated entities (QDEs) under 8 CFR 245a.3(b)(5). Numerous comments were received concerning this definition. Several commentors suggested that the Service should extend the cooperative agreements with QDEs. The Immigration Reform and Control Act of 1986 (IRCA) in section 201 provides for filing of applications for temporary resident status with either the Attorney General or with a qualified designated entity. The statute does not provide for a like situation for the filing of applications for permanent residence. Consequently, the Service will neither extend nor expand QDE cooperative agreements. Other commentors suggested revisions to the definition. The Service considered these comments and will retain the definition appearing in the preliminary working draft, with one exception—that being the insertion of the phrase, "prior to January 30, 1989," pertaining to cooperative agreements which were not allowed to lapse by the Service.

New § 245a.1(s) is being added to define the term "satisfactorily pursuing" as used in section 245A(b)(1)(D)(i)(II) of the Act. Some commentors suggested that the definition set too high a level of course attendance. The length of the course was also cited as being too long. Other commentors suggested that the Congressional intent to require a serious effort to learn English and the history and government of the United States is not met because a sixty (60) hour course is insufficient. The Service believes the statute is clear in requiring a demonstration of basic citizenship skills. A course designed to achieve these skills should be of sufficient length to comply with Congressional intent yet not be overly burdensome on the applicant. Consequently, the Service is proposing a definition which incorporates a minimum attendance period of thirty (30) hours and a minimum course length of one hundred (100) hours. Many commentors suggested the Service recognize the good faith effort shown by many aliens who have already enrolled and completed courses in basic citizenship skills. The Service agrees and is proposing that individuals who enrolled in courses that meet the requirements set forth in the proposed definition on or after May 1, 1987, will be considered satisfactorily pursuing a course of study recognized by the Attorney General. Serious concern by commentors from the more populous areas of the country that applicants will be hard pressed to find sufficient course opportunities in the timeframe available has led the Service to consider alternative means of meeting the "satisfactorily pursuing" requirement. As a result, four (4) additional options are proposed for applicants in addition to the attending of courses as discussed above. By providing these options, sufficient opportunities will be available for applicants to meet the satisfactorily pursuing requirement. One commentor questioned how course providers could receive financial assistance. Financial assistance grants (SLIAG) are authorized by section 204 of the Immigration Reform and Control Act of 1986. Under the grant program, $1 billion less an amount termed the "federal offset", is appropriated each year for FY 1988 through FY 1991 to defray part of state and local costs associated with providing public assistance, public health assistance and educational services to aliens granted lawful resident status pursuant to sections 245A, 210, or 210A of the Immigration and Nationality Act (INA), as amended, by IRCA. The Secretary of Health and Human Services administers the SLIAG Program.

New § 245a.1(t) is being added to define the term "minimal understanding of ordinary English" as used in section 245A(b)(1)(D)(i) of the Act. The comments received were mostly favorable and supported the definition as written. The Service, therefore, will make no change in the proposed definition.

New § 245a.1(u) is being added to define the use of a curriculum in a course of study recognized by the Attorney General. One commentor suggested that the content of the Federal Citizenship texts should not be used exclusively in formulating the curriculum of a course of study. Another commentor favored the definition as written. The Service will change its proposed definition to provide for the Federal Citizenship Text serving as a basis for curriculum development and also provide for the use of texts with similar content. The definition is also changed to reflect the change made in § 245a.1(s) pertaining to the minimum length of a course.

Section 245a.3(a) is amended to provide for the acceptance of applications at Regional Processing Facilities. Commentors expressed their concern about determining the date temporary residence was granted. The date an alien was adjusted to temporary residence is addressed in § 245a.2(s) and is the date indicated on the fee receipt Form I–689.

Section 245a.3(b)(4)(i) is being amended to accurately reflect the wording found in the statute regarding the basic citizenship skills requirements.

Section 245a.3(b)(4)(ii) is being amended to include those individuals who are physically unable to comply with the requirements of 8 CFR 245a.3(b)(4)(i) and also to limit the applicability of the basic citizenship skills requirements to individuals who are 16 years or older and under the age of 65. The Service proposes as an exercise of discretion to waive on a blanket basis all applicants under the age of 16 and 65 years of age or older without formal application for waiver, as well as applicants who are physically unable to comply. These proposed changes resulted from a review of numerous comments and reconsideration by the Service of this section.

New § 245a.3(b)(4)(iii) is being added to address the examination for basic citizenship skills. Numerous comments were received concerning § 245a.3(b)(4)(iii). Commentors were concerned about the length of time between examinations in those instances where an individual did not first pass the examination for basic citizenship skills. One commentor recommended a time period of six (6) months be provided between examinations. Several commentors suggested the Service develop questions apart from those found in the Federal Textbooks on Citizenship to be used in the examination. One commentor suggested applicants should have unlimited examination opportunity. In consideration of all the comments received on this section, the Service will now propose to test an applicant's ability to read and write English by excerpts from the Federal Textbooks on Citizenship at the elementary literacy level. In addition, due consideration will be given to the applicant's education, background, age, length of residence in the United States, opportunities available and efforts made to acquire basic citizenship skills and any other relevant factors. The Service will also provide for a six (6) month time period

between examinations unless the applicant requests to be examined sooner. The Service recognizes that a flexible approach for examining basic citizenship skills is called for in order to continue to operate a generous and liberal legalization program as Congress intended.

New § 245a.3(b)(4)(iv) is being added to address the providing of a "Certificate of Satisfactory Pursuit" to satisfy the basic citizenship skills requirements. Several commentors asked whether the Certificate of Satisfactory Pursuit could be presented at the time of interview as opposed to at the time of filing an application. Other commentors suggested that it was not clear whether an applicant had to be enrolled in a recognized course of study at the time of application for permanent residency. The Service proposes that Certificates of Satisfactory Pursuit be presented either at the time of filing or at the time of interview. In addition, applicants need not be enrolled in a recognized course of study at the time of application of permanent residency. The term "certificate" has replaced "affidavit" in this section as the Service feels it has a clearer meaning.

New § 245a.3(b)(4)(v) is being added to set the time period after which the Service will accept enrollment in a recognized course of study and issuance of Certificates of Satisfactory Pursuit. That time period is subsequent to May 1, 1987. The Service has set this time period as May 1, 1987 as it is the date the implementing regulations were published in the **Federal Register.**

Section § 245a.3(b)(5) of this chapter is being amended to allow for the certification of educational programs by district directors locally as the need arises, as well as the certification of national programs by the Outreach Program of INS. It is also being amended to clarify the meaning of qualified designated entities as used in this section. Commentors suggested that district directors maintain and publicize lists of recognized courses and that sufficient courses be recognized by a district director to address the needs of the district. Some comments were received that suggested the Service set a maximum fee that course providers could charge. In response to these suggestions and for clarification purposes the Service is proposing two new sections. Section 245a.3(b)(6), explains the method whereby course providers who are already covered under § 245a.3(b)(5) will be identified by district directors. Section 245a.3(b)(7) explains the fee structure. The Service feels that the district director knows the needs of his or her district and therefore is the proper authority to ensure a sufficient number of course providers. Guidelines for approving additional recognized courses of study will be issued under separate cover. No maximum fee standard will be imposed; however, reasonable fees should be established. If a district director and/or the Director of the Outreach Program believes that a fee charged is excessive, this factor alone can justify either refusal to certify or de-certify a course provider.

New § 245a.3(b)(8) is being added to provide information on the Federal Textbooks on Citizenship. Seven commentors suggested that new materials be designed in lieu of the Federal Textbooks on Citizenship. As previously addressed the Service has proposed that the texts be used as a basis for course instruction and that other similar texts can be used. This section addresses the availability of the Federal Textbooks for interested parties.

New § 245a.3(b)(9) is being added to address the maintenance of student records by course providers.

New § 245a.3(b)(10) is being added to address the issuance of the Certificate of Satisfactory Pursuit (I–699).

New § 245a.3(b)(11) is being added to provide for the "designated official" who will have the authority to sign Certificates of Satisfactory Pursuit.

New § 245a.3(b)(12) is being added to provide for the on-site monitoring of courses of study recognized by the Attorney General. Many comments were received suggesting limiting the scope of INS on-site monitoring or delegating the monitoring in whole or in part to other agencies or organizations such as the States (Department of Education). The monitoring of course providers is necessary both to ensure that the providers are conducting adequate courses and to ensure that the alien public's needs are adequately served. The Service wishes to work in concert with the various state and local agencies to ensure course instruction is proper and meets the intent of the legislation that applicants achieve a basic understanding of citizenship skills. The Service does not intend to closely monitor established bona-fide educational providers but instead will direct most efforts toward providers who are entering into course instruction for the first time.

New § 245a.3(b)(13) is being added to implement certain standards for qualifications of teachers providing instruction in courses of study recognized by the Attorney General as defined at § 245a.3(b)(5) of this chapter. Implementation of a set of standards is necessary because such courses vary from providers who have had extensive experience in educational services for limited English speakers to new programs with untested skills. Three commentors supported the section as written and agreed with the flexibility relating to the selection of teachers.

Section 245a.3(d)(1) is amended to provide for the filing of an application for change of status to that of a permanent resident alien by direct mailing the application to the Regional Processing Facility. Several commentors expressed concern over mailing applications to the Regional Processing Facility. This issue was addressed previously in this proposed rule concerning the processing method. The Service feels direct mail is a less costly way to operate the permanent resident application phase of the Legalization Program and in many instances, will be more convenient to the alien public in the applications can be submitted without taking time off work, etc. The Service realizes however, that local district practices (e.g., drop boxes) may be already in operation for direct mail to Regional Service Centers, or may be added at legalization offices as a convenience to the public. If drop-box service is made available by the district director, the alien public may certainly avail itself of this alternate way to submit applications.

Section 245a.3(d)(2) is amended to provide for the Regional Processing Facility directors' use of discretion to temporarily retain documents for forensic examination. Several commentors suggested the Service not require the submission of original documents through the mail. The Service agrees and will change the section to reflect that documentation can be provided by supplying copies certified true and correct by the alien's representative pursuant to § 204.2(j) (1) or (2). The Service reserves the right, however, to request original documentation as necessary. Original documentation can either be requested by the director, Regional Processing Facility, or the district director.

New § 245a.3(d)(4) is being added to provide for the submission of medical examination results of Form I–693 only for those applicants who applied for temporary residence and submitted an I–693 which did not reflect that a serologic test was performed to determine the presence or absence of antibody against HIV, the etiologic agent of acquired immuno-deficiency syndrome (AIDS). As of December 1, 1987, the Immigration and Naturalization

Service required serologic testing for HIV infection as part of the medical examination process for aliens applying for lawful resident status under the provisions of IRCA. Several commentors suggested the Service be more specific in the regulations that a complete medical examination is not required of applicants. The Service is changing this section accordingly.

New § 245a.3(d)(5) is being added to provide for the extension of the validity of the temporary resident card (I–688) during the pendency of an application for permanent residence made under this chapter. One commentor agreed with the section as written. Extending the I–688 of an applicant as necessary is an on-going Service procedure and this section restates existing Service policy.

New § 245a.3(d)(6) is being added to provide for the denial of an application for permanent residence for lack of prosecution. Several commentors suggested that this section be changed in various ways to provide for a second opportunity for an applicant to respond before the denial of the application. Upon consideration the Service concurs and will change this section to provide for a second notice and additional time period of sixty (60) days.

Section 245a.3(e) is amended to provide for interviews taking place at other than Service Legalization Offices. Several commentors suggested that confidentiality of the applicant's information would be threatened if interviews are conducted at other than Service offices. The confidentiality of the information supplied by the applicant for the permanent residence phase will be ensured by retention of the application at the Regional Processing Facility in most cases. Adjudication usually will consist of limited computer terminal data review and update by field personnel. A new § 245a.3(n) is being added to this proposed rule to further address confidentiality. Two commentors suggested that interviews be mandatorily waived for individuals under 14. The Service feels that as the need arises individuals may have to be interviewed concerning various aspects of the case. Consequently, the Service does not agree that a blanket waiver of the interview requirement is warranted.

Section 245a.3(g)(4) is being amended to clarify that it is not necessary to file a formal waiver application in order to apply the special rule for determination of public charge.

Section 245a.3(i) is amended to provide for the retention by a temporary resident alien of the temporary resident card (I–688) in the case of an adverse decision. One commentor agreed with the section as written. Other commentors suggested clarification be provided with respect to retention of the temporary resident card (I–688) where an adverse decision is rendered on an application. The Service feels that an adverse decision is not final until the appeal period has tolled. Consequently, this section will be changed to provide for retention of a temporary resident card until such time as the appeal time has tolled or until the expiration date of the card, whichever is later. In addition, one commentor suggested that the Service provide that applicants who have been denied be allowed to submit another application as long as the applicant submits the application within the one-year application period. The Service agrees and is changing this section accordingly.

Section 245a.3(j) is amended to provide for the submission of a brief to support an appeal after the thirty (30) day period allowing for receipt of an appeal has passed. This section is also amended to provide for review of the Record of Processing (ROP) after an appeal has been properly filed. Several commentors suggested longer periods be allowed for submission of appeals. The Service believes the time periods provided are sufficient for a party to submit an appeal and any supporting briefs. Consequently, the Service will not change the appeal periods. The Service will add, for clarification purposes, language to the section concerning the date from which the thirty (30) calendar days begins to toll for the submission of a brief to the Regional Processing Facility.

Section 245a.3(l) is amended to provide for certification to the Administrative Appeals Unit of decisions on appealed cases subsequently remanded back to either the Regional Processing Facility director or the district director. This section is also amended to provide for certification by district directors. Comments were generally in support of the section as written.

Section 245a.3(m) is amended to reflect the fact that the adjustment date shall be the date of approval of the application for permanent residence. The date of adjustment is being changed to be consistent with other Service adjustment actions.

New § 245a.3(n) is being added to address confidentiality during the permanent residence phase of the Legalization Program. Several commentors expressed their concern about confidentiality. The Service desires to reinforce the confidentiality provisions of IRCA and therefore is adding this new section.

In accordance with 5 U.S.C. 605(b), the Commissioner of Immigration and Naturalization certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

The Information Collection Requirements contained in this regulation have been submitted to the Office of Management and Budget for clearance under the provisions of the Paperwork Reduction Act.

List of Subjects in 8 CFR Part 245a

Aliens, Temporary resident status, Permanent resident status.

Accordingly, Chapter I of Title 8 of the Code of Federal Regulations is amended as follows.

1. The authority citation for Part 245a is revised to read as follows:

Authority: Pub. L. 99–603, 100 Stat. 3359, 8 U.S.C. 1101 note and Pub. L. 100–204, 101 Stat. 1331.

2. The heading for Part 245a is revised to read as follows:

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED BY PUB. L. 99–603, THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, AND PUB. L. 100–204, SECTION 902

3. In § 245a.1, paragraph (h) is revised and paragraphs (r), (s), (t), and (u) are added to read as follows:

§ 245a.1 Definitions.

* * * * *

(h) The term "brief and casual" as used in section 245A(b)(3)(A) of the Act, means temporary trips abroad as long as the alien establishes a continuing intention to adjust to lawful permanent resident status. However, such absences must comply with § 245a.3(b)(2) of this chapter in order for the alien to maintain continuous residence as specified in the Act.

* * * * *

(r) A qualified designated entity in good-standing with the Service means those designated entities whose cooperative agreements were not suspended or terminated by the Service or those whose agreements were not

allowed to lapse by the Service prior to January 30, 1989, (the expiration date of the INS cooperative agreement for all designated entities).

(s) Satisfactorily pursuing as used in section 245A(b)(1)(D)(i)(II) of the Act means:

(1) An applicant for permanent resident status has attended a recognized program for at least 30 hours of a minimum 100-hour course as appropriate for his or her ability level, and is demonstrating progress according to the performance standards of the English/citizenship course prescribed by the recognized program in which he or she is enrolled (as long as enrollment occurred on or after May 1, 1987, course standards include attainment of particular functional skills related to communicative ability, subject matter knowledge, and English language competency, and attainment of these skills is measured either by successful completion of learning objectives appropriate to the applicant's ability level, or attainment of a determined score on a test or tests, or both of these); or

(2) An applicant presents a high school diploma or general equivalency diploma (GED) from a school in the United States; or

(3) An applicant has attended for a period of one year, a state recognized, accredited learning institution and that institution certifies such attendance; or

(4) An applicant has attended courses conducted by employers, social, community, or private groups certified (retroactively if necessary) by the district director or the Director of the Outreach Program; or

(5) An applicant passes a proficiency test for legalization, such test being given by qualified administrators (e.g., State Departments of Education), indicating that the applicant has reached a specific level of knowledge equivalent to a 30-hour enrollment in a designated course as outlined in paragraph (1) of this definition, and submits a "statement of intent" that further education in any necessary area will be pursued.

(t) Minimal understanding of ordinary English as used in section 245A(b)(1)(D)(i) of the Act means an applicant can satisfy basic survival needs and routine social demands. The person can handle jobs that involve following simple oral and very basic written communication.

(u) Curriculum shall mean a defined outline for an instructional program. Minimally, it prescribes WHAT is to be taught. It can also include suggestions for HOW, WHEN, and WITH WHAT MATERIALS. The curriculum must:

(1) Include the content of the Federal Citizenship Text series as the basis for curriculum development (other texts with similar content may also be used);

(2) Be designed to provide at least 100 hours of instruction per class level;

(3) Be relevant and educationally appropriate for the program focus and the intended audience; and

(4) Be available for examination and review by INS as requested.

4. Section 245a.3 is revised to read as follows:

§ 245a.3 Application for adjustment from temporary to permanent resident status.

(a) *Application period for permanent residence.* An alien who has resided in the United States for a period of eighteen (18) months after the granting of temporary resident status may make application for permanent resident status during the twelve-month period beginning on the day after the requisite eighteen months' temporary residence has been completed. The date of adjustment to lawful temporary residence status is the date indicated on the fee receipt, Form I-689. Applications for lawful permanent residence under section 245A(b)(1) of the Act will be accepted when received at the Regional Processing Facilities beginning on November 7, 1988. Applications received at the Regional Processing Facilities prior to the beginning of an alien's twelve-month application period will be held by the Service and processed but will not be considered filed until the beginning of the alien's twelve-month application period.

(b) *Eligibility.* Any alien physically present in the United States who has been lawfully admitted for temporary resident status under section 245A(a) of the Act, such status not having been revoked or terminated, may apply for adjustment of status to that of an alien lawfully admitted for permanent residence if the alien:

(1) Applies for such adjustment during the one-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status;

(2) Establishes continuous residence in the United States since the date the alien was granted such temporary residence status. An alien shall be regarded as having resided continuously in the United States for the purposes of this part if, at the time of applying for adjustment from temporary to permanent resident status, no single absence from the United States has exceeded thirty (30) days, or the aggregate of all absences has not exceeded ninety (90) days between the date of granting of lawful temporary resident status and applying for permanent resident status unless the alien can establish that due to emergent reasons, the return to the United States could not be accomplished with the time period(s) allowed; A single absence from the United States of more than 30 days, or aggregate absences of more than 90 days during the period for which continuous residence is required for adjustment to permanent residence, shall break the continuity of such residence, unless the temporary resident can establish to the satisfaction of the district director that he or she did not, in fact, abandon his or her residence in the United States during such period;

(3) Is admissible to the United States as an immigrant, except as otherwise provided in paragraph (f) of this section; and has not been convicted of any felony, or three or more misdemeanors; and

(4)(i)(A) Can demonstrate that he or she either meets the requirements of section 312 of the Immigration and Nationality Act, as amended, (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

(B) Is satisfactorily pursuing a course of study recognized by the Attorney General to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

(ii) The requirements of paragraph (b)(4) of this section must be met by each applicant who is 16 years or older, except that these requirements are waived at the discretion of the Attorney General, for those individuals under the age of 16 and those 65 years of age or older. These requirements may also be waived for those who are physically unable to comply.

(iii)(A) Literacy and basic citizenship skills requirements for applicants who demonstrate that they meet the requirements of paragraph (b)(4)(i)(A) of this section: The ability of an applicant to speak and understand English shall be determined from answers to questions normally asked in the course of the interview and processing for permanent resident status. An applicant's ability to read and write English shall be tested by excerpts from one or more parts of the Federal Textbooks on Citizenship at the elementary literacy level. The test of a petitioner's knowledge and understanding of the history and form of government of the United States shall be given in the English language. The scope of the testing shall be limited to subject

matter covered in the revised (1987) Federal Textbooks on Citizenship and to the review questions provided at the end of each chapter. In choosing the subject matter and in phrasing questions, due consideration shall be given to the extent of the applicant's education, background, age, length of residence in the United States, opportunities available and efforts made to acquire the requisite knowledge, and any other elements or factors relevant to an appraisal of the adequacy of his or her knowledge and understanding.

(B) An applicant who fails to pass the English literacy or educational tests at the time of the interview, or other designated period of testing, shall be afforded a second opportunity after six (6) months (or earlier, at the request of the applicant) to pass the tests or submit an "Affidavit of Satisfactory Pursuit" of a course of study recognized by the Attorney General before the application for permanent residence is denied.

(iv) An applicant who plans to satisfy the English language and basic citizenship skills requirements of IRCA by satisfactorily pursuing a course of study recognized by the Attorney General must submit a "Certificate of Satisfactory Pursuit" issued by the designated school or program official attesting to the applicant's satisfactory pursuit of the course of study as defined at § 245a.1(s) of this chapter. Such applicant shall not then be required to demonstrate that he meets the requirements of § 245a.3(b)(4)(i)(A) of this chapter in order to be granted lawful permanent residence provided he is otherwise eligible. A "Certificate of Satisfactory Pursuit" may be submitted either at the time of filing Form I–698, subsequent to the time of application and prior to the interview, or at the time of the interview. An applicant need not, necessarily, be enrolled in a recognized course of study, at the time of application for permanent residency.

(v) Enrollment in a recognized course of study as defined in § 245a.3(b)(5) and issuance of a "Certificate of Satisfactory Pursuit" must occur subsequent to May 1, 1987.

(5) A course of study in the English language and in the history and government of the United States shall satisfy the requirement of paragraph (b)(4)(i) of this section if:

(i) It is sponsored or conducted by an established public or private institution of learning recognized as such by a qualified state certifying agency, or by an institution of learning approved to issue Forms I–20 in accordance with § 214.3 of this chapter, or by a qualified designated entity within the meaning of section 245A(c)(2) of the Act, in good-standing with the Service, or is certified by the district director in whose jurisdiction the program is conducted, or is certified by the Director of the Outreach Program nationally, and

(ii) The course materials for such instruction include textbooks published under the authority of section 346 of the Act.

(6) *Notice of Participation.* All courses of study recognized under § 245a.3(b)(5) which are already conducting or will conduct English and U.S. history and government courses for temporary residents must submit a Notice of Participation to the district director in whose jurisdiction the program is conducted or to the Director of the Outreach Program for national programs. The Notice of Participation shall be in the form of a letter typed on the letterhead of the course provider (if available) and contain the following information:

(i) The complete addresses and telephone numbers of sites where courses will be offered, and class schedules.

(ii) The complete names of persons at sites in charge of conducting English and U.S. history and government courses of study.

(iii) A statement that the course of study will issue "Certificates of Satisfactory Pursuit" to temporary resident enrollees according to INS regulations.

(iv) A list of designated officials of the recognized course of study authorized to sign "Certificates of Satisfactory Pursuit", and samples of their original signatures.

(v) A statement that if a course provider charges a fee to temporary resident enrollees, the fee will be in accordance with the reasonable standard set by the district director or the Director of the Outreach Program.

The Notice of Participation shall be submitted to the district director within thirty (30) days after publication of this Final Rule in the **Federal Register**. Acceptance of "Certificates of Satisfactory Pursuit" may be delayed if the course provider fails to submit the Notice of Participation within the requisite timeframe. Each district director shall compile and maintain lists of recognized courses within his or her district.

(7) *Fee Structure.* No maximum fee standard will be imposed by the Attorney General. However, if it is believed that a fee charged is excessive, this factor alone will justify non-certification of the course provider by INS as provided in § 245a.3(b) (10) and/or (12) of this section.

(8) Citizenship textbooks, for the use of applicants for lawful permanent residence under section 245A of the Act receiving instruction in or under the supervision of a course of study recognized by the Attorney General under the provisions of § 245a.3(b)(5) of this chapter in preparation for permanent residence, shall be prepared and distributed by the Service, pursuant to § 332b.3 of this chapter, to appropriate representatives of public schools. These textbooks may otherwise be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, and are also available at certain public institutions.

(9) *Maintenance of Student Records.* Course providers conducting courses of study recognized under § 245a.3(b)(5) of this chapter shall maintain for each student the following information and documents:

(i) Name.

(ii) A–number (90 million series).

(iii) Date of enrollment.

(iv) Date of termination.

(v) Attendance records.

(vi) Assessment records.

(vii) Photocopy of signed "Certificate of Satisfactory Pursuit" issued to the student.

(10) *Issuance of Certificate of Satisfactory Pursuit (I–699).* (i) Each recognized course of study shall prepare a standardized certificate that is signed by the designated official. The "Certificate of Satisfactory Pursuit" shall be issued to an applicant who has attended a recognized course of study for at least 30 hours of a minimum 100-hour course as appropriate for his or her ability level, and is demonstrating progress according to the performance standards of the English and U.S. history and government course prescribed. Such standards shall conform with the provisions of § 245a.1(s) of this chapter.

(ii) The district director shall reject a "Certificate of Satisfactory Pursuit" if it is determined that the certificate is fraudulent or was fradulently issued.

(iii) The district director shall reject a "Certificate of Satisfactory Pursuit" if it is determined that the course provider is not complying with INS regulations. In the case of non-compliance, the district director will advise the course provider in writing of the specific deficiencies and give the provider thirty (30) days within which to correct such deficiencies.

(iv) District directors will accept "Certificates of Satisfactory Pursuit" from course providers once it is determined that the deficiencies have been satisfactorily corrected.

(v) Course providers which engage in fraudulent activities or fail to conform with INS regulations will be removed from the list of INS approved programs and the INS will not accept "Certificates of Satisfactory Pursuit" from these providers.

(11) *Designated official.* (i) The designated official is the authorized person from each recognized course of study whose signature appears on all "Certificates of Satisfactory Pursuit" issued by that course;

(ii) The designated official must be a regularly employed member of the school administration whose office is located at the school and whose compensation does not come from commissions for recruitment of foreign students.

(iii)(A) The head of the school system or school, the director of the Qualified Designated Entity, the head of a program approved by the Attorney General, or the president or owner of other institutions recognized by the Attorney General must designate a "designated official". Such designated official may not delegate this designation to any other person. Each school or institution may have up to three (3) designated officials at any one time. In a multi-campus institution, each campus may have up to three (3) designated officials at any one time;

(B) Each designated official shall have read and otherwise be familiar with the "Requirements and Guidelines for Courses of Study Recognized by the Attorney General". The signature of a designated official shall affirm the official's compliance with INS regulations;

(C) The name, title, and sample signature of each designated official shall be attached to and submitted with each "Certificate of Satisfactory Pursuit".

(12) *Monitoring by INS.* (i) INS Outreach personnel in conjunction with the district director shall monitor the course providers in each district in order to:

(A) Assure that the program is a course of study recognized by the Attorney General under the provisions of § 245a.3(b)(5).

(B) Verify the existence of curriculum as defined in § 245a.1(u) on file for each level of instruction provided in English language and U.S. history and government classes.

(C) Assure that "Certificates of Satisfactory Pursuit" are being issued in accordance with § 245a.3(b)(10).

(D) Assure that records are maintained on each temporary resident enrollee in accordance with § 245a.3(b)(9).

(E) Assure that fees (if any) assessed by the course provider are in accordance with § 245a.3(b)(7).

(ii) If there is reason to believe that the service is not being provided to the applicant, INS will issue a 24-hour minimum notice to the service provider before any site visit is conducted.

(iii) If it is determined that a course provider is not performing according to the standards established in either § 245a.3(b) (10) or (12) of this chapter, the district director shall institute decertification proceedings. Notice of Intent to Decertify shall be provided to the course provider. The course provider has 30 days within which to correct performance according to standards established. If after the 30 days, the district director is not satisfied that the basis for decertification has been overcome, the course provider will be decertified.

(13)(i) Courses of study recognized by the Attorney General as defined at § 245a.3(b)(5) of this chapter shall provide certain standards for the selection of teachers. Since some programs may be in locations where availability of qualified staff is limited or non-existent, or where budget constraints restrict options, teacher selections should include as many of the following qualities as possible:

(A) Specific training in Teaching English to Speakers of Other Languages (TESOL);

(B) Experience as a classroom teacher with adults;

(C) Cultural sensitivity and openness;

(D) Familiarity with competency-based education;

(E) Knowledge of curriculum and materials adaptation;

(F) Knowledge of a second language; and

(G) Flexibility.

(c) *Ineligible aliens.* (1) An alien who has been convicted of a felony, or three or more misdemeanors.

(2) An alien who has assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group or political opinion.

(3) An alien who was previously granted temporary resident status pursuant to section 245A(a) of the Act who has not filed an application for permanent resident status under section 245A(b)(1) of the Act during the one year period which began with the nineteenth month that begins after the date the alien was granted such temporary status.

(4) An alien who was not previously granted temporary resident status under section 245A(a) of the Act.

(d) *Filing the application.* The provisions of Part 211 of this chapter relating to the documentary requirements for immigrants shall not apply to an applicant under this part.

(1) The application must be filed on Form I–698. The application will be mailed to the designated Regional Processing Facility having jurisdiction over the applicant's residence. Form I–698 must be accompanied by the documents specified in the instructions.

(2) The submission of original documents is not required at the time of filing Form I–698. Copies certified as true and correct by a qualified designated entity in good-standing or by an alien's representative in the format prescribed § 204.2(j) (1) or (2) of this chapter may be submitted with Form I–698. Original documents must be presented when, and if, requested by the Service. Official government records, employment or employment-related records maintained by employers, unions, or collective bargaining organizations, medical records, school records maintained by a school or school board or other records maintained by a party other than the applicant which are submitted in evidence must be certified as true and correct by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. At the discretion of the district director and/or the Regional Processing Facility director, original documents may be kept for forensic examination.

(3) A separate application (I–698) must be filed by each eligible applicant. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check or certified bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(4) Applicants who filed for temporary resident status prior to December 1, 1987, are required to submit the results of a serologic test for the HIV virus on Form I–693, "Medical Examination of Aliens Seeking Adjustment of Status, (Pub. L. 99–603)", completed by a designated civil surgeon. Such applicant is not required to have a complete medical examination.

(5) If necessary, the validity of an alien's temporary resident card (I–688) will be extended in increments of six (6) months until such time as the decision on an alien's properly filed application for permanent residence becomes final.

(6) An application deficient in any way shall be returned to the applicant with request for correction, additional

information, and/or documentation. If response to this request is not received within 60 days, a second and final request for correction, additional information, and/or documentation shall be made. If the second request is not complied with within 60 days, the application will be denied for lack of prosecution.

(e) *Interview.* Each applicant, regardless of age, must appear at the appropriate Service office and must be fingerprinted for the purpose of issuance of Form I–551. Each applicant shall be interviewed by an immigration officer, except that the interview may be waived for a child under 14, or when it is impractical because of the health or advanced age of the applicant. An applicant failing to appear for the first scheduled interview may, for good cause, be afforded a second interview opportunity.

(f) *Numerical limitations.* The numerical limitations of sections 201 and 202 of the Act do not apply to the adjustment of aliens to lawful permanent resident status under section 245A(b) of the Act.

(g) *Applicability of exclusion grounds*—(1) *Grounds of exclusion not to be applied.* The following paragraphs of section 212(a) of the Act shall not apply to applicants for adjustment of status from temporary resident to permanent resident status: (14) workers entering without labor certification; (20) immigrants not in possession of valid entry documents; (21) visas issued without compliance of section 203; (25) illiterates; and (32) graduates of non-accredited medical schools.

(2) *Waiver of grounds of excludability.* Except as provided in paragraph (g)(4) of this section, the Service may waive any provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is otherwise in the public interest. In any case where a provision of section 212(a) of the Act has been waived in connection with an alien's application for lawful temporary resident status under section 245A(a) of the Act, no additional waiver of the same ground of excludability will be required when the alien applies for permanent resident status under section 245A(b)(1) of the Act. In the event that the alien becomes excludable under any provision of section 212(a) of the Act subsequent to the date temporary residence was granted, a waiver of the ground of excludability, if available, will be required before permanent resident status may be granted.

(3) *Grounds of exclusion that may not be waived.* Notwithstanding any other provisions of the Act the following provisions of section 212(a) of the Act may not be waived by the Attorney General under paragraph (g)(2) of this section:

(i) Paragraphs (9) and (10) (criminals);

(ii) Paragraph (15) (public charge) insofar as it relates to an application for adjustment to permanent residence by an alien other than an alien who is eligible for benefits under Title XVI of the Social Security Act or section 212 of Pub. L. 93–66 for the month in which such alien is granted lawful temporary residence status under subsection (a);

(iii) Paragraph (23) (narcotics), except for a single offense of simple possession of thirty grams or less of marijuana;

(iv) Paragraphs (27) (prejudicial to the public interest), (28) (communists), (29) (subversive);

(v) Paragraph (33) (participated in Nazi persecution).

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself or herself and his or her family even though his or her income may be below the poverty level is not excludable under paragraph (g)(3)(ii) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for Determination of Public Charge.

(5) *Public cash assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and/or has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for proper adjudication may result in denial of the application.

(h) *Departure.* An applicant for adjustment to lawful permanent resident status under section 245A(b)(1) of the Act who was granted lawful temporary resident status under section 245A(a) of the Act, shall be permitted to return to the United States after such brief and casual trips abroad, as long as the alien reflects a continuing intention to adjust to lawful permanent resident status. However, such absences from the United States must not exceed the periods of time specified in § 245a.3(b)(2) of this chapter in order for the alien to maintain continuous residence as specified in the Act.

(i) *Decision.* The applicant shall be notified in writing of the decision, and, if the application is denied, of the reason therefor. An application will not be denied if the denial is based on adverse information not previously furnished to the Service by the alien without providing the alien an opportunity to rebut the adverse information and to present evidence in his or her behalf. A party affected under this part by an adverse decision is entitled to file an appeal on Form I–694. An alien whose application is denied will not be required to surrender his or her temporary resident card (I–688) until such time as the appeal period has tolled, or until expiration date of the I–688, whichever date is later. If the applicant believes that the grounds for denial have been overcome, he or she may submit another application with fee provided that the application is submitted within his or her one-year application period.

(j) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit) (the appellate authority designated in § 103.1(f)(2) of this chapter). Any appeal with the required fee shall be filed with the Regional Processing Facility within thirty (30) days after service of the Notice of Denial in accordance with the procedures of § 103.3(a) of this chapter. An appeal received after the thirty (30) day period has tolled will not be accepted. The thirty (30) day period for submitting an appeal begins three days after the notice of denial is mailed. A brief may be submitted with the appeal form or submitted up to thirty (30) calendar days from the date of receipt of the appeal form at the Regional Processing Facility.

For good cause shown, the time within which a brief supporting an appeal may be submitted may be extended by the Administrative Appeals Unit (AAU). If a review of the Record of Proceeding (ROP) is requested by the alien or his or her legal representative and an appeal has been properly filed, an additional thirty (30) days will be allowed for this review from the time the Record of Proceeding is photocopied and mailed.

(k) *Motions.* The Regional Processing Facility director may sua sponte reopen and reconsider any adverse decision. When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the INS director of the Regional Processing Facility may issue a new decision that will grant the benefit which has been requested. The director's new decision must be served on the appealing party within forty-five (45) days of receipt of any briefs and/or new evidence, or upon expiration of the time allowed for the submission of any briefs.

(l) *Certifications.* The Regional Processing Facility director or district director may, in accordance with § 103.4 of this chapter, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The decision on an appealed case subsequently remained to either the Regional Processing Facility director or the district director will be certified to the Administrative Appeals Unit.

(m) *Date of adjustment to permanent residence.* The status of an alien whose application for permanent resident status is approved shall be adjusted to that of a lawful permanent resident as of the date of approval.

(n) *Limitation on access to information and confidentiality.* (1) No person other than a sworn officer or employee of the Department of Justice or bureau of agency thereof, will be permitted to examine individual applications. For purposes of this part, any individual employed under contract by the Service to work in connection with the Legalization Program shall be considered an "employee of the Department of Justice or bureau or agency thereof".

(2) No information furnished pursuant to an application for legalization under this section shall be used for any purpose except:

(i) To make a determination on the application; or,

(ii) For the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (n)(3) of this section.

(3) If a determination is made by the Service that the alien has, in connection with his or her application, engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowlingly made a false statement or representation, or engaged in any other activity prohibited by section 245A(c)(6) of the Act, the Service shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(4) Information obtained in granted I-698 applications and contained in the applicant's file is subject to subsequent review in reference to future benefits applied for (including petitions for naturalization and permanent resident status for relatives).

Attachment

Although not a part of the CFR, the following Immigration and Naturalization Service forms were developed as a result of the Immigration Reform and Control Act of 1986. The reproductions are not official forms and should not be copied or used in any way and are being included for informational purposes only.

BILLING CODE 4410-10-M

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OMB No. 1115-0000

U.S. Department of Justice
Immigration and Naturalization Service

Application to Adjust Status from Temporary to Permanent Resident
(Under Section 245 A of Public Law 99-603)

Please read instructions: fee will not be refunded.	Fee Stamp
INS Use: Bar Code **Address Label**	
(Place adhesive address label here from booklet or fill in name and address, and A 90 million file number in appropriate blocks.)	Applicant's File No. A-9 — — — — — — — — —

1. Family Name *(Last Name in CAPITAL Letters)* *(See instructions)* *(First Name)* *(Middle Name)*	2. Sex ☐ Male ☐ Female
3. Name as it appears on Temporary Resident Card *(I-688)* if different from above.	4. Phone No.'s *(Include Area Codes)* Home: Work:
5. Reason for difference in name *(See instructions)*	
6. Home Address *(No. and Street)* *(Apt. No.)* *(City)* *(State)* *(Zip Code)*	
7. Mailing Address *(if different)* *(Apt. No.)* *(City)* *(State)* *(Zip Code)*	
8. Place of Birth *(City or Town)* *(County, Province or State)* *(Country)*	9. Date of Birth *(Month/Day/Year)*
10. Your Mother's First Name	11. Your Father's First Name / 12. Enter your Social Security Number — — —-— — —-— — — —

13. Absences from the United States since becoming a Temporary Resident Alien. *(List most recent first.)* *(If you have a single absence in excess of 30 days or the total of all your absences exceeds 90 days, explain and attach any relevant information).*

Country	Purpose of Trip	From *(Month/Day/Year)*	To *(Month/Day/Year)*	Total Days Absent

14. When applying for temporary resident alien status, I
☐ did ☐ did not submit a medical examination form (I-693) with my application that included a serologic (blood) test for human immunodeficiency virus (HIV) infection. *(If you did not, submit a medical examination form (I-693) with this application that includes a serologic test for HIV.)*

15. Since becoming a temporary resident alien, I
☐ have ☐ have not been arrested, convicted or confined in a prison. *(If you have, provide the date(s), place(s), specific charge(s) and attach any relevant information.)*

16. Since becoming a temporary resident alien, I
☐ have ☐ have not been the beneficiary of a pardon, amnesty (other than legalization), rehabilitation decree, other act of clemency or similar action. *(If you have, explain and attach any relevant documentation.)*

17. Since becoming a temporary resident alien, I
☐ have ☐ have not received public assistance from any source, including but not limited to, the United States Government, any state, county, city or municipality. *(If you have, explain, including the name(s) and Social Security Number(s) used and attach any relevant information.)*

18. Concerning the requirement of minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States: *(Check appropriate block under Section A or B.)*

A. I will satisfy these requirements by;
- ☐ Examination at the time of interview for permanent residence.
- ☐ Satisfactorily pursuing a course of study recognized by the Attorney General.

B. I have satisfied these requirements by;
- ☐ Having satisfactorily pursued a course of study recognized by the Attorney General *(please attach appropriate documentation).*
- ☐ Exemption, in that I am 65 years of age or older, under the age of 16, or I am physically unable to comply. *(If physically unable to comply, explain and attach relevant documentation.)*

19. Applicants for status as Permanent Residents must establis' that they are not excludable from the United States under the following provisions of section 212 of the INA. An applicant who is excludable under a provision of section 212 (a) which may not be waived is ineligible for permanent resident status. An applicant who is excludable under a provision of section 212 (a) which may be waived may, if otherwise eligible, be granted permanent resident status, if an application for waiver on form I-690 is filed and approved.

A. Grounds for exclusion which *may not be waived:*
- Listed by paragraph number of section 212 (a);

____ (9) Aliens who have committed or who have been convicted of a crime involving moral turpitude (does not include minor traffic violations).
____ (10) Aliens who have been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more.
____ (15) Aliens likely to become a public charge.
____ (23) Aliens who have been convicted of a violation of any law or regulation relating to narcotic drugs or marihuana, or who have been illicit traffickers in narcotic drugs or marihuana.
____ (27) Aliens who intend to engage in activities prejudicial to the national interests or unlawful activities of a subversive nature.
____ (28) Aliens who are or at any time have been anarchists, or members of or affiliated with any Communist or other totalitarian party, including any subdivision or affiliate thereof.
____ (29) Aliens who have advocated or taught, either by personal utterance, or by means of any written matter, or through affiliation with an organization:
1) Opposition to organized government;
2) The overthrow of government by force or violence;
3) The assaulting or killing of government officials because of their official character;
4) The unlawful destruction of property;
5) Sabotage, or;
6) The doctrines of world communism, or the establishment of a totalitarian dictatorship in the United States.
____ (33) Aliens who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, and in association with:
1) The Nazi government in Germany;
2) Any government in any area occupied by the military forces of the Nazi government in Germany;
3) Any government established with the assistance or cooperation of the Nazi government of Germany;
4) Any government which was an ally of the Nazi government of Germany;
ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.
- Provisions of 212 (e):
Aliens who at any time were exchange visitors subject to the two-year foreign residence requirement unless the requirement has been satisfied or waived pursuant to the provisions of section 212 (e) of the Act. (Does not apply to the Extended Voluntary Departure (EVD) class of temporary resident aliens).

Do any of the above classes apply to you?
☐ No ☐ Yes *(If "Yes", attach an explanation, and any relevant documentation. Place mark (X) on line before ground(s) of exclusion.)*

B. Grounds for exclusion which *may be waived:*
- Listed by paragraph number of section 212 (a);

____ (1) Aliens who are mentally retarded.
____ (2) Aliens who are insane.
____ (3) Aliens who have suffered one or more attacks of insanity.
____ (4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect.
____ (5) Aliens who are narcotic drug addicts or chronic alcoholics.
____ (6) Aliens who are afflicted with any dangerous contagious disease.
____ (7) Aliens who have a physical defect, disease or disability affecting their ability to earn a living.
____ (8) Aliens who are paupers, professional beggars or vagrants.
____ (11) Aliens who are polygamists or advocate polgamy.
____ (12) Aliens who are prostitutes or former prostitutes, or who have procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose, or aliens coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution.
____ (13) Aliens coming to the United States to engage in any immortal sexual act.
____ (16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation.
____ (17) Aliens who have been arrested and deported and who reentered the United States within five years from the date of deportation.
____ (19) Aliens who have procured or have attempted to procure a visa or other documentation by fraud, or by willfully misrepresenting a material fact.
____ (22) Aliens who have applied for exemption or discharge from training or service in the Armed Forces of the United States on the ground of alienage and who have been relieved or discharged from such training or service.
____ (31) Aliens who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

Do any of the above classes apply to you?
☐ No ☐ Yes *(If "Yes", attach an explanation, and any relevant documentation and submit Form I-690. Place mark (X) on line before ground(s) of exclusion.)*

20. If your native alphabet is other than Roman letters, write your name in your native alphabet.	21. Language of native alphabet
22. Signature of Applicant - *I CERTIFY*, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I hereby consent and authorize the Service to verify the information provided, and to conduct record checks pertinent to this application.	23. Date *(Month/Day/Year)*
24. Signature of person preparing form, if other than applicant. I DECLARE that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.	25. Date *(Month/Day/Year)*
26. Name and Address of person preparing form, if other than applicant *(type or print)*.	27. Occupation

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OMB No. 1115-0000

U.S. Department of Justice
Immigration and Naturalization Service

Application to Adjust Status from Temporary to Permanent Resident
(Under Section 245 A of Public Law 99-603)

Instructions - Form I-698

1. **Filing the Application**
A separate application must be filed by each applicant. Applications must be typewritten or printed legibly in ink and completed in full. If extra space is needed to answer any item, attach a continuation sheet and indicate the item number. Applications must be mailed to one of the four Regional Processing Facilities depending on where an applicant resides. *(See below.)*

If applicant resides in:
Connecticut; Delaware; District of Columbia; Maine; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Puerto Rico; Rhode Island; Vermont; Virgin Islands; Virginia; or West Virginia;

Mail application to :
Regional Processing Facility
U.S. Immigration and Naturalization Service
P.O. Box 590
Williston, Vt 05495

If applicant resides in:
Alaska; Colorado; Idaho; Illinois; Indiana; Iowa; Kansas; Michigan; Minnesota; Missouri; Montana; Nebraska; North Dakota; Ohio; Oregon; South Dakota; Utah; Washington; Wisconsin; or Wyoming;

Mail application to:
Regional Processing Facility
U.S. Immigration and Naturalization Service
Federal Building and U.S. Courthouse
100 Centennial Mall, Room B-25
Lincoln, Ne 68508

If applicant resides in:
Alabama; Arkansas; Florida; Georgia; Kentucky; Louisiana; Mississippi; New Mexico; North Carolina; Oklahoma; South Carolina; Tennesee; or Texas;

Mail application to:
Regional Processing Facility
U.S. Immigration and Naturalization Service
P.O. Box 569710
Dallas, Tx 75356-9710

If applicant resides in:
Arizona; California; Guam; Hawaii; or Nevada;

Mail application to:
Regional Processing Facility
U.S. Immigration and Naturalization Service
P.O. Box 30030
Laguna Niguel, Ca 92677-0030

Note: It is recommended that applicants retain a complete copy of their application for their records.

2. **Fee**
A fee of seventy-five dollars ($75.00) is required at the time of filing this application. The fee is not refundable regardless of the action taken on the application. All fees must be submitted in the exact amount. The fee must be in the form of a U.S. Postal Money Order, Money Order, or Bank Check. Cash or personal checks of any type will not be accepted. All money orders and bank checks must be made payable to "Immigration and Naturalization Service". Any stop payment action taken by an applicant or applicant's representative will cause the Service to terminate action on the application. Applicants will receive a notice of fee receipt after applications are received and processed at a Regional Processing Facility.

3. **Photographs**
With the application submit one color photograph of yourself taken within thirty (30) days of the date of this application. Two additional color photographs will be required at the time of the interview. Do not send these two additional photographs with this application. The photos must have a white background, be glossy, unretouched, and not mounted; dimension of facial image should be about one inch from chin to top of hair. Applicant must be shown in photos in a three-fourths profile view showing right side of face with right ear and both eyes visible. Applicant's name and A 90 million file number should be placed lighlty in pencil on the back of the photographs.

4. **Medical Examination**
A medical examination form (I-693) is required only for those applicants who were not given a serologic test for human immunodeficiency virus (HIV) infection as part of their medical examination when applying for temporary residence. If the applicant is 15 years of age or older and the applicant's medical examination for temporary residence did not include a serologic test for HIV, the applicant should choose a doctor from a list of doctors or clinics in the applicant's area that have been approved by the Immigration and Naturalization Service to perform medical examinations and make arrangements with the doctor or clinic to have a serologic test for HIV.

Note: Applicants who must comply with this requirement do not have to undergo another complete medical examination. The medical examination form need only reflect the results of the serologic test.

(Please see additional instructions on the reverse side of this page.)

Instructions - Form I-698 *(Continued)*

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5. **Documents - General**
The submission of original documents is not required at the time of filing Form I-698. Copies certified as true and correct by a qualified designated entity in good-standing or by an alien's attorney or accredited representative in the format prescribed section 204.2 (j) (1) or (2) of this chapter may be submitted with Form I-698. Original documents must be presented when, and if, requested by the Service. If any original document is submitted without a certified copy it becomes the property of the Attorney General and will be retained by the Service. Any document in a foreign language must be accompanied by a summary translation into English. A summary translation is a condensation or abstract of the document's text but includes all pertinent facts. The translator must certify that he/she is competent to translate into English and that the translation is accurate.

6. **I-772 - Declaration of Intending Citizen**
Section 274B of the Immigration and Nationality Act prohibits discrimination in employment hiring and firing based on an individual's national origin or citizenship status. To be afforded the protection of this section a temporary resident alien must file a notice of intent to become a U.S. citizen (I-772). For additional information concerning immigration related unfair employment practices contact the Office of Special Counsel for Immigration Related Unfair Employment Practices by mail at P.O. Box 65490, Washington, D. C. 20035-7688 or by telephone at 1-800-255-7688 or 202-653-5710 (for hearing impaired).

7. **Name Changes**
Applicants having experienced a name change must submit the certified copy of the decree of the court or marriage certificate as appropriate. A marrried woman may use either her maiden or present married name.

8. **Eligibility**
An application may be filed by any alien who was lawfully admitted for Temporary Resident status under Section 245A of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 and section 902 of the Department of State Authorization Bill of 1987. In order to be found eligible for Permanent Residence under Section 245A the alien must:

a) Apply for such adjustment during the one year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status;

b) Reside continuously in the United States, that is since becoming a temporary resident alien no single absence from the United States exceeded thirty (30) days or the total of all absences exceeded ninety (90) days;

c) Be found admissible to the United States as an immigrant, except as otherwise provided in the provisions of paragraph (14), (20), (21), (25), and (32) of Section 212 (a) of the Immigration and Nationality Act;

d) Have not been convicted of any felony or three or more misdemeanors committed in the United States;

e) Be able to demonstrate that he/she either;

1) Meets the requirements of Section 312 of the Immigration and Nationality Act, as amended (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

2) Is satisfactorily pursuing a course of study recognized by the Attorney General, to achieve such understanding of English and such knowledge and understanding of the history and government of the United States.

9. **Penalties for False Statements in Applications**
Whoever files an application for adjustment of status under Section 245A of the Act and who knowingly and willfully falsifies, misrepresents, conceals or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry will be subject to criminal prosecution.

Authority for Collecting this Information

The authority to prescribe this form is contained in the "Immigration Reform and Control Act of 1986". The information is necessary to determine whether a person is eligible for the immigration benefit sought and for processing permanent resident documentation (I-551). All questions must be answered. Failure to do so may result in the denial of the application.

Confidentiality

The information provided in this application is confidential and may only be used to make a determination on the application or for the enforcement of penalties for false statements referred to in instruction #9. The information provided is subject to verification by the Immigration and Naturalization Service.

Reporting Burden

Public reporting burden for this collection of information is estimated to average sixty (60) minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, N.W., Washington, D.C. 20536; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D. C. 20503.

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U.S. Department of Justice
Immigration and Naturalization Service

OMB # 1115-0000
Certificate of Satisfactory Pursuit

Instructions

This form is to be completed by the designated official of a course of study recognized by the Attorney General under 8 CFR 245a.3 (b) (5) to provide instruction to temporary resident aliens. The Certificate of Satisfactory Pursuit, along with the appropriate attachments will be submitted by the applicant in support of his or her application for adjustment from temporary to permanent resident status under section 245A of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act, Public Law 99-603. A copy of the completed certificate must be retained on file by the recognized course of study.

This is to certify that *(Applicant Name)*: _____

A Number: _____

is enrolled in a course of study recognized by the Attorney General to prepare the individual, whose name and A-90 number appears above, for permanent resident status in the United States.

This applicant has attended this recognized program for at least thirty (30) hours of a minimum one hundred (100) hour course as appropriate for their ability level, and has demonstrated progress according to the performance standards of this English language/Citizenship course. The applicant has attained functional skills related to communicative ability, subject matter knowledge, and English language competency. Attainment of these skills was measured by the successful completion of learning objectives appropriate to the applicant's ability level, or attainment of a determined score on a test or tests, or both of these.

I certify, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. I executed this form, after review and evaluation by me or other officials of this institution, of the student's transcripts or other record of courses taken and skills attained. I am a designated official of the institution named below and am authorized to issue this form.

Designated Official *(Signature)*: _____

Date of Issuance: _____

Institution/Entity: _____

Address *(Street Number and Name)*: _____

(City, State and Zip Code): _____

Telephone Number *(Area Code)*: ( ) _____

Attachments:

1. Evidence of certification as a recognized course of study:
   - ☐ Certification from qualified state certifying agency.
   - ☐ INS school approval for attendance by nonimmigrant students.
   - ☐ INS identification number of QDE Cooperative Agreement.
   - ☐ INS approval under 8 CFR 245 a.3 (b)(5)(i).
2. Name(s), title(s), and sample signature(s) of designated official(s).

Authority for Collecting this Information

The authority to prescribe this form is contained in the "Immigration Reform and Control Act of 1986". The information is necessary to determine whether a person meets the English language/Citizenship skills of IRCA by satisfactorily pursuing a course of study recognized by the Attorney General in order to be eligible to adjust status from temporary to permanent resident. All information must be provided as requested. Failure to do so may result in the rejection of this form.

Reporting Burden

Public reporting burden for this collection of information is estimated to average ten (10) minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the PolicyDirectives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, N.W., Washington, D.C. 20536; and the Office of Information and Regulatory Affairs Office of Management and Budget, Washington, D.C. 20503.

Form I-699 (07/20/83) **DRAFT #2**

BILLING CODE 4410-10-C

Date: July 18, 1988.
Richard E. Norton,
Associate Commissioner, Examinations.
[FR Doc. 88-17754 Filed 8-5-88; 8:45 am]
BILLING CODE 4410-10-M

8 CFR Parts 100, 103, 264 and 299

[INS Number 1020R-88]

Applicant Processing for the Legalization Program; Conforming Amendments

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend certain regulations to conform to proposed regulation changes published elsewhere in this issue. These provisions related to the processing of applicants for permanent residence under the Legalization Program as authorized by the Immigration Reform and Control Act of 1986 (IRCA). The Service published conforming amendment regulations at 52 FR 16205, May 1, 1987. This rule affects some of these regulations.

DATE: Comments must be received on or before September 7, 1988.

ADDRESSES: Written comments should be mailed in triplicate to Terrance M. O'Reilly, Deputy Assistant Commissioner, Legalization, Immigration and Naturalization Service, 425 "I" Street, NW., Washington, DC 20536, or delivered to Room 5250 at the same address.

FOR FURTHER INFORMATION CONTACT: Terrance M. O'Reilly, Deputy Assistant Commissioner, Legalization, (202) 786-3658.

SUPPLEMENTARY INFORMATION: The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603 was enacted on November 6, 1986. The Service published implementing regulations at 52 FR 16205, May 1, 1987, and amending regulations at 52 FR 43843, November 17, 1987; 53 FR 9274, March 21, 1988; 53 FR 9862, March 28, 1988; and at 53 FR 23382, June 22, 1988. The purpose of this proposed rule is to effect the necessary changes to the regulations brought about by the Service's intent to process applications for adjustment of temporary resident aliens for lawful permanent residence status.

At 53 FR 18096, May 20, 1988, the Service published in the **Federal Register** a notice making available to the public the preliminary working draft regulations. More than 170 copies of the preliminary working draft were forwarded to requesters. As a result, 135 individuals and interested organizations submitted written comments. The comments were reviewed and given serious consideration. The Service appreciates the time and effort put forth by all concerned parties.

This proposed rule changes the list of legalization offices; includes other Service offices besides legalization offices where interviews will occur; allows for the approval or denial of permanent resident applications at the district director level; sets the application fee; allows for the district director to certify decisions to the Administrative Appeals Unit; and allows for the submission of I-695, Application for Replacement of Form I-688A, Employment Authorization, or Form I-688, Temporary Residence Card (Under Pub. L. 99-603), to other Service offices besides legalization offices.

Summary of the Proposed Rule

Section 100.4(f) provides a list of legalization offices which will accommodate applicants for permanent residence. Several commentors stressed that the Service seriously reconsider the decision to close any legalization office for various reasons such as convenience to the public. The Service has carefully considered decisions to close legalization offices. The volume of application receipts (including Special Agricultural Worker applications) is a main factor studied before a decision is made to close a legalization office. The Service agrees with the commentors that the maximum number of legalization offices should remain open within funding constraints. In addition to the legalization offices listed in § 100.4(f) the following Service offices will conduct interviews for permanent residence.

Eastern Region

District offices—Baltimore, MD; Buffalo, NY; Philadelphia, PA; Porland, ME; and San Juan, PR; Sub-offices—Albany, NY; Christiansted, VI; Camden, NJ; Hartford, CN; Norfolk, VA; Pittsburgh, PA; Providence, RI; St. Albans, VT; and Syracuse, NY

Northern Region

District offices—Anchorage, AK; Cleveland, OH; Denver, CO; Detroit, MI; Helena, MT; Kansas City, MO; Omaha, NB; Portland, OR; Seattle, WA; and Saint Paul, MN; Sub-offices—Boise, ID; Cincinnati, OH; Indianapolis, IN; Milwaukee, WS; Salt Lake City, UT; St. Louis, MO; and Yakima, WA

Southern Region

District offices—Atlanta, GA; and New Orleans, LA; Sub-offices—Charlotte, NC; Jacksonville, FL; Memphis, TN; and Oklahoma City, OK

Western Region

District offices—Honolulu, HI; Sub-offices—Agana, GU; Reno, NV; and Tucson, AZ

Section 103.1(n) is revised to provide for the approval or denial of applications for permanent residence by the district directors at both legalization and other Service offices. Several commentors recommended that the final approval or denial authority should rest with the director of the Regional Processing Facility instead of the district director. The Service feels that the method of processing permanent residence applications using the Regional Processing Facilities for preliminary processing and the field offices for final adjudication is sound. Applicants will be processed for permanent residence cards, Form I-551, in field offices and will meet the English and History and Government of the United States requirement through examination at field offices (unless that requirement is waived or satisfied by satisfactorily pursuing a course of study). These tasks cannot be performed by the directors of the Regional Processing Facilities.

Section 103.4(b) is revised to provide for the certification of decisions by the district director as well as the Regional Processing Facility Director to the Administrative Appeals Unit. One commentor suggested the Service clarify § 103.4(b) as it was unclear what the certification to the Associate Commissioner, Examinations meant. The Service is adding clarifying language.

Section 103.7(b)(1) is amended to provide for an application fee for the filing of an I-698, Application to Adjust Status from Temporary to Permanent Resident (Under the Immigration Reform and Control Act of 1986). Numerous commentors protested "the proposed $100 token fee" which appeared in an article in the Los Angeles Times on June 3, 1988. Other commentors recommended the fee be set at $35 with various amounts for family caps. One commentor suggested the fee be set at the lowest rate possible and that the Service should provide for a waiver of the fee in hardship cases. The Service has seriously studied the issue of setting a fee for applying for permanent residence. The cost of the Legalization Program is to be self-funding through application fees; therefore, it has been determined that an application fee for permanent residence will be charged.

Section 264.1(c) is revised to provide for the submission of Form I–695, (Application for Replacement of Form I–688A, Employment Authorization, or Form I–688, Temporary Residence Card (Under Pub. L. 99–603)), to legalization and other Service offices. One commentor suggested that this section be expanded to include the procedures involved when a temporary resident alien or applicant for temporary residence loses his or her I–688, Temporary Resident Card, or I–688A, Employment Authorization Card, respectively, while outside the United States. The Service feels it is useful information and it will be included in this section. Other commentors suggested that appeal should be provided for the decision of the Regional Processing Facility director denying an I–695 application. Section 264.1(c) also addresses the processing of Form I–90, Application by Lawful Permanent Resident Alien For Alien Registration Card, Form I–551. No appeal is provided for from the decision of the district director in the denial of an I–90 application. The Service believes it is being consistent in its regulation in not providing an appeal from the Regional Processing Facility director's denial of an I–695 application.

In accordance with 5 U.S.C. 605(b), the Commissioner certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule is not a major rule within the definition of section 1(b) of EO 12291, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

The information collection requirements contained in this regulation, excepting the I–698, have been cleared by OMB under the Paperwork Reduction Act. The OMB control numbers for these collections are contained in 8 CFR Part 299. The information collection requirements pertaining to the I–698 have been forwarded to OMB for clearance.

List of Subjects

8 CFR Part 100

Administrative practice and procedure, Authority delegations (Government agencies).

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Fees, Reporting and recordkeeping requirements.

8 CFR Part 264

Reporting and recordkeeping requirements.

8 CFR Part 299

Forms, Reporting and recordkeeping requirements.

Accordingly, Chapter I of Title 8 of the Code of Federal Regulations is amended as follows:

PART 100—STATEMENT OF ORGANIZATION

1. The authority citation for Part 100 continues to read as follows:

Authority: 66 Stat. 173; 8 U.S.C. 1103.

2. Section 100.4(f) is amended by revising the list of legalization offices to read as follows:

§ 100.4 Field service.

* * * * *

(f) * * *

Legalization offices

Eastern Region

BOS—Boston, MA (XBT)
NEW—Paterson, NJ (XPT)
NYC—Manhattan, NY (XMA)
WAS—Arlington, VA (XAR)

Northern Region

CHI—Chicago, IL (XBI); Chicago, IL (XLS); Forest Park, IL (XLI)

Southern Region

DAL—Arlington, TX (XDA); Lubbock, TX (XLU)
ELP—El Paso, TX (XEL); Albuquerque, NM (XAL)
HLG—Harlingen, TX (XHA)
HOU—Houston, TX (XHU)
MIA—(Miami) Hialeah, FL (XOP); Tampa, FL (XTA); Fort Lauderdale, FL (XWS)
SNA—Austin, TX (XAU); San Antonio, TX (XSN)

Western Region

LOS—Anaheim, CA (XAH); El Monte, CA (XEM); Los Angeles, CA (XHO); Huntington Park, CA (XHP); Indio, CA (XID); East Los Angeles, CA (XLA); Buena Park, CA (XNK); Oxnard, CA (XOX); Pomona, CA (XPO); Riverside, CA (XRV); Santa Maria, CA (XSM); Santa Ana, CA (XSA); San Fernando, CA (XSR); Gardenia, CA (XTO); N. Hollywood, CA (XVN)
PHO—Phoenix, AZ (XPH), Las Vegas, NV (XLV)
SND—Escondido, CA (XES), San Diego, CA (XSD)
SFR—Bakersfield, CA (XBA), Fresno, CA (XFR), San Francisco, CA (XSF), Salinas, CA (XSI), San Jose, CA (XSO), Stockton, CA (XST)

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

3. The authority citation for Part 103 is revised to read as follows:

Authority: 5 U.S.C. 522(a); 8 U.S.C. 1101, 1103, 1201, 1301–1305, 1351, 1443, 1454, 1455; 28 U.S.C. 1746; 7 U.S.C. 2243; 31 U.S.C. 9701; E.O. 12356, 3 CFR 1982 Comp., p. 166.

4. In § 103.1, a new paragraph (n)(3) is added to read as follows:

§ 103.1 Delegations of authority.

* * * * *

(n) * * *

(3) Applications for permanent residence filed by legalization applicants pursuant to section 245A of the Act may be adjudicated by the district director having jurisdiction over the applicant's residence.

5. Section 103.4(b) is revised to read as follows:

§ 103.4 Certifications.

* * * * *

(b) *Certification of denials of special agricultural worker and legalization applications.* The Regional Processing Facility director or the district director may, in accordance with paragraph (a) of this section, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) (the appellate authority designated in § 103.1 (f)(2)) of this part, when the case involves an unusually complex or novel question of law or fact.

§ 103.7 [Amended]

6. Section 103.7 (b)(1) is amended by removing "(fee amount to be determined as required)" for Form I–698, and inserting in its place "A fee of seventy-five dollars ($75.00) for each application.

PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

7. The authority citation for Part 264 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1201a, 1301–1305; 66 Stat. 173, 191, 223–225; 71 Stat. 641.

8. Section 264.1(c) is amended by replacing all existing text beginning with the eighteenth sentence which reads "Application by an alien lawfully admitted for temporary residence . . ." with the following:

§ 264.1 Registration and Fingerprinting.

* * * * *

(c) * * * Application by an alien lawfully admitted for temporary residence for Form I–688, Temporary Resident Card, in lieu of one lost, stolen, mutilated, or destroyed, shall be made on Form I–695 accompanied by the fee required by § 103.7(b)(1) of this chapter, two color photographs, (regardless of the applicant's age, unless the requirement for such photographs has been waived by the director of the

legalization or Service office in his or her discretion because of hardship to an applicant who is confined due to age or physical infirmity), and when issuance of Form I–688 is desired in a changed name, by appropriate documentary evidence of such change. Any Form I–688 in applicant's possession must also be submitted with the application. An application by an alien within the United States for replacement of evidence of registration shall be submitted to the legalization or Service office having jurisdiction over the applicant's place of residence in the United States. Prior to the issuance of Form I–688, all applicants, regardless of age, shall appear at the appropriate legalization or Service office for interview and placement of fingerprint and signature on I–688 unless these requirements are waived at the discretion of the district director because of infirmity, illiteracy, or other compelling reasons. An alien who files application Form I–695 may be required to appear in person before an immigration officer prior to the adjudication of the application and be interviewed under oath concerning his or her registration. In addition, the applicant may also be required to present a completed fingerprint card (Form FD–285). The decision on an application for replacement of evidence of registration shall be made by the Regional Processing Facility director having jurisdiction over the alien's place of residence in the United States. No appeal shall lie from the decision of the Regional Processing Facility director denying the application. An alien outside the United States shall appear at an American Consulate or Service office abroad and present a full account of the circumstances involving the loss or destruction of Form I–688. A cable shall be sent to the Service's Central Office Records Branch for verification of status. Subsequent to verification that temporary residence was granted, a transportation letter will be issued to the temporary resident alien.

* * * * *

PART 299—IMMIGRATION FORMS

9. The authority citation for Part 299 continues to read as follows:

Authority: 66 Stat. 173; 8 U.S.C. 1103.

10. Section 299.5 is added to read as follows:

§ 299.5 Display of Control Numbers

INS form No.	INS form title	Currently assigned OMB control No.
I–698	Application to Adjustment Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99–603)	1115–0000

Dated: July 18, 1988.

Richard E. Norton,

Associate Commissioner, Examinations.

[FR Doc. 88–17757 Filed 8–5–88; 8:45 am]

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Monday
August 8, 1988

Part III

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1910 et al.

Hazard Communication; Notice of Proposed Rulemaking and Notice of Public Hearing

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, and 1926

[Docket H-022D]

Hazard Communication

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Notice of proposed rulemaking (NPRM) and notice of public hearing.

SUMMARY: On August 24, 1987, OSHA published a final rule to modify its Hazard Communication Standard (HCS) (52 FR 31852). The original rule, which was promulgated on November 25, 1983, covered employees exposed to hazardous chemicals in the manufacturing sector of industry. The modified rule expanded coverage to all employees exposed to hazardous chemicals, thus providing protection for those in non-manufacturing employments as well as manufacturing.

The HCS requires employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets, and training programs. Implementation of these hazard communication programs will reduce the incidence of chemically-related occupational illnesses and injuries.

An advance notice of proposed rulemaking (ANPR) on expansion of the scope had been published on November 27, 1985 (50 FR 48794). OSHA was subsequently directed by the U.S. Court of Appeals for the Third Circuit to issue a final standard to expand the scope of industries covered by the rule within sixty days of its decision issued on May 29, 1987, *United Steelworkers of America, AFL–CIO–CLC* v. *Pendergrass*, 819 F.2d 1263 (3d Cir. 1987), unless the Agency could demonstrate that such an expansion would not be feasible. The August final rule was OSHA's response to the Court's direction. However, the Agency recognized that had the standard been developed through a more complete rulemaking process, additional information regarding the feasibility or practicality of the provisions may have been included in the record. OSHA therefore established a sixty-day comment period on the final rule to permit interested parties to provide data or evidence regarding the feasibility or practicality of the provisions of the rule.

This NPRM proposes modifications to the final rule based upon information submitted to the rulemaking record, including a determination made by the Office of Management and Budget (OMB) under the Paperwork Reduction Act regarding the information collection requirements of the final rule. OSHA is inviting comment for sixty (60) days following publication of this NPRM, and is scheduling a public hearing to provide an opportunity for additional input.

DATES: Comments concerning the proposed standard and notices of intention to appear at the public hearing must be received on or before October 7, 1988. Parties requesting more than 10 minutes for their presentation at the hearing, and parties planning to present documentary evidence at the hearing, must submit the full text of their testimony and all documentary evidence no later than October 24, 1988. The hearing will take place in Washington, DC, and will begin at 9:30 a.m. on November 15, 1988.

ADDRESSES: Comments are to be submitted in quadruplicate to the Docket Officer, Docket H–022D, Occupational Safety and Health Administration, 200 Constitution Avenue NW., Room N3670, Washington, DC, 20210; telephone (202) 523–7894.

Notices of intention to appear at the hearing, testimony, and documentary evidence should be submitted, in quadruplicate, to Mr. Tom Hall, Division of Consumer Affairs, Docket H–022D, Occupational Safety and Health Administration, 200 Constitution Avenue NW., Room N3637, Washington, DC, 20210; telephone (202) 523–8615.

Written comments received and notices of intention to appear will be available for inspection and copying in the Docket Office, Room N3670, at the above address.

The informal public hearing will begin at 9:30 a.m. at the following location: Auditorium, U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, 200 Constitution Avenue, NW., Washington, DC, 20210; telephone (202) 523–8151.

SUPPLEMENTARY INFORMATION: References to the rulemaking record are made in the text of this preamble. The Hazard Communication Standard docket (No. H–022) contains five sub-dockets—H–022A, H–022B, H–022C, H–022D, and H–022E. Everything in all of these docket files is part of the rulemaking record. However, in this document, no specific references are made to either Docket H–022C or H–022E (these files deal exclusively with the issue of trade secrets). The following abbreviations have been used for citations to the other record files:

H–022, Ex.: Exhibit numbers in Docket H–022, which includes H–022A and H–022B.

Ex.: Exhibit numbers in H–022D for exhibits collected since the 1985 Court remand related to the expansion of the scope of industries covered.

Tr.: Public hearing transcript page numbers.

I. History of OSHA's Hazard Communication Standard

The development of OSHA's Hazard Communication Standard (HCS) was initiated in 1974. The process has been lengthy and is discussed in detail in the preambles to both the original and revised final rules (*see* 48 FR 53280–81 and 52 FR 31852–54). This discussion will focus on the sequence of events which have occurred since the original final rule was filed at the Federal Register in 1983.

Petitions for judicial review of the rule were filed in the U.S. Court of Appeals for the Third Circuit (hereinafter referred to as the "the Court" or "the Third Circuit") on November 22, 1983, by the United Steelworkers of America, AFL–CIO–CLC, and by Public Citizen, Inc., representing itself and a number of labor groups. Motions to intervene in these cases were received from the Chemical Manufacturers Association, the American Petroleum Institute, the National Paint and Coatings Association, and the States of New York, Connecticut, and New Jersey. In addition, petitions for review of the standard were filed by the State of Massachusetts in the First Circuit; the State of New York in the Second Circuit; the State of Illinois in the Seventh Circuit; the Flavor and Extract Manufacturers' Association in the Fourth Circuit; and the Fragrance Materials Association in the District of Columbia Circuit. These cases were subsequently transferred to the Third Circuit and consolidated into one proceeding. The cases brought by the Flavor and Extract Manufacturers' Association and the Fragrance Materials Association were withdrawn prior to filing briefs.

The Court issued its initial decision on the challenges to the rule on May 24, 1985 (*United Steelworkers of America* v. *Auchter*, 763 F.2d 728 (3d Cir. 1985)). (*See* Ex. 4–21.) The standard was upheld in most respects, but three issues were

remanded to the Agency for reconsideration. The decision was not appealed.

First, the Court concluded that the definition of trade secrets incorporated by OSHA included chemical identity information that was readily discoverable through reverse engineering and, therefore, was "broader than the protection afforded trade secrets by state law." The Court directed the Secretary of Labor to reconsider a trade secret definition which would not include chemical identity information that is readily discoverable through reverse engineering. Secondly, the Court held the trade secret access rule in the standard invalid insofar as it limited access to health professionals, but found the access rule otherwise valid. The Secretary was directed to adopt a rule permitting access by employees and their collective bargaining representatives to trade secret chemical identities. OSHA complied with the Court orders regarding the two trade secret issues in a separate rule, published in final form on September 30, 1986 (51 FR 34590). The revised trade secret provisions were incorporated into the test of the final rule published on August 24, 1987.

The third issue remanded to OSHA involved the scope of industries covered by the standard. The original HCS applied to employers and employees in the manufacturing sector. The Court directed the Secretary of Labor to reconsider the standard's application to employees in other industry sectors, and "to order its application in those sectors unless he can state reasons why such application would not be feasible." 763 F.2d at 739, 743.

OSHA subsequently published an advance notice of proposed rulemaking (ANPR) to collect comments and information on the expansion of the scope to cover these additional sectors (50 FR 48795; November 27, 1985). In particular, the Agency sought information on the extent employers in non-manufacturing industries have already implemented various aspects of a hazard communication program. In addition, OSHA wanted to obtain data regarding the applicability of the provisions as written in the original rule to these other sectors. A total of 226 responses were received. (*See* Ex. 2.) OSHA also commissioned a study of the economic impact of extending the HCS to the fifty major non-manufacturing industry groups within its jurisdiction. (*See* Exs. 4–1 and 4–2.) Based on this newly acquired evidence, as well as the previous rulemaking record, OSHA was in the process of drafting a proposed rule.

On January 27, 1987, however, the United Steelworkers of America, AFL–CIO–CLC and Public Citizen, Inc., petitioners in the 1985 challenge, filed a Motion For An Order Enforcing the Court's Judgment and Holding Respondent in Civil Contempt. Petitioners claimed that the Court's 1985 order had not authorized OSHA to embark on further fact gathering, and that OSHA should have made a feasibility determination based upon the 1985 rulemaking record. Petitioners also argued that even if further fact gathering had been allowed by the Court's order, OSHA's pace was unduly slow.

In response, OSHA noted that the Court's 1985 order did not specify that OSHA should act on the then-existing record. OSHA believed that seeking further evidence on feasibility in non-manufacturing was appropriate in light of its statutory obligation to issue rules that are well grounded in a factual record. OSHA also asserted that, consistent with Supreme Court precedent, the Agency should be permitted to exercise its discretion in determining the appropriate rulemaking procedures for complying with the Court's remand order. Lastly, the Agency argued that its schedule to complete the rulemaking was reasonable and did not constitute undue delay.

On May 29, 1987, the Court issued a decision holding that the Court's 1985 remand order required consideration of the feasibility of an expanded standard without further rulemaking. *United Steelworkers of America, AFL–CIO–CLC* v. *Pendergrass*. 819 F.2d 1263 (3d Cir. 1987). (*See* Ex. 4–20.) The Court declared that adequate notice had been provided to non-manufacturers during the original rulemaking that they might be covered by the HCS, *id.* at 1265–1266, 1269, that the answers to the remaining questions OSHA may have had regarding feasibility were "self-evident" or "readily ascertainable" from the original record, *id.* at 1268–69, and that further fact finding was "unnecessary", *id.* at 1268. The Court ordered the Agency to issue, within 60 days of its order, "a hazard communication standard applicable to all workers covered by the OSHA Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible." *Id.* at 1270.

OSHA subsequently re-evaluated the evidence in the record and determined that a modified final rule covering all employers subject to the Act (*i.e.*, both manufacturing and nonmanufacturing) was both necessary and feasible. The Agency therefore issued the final rule on Hazard Communication which was published in the **Federal Register** on August 24, 1987.

The only modifications OSHA made to the original rule in the August revision were those that were related to expansion of the scope. If the Agency had been able to publish a NPRM at that point, it had planned to propose other modifications based upon the ANPR comments as well as OSHA's considerable experience in implementing the original rule, and the experiences of OSHA-approved State Plan States in implementing the HCS in the non-manufacturing sector. Publication of a final rule precluded any actions other than those specifically required by the expansion, particularly since the Court determined that the record it reviewed (exhibits collected through November 1983) was a sufficient basis for the final rule. Thus evidence collected subsequent to that time was merely cited as additional substantiation for the expansion.

The revised final rule expanded the scope of industries covered from just the manufacturing sector to all industries where employees are exposed to hazardous chemicals. As OSHA stated at the time, the Agency has evidence to indicate that there is chemical exposure in every type of industry and thus employees in all industries must have protection under the rule. (*See* 52 FR 31858.)

As noted earlier, although the standard was issued as a final rule, OSHA invited interested parties to submit information, data or evidence regarding the feasibility or practicality of the provisions as written when applied to the non-manufacturing sector as well as any recommendations for further modification. A 60 day period was established for such comments, and it ended on October 23, 1987. A total of 136 comments were received (39 of them were received after the deadline), and entered into Docket H–022D. A variety of opinions were expressed in the comments regarding a number of issues, however, most of the comments did not contain data or evidence concerning either feasibility or practicality. Many of the comments were questions or requests for classification of the provisions.

OSHA is proposing some modifications it believes are appropriate

to address concerns raised and clarify the requirements. The Agency is also providing clarification regarding other issues in this preamble discussion. The Agency is, of course, always prepared to respond to any specific questions from the regulated community regarding compliance. To this end, OSHA has appointed a Hazard Communication Coordinator in each Regional Office to whom such questions should be directed. Instructions to OSHA's compliance staff regarding enforcement of the HCS also include interpretations and many employers have found these documents to be useful to them in complying with the rule. These instructions are included in the docket as Ex. 4–24, and copies may be obtained from OSHA's Publication Officer, (202) 523–9667. A booklet summarizing the rule's provisions is also available and may be used by employers in training workers regarding the requirements of the rule (the publication number is OSHA 3084 Revised).

In addition to the comments submitted to OSHA, the Office of Management and Budget (OMB) convened a public meeting under the Paperwork Reduction Act (44 U.S.C. Chapter 35) to address the information collection requirements of the expanded rule. The transcript of the OMB public meeting (which was held on October 16, 1987) is entered in the docket as comment 5–76, and other relevant documents (*e.g.*, copies of statements, etc.) are entered in Exhibit 6. (In addition, the transcript of an April 2, 1987, public meeting on the information collection requirements for the manufacturing sector is Ex. 4–3.) The majority of the participants in OMB's October 16 meeting submitted written comments to OSHA as well, so there is considerable duplication in Exhibit 6 of opinions that had already been expressed by the same parties in other parts of the rulemaking record.

In a letter sent to the Department of Labor on October 28, 1987, and subsequently published by OSHA in the **Federal Register** on December 4, 1987 (52 FR 46075) (Ex. 4–67), OMB, under the authority of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), disapproved certain information collection requirements in the expanded scope rule, as of the rule's effective date (May 23, 1988), based upon the record of the October 16 public meeting and the previous meeting on April 2, 1987 regarding the information collection requirements for the manufacturing sector, as well as OSHA's preamble to its August 24 rule and its justification submitted formally under the Paperwork Reduction Act. The October 28 letter stated that OMB disapproved: (1) The requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product that falls within the "consumer products" exemption included in section 311(e)(3) of the Superfnd Amendments and Reauthorization Act of 1986; and (3) coverage of any drugs regulated by the Food and Drug Administration in the non-manufacturing sector. In addition, OMB determined that OSHA should reopen the rulemaking on the HCS to consider alternatives to the definition of "article" which was included in both the original and revised final rules. Lastly, OMB conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide assistance to the regulated industries to alleviate paperwork burdens and costs. For a complete description of OMB's rationale for these determinations, *see* the **Federal Register** notice of December 4, 1987 (52 FR 46075). This document will only summarize the positions taken by OMB.

On April 13, 1988, OMB extended its approval of all information collection requirements in the HCS through April 1991, except that OMB continued to disapprove the three provisions previously disapproved, 53 FR 15033. OMB's approval of the existing definition of "article" was limited to the clarification included in a January 14, 1988, letter from Assistant Secretary for Occupational Safety and Health John Pendergrass to OMB, which stated that "absent evidence that releases of such very small quantities could present a health hazard to employees, the article exception to the rule's requirements would apply." In response to commenters who requested that OMB not extend approval to any requirements in the non-manufacturing sector, OMB also stated:

> The concerns of these commenters are largely based on the possibility that the standard and OMB's decision under the PRA will change dramatically as a result of the rulemaking. Although change is always possible, any such change would be fully considered during the rulemaking process. Of course, in order for OMB to grant PRA approvals, any changes must offer sufficient practical utility to justify any incremental paperwork burden they impose, including the burden of revising already-developed written programs. Moreover, as stated above, we are continuing to disapprove the previously-disapproved provisions; the rulemaking should of course conform the rule to these disapprovals.

In accordance with the Paperwork Reduction Act and the implementing regulations for that Act (5 CFR 1320.13(g) and 1320.14 (f) and (g)), OSHA is reopening the rule on all of the issues raised by OMB in its letter in order to have an opportunity to fully discuss the complete current record on each item, as well as to collect additional data from the public. The issues and alternatives for dealing with them are described further below. OSHA is also proposing certain minor modifications, described below, and invites comment on them as well.

Regarding OMB's requirement that OSHA develop a plan to assist the regulated community with the paperwork associated with the HCS, the Agency is in the process of developing compliance assistance materials. These include OSHA 3084, a booklet explaining the provisions of the rule, and a compliance kit designed to help employers come into compliance. The compliance kit will be made available through the Government Printing Office within a few months. A press release will provide information about obtaining a copy at such time as it becomes available. For further information, please contact OSHA's Office of Information and Consumer Affairs, (202) 523–8151.

The revised final rule has been challenged in the U.S. Court of Appeals by the Associated Builders and Contractors, National Grain and Feed Association, Associated General Contractors of Virginia, Associated General Contractors of America, and United Technologies Corporation. A number of interested parties have intervened in these cases as well. The challenges are in the preliminary stages of adjudication at this point, and generally involve the appropriateness of OSHA's publishing a final rule in response to the Third Circuit's order.

Although these cases were originally consolidated in the U.S. Court of Appeals for the District of Columbia Circuit, they were transferred to the U.S. Court of Appeals for the Third Circuit on May 20, 1988. The cases were transferred to the Third Circuit because the "revised [HCS] was promulgated in response to orders by the Third Circuit * * * and petitioners have raised issues similar to those already considered by that court."

On June 24, 1988, the Third Circuit granted a stay of the standard as it applies to the construction industry (29 CFR 1926.59) pending the outcome of the litigation challenging the rule. The rule is in effect for all other employers in both the manufacturing and

nonmanufacturing sectors. OSHA published a notice in the **Federal Register** on July 22, 1988 (53 FR 27679) to provide affected employers further information regarding the applicability of the stay and enforcement of the rule.

In addition to these challenges of the revised HCS, the United Steelworkers of America, AFL–CIO–CLC, and Public Citizen have filed a motion with the Third Circuit requesting the court to order that OSHA enforce all of the revised HCS including the three requirements OMB disapproved under authority of the Paperwork Reduction Act. OSHA will continue to abide by the OMB decision and will not enforce the disapproved requirements unless otherwise ordered by the Court.

Advisory Committee on Construction Safety and Health (ACCSH). As discussed in the preamble to the August 1987 final rule (52 FR 31858–59), the ACCSH reviewed a draft notice of proposed rulemaking to expand the scope of the HCS to construction on June 23, 1987. The ACCSH went through the NPRM line-by-line, making recommendations to adapt it to the construction industry, *i.e.*, the document with the recommended changes constituted an ACCSH recommended standard for hazard communication. A number of the recommendations were adopted (*e.g.*, the definition of workplace was modified to include job sites or projects; the written hazard communication program requirements were amended to clearly state that the programs are to be maintained at the site).

As this NPRM addresses issues that affect construction, OSHA transmitted a draft of it to the ACCSH for review and comment. In a meeting on March 30, 1988, the ACCSH did not provide specific recommendations on the NPRM. The ACCSH reiterated its desire to have a separate standard for construction, and appointed a subcommittee to make further recommendations to the Assistant Secretary. However, the ACCSH also reaffirmed that the standard as written should be implemented as scheduled on May 23, 1988.

The three primary issues in this NPRM that affect construction—the definition of "article," the coverage of consumer products, and the maintenance of material safety data sheets on multi-employer worksites—were all previously considered by the ACCSH on June 23, 1987.

With regard to the definition of "article," the ACCSH recommended that the definition state that vapors, mists, gases, and fumes are not to be considered articles (Tr 97–8). As OSHA explained during the meeting, those types of materials do not meet the definition in any event, and would not be considered articles. Thus there is no need for that particular modification. There were no further comments on the definition or its application to the construction industry during that meeting.

The ACCSH also reviewed OSHA's proposed exemption for consumer products, *i.e.*, that consumer products be exempt where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers. A motion was initially made to modify the exemption to allow consumer products used "as approved for consumer use, and which will not result in any duration or frequency of exposure which is greater than applicable threshold limit values for any hour of use." Tr. 81. After further discussion regarding the lack of a mechanism for "approval" for consumer use that would apply in this situation, and the lack of threshold limit values for the majority of chemicals in the workplace, the ACCSH voted to approve an amended exemption which reads "where the employer can demonstrate it is used in the workplace in the same manner as recommended for consumer use, and which will not result in any duration and frequency of exposure, which is greater than exposures experienced by consumers." Tr. 90.

The ACCSH also reviewed the requirement for maintenance of material safety data sheets on multi-employer worksites, and did not object to such a provision or indicate that it would be infeasible or unnecessary to have such a requirement. In fact, the committee further recommended that it be made explicit that written programs be maintained at the worksite, a recommendation that OSHA adopted.

II. Summary and Explanation of the Issues and the Provisions of the Notice of Proposed Rulemaking

The regulatory text presented in this document only addresses the proposed modifications, rather than reprinting the entire standard and incorporating the proposed changes. Since the HCS is lengthy and complicated, OSHA believes that this will make it easier for interested parties to identify the proposed modifications and provide appropriate comment. When the final rule is promulgated, OSHA will reprint the entire text including the modified provisions.

The discussion which follows is also limited primarily to the proposed changes and related issues. It does not provide a complete summary and explanation of all of the provisions of the rule—for such information interested parties should refer to the preambles of the original (48 FR 53334–40) and revised (52 FR 31860–67) final rules. There are also discussions of alternatives to the proposed modifications which have been suggested to OSHA. OSHA is inviting comment on these as well as the regulatory text itself. While the purpose of this rulemaking is principally to resolve the issues presented by the proposed and alternative provisions, OSHA is also interested in receiving comment on other issues that may be related to the proposal. In order to assist OSHA in its development of the final HCS in the nonmanufacturing sector, comment will also be accepted and considered concerning the entire rule's application to the nonmanufacturing sector.

As most interested parties are aware, the rulemaking record on this standard is quite extensive, and all of the material submitted to date will be considered in development of the new final rule. It is therefore not necessary, or desirable, to repeat comments previously provided unless there is new data, evidence or other information available concerning the arguments made.

In reopening the record, OSHA recognizes that it is not operating "on a clean slate." In developing the existing standard, OSHA had the benefit of an extensive evidentiary record. In addition, the Agency's experience gained under the original standard, as well as under State standards, some of which already applied to the nonmanufacturing sector, further supported OSHA's current standard. As explained in detail below, OSHA continues to believe that the record substantially justified the Agency's regulatory choices, and the information presented to OSHA after the standard was issued has, by and large, not convinced OSHA that significant changes are warranted to comply with the OSH Act.

In this rulemaking, OSHA is seeking additional information on whether these regulatory choices also meet the criteria of the Paperwork Reduction Act. If information collected in the course of this rulemaking responds to the concerns raised by OMB on these issues in its October 28, 1987, letter, OSHA will request that OMB reconsider its paperwork decision on these issues. OSHA will also consider requesting paperwork approval for other options

substantially supported by the record, as well as conforming the final rule to OMB's paperwork decisions.

OMB has published implementing regulations at 5 CFR 1320.4(b) which state that, to obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that:

(1) The collection of information is the least burdensome for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(2) The collection of information is not duplicative of information otherwise accessible to the agency; and,

(3) The collection of information has practical utility. Commenters to the record should focus on these criteria in this rulemaking.

OSHA will fully comply with the Paperwork Reduction Act, which prohibits agencies from "conducting or sponsoring" a collection of information without OMB approval. Hence, the provisions disapproved by OMB will be neither effective nor enforceable until OSHA completes this rulemaking.

It should be noted, however, that OSHA retains "almost unlimited discretion to devise means to achieve the Congressionally mandated goal." *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189, 1230 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). *Accord, Building and Construction Trades Dept., ALF-CIO* v. *Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988). The expectations of the manufacturing sector, which has been subject to the HCS since 1985, are settled, as are those of the nonmanufacturing sector, which has been preparing to comply with the present standard since August 1987, and with the paperwork requirements as approved by OMB since October 1987. Therefore, OSHA does not expect the standard to further change significantly unless the Agency is presented with substantial evidence that a regulatory modification is clearly necessary, either because the present standard is demonstrably infeasible in a specific respect, or because the proposed alternative would significantly increase the standard's intended safety and health benefit or significantly improve its cost-effectiveness. Employers must plan accordingly to fulfill their compliance obligations under the standard as it is currently approved and should not anticipate undue delay in its enforcement.

Comments submitted should clearly identify the provisions being addressed, the rationale for the position taken, and data or evidence in support of that rationale.

The discussion which follows is organized by paragraph of the standard for ease of reference. It is suggested that comments submitted be presented in the same fashion.

Scope and Application

Scope of industries covered. As OSHA described in the preamble to the revised final rule (52 FR 31855–59), expansion of the protections afforded by the HCS to all nonmanufacturing industries is supported by the rulemaking record. Evidence collected by OSHA indicates that there is chemical exposure occurring in every type of industry covered (although every employee may not be exposed). The Agency's position is that all such employees are entitled to information regarding the chemical hazards they are exposed to in the workplace, and that a uniform Federal hazard communication standard is the best method to ensure that information is provided. This position is consistent with the mandate of the Act (protecting all employees to the extent feasible), as well as with the Court's decision upon review of the rule.

Despite this explicit determination by OSHA, as well as by the Third Circuit, there were a number of comments submitted which suggested that certain industrial sectors should be exempted from the rule, or only covered by limited provisions.

For example, the National Cosmetology Association, Inc. (Ex. 5–54) submitted comments reiterating the position it had submitted in response to the ANPR that all small businesses should be exempt from the requirements, and that in particular, small cosmetology salons should be exempted. The argument presented was that cosmetologists are highly trained professionals and that cosmetics are safe because they are regulated by the Food and Drug Administration (FDA).

While cosmetologists and other such skilled workers are trained to execute their professional duties, it is not clear that they receive any training regarding the safe use of chemicals. To the extent that they do receive such training, the individual employer's duty to train will be minimized. Existence of prior training is certainly not a valid rationale for not promulgating a requirement for training for any particular group of workers. Furthermore, the contention that products used in cosmetology salons are safe due to regulation by the FDA is also not supported by the record. The FDA regulates products primarily for the protection of consumers, not for the protection of professionals who are generally exposed more frequently and to greater levels of the hazardous chemicals involved. For further discussion of the need for hazard communication in such facilities *see* Exs. 2–49 and 4–50.

With regard to the exemption of small businesses in general, OSHA does not consider it to be appropriate to determine the extent of protection afforded an employee by the size of business he/she is employed in. Although the Agency does have enforcement policies that take into consideration the size of the business, as well as free consultation services that are primarily intended for small employers without on-staff safety and health capability (*see* Exs. 4–38 and 4–39), such small businesses must still comply with regulations and ensure that their employees are protected to the same extent as employees of larger businesses.

Other employer representatives indicated that the degree of risk in their particular industry warranted either an exemption or limited coverage. (*See, e.g.*, Ex. 5–5, eating and drinking places; Ex. 5–19, educational institutions; and Ex. 5–44, agriculture.) The degree of "risk" encountered overall by employees in a given industry is also not a viable argument for exempting all such employees totally from coverage under the HCS. The standard already includes a number of exemptions and limitations of coverage that are indirectly related to the issue of risk, *e.g.*, limited coverage for employees who only handle chemicals in sealed containers. The rationale for this limited coverage is based upon the limited potential for exposure in these types of work operations. Under the HCS, the primary concern is the risk of being exposed to chemicals without knowing what the hazards of those chemicals are, and thus not being sure of the proper handling procedures. The purpose of the standard is to convey those hazards, which are intrinsic properties of the chemicals, along with the appropriate handling procedures. Although risk should be addressed in training programs where employers would be discussing extent of exposure and protective measures being implemented to reduce exposure, the extent of risk involved is not a determining factor with regard to a decision as to whether or not the information must be conveyed. Employees have the right-to-know that they are being exposed to a potential hazard—as long as the potential for exposure exists in the work operation and the chemical has been demonstrated to be hazardous, the rule applies.

There were also a number of comments from representatives of the construction industry which indicated that the protections of the rule are not necessary in that industry because exposures to hazardous chemicals are minimal, and therefore risks are low (*see, e.g.*, Exs. 5–17, 5–27, 5–58 (Klug and Smith Company: "We do not have constant exposures to numerous hazardous chemicals and because of this we have a low rate of occupational illnesses * * *."), 5–86, and 5–108). Conversely, there were other construction representatives which were concerned that the requirements would be too burdensome because of the large number of hazardous chemicals on each construction site (*see, e.g.*, Ex. 5–83 (American Subcontractors Association: "In the more chemically hazardous specialty trades, such as painting, roofing and insulation work, there could indeed be hundreds or thousands of chemical substances and compounds which would require MSDSs in accordance with the provisions of the expanded HSC"), and Ex. 5–76 (the National Association of Home Builders): "I have this vision of a truck pulling up to the site and behind it is the trailer and on the trailer is the file cabinet of MSD sheets." Other commenters suggested smaller numbers: Ex. 2–108, ("* * * 25 typical hazardous substances found on most construction sites * * *"); Ex. 2–199 ("* * * [F]irst, no painting job will use more than 30 to 60 coating materials. Many jobs required only four to eight materials * * *.").

OSHA believes that it is fair to assume that the number of chemicals on each site will vary based upon the type and complexity of the construction involved. However, in our experience, the likelihood of there being hundreds or thousands of chemicals on a particular site is very small. In conversations with State Plan States which have already implemented the expanded scope rule, as well as with construction contractors in these states, our experiences have been confirmed.

In any event, the number of hazardous chemicals on a site, whether small or large, is not the determining factor in terms of whether employees should be provided information regarding the hazards of those chemicals. (It should also be noted that very few non-manufacturing facilities would have as many chemicals on-site as many manufacturing firms do. For example, motor vehicle manufacturing plants typically have thousands of hazardous chemical products in each facility (*see, e.g.*, H–022, Tr. 3678, 3691). Yet these types of employers were strong supporters of the HCS, and in particular, the MSDS requirements. Furthermore, many already had programs to obtain MSDSs and make them available to exposed workers. *See, E.g.*, Tr. 3784.) Where there are few chemicals, employers' duties will be minimal. Thus it would not be appropriate to exempt the construction industry based upon this rationale. It is interesting to note that in a Bureau of Labor Statistics' survey of construction workers injured on the job, only 23% indicated that they had received any training regarding hazardous chemicals (Ex. 2–221).

There were other industry representatives who suggested that OSHA has no authority to regulate them because their industries are covered under the requirements of other Federal agencies. For example, the American Association of Railroads (Ex. 5–47) argued that the Department of Transportation (DOT) requirements prempt OSHA from regulating railroad employees with regard to hazard communication. DOT's applicable requirements would be under the Federal Railroad Administration (FRA).

Under section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), Congress stated that nothing in the Act would apply to "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health * * *." The operative language in this provision is "exercise statutory authority." As a matter of policy, these issues are generally not addressed in the regulatory language of a standard but rather are worked out between the agencies involved if a potential conflict or duplication of effort arises, or are resolved in litigation. The situation is not static since the extent of preemption would change if the extent of regulation changes. Therefore, it is not appropriate to delineate respective authorities on a given issue in the text of a standard itself.

However, to assist employers attempting to comply with the rules of more than one Agency in this area, OSHA has decided to include in this preamble a discussion of jurisdictions in two industries, transportation and pesticides. This discussion is obviously not a definitive finding of jurisdiction, but merely restates the Agency's position regarding the areas it believes are regulated under the HCS. The primary concern to OSHA is that the protections afforded by hazard communication are provided to all employees, and if that is being done under the regulations of another Federal agency, then section 4(b)(1) of the Act would apply and OSHA's standard would not be applicable. If such protection is not being provided to any group of employees, then the OSHA standard would apply.

In the railroad industry, OSHA standards would generally apply to those employee hazards which are not related to the operation of railroads. The FRA's program for occupational safety and health of employees addresses three major fields of railroad operations: (1) Tracks, road beds, and associated structures, *e.g.*, bridges and signals; (2) equipment, *e.g.*, rolling equipment and safety appliances such as brakes and coupling devices; and, (3) human factors, *e.g.*, hours of services.

The American Trucking Association (Ex. 5–82) recommended that a Memorandum of Understanding be adopted by OSHA and DOT to clarify coverage. This is an option that may be pursued at a later date. The Bureau of Motor Carrier Safety (BMCS) of DOT exercises statutory authority for the operation of commercial motor vehicles engaged in interstate or foreign commerce. BCMS occupational safety and health programs include equipment safety, noise abatement, transport of hazardous materials over the nation's highways, and operators' hours of service. OSHA retains statutory authority for those working conditions not covered by BMCS requirements.

Another area of potential conflict raised in the comments (*see, e.g.*, Exs, 5–6, 5–44, 5–50, and 5–66), involves employees exposed to pesticides. Commenters maintain that OSHA cannot cover pesticide exposures outside the manufacturing sector as these are regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*) administered by the Environmental Protection Agency (EPA). EPA requires pesticides to be labeled, approves the specific label language, and requires the pesticides to be applied in accordance with the labeling instructions.

As OSHA sees the situation, there are jurisdictional questions regarding three groups of workers exposed to pesticides. First, there are applicators of restricted use pesticides. These workers are certified and receive training regarding proper application. It appears to OSHA that for these workers, EPA has clearly exercised statutory authority for protecting them in the area of hazard communication.

The second group of workers are those applying non-restricted use pesticides. For these workers, protection requires that they read and act on the

labels approved by EPA. There is some evidence to indicate this may not occur (Ex. 4–32), and that additional information sources are required to ensure appropriate protection. It certainly can be argued that material safety data sheets and training would provide more complete, effective information transmittal. However, the issue of whether EPA's promulgation of a label requirement for a non-restricted use pesticide might prohibit OSHA from requiring the other provisions of the HCS—MSDSs and training—to be applied to employees using these hazardous chemicals is a difficult one, and OSHA invites comments and arguments to assist the Agency.

The third group in question are those workers who are incidentally exposed downstream to the pesticide residues after application, *e.g.*, farmworkers, grain elevator workers, and workers in furniture manfuacturing facilities handling preserved wood. In these situations, the workers are often located at a different site from where the application took place, and do not have access to label information at all. It appears that these workers clearly come under OSHA's jurisdiction and hazard communication would apply.

OSHA will, however, continue to have discussions with the other Agencies involved to more clearly delineate the scope of the respective regulatory requirements in these areas.

Representatives of the agriculture industry (Exs. 5–6, 5–50) were also concerned that the revised final rule did not mention the Congressional appropriations rider under which OSHA is prohitibed from promulgating or enforcing standards on farms with 10 or fewer employees unless the farm has a temporary labor camp. As long as this rider appears in OSHA's appropriations bill, the protections of the HCS will not apply on those farms. However, farms with 11 or more employees, as well as those with temporary labor camps, are covered by the rule.

Labeling exemptions. The original HCS included a number of exemptions from the requirements for labels on shipped containers for those hazardous chemicals that are already labeled in accordance with the requirements of another Federal agency. In the revised final rule, OSHA added an exemption for medical and veterinary devices labeled in accordance with the requirements of the Food and Drug Administration. Medical and veterinary devices had been inadvertently omitted from the exemptions in the original rule (52 FR 31862).

The Department of Agriculture (Ex. 5–28) and the Animal Health Institute (Ex. 5–37) have requested that a specific exemption be included for labeling of veterinary biological products as well. Although these materials are considered to be drugs, the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 392(b) "defers" regulation of some veterinary biologics to the Department of Agriculture when the biologics are subject to the Virus-Serum-Toxin Act of 1913, 21 U.S.C. 151–58.

To the extent that the hazards of these materials are biological hazards, the HCS would not apply in any event. However, there are apparently some chemicals used in the materials that would potentially be covered by the HCS (in particular, formaldehyde). OSHA is adding an exemption for labeling of these items when they are subject to the labeling requirements of either the Food and Drug Administration or the Department of Agriculture. It should be noted, however, that this exemption is just for labeling, and to the extent chemical hazards are present in these materials, the other provisions of the HCS would apply in terms of employee protection.

Articles. The NPRM published in March of 1982 did not include an exemption for articles. Since the rule's provisions were only intended to apply to those substances to which employees are potentially exposed—and substances inextricably bound in a manufactured item do not present a potential for exposure—OSHA did not believe that an article exemption was necessary. However, the Agency did receive a few comments from affected manufacturers that requested such an exemption (*see* H–022 Exs. 19–47, 19–73, 19–76, 19–166, 19–209, and 19–220). For example, the Standard Oil Company (Ex. 19–47) stated: "Consideration should be given to the possibility of exempting hazardous substances contained in articles, such as electrolyte in a battery. One might conclude that these are not 'chemicals present in the workplace in such manner that employees may be exposed under normal conditions of use.' However, a definitive statement in the regulations would be preferable." Similarly, the National Association of Manufacturers (Ex. 19–209) suggested that the definition of containers to be labeled not include "articles posing no unreasonable risk" in the workplace: "For example, brass billets in a storage box need no labels. However, when the billet is melted and may fume, the operating instructions to the employee should include this hazard." And INCO Limited (Ex. 19–166): "The definition of 'chemical' should therefore exclude manufactured items such as metals, alloys, ceramics, plastic, cloth, etc. These materials generally exist in such a state that they may be handled and transported without creating hazards not readily recognized by all * * *." It was also suggested that OSHA might look to the definition of article used by EPA under the Toxic Substances Control Act, 15 U.S.C. 2601, when crafting an appropriate exemption (Ex. 19–73). Otherwise, no specific definitions were suggested by commenters.

Although inclusion of an exemption for "articles" was certainly not a major issue for the manufacturers of such items during the rulemaking, OSHA decided that the addition would serve to clarify the rule's intent. Therefore an article exemption was included in both the original and revised final rules. The HCS does not apply to articles in any respect. The definition of "article" is "a manufacturer item: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use." "The purpose of this exemption is to ensure that items which may contain hazardous chemicals, but in such a manner that employees won't be exposed to them, not be included in the hazard communication programs." 48 FR 53293.

OSHA's article definition was based, to a large extent, on the "article" definition used by the Environmental Protection Agency (EPA) under the Toxic Substances Control Act (TSCA):

> "Article" means a manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end use function(s) dependent in whole or in part upon its shape or design during end use, and (3) which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design.

See 40 CFR 704.3.

The first two parts of OSHA's article definition are identical to EPA's definition. However, OSHA was concerned that the third part of EPA's definition was too broad, and if adopted, would exempt manufactured items which result in exposure of workers to hazardous chemicals during their use in the workplace. An example of this potential deficiency in coverage

was described during the rulemaking using formaldehyde emissions from fabrics handled in garment manufacturing facilities—downstream employees are exposed to formaldehyde although the fabric would probably be considered an article under EPA's TSCA regulations. 48 FR 53293. OSHA modified EPA's definition to ensure that manufactured items that release, or otherwise expose workers to hazardous chemicals during normal conditions of their use in the workplace, are covered by the HCS. This modification was necessary to adapt the definition to address the concerns in the workplace, which are different than EPA's purpose under TSCA. In particular, as OSHA described in the preamble to the revised final rule (52 FR 31865), it is important in terms of workplace protection to emphasize the total exemption generally applies to items which are at the point of "end" use. Normal conditions of "use" in the workplace might involve exposures prior to the ultimate use of the product. The article exemption was specifically drafted in the manner promulgated to ensure that employers and employees have information to protect workers involved in these intermediate workplace uses. "Use" under the definitions of the rule means to package, handle, react, or transfer. Certainly an employee installing an item in such a way that an exposure results would be "handling" the item and thus entitled to information under the rule. "Use" of the item in terms of the exemption must be specifically related to the workplace exposure of employees, not the intended purpose of the item once it is in place. It makes a considerable difference in work practices and protective measures when, for example, an employer knows that the tiles his employees are sanding all day when installing them contain lead that is becoming airborne as a result of that operation rather than just generating nuisance dust. Once the tie is installed, it is an article because there is no exposure.

These intermediate "uses" of an article are often of concern in the construction industry. The Advisory Committee on Construction Safety and Health (ACCSH) reviewed the definiton of "article" at a meeting on June 23, 1987 (Ex. 4–6): "We believe that fundamentally the definition is pretty good, with one possible exception. And I would move that in the first line of the definition following the word "fluid" that we add the words vapor, mist, gas, fume * * *." This motion was accepted by the Committee. OSHA agrees that vapors, mists, gases, and fumes are not "articles," but believes that it is quite clear than they are not covered under the current definition so this modification is not being made.

For practicality and feasibility reasons, OSHA has determined that repair of manufactured items at some point after installation is generally not considered to be a "normal condition of use." Although employees involved in these types of operations would certainly benefit from specific information regarding the materials they are dealing with (as in the example of the tiles containing lead which was just described), OSHA recognizes that the time lapse between installation and possible repair is such that it is not reasonable to assume that written information can be maintained and made available on that possibility. 52 FR 31865. Employers involved in such activities must provide the best information available to them. Since repair may involve installation of a replacement part, having information for installation will somewhat alleviate the problem of not having substance-specific information for articles being repaired.

During implementation of the original rule, OSHA received a number of questions regarding the application of the article definition and exemption, particularly with regard to metal casting. The responses to these questions were generally quite clear in terms of determining whether an item was covered or not. In its instructions to compliance officers regarding enforcement of the rule, OSHA provided the following guidance (Ex. 4–24):

> * * * The key to the definition of "article," and thus the exemption, is the term "under normal conditions of use." For example, an item may meet the definition of "article," but produces a hazardous byproduct if burned. If burnng is not considered as part of its normal conditions of use, the item would be an "article" under the standard, and thus exempted. The following items are examples of articles: Stainless steel table; Vinyl upholstery; Tires. The following items are examples of products which would NOT be considered "articles" under the standard, and would thus not be exempted from the requirements: Metal ingots that will be melted under normal conditions of use. Fabric treated with formaldehyde where downstream garment manufacturing employees will be exposed when making clothing. Switches with mercury in them when a certain percentage break under normal conditions of use.
>
> It should be noted that the only information that has to be reported in these situations is that which concerns the hazard of the release. The hazardous chemicals which are still bound in the article would still be exempted under the "article" exemption.

These examples were based upon actual questions OSHA had received from interested parties. Despite the fact that the responses to these questions were generally clear, OSHA determined that it would be helpful to ensure that all interested parties were familiar with the definition and exemption and clearly understood them. Therefore, OSHA decided to raise the issue for comment when the ANPR was published in 1985.

The vast majority of the comments received dealt with metal castings. A number of these simply stated that metal castings should always be considered articles, do not result in hazardous exposures (or if they do everyone already knows what the hazards are), and should not be covered. *(See, e.g.,* Exs. 2–2, 2–16, 2–20, 2–25, 2–32, 2–50, 2–65, 2–170, 2–209, and 2–215.) These comments were specific to the metal castings industry, and did not address the definition of article *per se* except to state that it should explicitly eliminate coverage of metal castings.

OSHA believes that many castings, if not most, would be articles and thus exempted from the rule (*e.g.*, manhole covers; frying pans; wrought iron gates). However, when a metal casting is not in finished form, and is being re-worked by a downstream employer in such a way that a hazardous chemical is released, it is not an exempted "article." If the re-working is done in such a way that no hazardous chemicals are released, it is an article. Under the hazard determination requirements of the rule, the firm producing the casting must determine its normal conditions of use downstream, and whether it is exempted as an article. This requirement applies to manufacturers of all types of products, and metal casting producers are not excepted from this approach.

For those commenters who specified a tye of casting which they contend is an article, *e.g.*, iron (Exs. 2–3, 2–6, 2–24, 2–27, 2–47, 2–74, and 2–136) and aluminum (Ex. 2–29)), the decision in the first instance is the manufacturer's. OSHA has made no across-the-board determination that iron or aluminum castings are or are not articles. If, during an inspection, OSHA finds such castings in a work situation where hazardous chemicals are being released from the casting under normal conditons of use, we will expect the manufacturer of the casting to have provided chemical hazard information to the downstream employer. This also applies to other types of products which commenters suggested should be specifically exempted as articles, *e.g.*, textiles (Exs.

2–40 and 2–103); rubber-like polymer (Ex. 2–18); and scrap metal (Ex. 2–107).

In response to OSHA's request for comments or for suggestions to modify or clarify the definition of article, a number of commenters responded that the definition is workable as it is, and allows employers to apply logic and reason in their determinations (Exs. 2–59, 2–79, 2–96, 2–101, 2–112, 2–154, and 2–187).

For example, Daniel Construction Company (Ex. 2–59), a construction firm which voluntarily implemented hazard communication in its facilities prior to promulgation of the OSHA rule, stated the following:

> We have no problem with the current definition and exemption. It allows for reason and logic to be applied to the work situation. Any more detailed definition and exemption would cause more problems. A common material that we often work with, galvanized steel, illustrates how well the definition and exemption work. When sawed, drilled, bent or bolted together, there are only mechanical hazards involved; when heated to high temperatures, cut with a torch, or welded upon, inhalation of the resulting fume causes the toxic response called fume fever. It would be extremely difficult to write a more specific definition and exclusion that would cover the work with galvanized steel and would then be applicable to a significant number of other situations. We recommend that you leave the definition and exclusion as it is.

Daniel Construction's comment is an excellent example of the application of the article definition and exemption, and the need for such a delineation of use in determining the need for information about the product.

The State of New Mexico, an OSHA-approved State Plan State which used the definition of "article" in its State rule, stated that "[t]he current definition of 'article' is sufficient and does provide enough information to determine what should be defined as an 'article.' " Ex. 2–79. It should be noted that all of the State Plan States, as well as the non-State Plan States with their own right-to-know laws, have adopted an identical or comparable definition for "article" as the one in the OSHA standard, so it is, and has been for some years, the criterion used nationally for determining what manufactured items are exempted from right-to-know requirements. The current OSHA definition is also being used internationally as the Canadian government, which is in the process of implementing and system to communicate information about hazardous materials in the workplace, has also adopted it (Ex. 4–72).

In addition, the Environmental Protection Agency (EPA) recently promulgated a final rule entitled "Toxic Chemical Release Reporting: Community Right-to-Know" which also incorporates the OSHA article definition. EPA had originally proposed to use the TSCA definition. However, based on information submitted to the rulemaking record, EPA determined in the final rule that it was "more appropriate" to use the OSHA definition since it related more specifically to the issue of chemical releases. "The TSCA article definition is worded primarily to distinguish 'chemical substances' and 'mixtures' from those manufactured items that contain chemical substances and mixtures. The OSHA HCS definition was adapted from the TSCA regulatory definition, for the purpose of exempting certain items from the MSDS preparation requirements; the supposition being that the item's normal end use would not release or cause exposure to a 'hazardous chemical' in the article." 53 FR 4507.

Furthermore, Aluminum Company of America (Ex. 2–96), a manufacturer which would be applying the definition to its products, indicated: "Alcoa does not favor further clarification of the article definition. As currently stated, the definition provides sufficient flexibility to enable manufacturers to determine its applicability in a given circumstance. We believe such flexibility for manufacturers is critical to maintain and, therefore, recommend that the article definition not be modified." Similarly, Kaiser Aluminum, another manufacturer involved in application of the definition, concluded (Ex. 2–187): "We believe the current definition of 'article' is adequate as written. It provides the flexibility we believe is needed to determine whether certain aluminum products are covered by the definition. We do not believe a 'cut and dried' definition to be workable. Certainly consideration of foreseeable further processing as well as the products' chemical and physical properties should determine applicability of the Standard in a given circumstance."

Another manufacturing representative, the Manufactured Housing Institute, similarly endorsed the existing definition (Ex. 2–101): "* * * MHI does not believe that the exemption has resulted in confusion. MHI feels that the exemption is appropriate and should be continued."

A comment from the Amalgamated Clothing and Textile Workers Union (ACTWU) (Ex. 2–154A), discussed the types of additional protection afforded workers in garment manufacturing facilities as a result of the article definition as promulgated:

> ACTWU has experienced positive employee responses to the HCS. Employees of downstream garment manufacturers directly benefit from the non-exemption requirement under the "articles" provision. Workers are alerted to the hazards associated with the off-gassing of hazardous chemicals from fabrics.
>
> A recent survey conducted at a uniform manufacturing plant revealed that some employees are experiencing symptoms associated with formaldehyde exposure. Their exposure is formaldehyde off-gassing from fabric treated with permanent press resins. Caution labels supplied by fabric manufacturers alerted these workers to the possible cause of their health effects * * *.

The ACTWU concluded that the "article" definition as written, provides "a unique means through which workers are alerted to the hazards associated with certain end-use products and an irreplaceable mechanism of requesting additional information."

There were several comments which suggested that the definition needed to be clarified, but no specific problems were indicated and no suggestions were made (Exs. 2–34, 2–52, 2–56, 2–83, and 2–93). There was also a series of comments which either suggested adopting the entire EPA definition, or provided an alternative to the definition (*see, e.g.*, Exs. 2–84, 2–103, 2–104, 2–106, 2–124, 2–140, 2–142, 2–145, 2–147, 2–188, 2–200, and 2–211). As stated above, OSHA believes the EPA article definition is inappropriate for the HCS because it would exempt from the rule manufactured items that contain hazardous chemicals and release them in such a way as to expose workers under normal conditions of use. Furthermore, EPA's purpose in exempting these items because of their commercial status is quite different than OSHA's purpose to provide information to exposed workers, and thus a different approach is necessary.

All of these alternative suggestions were in comments submitted and coordinated by representatives of formaldehyde-related industries, such as producers of textiles and wood products which contain formaldehyde resins. These same comments were submitted to the formaldehyde docket, and were considered in the formulation of the final rule on formaldehyde. *See* 52 FR 46168. Since formaldehyde is a specific, unique hazardous chemical used in manufactured articles, *i.e.*, a gas which is released from solid products, and is fairly ubiquitous in both its uses and its presence in the environment, OSHA believes it is appropriate to deal with the problems raised on a substance-specific basis, rather than modifying a generic rule to address one situation.

One alternative that was suggested by these coordinated comments

recommended modifying the third part of the definition to exclude manufactured items which are formed into a specific shape or design for a particular end-use function and which "consist[ ] of substances which have been thermoset, chemically reacted, or bound by molecular forces, or a combination of these or similar chemical/physical factors." (*See, e.g.*, Ex.2–84.)

OSHA does not find that this alternative provides sufficient protection to employees since it does not result in information being provided if a hazardous chemical is released despite the bonding, etc. described. The process used to produce the material is irrelevant to hazard communication—the only concern is what employees are being exposed to in the workplace.

Another alternative suggested by the formaldehyde industry commenters is the OSHA exempt *de minimis* releases so that a manufactured item which releases "small" amounts of a hazardous chemical during normal conditions of use is still considered an article and not covered by the HCS. In particular, the following has been suggested (*e.g.*, Ex. 2–84):

> An amount shall be considered *de minimis* if (a) the concentration of the hazardous chemical in the article is less than 1% by weight, or 0.1% if the chemical is a carcinogen; or (b) the manufacturer has reason to believe that release of the chemical from the article under expected conditions of use will not exceed an established OSHA PEL or ACGIH TLV.

This alternative also does not provide sufficient protection for employees, and does not address the true issue of concern—the exposure of employees. The weight or volume of a gas present in a solid material is totally unrelated to what is released—in the situation of the formaldehyde-contaminated products (which are the only examples provided in the record to substantiate a "need" for a *de minimis* exemption in the definition), the gas is 100% of the release even though the relative weight or volume would be far less than the percentages indicated. In fact, OSHA does not consider the exposures resulting from some of the products of concern to the formaldehyde industry, and which would be exempted if their recommendations are adopted, to be *de minimis* in the sense that they are exposures that result in no hazard to employees and are thus insignificant. Hazard determinations are to be performed under the rule on those chemicals to which employees are actually or potentially exposed. In the case of solid items, this means that the hazard determination must be done only on the release, not on those materials still bound in the article. The hazard determination provisions, including the percentage cut-off, would apply to the released material while the bound materials in the solid remain totally exempted. Chromium, for example, is a hazardous chemical, but the fact that it is present in concentrations of greater than 1% of the weight of a solid metal item, such as a bolt, which does not change in form or release chromium into the workplace air is irrelevant to the employees' protection, and therefore need not be considerd in an evaluation of the hazards.

Determination of the point at which a gas in a solid becomes hazardous under the rule is unlike liquid or gas mixtures where OSHA has used a percentage cut-off (paragraph (d)(5)). Commenters have used the existence of this cut-off for liquid or gas mixtures to support the claim that a similar approach should be used for articles. Although the percentages are not ideal, it is a reasonable conclusion that in a liquid mixture the amount of material released in generally related to the amount of that material in the mixture. Differences in vapor pressures will have some effect on that, but the general rule does apply. Furthermore, OSHA has adopted a provision that will protect employees in the situations where the percentage cut-off will not be protective enough, and stated that if the employer has information to indicate that the material will present a health hazard to employees when present in smaller concentrations, or could exceed an established exposure limit, it is still covered regardless of the fact that the amount of material present in the mixture is small. It should also be noted that where there is a hazardous chemical present in a liquid mixture which presents no potential for exposure, *i.e.*, it is chemically bound in such a way that it will not be released, the presence of that chemical does not have to be indicated and it is not considered in the hazard determination process. For example, if silica is present in a liquid mixture which remains a liquid, and the silica cannot become airborne under normal conditions of use or in a foreseeable emergency, the percentage of it in the mixture is irrelevant and it is not considered in the hazard evaluation. In other words, there is not potential for exposure, therefore it is not subject to the rule.

Similarly, a solid item may contain large concentrations of a hazardous chemical, but the chemicals are bound in such a manner that employees will not be exposed to them when they are being used (*e.g.*, lead nuts and bolts). The percentage of these materials in the solid is irrelevant to employee exposure and thus not to be considered in the hazard determination process, just as the silica in the liquid mixture described above is not to be considered. Other manufactured items may contain only small amounts of hazardous chemicals by weight in the product as a whole, yet clearly pose potential hazards to employees because these chemicals are released into the workplace under normal conditions of use (*e.g.*, the formaldehyde-treated fabric described previously) and employees are exposed.

Furthermore, requiring information disclosure solely in situations where the released chemical might exceed an OSHA PEL or ACGIH TLV is not consistent with the purpose of the rule. "The purpose of hazard communication is to ensure the disclosure of information about the possible hazards of chemicals in the workplace before the worker is exposed to them, and thus is at risk of experiencing adverse health effects." 49 FR 53296. Providing chemical hazard information only if established air contaminant limits might be exceeded would clearly conflict with this purpose. Also, exposure limits have been established for only a limited number of hazardous chemicals and would not address the vast majority of hazardous chemicals encountered in the workplace. Moreover, since the HCS defines employee exposure as including ingestion, skin contact and absorption, in addition to inhalation, the air contaminant limits might be unrelated to the total exposure experienced by workers to the chemical released from the product. If a hazardous chemical is released from an item, employees should be informed.

However, the Agency does recognize the practical considerations in applying the definition is some situations (*e.g.*, whether molecular level releases are covered). In the preamble to the revised final rule, the Agency explicitly reiterated its position on this issue (52 FR 31865):

> Releases of very small quantities of chemicals are not considered to be covered by the rule. So if a few molecules or a trace amount are released, the item is still an article and therefore exempted * * *.

In practice, application of the definition in these situations has not been a problem. OSHA believes that potential coverage of these very small releases have been raised as a theoretical problem, rather than an actual problem of application. Examples of items which may release very small quantities of materials, but which the Agency

considers to be exempted, have been provided in both the compliance directive for the rule (Ex. 4–24), and the revised final rule discussion on articles (52 FR 31865). These would include such items as pens or pencils; emissions from tires when in use; vinyl upholstery; emissions from newly varnished furniture; and adhesive tapes. It should be noted that these very small releases are far below the types of releases that would be exempted if the percentage cut-off *de minimis* approach is taken. Although these nearly imperceptible releases are cited as reasons for having a *de minimis* cut-off, these types of releases have always clearly not been covered by the rule. The proponents of the specific cut-off for *de minimis* releases are, in fact, attempting to exempt other products which are clearly covered by the rule, and are intended to be covered due to the type of exposure and hazard involved.

Comments repeating the arguments regarding the *de minimis* issue were again submitted by the formaldehyde-related industries in the comments submitted in response to the final rule (*see* Exs. 5–1, 5–99, and 5–101), as well as in comments submitted to OMB (Ex. 6). No new arguments were presented. Several other commenters supported use of the EPA TSCA definition (Exs. 5–72, 5–84, 5–93, and 5–94) or the need for a *de minimis* exemption (Exs. 5–83, 5–89, 5–86, and 5–107), but had no substantive discussions regarding the current definition or difficulty in applying it. Furthermore, these comments were from representatives of the non-manufacturing sector which are not in industries involved in hazard evaluation and thus do not have to apply the definition. The only possible impact on them is that they will potentially receive information about more products which they use than they will if the definition is changed.

OSHA concludes that, first of all, the definition of "article" and application of the exemption is an issue in the manufacturing sector where such items are produced, not in non-manufacturing. The decisions regarding the application of the rule to such items has already had to be made by the manufacturing sector, and information on non-exempted materials is already being provided to other manufacturers, and non-manufacturers in those States which have already extended the rule. For non-manufacturers, the difference in the definition only affects them in terms of what information they receive about the items they use in their workplaces. Secondly, the rulemaking record does not indicate there is a pervasive problem with the definition as written, and in fact, as discussed previously, a number of commenters specifically supported the definition. (If manufacturers in general have a significant problem with the article definition, it would have been expected to be a major issue at the April 2, 1987 OMB public meeting on the information collection requirements of the rule affecting manufacturing (Ex. 4–3). However, the "need" for a *de minimis* exception in the article definition was only raised during that meeting by The Formaldehyde Institute.) Those commenters who didn't support the definition were generally objecting to their products being covered, not to the definition *per se*. In fact, it is interesting to note that although the formaldehyde-related industries repeatedly urged that OSHA adopt a *de minimis* exemption for its products, when the Agency took such action representatives of the industries filed a petition for an administrative stay of the hazard communication provisions of the formaldehyde rule (Ex. 4–68):

> Petitioners seek to stay a single requirement of the formaldehyde standard: a cancer label is apparently required for formaldehyde gas, mixtures, and solutions composed of greater than 0.1% formaldehyde, and materials "capable of releasing into the air under any normal conditions of use at concentrations reaching or exceeding 0.1 ppm." This requirement is, on the one hand, unnecessary for worker protection and, on the other hand, devastating to the business of various industries which manufacture and sell products emitting minimal amounts of formaldehyde.

Thus the request for a *de minimis* exception was apparently not merely to clarify the requirements—the ultimate aim was to exempt specific types of products from coverage that would otherwise be covered under the current rule, as well as the formaldehyde standard, even though they pose a potential hazard to workers.

OSHA further concludes that there is no appropriate, protective, generic *de minimis* exemption that has been suggested for the HCS. The only commenters that repeatedly suggested a *de minimis* approach were those involved in formaldehyde industries. The final formaldehyde standard includes a *de minimis* exemption for such products, and thus the Agency has addressed the specific concerns in a substance-specific standard based on the rulemaking record developed for formaldehyde. OSHA believes that it is more appropriate to deal with the issues involving formaldehyde exposures in the substance-specific standard.

On February 2, 1988, OMB disapproved the information collection requirements of the formaldehyde standard for any labeling and MSDS requirements that "go beyond those already approved in the Hazard Communication Standard (HCS)." Ex. 4–101. In OSHA's view, there are no labeling or MSDS requirements in the formaldehyde standard that go beyond those in the HCS.

Chemical manufacturers, importers, and distributors have been required to provide labels and material safety data sheets for formaldehyde and formaldehyde-containing products since the HCS became effective on November 25, 1985. To be considered in compliance with the HCS, an adequately prepared label and MSDS would have had to include all of the information currently specified in the formaldehyde standard under its specific hazard communication requirements.

The formaldehyde standard is less stringent than the HCS insofar as there is a specific cut-off of 0.1 ppm to determine whether or not an item would be considered an article under that rule. Fewer formaldehyde-containing products would be subject to the hazard communication requirements under the formaldehyde standard than would be subject to the HCS itself. Thus the establishment of the specific cut-off was de-regulatory. OSHA will be resubmitting the labeling and MSDS requirements of the formaldehyde standard to OMB for further review in the near future. Until further notice, OSHA will be enforcing the HCS labeling and MSDS requirements for formaldehyde and formaldehyde-containing products. Chemical manufacturers, importers, and distributors may use the applicable provisions in the formaldehyde standard as additional guidance for determining what constitutes an appropriate hazard warning. Furthermore, OSHA's enforcement policy will use the 0.1 ppm cut-off for determining when a health hazard is present, rather than the lower threshold (*i.e.*, very small quantities) used under the HCS.

The Agency has decided to propose modifications to the article definition in several respects to accommodate legitimate concerns about the rule's application. First, consistent with EPA's approach, fluids and particles have been specifically excluded from being considered articles. This is not a change in interpretation, but has merely been added to clarify coverage. Secondly, the definition specifically exempts releases of very small quantities (*e.g.*, minute or trace amounts) of hazardous chemicals

as long as they do not pose a health risk to employees. A reference to the hazard determination provisions of paragraph (d) has also been added to help clarify that a hazard determination, including the mixture percentage cut-offs, is to be done on the released material, not on those materials still bound in solid form.

Therefore, if there is evidence that under normal conditions of use a single chemical, determined to be hazardous under paragraph (d), is released from a manufactured item, the HCS provisions would apply for that released chemical unless the release was of minute or trace quantities and did not pose a health risk to employees. If a mixture of chemicals is released in minute or trace quantities, it would not be covered unless it posed a health risk to employees. If it is released in more than such quantities, then the mixture rule in paragraph (d)(5) would apply.

Thus, if a hazardous chemical component of the released chemical mixture comprises less than 1% (or if a carcinogen, less than 0.1%), and there is no evidence that this hazardous chemical component could exceed an established OSHA permissible exposure limit or American Conference of Governmental Industrial Hygienists' Threshold Limit Value, or could present a physical hazard or health risk to employees in the concentrations released, the employer need not comply with the HCS information transmittal requirements for this truly minute release of hazardous chemical. The rule requires compliance with the HCS when workers are exposed to hazardous chemicals known to be released from manufactured items under normal conditions of use, but clarifies by reference to paragraph (d) that the percentage cut-offs in the current rule's mixture provisions exempt employers from the HCS where there are very small quantities of hazardous chemicals released from these items and which do not pose a health risk to employees.

Other alternatives have been considered by OSHA but rejected for various reasons. For example, establishing a percentage of the permissible exposure limit (PEL) as a cut-off has been discussed. The problems foreseen for this approach include, foremost, the lack of PELs for many substances, and additionally, the difficulty in accurately predicting specific exposures downstream (*i.e.*, a percentage of the PEL being exceeded), and the difficulty in standardizing methods of measuring such releases (an issue that has also been raised in the petition for administrative stay of the formaldehyde rule, Ex. 4–68). Although OSHA has set specific coverage cut-offs in a number of particular standards requiring chemical manufacturers to estimate downstream exposures, these cut-offs were based on administrative records developed specifically for these regulated chemicals. OSHA believes it is inappropriate to set a single exposure cut-off for the hundreds of thousands of chemical products covered by the HCS.

Determining coverage by the level of detectability for each released material has also been suggested. Since the limits of detectability vary by chemical, this does not appear to be a viable approach. Furthermore, sometimes the method of detection for a chemical is so refined that this would result in more items being considered to be covered under the rule than under the current approach. OSHA invites comment on these suggestions and the proposed modifications to the definition and exemption, as well as soliciting other approaches for dealing with or clarifying the issue.

OMB Determination on Articles. According to the letter prepared by OMB regarding the information collection requirements of the rule (Ex. 4–67), the record examined by OMB in making its determination "supports the need for an article exemption" but "does not support the existing definition of 'article,' particularly with regard to the lack of a *de minimis* exemption and the agency's interpretation of 'normal conditions of use'." OMB further concludes that "the evidence is convincing that the current definition of 'article' would indeed result in the inclusion of many items that present trivial risks, and that OSHA's preamble discussion of the issue is insufficient to exclude those items." An approach that OMB would consider to be more consistent with the Paperwork Reduction Act "would exclude *de minimis* exposures expressly, and define such exposures in the same terms used in the exclusion for trace components of mixtures."

OMB also believes that "the record suggests that the detailed substance-specific information provided on the MSDS can be useful in a controlled work environment, such as a manufacturing facility, in which the employer knows what hazards are present and where. Detailed substance-specific information does not, however, seem to offer much practical benefit in uncontrolled environments, such as that faced on a construction site or by a repairman, where the employer knows generally but not specifically what hazards the employee will face, or when, or where. In uncontrolled situations, generic hazard training seems much more relevant to protecting workers from the array of hazards they may face and the materials handling decisions that they must make throughout the workday."

OMB uses this argument to object to OSHA's determination that the exemption for an article is based upon its ultimate use, and it is not exempted if it releases material while workers are using it in the course of their employment in operations such as installation. "Outside the manufacturing sector, there is likely to be little practical utility to a requirement that MSDSs and labels accompany solid objects that would be 'articles' under normal conditions of use."

OMB therefore required OSHA "to consider, at least, alternatives to the definition of 'article,' including a *de minimis* exemption and clarification of the concept of 'normal conditions of use,'' and shall conform the requirements on the manufacturing sector with the requirements on the non-manufacturing sector in light of this decision."

OSHA has reconsidered the definition, as described above, and is proposing a modification consistent with existing interpretations of the rule and adequate protection of workers. Comment on the OMB determination is invited as well as comments on the discussion above and the proposed modifications.

Food, drugs, cosmetics, and alcoholic beverages. In the revised final rule, OSHA included an exemption for food, drugs, cosmetics, or alcoholic beverages in a retail establishment which are packaged for sale to consumers (paragraph (b)(6)(v)). This exemption recognized that even where these chemicals are hazardous chemicals (and many are not, particularly in the area of food items), they present little or no hazard to employees when they are in final packaged form for sale to consumers. This exemption effectively limited coverage of many retail establishments which only have hazardous chemicals in this form, *i.e.*, packaged for sale to consumers. But it did not exempt these products when they are being used in a retail establishment and thus exposing employees—such as beauty products being used in a salon.

OSHA has received comments and questions about the application of this exemption from both businesses distributing to retail food establishments (*see*, Ex. 5–97) and the retail establishments themselves (*see*, Ex. 5–5). As stated in the preamble to the

revised final rule, if a product is exempted downstream, a distributor has no responsibility for providing a MSDS on that product to the retail distributor. "In addition, since these products are exempted, employers which package them for retail sale would not have to furnish material safety data sheets to distributors receiving the products." 52 FR 31862.

OSHA is proposing a further modification to this exemption which both clarifies and extends it to other food and alcoholic beverage products in retail establishments which are being prepared for consumption by consumers. Thus food which is used for cooking meals to be sold to customers would be exempt, as would alcoholic beverages which are sold by the glass and thus prepared for consumption rather than "packaged" for consumer use. Although OSHA believes that most such products in terms of food items would not be hazardous under the rule in any event, it appears that some manufacturers are nevertheless providing material safety data sheets for such items as aflatoxin in peanut butter used in a restaurant. To ensure such interpretations are not made, and that material safety data sheets are not unnecessarily being provided for such items, OSHA is proposing this modification to the exemption and inviting comment on the proposed language.

Consumer products. One of the principles upon which the HCS is built is that employees are entitled to information regarding any chemical which is hazardous and to which they are potentially exposed. The type of use this product is intended for is irrelevant—the risk being addressed is exposure to a chemical without knowing what the hazards and appropriate protective measures are. That being the case, the 1982 NPRM contained no exemptions for any "types" of chemicals. The exemptions which were in the original final rule were based upon comments submitted to the rulemaking record after that proposal. OSHA limited the exemptions to situations where other regulatory programs adequately addressed the problems involved (*e.g.*, labeling exemptions for those products labeled in accordance with another Federal agency's requirements), or where the hazards did not result from workplace exposure.

In the area of consumer products, the original final rule included an exemption for additional labels on such products when they are labeled in accordance with the requirements of the Consumer Product Safety Commission (CPSC). CPSC's requirements for labeling of hazardous substances are for the purpose of protecting consumers when such products are used in the home, the school, and recreational facilities (15 U.S.C. 2052(a)(1)). The Federal Hazardous Substances Act, 15 U.S.C. 1261 *et seq.*, and regulations issued under that Act by CPSC are not designed to protect workers. *See American Petroleum Institute v. OSHA*, 581 F.2d 493, 510 (5th Cir. 1978), *aff'd on other grounds sub. nom. Industrial Union Dep't. v. American Petroleum Institute*, 448 U.S. 607 (1980).

Consumer products generally do not include the type of specific hazard information OSHA would require on the labels of containers of hazardous chemicals which are shipped. Although some consideration is given to chronic hazards, the basic emphasis is on acute effects. In addition, the labels focus on precautionary statements and routes of exposure rather than informing the user of the specific hazards. For example, a label for lead solder purchased in a hardware store indicates that it is "fatal if swallowed" and "causes severe burns," but gives no indication of the fact that lead causes not only acute lead poisoning but also has severe effects on a number of body systems, including damage to blood-forming, nervous, and reproductive systems (*see*, OSHA's lead standard, 29 CFR 1910.1025). Furthermore, the primary route of entry for occupational exposure to lead would normally be inhalation—the consumer label does not indicate that inhalation of fumes generated when soldering are of concern. (Ex. 4–71). Conversely, a properly prepared MSDS for the same material will indicate the full range of health effects, the appropriate protective measures, the fact that there is an OSHA standard for the material with a permissible exposure limit, and other useful information for both the employer and the employee being exposed.

OSHA nevertheless decided to permit the CPSC labels to suffice so as not to disrupt the extensive labeling conducted in accordance with those rules. OSHA believed that this could be justified on the basis that some information is provided on the labels that would be useful to workers, and that the requirement for MSDSs would provide what information is necessary to supplement the labels. 48 FR 53289. This additional information is critical to ensuring that training can be properly conducted, and that adequate protective measures are used in the workplace.

OSHA is not preempted from modifying the labeling requirements for those products covered by CPSC that may also be found in the workplace. 15 U.S.C. 2080. Where products are used in both industry and the home "there may be dual, or overlapping jurisdiction between the Secretary of Labor under OSHA and the Commission under the Consumer Product Safety Act." W. Kimble, *Federal Consumer Product Safety Act*, 337 (1975). "Different standards may * * * be applied to eliminate or reduce a hazard to the consumer than are applied to eliminate or reduce the same hazard as it confronts the * * * workman * * * *Id.* As the Fifth Circuit of the U.S. Court of Appeals found when considering labeling requirements for benzene, "[A]lthough an existing requirement for labeling under another act may affect the reasonable necessity for an OSHA requirement" section 4(b)(1) of the OSHA Act does not prohibit OSHA from requiring containers of hazardous chemicals to bear the warning labels authorized by section 6(b)(7) when the CPSC requires labels on the same products. *API v. OSHA*, 581 F.2d at 510. Therefore, OSHA is free to impose requirements determined to be necessary to protect employees from the hazards of products that may also be considered consumer products regulated under the requirements of the CPSC.

Upon considering what information is necessary for the protection of workers exposed to those so-called consumer products in the workplace, OSHA decided that protection of workers would be served by allowing the CPSC labels to suffice, but requiring MSDSs and training as for any other hazardous chemicals. There appears to be some misconception that by virtue of being permitted to be marketed to consumers, consumer products are inherently safe and don't require any additional information be given to workers using them. This certainly is not the case.

The Consumer Product Safety Commission (CPSC), in its National Electronic Injury Surveillance System (NEISS), compiles estimates of product-associated injuries based on a statistically significant sample of incidents reported to institutions with emergency treatment department. Information regarding work-related injuries treated in emergency rooms has subsequently been provided by CPSC to the National Institute for Occupational Safety and Health (NIOSH). *See* Ex. 4–77.

These work-related data are total numbers of chemical injuries, and are not collected in such a way that the consumer product injuries in the workplace can be separated from other chemical product injuries. The CPSC

version of the data is reported by type of product, while the NIOSH work-related data is grouped by source of injury. Nevertheless, much information regarding reported injuries can be derived from the data as presented, and give some indication of the numbers of serious injuries related to the use of chemicals. Since these data only deal with injuries which require emergency room treatment, it can be assumed that they are a small subset of the total number of injuries which occur.

According to the CPSC, the national estimate for emergency room treatments of injuries related to paints, varnishes, and shellacs is 10,712, and 75% of these injuries occur in adults from ages 15 through 64, an age range which would encompass adults who work. At least 5% of these injuries result in hospitalization. National estimates for other types of chemical products which would also be found in the workplace include: 7530 injuries related to adhesives (51% of them in the adult working age categories); 3186 injuries related to lubricants (71% in the adult working age categories); 2977 related to drain cleaners (63% working age adults); 1882 related to automotive chemicals (69% working age adults); and 5584 related to laundry soaps or detergents (52% working age adults). There are many other products for which injuries are reported and which would be expected to be found in the workplace. These numbers indicate that adults of working age are being injured through the use of consumer products, whether in the home or in the workplace. In workplaces where these products are being used more frequently or for longer periods of time, the risk of injury increases. Appropriate communication of hazards and protective measures decreases that risk of injury.

The NIOSH data indicate that a total of 136,212 work-related chemical injuries were estimated to have been treated in emergency rooms in 1986. The sources of injuries included in this total were chemicals and chemical compounds (solids, liquids, gases): 102,428; coal and petroleum products: 23,532; and soaps, detergents, cleaning compounds not classified elsewhere: 10,252. There were other categories of sources of injuries that had chemical product exposures in them, but these three were expected to be the ones of cost significance. As mentioned above, it is not possible to determine which of these work-related injuries result solely from consumer products. However, in categories such as soaps, detergents, and cleaning compounds, it can reasonably be assumed that a number of them were consumer products.

Many products used industrially are also sold and used as consumer products. Thus, exempting such products is in essence exempting them because of the method of distribution for them, *i.e.*, that they are generally sold in retail establishments, rather than through wholesale distribution systems. This is not an appropriate rationale for such an exemption since it does not consider either exposure or hazardous nature. Of particular concern is that the CPSC label is designed to protect consumers under normal conditions of consumer use, or reasonably foreseen misuse, and is frequently directed towards protection of children unintentionally exposed in the home, rather than being directed towards protection of workers exposed repeatedly, and to potentially larger concentrations of the material. In fact, a number of consumer product labels recognize this difference in exposure and note on the label either that the product is not intended to be used in the workplace (Ex. 4–64), or that a material safety data sheet should be acquired if it is used in the workplace (Ex. 4–71).

It is also important to note that the record overwhelmingly supports the need for a comprehensive hazard communication program, comprised of labels, material safety data sheets, and training. In 1981, OSHA published and later withdrew a NPRM which was a labeling standard—it had no provisions for development of material safety data sheets or for training. One of the primary reasons for the withdrawal was the lack of support for a rule which relied only on label information. In fact, only one commenter on the 1982 NPRM believed that the MSDS should not be the primary source of information on the chemical (H–022 Ex. 19–49), whereas numerous respondents endorsed the MSDS provisions and role in hazard communication as being important and necessary (*see, e.g.*, H–022 Exs. 19–11, 19–62, 19–75, 19–91, 19–119, 19–156, 19–177, and 19–207). For example, the Chemical Manufacturers Association (Ex. 19–91) stated that: "[T]he proposed standard appropriately makes the MSDS, rather than the actual container in the workplace, the source from which employees and their representatives may obtain detailed information regarding potentially hazardous substances used in the workplace." Similarly, the American Petroleum Institute (Ex. 19–111) stated that "labels may not always be the most effective means for communicating the potential hazards of a work area * * *" and that "MSDSs constitute a vital means of communicating safety and health hazards presented by particular chemicals and mixtures to *employer/users* * * *." And American Cyanamid Company also agreed that "the use of the MSDS as the primary source of data for properties of commercial chemicals is a worthy part of the proposed regulation * * *." (Ex. 19–119.)

OSHA thus did not exempt consumer products from any provisions of the original final rule other than labeling. This was an explicit recognition by the Agency of the greater potential for exposure in the workplace, and the lack of complete information on consumer product labels to address such situations (48 FR 53289):

> OSHA recognizes, however, that there may be situations where worker exposure is significantly greater than that of consumers, and that under these circumstances substances which are safe for contemplated consumer use may pose unique hazards in the workplace. For this reason, the standard's exclusion is limited to labeling. It does not exempt employers from the material safety data sheet and training requirements of the standard with respect to any of these substances, provided of course that the substance otherwise meets the standard's definition of hazardous chemical. Moreover, it should be stressed that these labeling exclusions are for the enumerated substances only. To the extent that any employer uses other chemicals, such as in the manufacture or processing of these substances, they are fully subject to the requirements of this standard.

During the implementation of the original final rule, OSHA determined that its enforcement policy regarding consumer products would focus on the type and extent of usage (*see*, OSHA's instructions to compliance officers for enforcement of the HCS, Ex. 4–24):

> A common sense approach must be employed whenever a product is used in a manner similar to which it could be used by a consumer, thus resulting in levels of exposure comparable to consumer exposure. The frequency and duration of use should be considered. For example, it may not be necessary to have a data sheet for a can of cleanser used to clean the sink in an employee restroom. However, if such cleanser is used in large quantities to clean process equipment, it should be addressed in the Hazard Communication Program.

This appeared to OSHA to be a reasonable accommodation for employers who really do use consumer products in the manner intended, and with the same frequency and duration of exposure as would be experienced as consumers. OSHA has had no problems in implementing this enforcement policy, and it has been our experience that covered employers understand it and are able to comply. Therefore, although

it is a policy which decreases the amount of information available to some employees covered under the rule, OSHA felt it could be justified based on the fact that under the same circumstances in the home the same type of information would be available to that individual for protection. Many employers have told OSHA that consumer products are included in their hazard communication programs regardless of the enforcement policy of the Agency because they believe that all hazardous chemicals should be included in an appropriate hazardous materials management program.

OSHA recognized that many more non-manufacturers would use consumer products than would be found in manufacturing facilities, and that the method of obtaining them might more likely be from retail distributors than wholesale. Thus the ANPR included questions regarding the use of such products, and the means of obtaining them. Relatively few responses were received. However, the responses did confirm that in many cases the use of consumer products results in significant exposures that warrant more information being available than that which appears on a consumer product label. For example, Daniel Construction Company responded to the questions as follows (Ex. 2–59):

> The most common "consumer products" used in the construction industry are wood and wood products, caulking, and aerosol cans of spray paints, cleaners, lubricants, and solvents. These products are not typically used differently than consumers do. That does not mean that employees cannot be overexposed to the ingredients. For example, a 16-ounce spray can of paint used in a 10'x10'x10' room can produce a concentration of solvent that is more than ten times the acceptable exposure limit.

Of course a consumer product label would not normally indicate that there is a permissible exposure limit for a solvent present in the paint since this information is unrelated to consumer use and exposure. However, a MSDS for the product would be required to include such information which will enable the employer to ensure that employees are properly protected in a situation as that described by Daniel Construction Company. In fact, the CPSC has recommended the use of MSDSs for products they cover in school laboratories (Ex. 4–56), recognizing that additional information is desirable in these types of exposure situations. "Material safety data sheets should be obtained on each chemical delineating particular hazards or handling procedures." "Have a material safety data sheet on hand before using a chemical."

Similarly, the American Gas Association (Ex. 2–83) indicated that use of consumer products could result in different exposure levels than those encountered during consumer use:

> It could occur—not because of different use, but because the use by employees is for prolonged periods of time. An average consumer may use a cleanser several times a week to clean the kitchen or bathroom floor, whereas a gas company employee may use the same cleanser every day to clean a gas facility.

The Massachusetts Institute of Technology (MIT) (Ex. 2–120) also indicated that their employees are exposed to consumer products in greater amounts than consumers would be, including paint and thinners used by the painters, printing fluids used by the graphic arts services, cleaning and polishing chemicals used by the custodians, lawn and garden chemicals used by the grounds maintenance crew, and lubricating sprays and other maintenance products used by mechanics/electricians. MIT obtains MSDSs from vendors to ensure employees are properly protected from these materials. Mountain Bell (Ex. 2–164) also confirms that consumer product exposures may be greater in its industry, particularly "* * * where products are used on an extensive basis such as in automotive operations, janitorial operations, and copying operations * * *."

A few respondents felt that the consumer product label should be enough information (Exs. 2–75, 2–79, 2–99, 2–107, and 2–116). Others, however, noted that employees are not getting enough information regarding these products and that MSDSs should be made available. For example, Economics Laboratory, Inc., a manufacturer of consumer products for cleaning and sanitizing, suggested (Ex. 2–67):

> In the use of cleaning and sanitizing products, a principal point of worker exposure is during the transfer of concentrate from the original container to prepare a use solution. We supply products labeled as per ANSI and/or FHSA, but we have seen instances of deficient labeling on the products of some other manufacturers. We now send to all customers in these sectors an MSDS for every product they purchase. Many of our customers now use the labels, MSDS and other aids to train employees, but a formal requirement would increase that number throughout the industry.

The Adhesive and Sealant Council, a trade association which represents manufacturers of materials that may be marketed as consumer products, also addressed this issue (Ex. 2–109):

> * * * The Council is concerned that in certain cases hazard information may not reach employees of manufacturers and non-manufacturers. ASC members are aware of cases in which consumer products are purchased from retailers or distributors in consumer quantities but are used in the workplace. Under such circumstances the original manufacturer is not made aware of the use of its consumer products in the workplace. Thus, some workers may lack needed hazard information unless they or their employer affirmatively and voluntarily make an effort to obtain and promulgate the information.
>
> There are, of course, safety requirements applicable to consumer products under the Consumer Product Safety Act, and other federal laws, but these do not contain broad workplace safety requirements beyond standards and labeling, such as material safety data sheets. The present OSHA docket has not been opened as to this issue. However, ASC believes the problem could be greater with regard to non-manufacturer distribution than with direct manufacturer distribution * * *

One further comment submitted by an employee representative summed up the situation by stating that when a product is used by a professional in the workplace, it is no longer a "consumer" product regardless of the fact that a consumer can purchase the same product (Ex. 2–199).

OSHA decided to incorporate into the revised final rule its existing enforcement policy which is tied to type and extent of exposure (52 FR 31878; paragraph (b)(6)(vii)):

> Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers * * *.

OSHA further stated that this exemption "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products which employees are exposed to at home as well as at work, and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate." 52 FR 31863. OSHA had also examined the existing State rules in the area of right-to-know, and found that many had consumer product exemptions that were related to the type and extent of usage. (*See, e.g.*, Illinois, 48 Ill. Rev. Stat. s1401 (consumer goods exempted "provided that employee exposure to such

consumer goods is not significantly greater than consumer exposure occurring during the principal consumer uses of the consumer goods"); Maine, 26 M.R.S.A. s1709–1725 as amended (exempts consumer products and foodstuffs "to which, in the employer's knowledge, employee exposure is not significantly different from that of the general public during foreseeable use of the substance"); Massachusetts, Chapter 111F of Massachusetts General Laws (exempts consumer goods which are not carcinogens, mutagens, teratogens, neurotoxins, or "extraordinarily hazardous" substances and which are "used in the workplace in such a manner that employee exposure is equivalent to exposures resulting from consumer usage"). Other State rules are consistent with the original Federal HCS and have no exemptions for consumer products (*see, e.g.*, Arizona, Kentucky, South Carolina).

There were some comments submitted on the coverage of consumer products following the publication of the revised final rule. A number of them felt that they could not define what exposures in the workplace would be comparable to consumer exposure, and that the rule should exempt such exposures unless they are "significantly" greater than consumer exposure or that such products should be completely exempted (Exs. 5–53, 5–72, 5–88, 5–93, 5–94, and 5–97). As we have stated earlier, a common sense approach is required in making these determinations, and most employers we have dealt with clearly know whether the use of such products is unusual or frequent. However, we are inviting further comment on the issue of adding the word "significantly" to the consumer product exemption to modify "greater."

Another suggestion submitted (Exs. 5–84, 5–93) was to use the same consumer product exemption used by Congress in the community right-to-know provisions of the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. 99–499 (Ex. 4–16), which is being implemented by the Environmental Protection Agency (EPA). The exemption would then be for "any substance to the extent that it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public." As this exemption is also not related to the extent of employee exposure—which is the concern of OSHA in the HCS—it is not appropriate for this rule.

The legislative history for SARA does not discuss the household or consumer product exemption. OSHA's rule preceded the SARA legislation, and it can be argued that the exemptions in SARA were intended by Congress to address the different needs of community right-to-know versus worker right-to-know. Community right-to-know under SARA entails informing the general public and emergency response facilities about chemicals in their neighborhoods that could cause hazardous conditions during emergency situations. The HCS involves informing employees about the chemicals they are potentially exposed to on a day-to-day basis as a result of their work. Exemption of consumer products under SARA was not a determination by Congress that such coverage is unnecessary in the workplace.

The National Paint and Coatings Association (NPCA) suggested that it is too costly to provide MSDSs to paint contractors and retail establishments and that they therefore should not be required for consumer product paints (Ex. 2–75). Alternatively, NPCA suggested containers of one gallon or less should be exempted. As has already been described, OSHA believes that the only appropriate criteria for determining whether a chemical is covered is the existence of a hazard and the potential for exposure. Both of these criteria are met for many paint products. As was described above, use of even a 16 ounce spray can of paint can result in employee exposures of ten times the permissible exposure limit, so the size of the container is not the determining factor.

The NPCA indicated that it would be difficult to comply due to the large numbers of products involved and the multiplicity of distributors. However, there are already a number of States which require MSDSs for such products, and it is our understanding that many employers in construction have been able to obtain MSDSs for consumer product paints from their vendors. Furthermore, there is evidence in the record that paint producers customarily distribute documents referred to as "technical data sheets" which prescribe methods of application and other use-related information, including, in some situations, brief indications of hazards (Ex. 4–60). These technical data sheets are apparently supplied to distributors to provide information regarding the products that does not appear on the product labels. It appears to OSHA that if these sheets can efficiently be distributed for paint products, then MSDSs can as well. Alternatively, the information required on a MSDS could merely be added to the technical data sheets. It certainly cannot be argued that labels alone provide the same type of information that a MSDS would.

An issue that is related to the coverage of consumer products, and is undoubtedly the genesis of some of the recommendations to eliminate such products from coverage, is the distribution of consumer products in commerce. It is important to point out that the vast majority of consumer products are not covered by this rule. Only those which are hazardous are potentially covered, and within that group, only those which are used in the workplace. Producers of the materials which, while marketed to consumers, are likely to be sold to employers and used in the workplace are well aware of that potential market. (*See, e.g.*, Ex. 2–148.) Thus manufacturers of materials used in construction, graphic arts, and clearning operations, are aware that their products have industrial applications even when sold as consumer products. MSDSs have already been prepared and distributed for many, if not most, of these products. Manufacturers are required to have MSDSs for their own workers, and have already been required to distribute such MSDSs to non-manufacturing customers in a significant number of states with right-to-know rules. Furthermore, most manufacturers have and make available MSDSs because of product liability concerns separate and apart from any regulatory requirements. This was certainly demonstrated in the record by the large number of manufacturers that produced MSDSs in the absence of such requirements prior to promulgation of the original HCS. The sealed container provision also eliminates many consumer products from coverage in workplaces which may handle such materials, but do not open the containers to use them.

The record for the original final rule strongly supported the need for automatic transmittal of MSDSs from producers to users through the supply chain. The cost analyses of the rule demonstrated that a system that relies on users requesting a copy of a MSDS will be more costly, and less protective (48 FR 53327). However, in the revised final rule, OSHA determined that where retail distributors are involved in the distribution chain it was necessary to slightly revise this position. Therefore, the revised final rule stated (52 FR 31882, paragraph (g)(7)):

> Retail distributors which sell hazardous chemicals to commercial customers shall provide a material safety data sheet upon request, and shall post a sign or otherwise inform them that a material safety data sheet

is available. Chemical manufacturers, importers, and distributors need not provide material safety data sheets to retail distributors which have informed them that the retail distributor does not sell the product to commercial customers or open the sealed container to use it in their own workplaces.

OSHA provided the following rationale for this departure from the automatic provision approach found to be necessary in the original final rule (52 FR 31866):

> Retail distributors, however, often sell to businesses and the general public and frequently have no way of knowing who a particular purchaser is. Under the current rule, retail distributors might have to give material safety data sheets to each customer to ensure that commercial customers get the information they need under the HCS. A specific statement regarding retail distributors is, therefore, included in paragraph (g)(7) to address this practical problem. Those retail distributors who sell hazardous chemicals to employers must provide a material safety data sheet upon request, and must post a sign or otherwise inform the employers that an MSDS is available.

OSHA recognizes that although it is possible for an employer to incidentally purchase a hazardous chemical from any type of retail establishment, it is not reasonable to expect every retail store that happens to carry such materials to keep a file of MSDSs in case an employer decides to make a random purchase at the store. We further recognize that such random purchases would normally be of small amounts that would generally be used as a consumer uses them, and thus would be exempt under the rule anyway. However, even in those cases where they are used in greater quantities, it appears more reasonable to place the burden on the user in that situation to obtain the MSDS than to have every retail establishment keep large numbers of them on file. This provision also limits the number of establishments to which distributors of such products have to transmit MSDSs.

The National Retail Merchants Association (NRMA) (Ex. 5–74) indicated that the final rule "* * * has struck a good balance between the obvious problem of requiring retailers to train all employees about every product which may appear on retailers' shelves, and the real need for employee training for emergency spillage of packaged products." They did think, however, that the definition of "consumer product" as stated by CPSC might be confusing to retailers, particularly small businesses, since "retailers would have to go through the process of examining all goods sold in their stores to determine if they are or are not consumer products." In fact, if retailers are selling the products they are considered to be "consumer" products—there is no determination to be made by the retailer in this respect, it's a determination made by the producer in developing the appropriate label for the material based upon its intended use.

With regard to the issue of making MSDSs available at the retail distribution level, NRMA suggested that OSHA define the term "commercial account" to ensure it is being properly interpreted and applied. They further suggested that this definition be related to selling items in large quantities and below the regular retail price. "Such accounts can be identified, and it would be less burdensome to notify such customers that MSDSs are available upon request. In fact, many retail firms have already done this under many state right-to-know laws." (Ex. 5–74).

The United Brotherhood of Carpenters and Joiners of America (UBCJA) similarly noted that with regard to MSDSs being available from retail distibutors (Ex. 2–105):

> * * * [T]hose contractors who do purchase materials from retail outlets generally buy them from a building-supply house that sells such materials in larger quantities, and may give them a volume discount. These stores would have no problem supplying MSDSs to customers * * *

OSHA agrees with the NRMA that adding such a definition will clarify that many retail distributors have no need to maintain MSDSs because they do not generally supply hazardous chemicals to commercial customers (*e.g.*, grocery stores, clothing stores). Therefore, we are proposing a definition for the term "commercial account" based upon NRMA's recommended criteria, and are inviting comment on the appropriateness of this approach. In addition, we are proposing to further modify the language in paragraph (g)(7) to indicate that when an employer purchases a consumer product from a retail establishment which does not have commercial accounts, and that employer needs to obtain a material safety data sheet, the retail distributor's duty is limited to providing, upon request, the name, address, and telephone number of the chemical manufacturer, importer, or distributor from which a MSDS can be obtained. We believe these modifications should clarify the duties of distributors of consumer products through retail distribution.

In summary, OSHA is not proposing to modify the consumer product exemption *per se*, although it is inviting comment on certain issues. The Agency continues to maintain that the mode of distribution of a product (*i.e.*, through retail distribution rather than wholesale) is not a criterion that is related to employee exposure or the need for information and therefore is not relevant to whether consumer products should be covered by this rule. The modifications proposed to the provisions regarding retail distribution should clarify them to ensure the regulated community is aware what needs to be done to comply with the revised final rule. OSHA invites comments on these issues as well.

OMB Determination. OMB has disapproved the information collection requirements for any consumer products that are exempted from the EPA requirements for community right-to-know (Ex. 4–67). OMB maintains that such an exemption would make the OSHA and EPA right-to-know requirements, which are closely linked, mutually consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for their "consumer products" into two groups: An OSHA "consumer product" and an EPA "consumer product." Furthermore, OMB believes this exemption "establishes objective criteria that enable upstream and downstream employers to determine what is exempted and what is included. Upstream suppliers would not be forced to speculate as to the identity of the final user (consumer or employer?) in determining whether the product is subject to the HCS. The flow of MSDSs and labels would be restricted to unpackaged substances or substances packaged for industrial or commercial use, for which detailed hazard information would be expected to have practical utility." OSHA invites comments on these conclusions as well.

Drugs. The original HCS covered the manufacture and formulation of drugs in the manufacturing sector. The rule included a labeling exemption for such products when they were labeled in accordance with the regulations of the Food and Drug Administration (FDA), but all other aspects of the program were applicable to the drug products as well as those chemicals used to make them. In preparing the revised final rule, OSHA determined that it is not necessary to cover such drugs in the non-manufacturing sector when they are in a form that is not likely to result in exposure to employees. Thus the rule totally exempted drugs when they are in a retail establishment (*i.e.*, a drug store of a pharmacy) and packaged for sale to a consumer (paragraph (b)(60(v)). Therefore all over-the-counter drugs were exempted from the point of

packaging, and many prescription drugs were exempted as well since they are packaged prior to reaching the retail establishment. In addition, OSHA included an exemption for drugs in solid, final form for administration to a patient. As mentioned previously, this was based on the Agency's determination that the potential for exposure is minimal for these drugs.

However, in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies (*e.g.*, nurses, nurses' aides, pharmacy aides, or technicians), OSHA did not exempt those drugs that are not solid or are not pre-packaged for sale to consumers (a pharmacy in a hospital would be considered to be a retail sale establishment for purposes of the exemption as written). Thus nurses required to mix anti-neoplastic drugs, for example, would be entitled to a material safety data sheet and training under the revised final rule. There was little discussion of the drug issue in the record prior to the revised final rule (*see, e.g.*, Ex. 2–176). However, since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected. As an example of potential problems, a recent report in the American Industrial Hygiene Association (Ex. 4–59) described one hospital's experience with a drug that is generated as an aerosol in a tent for administration to children. Nurses, respiratory therapists, doctors, and other employees are directly exposed when they enter the tent to care for the patients. Information on the drug indicates that such occupational exposure may result in carcinogenesis, fertility impairment, and fetotoxicity. In addition, however, employees who were exposed also complained of experiencing acute effects such as headaches, burning and dryness of the eyes, coughing and dryness of the upper respiratory tract. The hospital eventually devised a protective program for exposed employees based upon its experiences. A MSDS with recommendations for protective measures may have helped them resolve the situation prior to employees being exposed.

In response to the approach taken in the revised final rule, the National Wholesale Druggists' Association (NWDA) (Ex. 5–85) recommended that OSHA recognize package inserts approved under FDA regulations as an acceptable alternative to material safety data sheets required under the rule. Additionally, the NWDA suggested that the *Physicians' Desk Reference*, a privately developed reference regarding drugs, also be considered to be an alternative to requiring MSDSs for drugs approved by FDA. Other commenters recommended that all prescription drugs be exempted since they are adequately covered by FDA labels, other available resources, and the medical training of persons handling or supervising handling of the drugs (Exs. 5–77 and 5–102).

Although the purpose of the Federal Food, Drug, and Cosmetic Act administered by the FDA is to protect consumers of such products and the general public (*see, e.g., Pharmaceutical Mfrs v. FDA*, 484 F. Supp. 1179, 1183 (D.Del 1980)), the product data inserts that accompany pharmaceuticals do contain some information that is analogous to that found on MSDSs and would provide some protection for employees. In particular, at 21 CFR 201.100(d)(1)(as paraphrased below), FDA requires that inserts for prescription drugs for human use must contain the following information: Adequate information for such use, including indications, effects, dosages, routes, methods, and frequency and duration of administration and any *relevant warnings, hazards, contraindications, side effects, and precautions, under which practitioners, side effects, and precautions*, under which practitioners licensed by law to administer the drug can use the drug safely and for the purposes for which it is intended * * * [in] the same [ ] language and emphasis as labeling approved or permitted * * *. (Italics added). This would be useful chemical hazard information for employees involved in administering the products even though employee protection is not the primary purpose of the information presented.

In addition to publication of such information in the package inserts themselves, the FDA regulations also state that (21 CFR 202.1(1)(2), as paraphrased below): [R]eferences published (*for example*, the "*Physicians' Desk Reference*") for use by medical practitioners, pharmacists, or nurses, containing drug information supplied by the manufacturer, packer, or distributor of the drug and which are disseminated by or on behalf of its manufacturer, packer, or distributor *are hereby determined to be labeling* as defined [by] the Act." (Italics added.) According to the *Physician's Desk Reference* (PDR) in its *Forward* (40th ed. 1986), "drug information" in the PDR is "prepared by manufacturers, edited and approved by their medical department and/or medical consultant." PDR publishes the information verbatim. *Id.*

OSHA is proposing to modify the definition of "material safety data sheet" under the rule to indicate that a package insert approved by FDA, or an entry in the PDR prepared in accordance with FDA's requirements, be considered in compliance with the HCS requirements for a MSDS for these products. In addition, the exemption regarding solid drugs is being corrected to read "*e.g.*, tablets or pills" rather than "*i.e.*" as is currently indicated in the revised final rule (*see, e.g.*, Exs. 5–77, 5–85, and 5–102).

The Agency is inviting comment on this issue, particularly from employees who would be affected by this modification to ensure that they agree that this information is adequate for their protection. The existing exemption for labeling would remain in effect, employers would still have to have hazard communication programs where covered, and training would have to be given to those employees who have not previously been trained regarding the hazards and protective measures.

Although hospitals and health care institutions have not participated in the rulemaking to date, it appears to OSHA that another issue of concern in these institutions would be labeling of drugs dispensed by a pharmacist to a nurse who gives it to the patient. It is our understanding that these dispensed drugs may not be marked in any way, and since the nurse doesn't transfer the material from the labeled container, the portable container exemption for labeling would not apply. OSHA invites comment on suggestions for dealing with this issue for non-solid drugs.

OMB Determination. OMB has disapproved "coverage of any FDA-regulated drug" in the non-manufacturing sector because such coverage "would result in duplicative paperwork and is unlikely to provide additional information of any practical utility." (Ex. 4–67) Comment is also invited on this alternative of totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces.

Nuisance dust. Another issue that was raised for comment on the ANPR is the coverage of nuisance particulates. Under the HCS, all chemicals for which OSHA has a standard, or which are listed in the latest edition of the American Conference on Governmental Industrial Hygienists' (ACGIH) *Threshold Limit Values and Biological Exposure Indices* annual publication, are to be considered hazardous in all situations (paragraph (d)(3) (i) and (ii)).

OSHA has a generic permissible exposure limit for all nuisance dust. There are also a number of substances listed in the threshold limit value (TLV) publication which are specifically identified as nuisance particulates. These substances are listed by name in the main table of the TLVs and in Appendix D, entitled "Some Nuisance Particulates." The HCS covers any chemicals listed in the TLV publication, so these nuisance particulates are in fact part of the "floor" of chemicals covered by the HCS.

However, since any dust or particulate can potentially be a "nuisance." OSHA decided as a matter of interpretation to limit coverage of this part of the rule to those nuisance particulates specifically listed in Appendix D of the TLV booklet. OSHA further determined that if a substance listed in Appendix D was found not to be included in an employer's hazard communication program, a *de minimis* citation would be issued as long as the substance did not pose a covered physicial or health hazard other than its nuisance characteristics. A *de minimis* citation has no penalties associated with it, and the employer has no duty to abate the condition.

The majority of those commenting in response to the 1985 ANPR stated that nuisance dust should not be covered (*see, e.g.*, Exs. 2–12, 2–23, 2–64, 2–77, 2–90, 2–107, 2–128, 2–144, 2–167, 2–193, 2–211). Additional comments recommending exclusion of nuisance dusts were received after the final rule as well (Exs. 5–84, 5–86, and 5–93). Edison Electric Institute's argument is an example of the comments received (Ex. 2–107):

> The purposes of the standard can be well-served even with the omission of nuisance dusts. Any solid (powder, flake, granules) can produce nuisance dusts. Requiring MSDSs on nuisance dusts would be impractical in some cases (*e.g.*, floor sweeping dusts), and of little use in others because those do not present a significant health hazard.

OSHA proposes in this document to exempt nuisance particulates from coverage of the rule if, when evaluated in accordance with the hazard determination provisions in paragraph (d), no evidence is found to indicate that the particulate presents any physical or health hazards other than possibly being a nuisance in the workplace. Comment is invited on this modification.

There were a few comments which supported continued coverage of nuisance dust (Exs. 2–30, 2–59, 2–88, and 2–105), and others which addressed specific dusts such as flour (particularly with regard to baker's asthma) (Exs. 2–88, 2–153, and 2–166), and grain (Exs. 2–97, 2–125, and 2–160). With regard to the coverage of flour dust, information concerning the health or physical hazards of flour dust would have to be evaluated in accordance with the requirements of the rule to determine if the scientific literature indicates flour dust presents a health or physical hazard. Elimination of the coverage of nusiance particulates *per se* does not negate the requirement for performing a hazard evaluation, nor does it automatically delete such substances as flour as a result of deleting the specific coverage of nuisance dusts.

Grain dust. As mentioned above, a few comments were received in response to the ANPR which addressed the coverage of grain dust (Exs. 2–97, 2–125, and 2–160). Industry representatives contended that grain dust is a nuisance particulate and should not be covered by the HCS. There were many more comments submitted following promulgation of the revised final rule (*see, e.g.*, Exs. 5–2, 5–16, 5–21, 5–32, 5–43, 5–57, 5–104, and 5–124). The vast majority of these comments simply objected to grain dust being considered a hazardous chemical under the rule, and to OSHA "adopting" the ACGIH TLV for grain dust.

Under the provisions of the original final rule, as well as the revised final, OSHA established a "floor" of chemicals which are always considered to be hazardous under the rule. These include chemicals which OSHA regulates, and chemicals which appear in the latest edition of *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, an annual publication of the American Conference of Governmental Industrial Hygienists (ACGIH) (now entitled *Threshold Limit Values and Biological Exposure Indices*) (paragraph (d)(3)). ACGIH is a professional society which is widely recognized as an authority in evaluation of the hazards of materials in the workplace, and establishment of recommended permissible exposure levels for those materials. During the rulemaking on the original rule, participants confirmed that if ACGIH finds a material to be hazardous, and thus establishes a permissible level for it, this is important information to be considered in the hazard determination process. (*See, e.g.*, 48 FR 53298–99.) Therefore, OSHA included this conclusion in the hazard determination process by stating that if the material appears on the ACGIH list, it is, by definition under the rule, a hazardous chemical. Chemicals listed by ACGIH (or regulated by OSHA), however, are not the only substances covered under the scope of the rule. If there is evidence to indicate a material presents a physical hazard in the workplace (*e.g.*, flammability or combustibility) or if there is one statistically significant study that indicates a potential adverse health effect may occur upon exposure, the chemical is covered by the rule (paragraph (d)(2)).

OSHA has not "adopted" the threshold limit value (TLV) for any of the substances on the TLV list. It has simply stated that the fact that this recognized authority has found a substance to be hazardous is important information for exposed employees and users of a product to be aware of, as well as being aware of the level of exposure that authority has recommended. Where OSHA has specific exposure levels, this information must also be indicated on a MSDS, and if the producer has a recommended level—as many larger manufacturers do—this information must also appear. Thus the downstream employers will have the benefit of knowing that such recommendations and requirements exist, and this will help them design appropriate protective measures for their employees.

Whether these materials appeared on the TLV list or not is somewhat immaterial in terms of whether they are covered by the rule since, if they are not listed, an evaluation still has to be made of the available hazard data to determine if they meet the definition of "hazardous chemical" under the standard. For grain dust, there is evidence that it presents both a physical hazard (potential for explosion) and a health hazard (there is evidence that respiratory effects result from exposure). (*See, e.g.*, OSHA Final Rule for Grain Handling Facilities, 52 FR 49542; Ex. 4–29 (MSDS for grain); Ex. 4–30 (ACGIH documentation for the TLV for grain dust); Ex. 4–43 (OSHA Grain Elevator Industry Hazard Alert, 1/5/78); and Ex. 4–49 (U.S. General Accounting Office report on grain fumigation, 1981). Thus grain dust would be covered by the rule regardless of whether the TLV list is referenced or not. The additional TLV reference merely ensures that the downstream employers are provided the necessary information about available recommendations for control of the exposures to the material.

OSHA does not agree that it has "delegated" its authority to ACGIH under the rule, and the Agency certainly has not "adopted" the TLV under this rulemaking process. The HCS requires employers to disclose complete and current information on hazardous materials employees are potentially

exposed to, and employees are entitled to receive available information on grain dust. It is not necessary for the Agency to make individual judgments about the hazards of each chemical under the HCS to determine if it is covered—the HCS is a generic rule which establishes criteria by which these judgments can be made by producers of substances, subject to review by OSHA through its enforcement procedures.

OSHA is aware that information such as material safety data sheets on grain dust, compliance manuals, and training aids have been developed and are currently available in the grain industry (*see, e.g.*, Exs. 4–29, 4–30, 4–43, 4–47, and 4–52).

Radiation and biological hazards. Although OSHA has never considered either radioactivity or biological hazards to be covered by the HCS, we do periodically receive inquiries regarding such coverage. Therefore, we are taking this opportunity to specifically indicate that these types of hazards are not covered by the rule. If a radioactive chemical presents other types of chemical hazards that are not the result of the radioactivity of the chemical, it will be covered for those hazards. Otherwise, the hazard of radioactivity itself is covered under the rules of other Federal agencies or under OSHA's radiation rules.

Definitions

Article. The issues involving the article definition and exemption have already been described in detail in the preceding section. The modified definition for "article" being proposed is "a manufactured item, other than a fluid or particle: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities (*e.g.*, minute or trace amounts) of a hazardous chemical (as determined under paragraph (d) of this section) and does not pose a physical hazard or a health risk to employees."

Commercial account. As discussed in the preceding discussion on consumer products, OSHA is proposing a definition for "commercial account" to help clarify which retail distributors need to maintain MSDSs for their customers. The definition proposed is "commercial account" means "an arrangement whereby a retail distributor sells hazardous chemicals to an employer, generally in large quantities over time and at costs that are below the regular retail price."

Hazard warning. Both the original and revised final rules include a definition for "hazard warning" which states that it means "any words, pictures, symbols, or combination thereof which convey the hazard(s) of the chemical(s) in the container(s)." "Appropriate hazard warnings" are to be put on container labels. Since the rule covers "physical" and "health" *hazards*, specific information regarding these would be required on a label to comply. OSHA provided clarification regarding the Agency's interpretations of these requirements in the preamble to the revised final rule (*see*, 52 FR 31864). However, since the issue was not related to the expansion of the scope, no modifications for purposes of clarification were proposed at that time. The Agency is taking this opportunity to repeat the discussion and to propose changes consistent with these interpretations to clarify the language in the rule itself.

Many labels at the time the HCS was promulgated included only precautionary statements, rather than providing necessary information about the specific hazards of the chemicals. Thus employees encountered statements such as "avoid inhalation" on virtually every chemical container, but were not provided with statements regarding what type or severity of effect inhalation could be expected to produce.

OSHA's intent in devising the labeling requirements for the rule was to keep the required information to a minimum. Although employers could choose to provide additional statements, OSHA's requirements were to be limited to the minimal amount necessary to convey the hazards to the workers. Under the OSHA scheme, other data regarding protective measures, first aid, etc., are to be included on the material safety data sheet or in training, rather than appearing on the label itself. This approach is in keeping with the Agency's evaluation of available data on effectiveness of labels which indicates that the more detail there is on a label, the less likely it is that employees will read and act on the information. The purpose of the label is to serve as an immediate visual warning of the chemical hazards in the workplace. (*See generally*, 48 FR 53300–03).

There have been misinterpretations of the requirements made based on statements in the preamble to the rule concerning various labeling systems (*see* 48 FR 53301). This preamble discussion involves format of labels, and is not an unqualified endorsement of any particular labeling system. It simply states that any format may be used, as long as the label includes the minimal information required by the standard. It should be noted that it can be expected that some labels prepared in accordance with any of the available labeling systems might be found to be deficient. Again, the preamble discussion cited merely reemphasized that employers are not constrained to use any particular format or wording, but are constrained by the necessity to comply with the requirements of the rule concerning the information to be provided—the identity, the hazards, and for containers leaving the workplace, the name and address of the responsible party.

To address questions raised regarding the definition, OSHA has added "physical and health" to modify the term "hazards" in the definition. The terms "physical" and "health" hazards are already defined in the rule, and these are the specific hazards that are to be "conveyed" in an "appropriate" hazard warning. In addition, the phrase "including target organ effects" is being added to clarify what OSHA considers to be "health hazards."

It will not necessarily be "appropriate" to warn on the label about every hazard listed in the MSDS. The data sheet is to address essentially everything that is known about the chemical. The selection of hazards to be highlighted on the label will involve some assessment of the weight of the evidence regarding each hazard reported on the data sheet. This does not mean, however, that only acute hazards are to be covered on the label, or that well-substantiated hazards can be omitted from the label because they appear on the data sheet. It also does not mean that employers preparing labels can eliminate hazards from the labels based on their assessment of the potential risks associated with exposure (and, implicitly, their estimates of the exposure levels in downstream workplaces). A "hazard" is an intrinsic property of a chemical, and where there is potential for exposure to that chemical, there is always a potential risk of experiencing adverse health effects. The purpose of the HCS is to provide early warning of such effects, thus resulting in avoidance of exposure and subsequently a reduction in risk. The only time a well-substantiated hazard can be omitted from a label is if the chemical is in a physical state that does not allow exposure to occur (*e.g.*, physically bound).

It may be "appropriate" to provide less detailed information on the chemical hazards in an in-plant labeling system, where MSDSs and training are readily available, than on a label placed

on a container leaving the workplace, where it may provide the only hazard information in certain situations and where there is no guarantee that the downstream employers handling or using the chemical will fully understand the less detailed label. This difference in appropriateness allows employers to establish standardized in-plant labeling systems, as long as training regarding the use of these systems is conducted, and MSDSs provide the required, detailed information. OSHA is proposing to modify the labeling provisions in paragraph (f) to clarify the differences in what is required for labels on shipped containers versus what is permitted for labels on in-plant containers. These modifications are discussed in the section on labels which follows.

ANSI Standard for Precautionary Labeling. OSHA is aware that the American National Standards Institute (ANSI) is in the process of revising its standard for precautionary labeling (Z129.1–1982) to include, among other things, guidance for target organ effect labeling. A copy of the latest version of this document is available in the record (Ex. 4–69). OSHA is inviting comment on whether the Agency should consider stating specifically (either in the final rule or in a compliance directive) that the draft ANSI standard, when finalized, and if acceptable to OSHA, provides employers with sufficient guidance to produce an acceptable label for compliance with the HCS. In other words, if the employer follows the guidance provided by ANSI, that would be one way to comply with the requirements of the HCS. Employers would still be free to use other labeling systems or approaches to labeling, where appropriate, as long as they meet the requirements of the HCS. But those employers who wish to have more specific guidance to follow would be able to use the ANSI standard to assist them in complying. OSHA is particularly interested in comments about the extent of target organ information that would be on a label under the ANSI scheme, and whether this would provide enough information to comply with the HCS.

Material safety data sheet. As described in the earlier discussion on coverage of drugs, OSHA is proposing to modify the definition of "material safety data sheet" to mean "written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section. For hazardous chemicals which are drugs regulated by the Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), an approved package insert or drug information in the *Physicians' Desk Reference* will be considered a material safety data sheet for purposes of compliance with this rule in the nonmanufacturing sector."

Hazard Determination

Mixtures. OSHA is making one minor correction to the mixture provisions. In paragraph (d)(5)(iv), OSHA requires that hazardous chemical components of a mixture in concentrations less than one percent (or in the case of carcinogens, less than 0.1 pecent) are covered by the HCS if they can be released in concentrations which may exceed an OSHA exposure limit or ACGIH Threshold Limit Value, or could present a health "hazard" to employees in the concentrations released. OSHA incorrectly used the term "hazard" in this provision. A hazard is an inherent property of the chemical, and would exist no matter what quantity was present. OSHA intended to refer to the presence of a health risk to employees exposed to the chemical. The risk is a function of the inherent hazard and the amount of exposure. Therefore, in accordance with these scientific principles, OSHA is correcting paragraph (d)(5)(iv) to state that such quantities of hazardous chemicals are always covered by the HCS when they present a health risk to employees in concentrations below the cut-offs.

Written Hazard Communication Program

Mobile worksites. Under the revised final rule, OSHA included what is termed a mobile worksite provision which permitted employers of employees who travel between workplaces during a work shift to maintain MSDSs at the central workplace as long as the information is available to employees immediately in the event of an emergency (paragraph (g)(9)). Such employees would also have access at the central location prior to departing for the other sites, and when they return to the central location. This appeared to OSHA to be a reasonable accommodation for such a work operation, that still provides employees with immediate access to necessary information in an emegency and daily access to all information as a reference source.

Several commenters requested that OSHA clarify that in this situation the written hazard communication programs may also be maintained at the central workplace (Exs. 5–46, 5–67, 5–79, and 5–110). (*See also*, Ex. L–5–100 which suggests that the mobile worksite provision should apply when workers are at a remote site for several days.) Therefore OSHA is proposing to add the following paragraph to the written hazard communication program requirements (paragraph (e)(5)):

> Where employees must travel between workplaces during a workshift, *i.e.*, their work is carried out at more than one geographical location, the written hazard communication program may be kept at a central location at the primary workplace facility.

It should be noted that as in the situation with MSDSs, this exception is limited to work operations where employees travel during each day, thus making it somewhat impractical to either carry a written program with them, or to have a duplicate copy at each site serviced (such as oil wells). Comment is invited on this exception and its application.

Multi-employer worksite provision. When OSHA promulgated the original final HCS, there was a requirement in the written hazard communication program that employers include in the plan and implement "the methods the employer will use to inform any contractor employers with employees working in the employer's workplace of the hazardous chemicals their employees may be exposed to while performing their work, and any suggestions for appropriate protective measures." 48 FR 53343, paragraph (e)(1)(iii).

This provision was included in the rule to ensure that contractor employers had enough information to protect their employees when performing work on manufacturing sites. Contractors are often used in this context to perform such tasks as servicing and cleaning out reactor vessels, and their employees may be exposed to significant quantities of hazardous chemicals under those circumstances.

The rule did not address the opposite situation, *i.e.*, where a contractor brings a hazardous chemical to the manufacturing facility and exposes the manufacturing employer's employees. OSHA received many inquiries from manufacturers concerning this issue. It is apparently a pervasive problem, and these manufacturers wanted to be able to use some provision in the rule to compel contractors to provide such information. After a number of informal discussions with interested parties concerning how manufacturers might resolve this problem, OSHA included a recommendation in its compliance directive (Ex. 4–24) that employers consider including arrangements for an exchange of hazard information in their contracts. We had been told that this

practice was being used successfully by a number of manufacturers.

OSHA believes that this problem of multiple employers using hazardous chemicals on the same site becomes even more pressing when the standard covers the non-manufacturing sector, particularly in the construction industry. In fact, representatives of the construction industry have long supported requirements to ensure information is available to them on such sites. As noted in the preamble to the expanded rule (*see* 52 FR 31858–59), the Advisory Committee on Construction Safety and Health (ACCSH) made recommendations for signs, labels, MSDSs, and training on construction sites as early as 1980 (Ex. 4–4, *Report on Occupational Health Standards for the Construction Industry* (5/16/80)). At that time the Committee felt "that the construction employer was not in a position to easily acquire information on the hazards associated with the many products and materials used in the industry, but that such information was fundamental to the preparation of warning signs, labels, training programs, and other important job safety and health activities." 52 FR 31859. The HCS did not exist at the time of the report, and the Committee thus recommended that a solution to the problem of lack of information would be to modify and extend the existing OSHA standard for material safety data sheets which at the time applied only to ship repairing, shipbuilding, and ship breaking (29 CFR 1915, 1917, and 1918):

> The modified standard would require manufacturers or formulators of harmful materials or agents to supply material safety data sheets along with their products in such a fashion that they reach construction employers * * * Under the standard, these data sheets would then be available at the construction worksite for use by employers and employees.

Furthermore, ACCSH indicated in the same report that worker training should include the "exact identification of the material or process that is hazardous," "health effects of the material," and "location and availability of chemical identification lists and substance data sheets." ACCSH clearly believed that substance-specific information is necessary and appropriate on construction sites.

This issue was also addressed in a number of comments submitted in response to the ANPR. For example, the National Association of Home Builders (NAHB) (Ex. 2–223) addressed the issue of multiple subcontractors:

> It is crucial that OSHA recognize that any of these subcontractors may bring "hazardous" materials onto the jobsite, but exposure to these materials will not necessarily be limited to employees of that subcontractor. Thus, an electrician may be exposed to paint fumes, and a plumber may be exposed to muriatic acid. Obviously, some system of conveying information to workers must be developed which accounts for this diverse workforce on the site.

Similarly, the National Erectors Association (Ex. 2–226) suggested:

> The customer and the general or prime contractor(s) should jointly develop and agree on a hazard communication program for that site. The general or prime contractor should in turn discuss and develop an appropriate hazard communication program with each of the subcontractors which he has control over. MSDS information should be discussed and updated at the weekly tool box safety meetings and the contractor progress meetings.

The National Constructors Association (NCA) (Ex. 2–108) also indicated that:

> Another major problem exists in that owner/clients do not automatically furnish their MSDS's to contractors working on the owner/client property, that are or could be, exposed to owner/client controlled hazardous substances.

In a later comment, NCA recommended that language be included in the expanded scope rule as follows (Ex. 2–225):

> Contractor employers using hazardous chemicals which may create a hazard to employees of other employers at a multi-employer workplace during normal conditions of use, or during a foreseeable emergency shall:
>
> * * * Inform the other employers of the storage and work locations of the hazardous chemicals;
>
> * * * Supply a copy of the material safety data sheet to each employer who requests a copy;
>
> * * * Review the material safety data sheet with other employers whose work will be directly affected by the use of the hazardous chemicals.

In addition, NCA included a provision in their recommended standard that addressed employee access to MSDSs at the worksite: "The contractor employer shall maintain copies of the material safety data sheets for each hazardous chemical used by the contractor employer, or furnished by another employer in the workplace, and shall make them readily accessible during each work shift to employees when they are in their work area(s)."

The American Road & Transportation Builders Association (Ex. 2–81) also addressed the issue: "Coordination of responsibility for MSDS access, labeling, and training, again, is necessary * * *. A possible compromise would be to make the information available where notices are generally posted, at a central location, where workers often report for work."

The United Brotherhood of Carpenters and Joiners of America (Ex. 2–105) reported that contractors are already making MSDSs available on construction sites:

> Many contractors now keep a loose-leaf book of MSDSs in their trailer on site for each access. Some contractor associations have produced loose-leaf binders that review the chemicals commonly used at worksites, their hazards, and the HCS requirements. There are also numerous private services available to provide data sheets on microfiche and on-line by computers * * *. Microfiche takes up little space (one loose-leaf binder) * * *. Any contractor with a personal computer could tie into an MSDS data base by purchasing a modem.

The International Brotherhood of Painters and Allied Trades (IBPAT) indicated that, as a general rule, MSDSs have not been provided automatically to contractors. However, paint manufacturers have usually provided them when requested. Given the short duration of some construction jobs, however, receipt upon request from the manufacturer is too late—the job is completed. "Failure to have the MSDS available ahead of time does not allow a contractor ample opportunity to take into consideration the kind of equipment that may be necessary to do a job safely * * *." (Ex. 2–199). The IBPAT confirms that MSDSs are necessary to properly protect painters, regardless of whether the paints are industrial coatings or consumer products: "If the paint manufacturer has any reason to believe that a product sold will be used by a professional, then the product should be provided with ways sufficient for the employer and the user to assure that the employer will receive the proper MSDS for the product * * *. In general, products purchased by professional paint or allied product applicators are used at quicker rates for longer periods of time thus the same product will often pose greater risk to professionals than consumers. The types of products so purchased are also extremely varied, ranging from rather benign to extremely hazardous * * *".

In preparing the revised final rule, OSHA took these comments into consideration and included a multi-employer worksite provision in the written hazard communication program requirements (52 FR 31880; paragraph (e)(2), as summarized below):

> Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor

working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:

* * * The methods the employer will use to provide the other employer(s) with a copy of the material safety data sheet, or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s)' employees may be exposed to while working;

* * * The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,

* * * The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

As described in the preamble to the final rule (52 FR 31865), this type of provision is necessary to ensure that all employees have sufficient information to protect themselves in the workplace, regardless of which employer uses the hazardous chemical. It also ensures that employers have the necessary information to adequately conduct training, and to select appropriate protective measures for the work operation. Several OSHA-approved State Plan States have incorporated similar provisions in their expanded scope rules, and have successfully implemented them.

ACCSH reviewed the multi-employer worksite provision at its meeting on June 23, 1987, and did not raise objections to the items addressed, including the provision for MSDSs to be made available on multi-employer worksites (Ex. 4–6). ACCSH recommended that provisions regarding material safety data sheets be amended to preclude use of a chemical on-site prior to receipt of an MSDS (Ex. 4–6, Tr. 218, 222), and that employees who travel between workplaces must have a copy of an MSDS in their vehicles for each chemical they will be using (Tr. 243).

One member cited an incident which occurred on a construction site involving a potentially carcinogenic material. The label indicated the potential carcinogenic effects, but did not provide suggested protective measures. This is consistent with the HCS since protective measures are only required to be included on the MSDS. The job was stopped for three days until the company could obtain the MSDS and ascertain from it the protective measures they needed to implement to protect the workers. "This unfortunately is what is happening with a lot of labels that are being used today. The labels are not specific enough, and as a result, the control measures that are necessary to use that material are not readily available until they get a material safety data sheet and read the details on it." Tr. 188.

Another member suggested that obtaining and maintaining MSDS information on a worksite is analogous to obtaining and maintaining instructions for assembling or installing equipment and similar tasks that are commonly performed in construction. The paperwork necessary to provide instructions is routinely provided prior to use as the job would have to be stopped if it was not received from suppliers at that time. "If the same urgency was placed on the MSDS in getting it to the job as it was [on] getting instructions on how to put * * * together a piece of equipment on the job, it would arrive there." Tr. 190.

OSHA decided that the provisions as written adequately addressed the problems raised, *i.e.*, the standard already requires suppliers to provide the MSDSs, and employers to have MSDSs for each hazardous chemical in the workplace. However, OSHA believes that the ACCSH's discussion of the issues and the recommendations made regarding MSDSs clearly indicate that the Committee did not envision hazard communication requirements for construction that do not include on-site availability of MSDSs.

The Committee also suggested that OSHA clarify the language of the rule to ensure that the written programs are maintained at each worksite, and OSHA adopted that recommendation in the revised final rule. Furthermore, on November 3, 1987, after reviewing the OMB letter regarding the information collection requirements of the rule, ACCSH unanimously reaffirmed its position that while a separate standard would be preferred for the construction industry, "the Committee does not feel it would be appropriate to exempt or remove protections existing now" under the HCS, and that the rule continue to apply in construction (Ex. 4–74).

As discussed above regarding consumer products, without MSDSs the hazard communication program will not be effective. The consensus of the participants in the rulemaking on the original final rule was that labels can only provide limited information—the detailed source of information must be the MSDS. Furthermore, adequate training cannot be conducted if the information is not available on the substances involved. As the National Paint and Coatings Association (H–022 Ex. 19–62) stated:

> NPCA concurs with the Agency's assessment of the function and utility of the MSDS as the primary component of a Hazard Communications Program * * *. The label is limited in the amount and detail of hazard information which it can contain and still effectively communicate. The MSDS serves as the source document and amplification of the information presented on the label * * * NPCA has had a long-standing policy of recommending that MSDS's be provided to customer/employers even though not as yet required by law

OSHA agrees with NPCA's assessment of the importance of MSDSs, although their more recent comments do not appear to be consistent with this approach since they have suggested that MSDSs are not necessary for paint contractors (Ex. 5–75). OSHA believes the need for such information is just as critical in the non-manufacturing sector where employees are exposed to the same hazardous chemicals as in the manufacturing sector. Many other manufacturers and their representatives concurred with OSHA's conclusion that a program cannot be effective without all of the major components included in the OSHA rule—including MSDSs being available to employees and employers at the job site (*see, e.g.*, H–022 Exs. 19–62, 19–91, 19–124, 19–156, 19–185, and 19–199.)

The comments received following publication of the final rule are mixed on this issue. One commenter (Ex. 5–108) posed a question that we believed was answered by the multi-employer worksite provision: "Although the law for training and maintaining MSDS will put the responsibility for their employees on the subcontractor, how about the exposure of two or more subcontractors' employees to each other, our exposure to products subcontractors' employees are using and their employees' exposure to products we are using? These are not everyday problems in manufacturing, therefore, here is another complex area that should be considered if the standard is to be expanded." We agree, and hence addressed it in the written program requirements.

Several commenters believed that the provisions would not work because of the number of contractors on the site and the potential number of chemicals (Exs. 5–83, 5–84, and 5–89). One suggested alternative, however, was to allow contractors to deposit copies of their MSDSs in a central location on-site or make them available on some reasonable basis such as in their truck. This is already explicitly permitted under the rule. Similarly, the National Association of Home Builders (NAHB) testified during the OMB paperwork meeting (Ex. 5–76, Tr. 53) on the issue of keeping MSDSs on a multi-employer worksite. When questioned as to the

feasibility of keeping them at a central location on the site, NAHB indicated that the preamble to the revised final rule appeared to allow such an option, but the standard did not. "Now if OSHA's honest opinion is that a central MSD depository on the site will take care of multi-employer worksites, let's see it in the rule * * *." *See* paragraph (e)(2)(i) stating that the written program shall include methods the employer will use to either "provide the other employer(s) with a copy of the material safety data sheet or make it available at a central location in the workplace." 52 FR 31880. This is in the rule itself, and appears, therefore, to address NAHB's statement.

Some commenters have clearly misinterpreted the requirements of the rule for multi-employer worksites. For example, the Alliance of the Textile Care Associations (ACTA) (Ex. 6, Tr. 190–198) argued that they would have to maintain in their facilities MSDSs for all chemicals at their customers' sites. "An industrial laundry would be required to maintain material safety data sheets and other information from between 1,000 and 5,000 businesses. If one assumes only very conservatively 10 material safety data sheets per account, this would mean that an industrial launderer would be confronted with between 10,000 and 50,000 material safety data sheets organized by service route * * *." The HCS does not require any such collection.

First of all, there is no requirement to maintain MSDSs for products at other sites so the launderer would not be required to maintain in its facilities any MSDSs from the facilities on its routes. MSDSs are only required for the chemicals used at the facility of concern. Secondly, service employees who are simply picking up and dropping off materials such as described in this testimony (10 minutes in the facility) are not generally "working" on that site in the sense of the multi-employer worksite provision, and are probably not "exposed" to the chemicals in the facility. The ACTA indicates that the HCS requires training on each and every chemical—this is not true. The HCS requires training on hazards, and this can be presented either by chemical or by categories of hazard (*e.g.*, flammability). In most situations, it is more practical and effective to train by hazard categories. Furthermore, the training teaches employees to use substance-specific information available to them on labels and material safety data sheets. The delivery people should receive such training, be advised to read lables, and trained to request material safety data sheets if they are "exposed" in the conduct of their duties at the customer's site and need more information. Availability of the MSDSs at the customer's site satisfies the requirements of the rule.

Although some of these commenters mentioned the large number of chemicals on-site as being a potential problem, others argued that construction sites have few hazardous chemicals, and therefore do not need right-to-know programs (*see, e.g.*, 5–17, 5–58, 5–81, 5–86, 5–108, and 5–117.) However, it was interesting to OSHA to note that the alternative recommended by these commenters to the rule as written was to require the following (Exs. 5–10, 5–65, and 5–117):

> Post a list of hazardous chemicals at the job site with a copy of the MSDS.
>
> Each contractor is responsible for posting only MSDS for substances they are using.
>
> Make available to all employees a list of hazardous substances being used at site.
>
> Require proper labeling for all hazardous substances prior to purchase.
>
> Require contractors to provide personal protective equipment for their employees.

It appears that if these construction employers are recommending that MSDSs be maintained at the worksite, they must consider it to be feasible and appropriate. This worksite accessibility appears to be feasible at even the smallest sites (IBPAT, Ex. 2–199):

> The painting contractor usually has an office, a trailer, a hotel room, a car, a shoe box—somewhere—from which business is conducted and where are found documents pertaining to the job, such as bid specs, purchase orders, employment rosters, coating technical data sheets and so on. All of these are materials which from time to time during the course of a job the employer will be required to make available or use at the job site. MSDS's would be treated similarly.

OSHA still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees. We are inviting further comment on this provision.

OMB Determination. OMB has stated that the "practical utility for the requirement to bring MSDSs on-site at multi-employer workplaces" has not been demonstrated. According to OMB, an acceptable option would be to "require employers at multi-employer worksites to keep labels intact on any containers they bring onto the worksite; to train their employees in the hazards with which they work directly, in recognition of and response to the general hazards that are likely to be introduced by other employers, and in the need to observe hazard labels on the worksite and request MSDSs when further information is needed; and to provide MSDSs to other employers upon request." OMB has disapproved the "requirement to bring MSDSs onto multi-employer worksites." OMB's suggested approach "relies on labels and general hazard training to protect workers from substances brought onsite by other employers." OSHA invites comment on this approach as well.

Labels and Other Forms of Warning

As mentioned previously, OSHA proposes to modify the language in paragraph (f)(5) to clarify what types of hazard warnings are permitted on labels of in-house chemical containers. OSHA is modifying the rule (paragraph (f)(5)(ii), to clarify that employers may, as an alternative to specific hazard warnings, provide more general hazard information on the labels as long as the specific physical and health hazards of the chemicals are conveyed through implementation of the other aspects of the hazard communication program (*i.e.*, provision of data sheets and training). For example, some labeling systems indicate the presence of a "health" hazard and rate the severity of that hazard using a number system. The specific health hazard is not on the label under this system, but is available on the MSDS. Employers using this type of hazard rating system must ensure that the worker has the required ready access to the data sheet, and understands the labeling system used and how to obtain and use the information provided. The training program must address these aspects of the employer's hazard communication program. Precautionary statements alone are not considered to be general hazard information under this provision.

In the revised final rule, OSHA made a change to the labeling requirements for shipments of solid metal. Solid metal is often considered to be an "article" under the rule, and thus exempt. Where the metal is not an "article" since its downstream use results in hazardous chemical exposure to employees working with it, a provision was added which allows shippers of this type of material to send the label information once, similar to material safety data sheet transmittal, as long as the material is the same and it is being shipped to the same customer. In these situations, there should be no hazard to anyone handling the metal from the time it is produced in solid form, until the time someone works on it in a way that releases a chemical hazard. Since the label information transmitted would only reflect the

chemical hazards released when it is later worked on, the label would not provide any hazard information that is needed by those handling the material in transit. The label information does serve a different purpose than the MSDS as the label is an immediate visual warning, a "snapshot picture" of the hazards, whereas the MSDS provides detailed hazard information. It was emphasized that this exception is only for the solid metal itself—any hazardous chemicals present in conjunction with the metal in such a form that employees may be exposed when handling the material (e.g., cutting fluids, lubricants, and greases), would require labels with each shipment.

OSHA is proposing to further modify this exception to include wood, plastic, and whole grain. We believe the situation involving wood and plastic is analogous to solid metal in that the hazard potential is in the downstream use and does not involve employees involved in transit. For whole grain, we recognize that some dust may be generated during the transportation process, but believe that the repetitive nature of the shipments and the relatively small amount of dust generated due to the handling at this stage makes such an exemption appropriate. (*See, e.g.*, Ex. 5–13, 5–15, 5–21, 5–52, and 5–92.) The Agency invites comment on this extended exception.

Material Safety Data Sheets

As described in more detail above, OSHA is proposing to modify paragraph (g)(7) dealing with the distribution of hazardous chemicals to clarify the duties of the retail distributor in particular, but also distributors in general. First of all, the language regarding the general duty for distributors to provide MSDSs has been modified to track the language in paragraph (g)(6) immediately preceding it regarding the duty of chemical manufacturers and importers to transmit such information with their initial shipment and with the first shipment after a material safety data sheet is updated. Previously, the rule simply stated that "distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers." This slight modification clarifies that distributors are required to provide MSDSs in the same manner that chemical manufacturers and importers do.

The paragraph further indicates that retail distributors only need to provide MSDSs if they have commercial accounts for employers purchasing hazardous chemicals. If an employer incidentally purchases a hazardous chemical from them, and they are not required to have one available since they don't use the chemical or have commercial accounts, then the retail distributor's duty is limited to providing that employer with the name, address, and telephone number of the supplier from which the MSDS can be obtained.

Employee Information and Training

OSHA is not proposing to modify the training requirements. However, a number of comments were received regarding training in construction and the Agency would like to respond generally to some of the issues raised.

Several commenters noted that construction standards already require training, and clarification of the construction training standards is all that is necessary (Exs. 5–58, 5–86, and 5–108). OSHA agrees that the construction industry is unique among the non-manufacturing industries because there are long-standing requirements for regular training regarding hazardous chemicals (the following are summaries of the relevant subparagraphs of 29 CFR 1926.21):

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to this work environment to control or eliminate any hazards or other exposure to illness or injury.

(3) Employees required to handle or use poisons, caustics, and other harmful substances shall be instructed regarding the safe handling and use, and be made aware of the potential hazards, personal hygiene, and personal protective measures required * * *.

(5) Employees required to handle or use flammable liquids, gases, or toxic materials shall be instructed in the safe handling and use of these materials and made aware of the specific requirements contained in Subparts D, F, and other applicable subparts of this part.

Employers who are in compliance with these provisions as required will largely be in compliance with the HCS training provisions as well. The HCS will simply require that construction employers supplement these already established training programs with the additional information required by the HCS, such as the existence of the rule and the use and availability of labels and MSDSs.

Coverage of construction employers under the HCS will enable them to provide more effective training under the construction rules because the HCS will ensure they are provided with necessary substance-specific information upon which to base an appropriate training program. It will also enable them to select more appropriate protective measures for the hazardous chemicals on their sites. As has been previously cited, the Advisory Committee on Construction Safety and Health has long recognized the construction employers' decreased ability to properly transmit hazard information and design appropriate protective measures without the labels and MSDSs for the specific products (Ex. 4–4).

With regard to suggestions that more guidance be provided for training, OSHA promulgated voluntary training guidelines for employers in 1984. These have recently been reprinted along with all OSHA training requirements in "Training Requirements in OSHA Standards and Training Guidelines," OSHA 2254 (revised) (Ex. 4–58). Copies may be obtained from OSHA's publication office at (202) 523–9667.

Addition of Appendix E. OSHA has included a new nonmandatory appendix in this proposal to provide additional guidance to employers complying with the HCS. This appendix suggests the steps an employer should follow to achieve compliance, and provides some information regarding how OSHA will be enforcing the requirements of the HCS. This should assist employers in designing and implementing effective programs.

III. Analyses of Regulatory Impact, Regulatory Flexibility, and Environmental Impact

Executive Order 12291 (46 FR 13197, Feb. 19, 1981) requires that a regulatory analysis be conducted for any rule having major economic consequences on the national economy, individual industries, geographical regions, or levels of government. The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) similarly requires the Occupational Safety and Health Administration (OSHA) to consider the impact of a regulation on small entities.

Consistent with these requirements, the Office of Regulatory Analysis (ORA) prepared a preliminary Regulatory Impact and Regulatory Flexibility Analysis for the NPRM OSHA expected to publish to expand the Hazard Communication Standard (HCS) to the non-manufacturing sector. The preliminary analysis describes the industries affected by the standard, some of the potential benefits that will accrue to employees exposed to hazardous chemicals at their places of work, the costs of compliance with the standard, and the technological and economic feasibility of the provisions. It was completed July 1, 1987, and was submitted to the OSHA Docket (Ex. 4–1) on August 14, 1987. As has been

described more fully above, OSHA was ordered by the Third Circuit to expand the rule based on the record developed by the Agency at the time of the 1983 rule. The impact analyses prepared after that time period were summarized in the preamble to the final rule and made available in the docket because they provided supplemental evidence of the economic and technological feasibility of the expansion of the scope. The current NPRM is merely a revision of the already promulgated expansion of the scope, and any further analyses are related solely to that revision. The analyses performed prior to publication of the final rule are not being revised. However, OSHA is taking this opportunity to discuss some issues that have been raised related to those analyses. *See, e.g.*, U.S. Small Business Administration, Exs. 4–88 and 5–93.

To ensure that the Agency had all available information regarding the economic feasibility of extending the HCS to nonmanufacturing industries, OSHA invited the public to submit additional data and evidence pertaining to feasibility at the time of the publication of the final rule.

A number of comments were received. Many of these comments provided no specific data or evidence regarding either the costs or the analysis, but rather simply indicated that the costs would be larger than estimated. OSHA maintained that the economic methodology used in the analysis is appropriate, and the costs are based on reasonable assumptions.

In general, three specific criticisms were made regarding the approach to the analysis: (a) The data used by ORA from the National Institute for Occupational Safety and Health (NIOSH) National Occupational Hazard Survey (NOHS) and the National Occupational Exposure Survey (NOES) to estimate the number of Material Safety Data Sheets (MSDSs) which a given establishment would be required to maintain are inappropriate and have resulted in low cost estimates for maintaining MSDSs; (b) the estimate of two hours of professional time required for providing a written program is too low; and (c) the cost estimates related to the Superfund Amendment and Reauthorization Act (SARA), Title III, Sections 311 and 312, are too low.

The Office of Regulatory Analysis used the same approach to estimating costs associated with the Hazard Communication Standard for nonmanufacturing that it did for manufacturing. This methodology was successfully used to determine the potential costs of the Hazard Communication Standard for manufacturing, and use of the same approach ensured comparability of the analyses. In the 1983 analysis, OSHA relied on exposure data from the NIOSH National Occupational Hazard Survey conducted between 1972 and 1974 to estimate the extent of exposure to hazardous chemicals, and thus the numbers of MSDSs that would be required. Few comments were received on this approach, although some manufacturers argued that these data had been collected ten years prior to use in the OSHA analysis, and that the industries' characteristics had changed (Docket H–022, Exs. 19–44, 19–76, 19–91, 19–147). However, the NOHS was the only data source available to OSHA to obtain these types of estimates and it was used in the final impact analysis for the 1983 rule.

OSHA considered this concern in preparation of the analysis for the rule's expansion to the nonmanufacturing sector, and subsequently utilized unpublished data from the National Occupational Exposure Survey (NOES), conducted between 1981 and 1983, to estimate the average number of MSDSs that would have to be maintained by nonmanufacturing firms under the extended HCS.

The NOES and NOHS surveys were conducted by NIOSH to gather information concerning the number of physical, chemical, and biological hazards to which a worker is potentially exposed in the workplace. The NOHS survey was conducted from 1972–1974 and consisted of samples from 5,200 facilities in 67 Standard Metropolitan Statistical Areas and included establishments of all sizes in assorted industries. The NOES survey was conducted from 1981–1983 and consisted of samples from 4,490 establishments in 98 geographic areas and was also representative of facilities of all sizes in many industries.

In order to estimate the number of products for which a firm must maintain an MSDS, the NOES survey data was used wherever possible because it was more recent than the NOHS data and it collected information on trade name products. While the principal objective of the survey was to assess the number of chemical (as well as physical and biological) agents to which a worker is potentially exposed, when NOES surveyors observed products being used which were known only by trade name, they wrote down manufacturing information about the products and researched the chemical ingredients when the field work of the survey was complete. In this way NIOSH could eventually determine which chemical agents workers are exposed to while using a product.

OSHA requested the unpublished NOES data from NIOSH after the field work was completed, but before the trade name products were broken down into their constituent chemicals. Consequently, the NOES data used by ORA is a count of actual products containing hazardous chemicals to which a worker is potentially exposed and is therefore representative of the number of MSDSs an employer will be required to maintain under the Hazard Communication Standard. The product orientation of the 1982 NOES survey was consistent with OSHA's needs in assessing the MSDS requirements of HCS. The HCS requires a MSDS for a mixture or product, not for each chemical constituent of that mixture. Although some employers have chosen to maintain the MSDSs for each component when mixture-specific information does not exist—and OSHA permits that approach—it is not required and a product MSDS is always preferable. When NOES product data were unavailable, earlier NOHS chemical specific data were used after they were adjusted downward to make the numbers comparable to the newer, product-oriented NOES data. Some criticisms of the appropriateness of the NIOSH data evidently arose from the belief that OSHA should estimate the number of chemicals handled rather than the total number of products. This approach would not be consistent with the requirements of the rule.

It is also interesting to note that another concern expressed by the manufacturing industries about the NOHS data was that it overcounted the number of potential hazards. The Chemical Manufacturers Association (CMA) submitted material to the docket (H–022, Ex. 19–76) which discussed the NOHS data base. CMA's fear was that OSHA's reliance on the NOHS data may "overstate the existing hazards presented by chemicals in the workplace," and that the results of an exhaustive review of the NOHS report by the Franklin Research Center concluded that "occupational exposure to potential carcinogens has been greatly overestimated." However, NIOSH's testimony confirmed the validity of using the NOHS data for estimation of hazardous chemical exposures, and certainly the NOHS and NOES data are the best information available that is based upon a large sampling of industry types and sizes. (*See* 48 FR 53282).

The data used by ORA from the NOES are averages. OSHA expects that

some establishments in the nonmanufacturing industries will maintain more MSDSs than the average, just as some establishments will maintain fewer. Consequently, examples of firms with more than the average number of chemicals do not invalidate the survey (*see* 5–93). Furthermore, it should be noted that OSHA's estimates are for the number of hazardous chemical products at a facility or site, not for an inventory of all the chemicals a firm may have at multiple sites. The HCS also only requires that a firm maintain one MSDS for a particular chemical—where multiple suppliers are used, the chemical is only counted once.

Another issue raised in the record was the appropriateness of reducing the number of hours required for preparing a written program for non-manufacturing facilities from the estimate used in the analysis for the manufacturing sector (Ex. 5–93; Ex. 6). In considering a standard for nonmanufacturing, OSHA carefully considered the differences between manufacturing and nonmanufacturing, as well as its experience in implementing the rule in the manufacturing sector. There are generally fewer hazardous chemicals and chemical hazard exposures in nonmanufacturing industries (this was addressed by the Court, *see* 52 FR 31853), and OSHA took this into account in estimating the average of eight hours of professional time required annually to develop and administer a training program in nonmanufacturing (as opposed to the average 16 hours estimated for a typical firm in manufacturing). Also, the average of two hours allowed to develop a written plan was seen as reasonable for a typical firm in nonmanufacturing, as opposed to the average of eight hours estimated for a typical firm in manufacturing.

OSHA assumed that a substantial savings of compliance effort would result as trade associations, other organizations (such as professional societies), and private sector service providers offer pre-packaged outlines to non-manufacturers complying with the Hazard Communication Standard for a minimal fee. OSHA, Supporting Statement for Information Collection Requirements of the Hazard Communication Standard, at II–4 (September 1987). Public and private organizations had provided such guidance to manufacturers covered by the original HCS and to employers covered by state laws. *See, e.g.*, Exs. 4–24 (OSHA inspection procedures for the HCS, 29 CFR 1910.1200); 4–26 (U.S. Department of Agriculture, *Hazard Communication: A Program Guide for Federal Agencies* (August 1987)); 4–35 (Right to Know Compliance Kit from Academic Products) (available in bulk quantities for $12 per kit); 4–41 (sample written programs from the Refractories Institute and the State of Oregon); 4–65 (Association of Graphic Arts's written program) (free to members).

OMB, however, has determined under authority of the Paperwork Reduction Act that OSHA cannot take into account at this point the savings generated by compliance guides developed to date, or assumed to be developed in the near future, when calculating the information collection burdens of the rule. OMB believes that an additional administrative effort by OSHA, however, "could substantially reduce the start-up paperwork burden and costs of the HCS, particularly those of small businesses." OSHA is pursuing several methods of providing continued guidance to employers attempting to comply with the performance-oriented HCS, and notes that compliance aids have been produced by other public and private organizations as anticipated. *See, e.g.*, Exs. 4–47 (news clipping from Farm and Dairy, Salem, Ohio, noting Grain Elevator and Processing Society's development of HCS compliance materials); 4–83 (materials developed by the AFL–CIO regarding right-to-know); 4–90 (sample written program and guidelines for compliance published in the journal *Professional Safety*); 4–105 ("Countdown to Compliance") (pamphlet prepared by 28 construction trade associations); 4–112 (Maryland Occupational Safety and Health Division's model training program for construction); 4–113 (materials developed by the National Solid Waste Management Association); 4–114 (*PIA Hazard Communication Manual: A Suggested Model Program for Printing Plants*); and 4–115 (Food Marketing Institute's *Guidelines for Complying with OSHA's Hazard Communication Standard*).

The third concern expressed by industry was ORA's cost estimate of Title III of SARA, sections 311 and 312. Several comparisons have been made between OSHA's analysis and an alternative analysis prepared by EPA (*see* Exs. L–5–129 and 5–93). EPA used in its analysis several of the assumptions it made when estimating the costs of Title III to the manufacturing sector. Many of these assumptions are considered by OSHA to be inappropriate for firms in the nonmanufacturing sector. For example, EPA calculated that over five hours of technical time, over five hours of managerial time, and forty minutes of secretarial time would be needed to set up a filing and recordkeeping system for Tier I forms once they are filled out. ORA believes this estimate seriously overstates the time it will take a clerical employee to establish a filing and recordkeeping system for the typical nonmanufacturing firm. EPA based its estimate of the number of affected establishments for specific reporting thresholds on an average of manufacturing data from New Jersey and Michigan, and nonmanufacturing data from Michigan, and made no allowance for the fact that establishments in different SIC's and of different sizes will be affected differently by EPA's establishment of threshold reporting quantities (*i.e.*, the amount of a chemical that must be present to trigger the reporting requirements). In preparing its estimates ORA considered each type of industry, as categorized by the Standard Industrial Classification (SIC) codes, and the likelihood of chemicals being used in the quantities established by EPA for reporting, to assess how each industry would be affected for each different size of establishment. Clearly, industries such as banking or real estate are not represented by data based on a survey of manufacturing facilities. Thus OSHA believes its analysis is more appropriate than a straight percentage based on two unrepresentative data sources.

The documentation submitted to the OSHA docket after the current rule was published does not provide sufficient evidence for OSHA to conclude that the Hazard Communication Standard is infeasible in any industry. Although there are claims from the construction industry that costs are underestimated by OSHA and it is therefore infeasible for this industry to comply (*see e.g.*, Exs. 5–65, 5–83, and 5–86), many firms in the construction industry have been subject to state hazard communication laws for the last several years. The construction industry has also been subject for many years to the requirements of 29 CFR 1926.21, which establishes the obligation to train construction workers in the recognition and the safe handling of hazardous substances. In this regard the Hazard Communication Standard has added very few additional training responsibilities. OSHA's cost estimates focus only on new duties, not on the burdens of pre-existing standards.

If OSHA were to rely on some or all of the assertions in the record regarding estimates of the time involved in complying with the Standard, and estimates of the number of MSDSs which would be generated by the imposition of the Standard, the Standard

would still be feasible in every SIC. Consequently, OSHA finds that claims of infeasible costs are not substantiated by any analysis or evidence, and that nothing in the record supports a conclusion of infeasibility in any SIC.

As has already been detailed in this preamble, the NPRM is proposing some modifications to the provisions of the revised final rule and clarifying other provisions. OSHA expects that these limited modifications will not eliminate protections of the rule, but will make the standard more cost-effective. OSHA does not consider this NPRM to be either a major or significant rule. In addition, the changes are too subtle for the economic model to be able to reflect the decreases in the costs. However, it is expected that if the proposed changes are implemented the costs will be somewhat reduced.

Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Assistant Secretary certifies that the proposals contained in this document will not, if promulgated, have a significant economic impact on a substantial number of small entities. This NPRM proposes few substantive changes to the HCS promulgated on August 24, 1987. The limited substantive changes would not eliminate protections already provided by the rule, but would make the standard more cost-effective. As noted in the discussion above regarding the regulatory impact analysis, the proposed changes are too subtle to be quantified by the economic model used to calculate compliance costs of the HCS. It is expected, however, that if the proposed changes are implemented, the compliance costs would be somewhat reduced for small businesses.

A regulatory impact and regulatory flexibility analysis was prepared by OSHA for the August 1987 revised HCS (Ex. 4–1 ____. *See also* 52 FR 31867–76 (summary of analyses). OSHA analyzed the impact of expanding the coverage of the HCS from the manufacturing sector to all employers within OSHA's jurisdiction. Economic impacts were analyzed for each provision of the rule; for each of fifty business classifications as indicated by their two-digit Standard Industrial Classification Codes; and for four employment size classes (1–19; 20–99; 100–249; and greater than 250). The majority of non-manufacturers are small businesses with fewer than 20 employees, and the effects of the HCS on small businesses were analyzed. *Id.* at 31869, 75–76 (tables 9 and 10). It should be noted, however, that although a particular workplace may be considered a small business based upon the number of employees at that site, many of these businesses are actually part of large corporations with significant safety and health resources (*e.g.*, fast food franchises, retail store chains). OSHA's analyses indicated that the HCS's compliance costs would be a negligible percentage (less than one-half of one percent) of the typical small business' average annual revenue. *Id.* at 31869, 75 (table 9). In addition, no disproportionate impact was foreseen for small businesses when compared to large businesses. *Id.* at 31870, 75–76 (table 10).

OSHA believes that it has minimized the economic impact of the HCS on small entities in accordance with the Regulatory Flexibility Act, while accomplishing the objectives of the OSH Act. The HCS is a performance-oriented rule which benefits small employers by allowing them to choose compliance methods best suited for their individual workplaces. The HCS is also tailored for some work operations found in small businesses to ensure that the standard is practical and cost-effective in communicating hazards to workers. *See, e.g.*, 29 CFR 1910.1200(b)(3). (laboratories); (b)(4), (handling of sealed containers); (b)(5), (container labeling exemptions); (b)(6), (products totally exempted). *See also* 52 FR 31858. In addition, OSHA-developed compliance guidelines, such as proposed Appendix E, will directly benefit small businesses by clarifying and simplifying compliance efforts.

The U.S. Small Business Administration has submitted a number of comments concerning the impact of the standard on small businesses (*see, e.g.*, Exs. 4–88 and 5–93). These comments have been considered by OSHA, and those involving specific provisions have been addressed in the discussions of the issues raised in this proposed rule.

As noted in the August 24, 1987, **Federal Register** publication, OSHA's analysis (Ex. 4–1) is available for public inspection and copying in OSHA's Docket Office, Room N3670, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 523–7894. OSHA invites the public to comment on the effects the proposed changes to the HCS will have on small entities, and to suggest alternatives to the proposed changes which would minimize any significant economic impact on a substantial number of small entities while accomplishing the objectives of the HCS and the OSH Act.

Environmental Assessment—Finding of No Significant Impact

In accordance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality guidelines (40 CFR Part 1500), and the Department of Labor regulations (29 CFR Part 11), the Assistant Secretary for OSHA has determined that this proposed rule will not have a significant environmental impact. As concluded previously, the current standard will not significantly affect the quality of the human environment outside the workplace. 52 FR 31870; 48 FR 53333–34. Labeling of containers will not have a direct or significant impact on air or water quality, land or energy use, or solid waste disposal outside of the workplace. Similarly, the requirements for preparation of a written compliance plan, provision and maintenance of MSDSs, and provision of information and training should not have an adverse environmental impact. Accordingly, this document's proposed modifications to the HCS also will not have a significant impact on the environment outside the workplace.

IV. Clearance of Information Collection Requirements

The information collection requirements of the 1987 revised final standard were reviewed by the Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). OSHA subsequently published in the **Federal Register** the approval numbers for the rule (1218–0072), and OMB's letter regarding its disapproval of several items (December 4, 1987, 52 FR 46075; Ex. 4–67). As discussed above, OMB disapproved: (1) The requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product that falls within the "consumer products" exemption included in section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986; and (3) coverage of any drugs regulated by the Food and Drug Administration in the non-manufacturing sector. In addition, OMB determined that OSHA should reopen the rulemaking on the HCS to consider alternatives to the definition of "article" which was included in both the original and revised final rules. Lastly, OMB conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide

assistance to the regulated industries to alleviate the paperwork burdens and costs. On April 13, 1988, OMB extended until April 1991 the approval of all provisions except the three that were previously disapproved.

In accordance with the Paperwork Reduction Act and its implementing regulations issued by OMB (5 CFR Part 1320), OSHA certifies that it has submitted the information collection requirements contained in this proposed revision to its current standards to OMB for review under section 3504(h) of that Act. Comments on these information collection requirements may be submitted by interested parties to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Occupational Safety and Health Administration, 726 Jackson Place, NW., Washington, DC 20503. OSHA requests that copies of such comments also be submitted to the OSHA Docket Office as part of the record for this rulemaking.

V. Public Participation—Notice of Hearings

Comments

Interested persons are invited to submit written data, views, and arguments on all issues regarding this proposed standard. These comments must be received on or before October 7, 1988, and be submitted in quadruplicate to the Docket Officer, Docket No. H–022D, Occupational Safety and Health Administration, 200 Constitution Avenue NW., Room N3670, Washington, DC 20210. Written submissions must clearly identify the provisions of the standard which are addressed and the position taken with respect to each issue. The data, views, and arguments that are submitted will be available for public inspection and copying at the above address. All timely written submissions will be made a part of the record of the proceeding.

Oral Hearings

Under section 6(b)(3) of the Act, an opportunity to submit oral testimony concerning the issues raised by the proposed standard will be provided at an informal public hearing scheduled to begin at 9:30 a.m. at the following location on the indicated date: Washington, DC: November 15, 1988, The Auditorium, Frances Perkins Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice of Intention To Appear

All persons desiring to participate in the hearings must file a notice of intention to appear, in quadruplicate, received on or before October 7, 1988, addressed to Mr. Tom Hall, OSHA Division of Consumer Affairs, Docket No. H–022D, 200 Constitution Avenue, NW., Room N3637, Washington, DC 20210; telephone (202)523–8615.

Notices of intention to appear, which will be available for inspection and copying at the OSHA Docket Office (Room N3670 at the same address); telephone (202)523–7894; must contain the following information:

(1) The name, address, and telephone number of each person to appear;

(2) The capacity in which the person will appear;

(3) The approximate amount of time requested for the presentation;

(4) The specific issues that will be addressed;

(5) A detailed statement of the position that will be taken with respect to each issue addressed; and,

(6) Whether the party intends to submit documentary evidence, and if so, a brief summary of that evidence.

Filing of Testimony and Evidence Before Hearings

Any party requesting more than 10 minutes for a presentation at the hearing, or who will submit documentary evidence, must provide, in quadruplicate, the complete text of the testimony, including any documentary evidence to be presented at the hearing, to the OSHA Division of Consumer Affairs. This material must be received by October 24, 1988, and will be available for inspection and copying at the OSHA Docket Office. Each such submission will be reviewed in light of the amount of time requested in the notice of intention to appear. In those instances where the information contained in the submission does not justify the amount of time requested, a more appropriate amount of time will be allocated and the participant will be notified of that fact.

Any party who has not substantially complied with this requirement may be limited to a 10-minute presentation, and may be requested to return for questioning at a later time.

Conduct of Hearings

The hearings will commence at 9:30 a.m., according to the schedule specified above, with resolution of any procedural matters relating to the proceeding. The hearings will be conducted in accordance with 29 CFR Part 1911, and the prehearing guidelines which will be sent to all persons who file a notice of intention to appear. The hearings will be conducted as expeditiously as possible, consistent with the full development of the record and the rights of the parties.

The hearings will be presided over by an Administrative Law Judge who will have all the powers necessary or appropriate to conduct a full and fair informal hearing as provided in 29 CFR Part 1911 and the prehearing guidelines, including the powers:

1. To regulate the course of the proceedings;

2. To dispose of procedural requests, objections, and comparable matters;

3. To confine the presentation to the matters pertinent to the issues raised;

4. To limit the time for questioning;

5. To regulate the conduct of those present at the hearing by appropriate means; and,

6. To keep the record open for a reasonable stated time to receive additional written data, views and arguments from any person who has participated in the oral proceeding.

Following the close of the hearings or of any post-hearing comment period, the presiding Administrative Law Judge will certify the record to the Assistant Secretary of Labor for Occupational Safety and Health. The Administrative Law Judge does not make or recommend any decisions as to the content of a final standard. The proposed standard will be reviewed in light of all oral and written submissions received as part of the record, and final decisions will be made by the Assistant Secretary based upon the entire record in this proceeding.

VI. State Plan Applicability

The 25 States with their own OSHA-approved occupational safety and health plans must adopt a comparable standard within six months of the publication date of a final standard. These States include: Alaska, Arizona, California (operating only in the public sector), Connecticut (for State and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York (for State and local government employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a State standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate.

Although a State HCS becomes effective in accordance with State promulgation provisions, and is enforceable upon promulgation, OSHA must also review and approve the standard to assure that it is "at least as effective" as the Federal standard. OSHA intends to closely scrutinize State standards submitted under current or future State plans to assure not only

equal or greater effectiveness, but also that any additional requirements do not conflict with, or adversely affect, the effectiveness of the national application of OSHA's standard. Because the HCS is "applicable to products" in that it permits the distribution and use of hazardous chemicals in commerce only if they are in labeled containers accompanied by material safety data sheets, OSHA must determine in its review whether any State plan standard provisions which differ from the Federal are "required by compelling local conditions and do not unduly burden interstate commerce." Section 18(c) of the Act, 29 U.S.C. 667(c).

VII. Authority, Signature, and the Proposed Rule

This document was prepared under the direction of John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For the reasons set out in the preamble, and under the authority of the Paperwork Reduction Act, 5 U.S.C. 3504 and 5 CFR Part 1320, section 41 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941), section 107 of the Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333), sections 4, 6 and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 9–83 (48 FR 35736), 29 CFR Part 1911, and 5 U.S.C. 553, the Occupational Safety and Health Administration hereby proposes to amend Parts 1910, 1915, 1917, 1918, and 1926 of Title 29 of the Code of Federal Regulations, as set forth below.

List of Subjects in 29 CFR Parts 1910, 1915, 1917, 1918, and 1926

Hazard communication, Occupational safety and health, Right-to-know, Labeling, Material safety data sheets, Employee training.

Signed at Washington, DC, this 2nd day of August.

John A. Pendergrass,

Assistant Secretary for Occupational Safety and Health.

OSHA proposes to amend Parts 1910, 1915, 1917, 1918, and 1926 of Title 29 of the Code of Federal Regulations as follows:

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

1. The authority citation for Subpart Z of Part 1910 would continue to read as follows:

Authority: Secs. 6, 8, Occupational Safety and Health Act (29 U.S.C. 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754); 8–76 (41 FR 25059); or 9–83 (48 FR 35736) as applicable and 29 CFR Part 1911.

Section 1910.1000 Tables Z–1, Z–2, Z–3 also issued under 5 U.S.C. 553.

Section 1910.1000 not issued under 29 CFR Part 1911, except for "Arsenic" and "Cotton Dust" listings in Table Z–1.

Section 1910.1001 also issued under sec. 107 of Contract Work Hours and Safety Standards Act, 40 U.S.C. 333.

Section 1910.1002 not issued under 29 U.S.C. 655 or 29 CFR Part 1911; also issued under 5 U.S.C. 553.

Sections 1910.1003 through 1910.1018 also issued under 29 U.S.C. 653.

Section 1910.1025 also issued under 29 U.S.C. 653 and 5 U.S.C. 553.

Section 1910.1043 also issued under 5 U.S.C. 551 *et seq.*

Sections 1910.1045 and 1910.1047 also issued under 29 U.S.C. 653.

Sections 1910.1200, 1910.1499, and 1910.1500 also issued under 5 U.S.C. 553.

PART 1915—OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIPYARD EMPLOYMENT

2. The authority citation for Part 1915 would continue to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' compensation Act (33 U.S.C. 941); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable; 29 CFR Part 1911.

Section 1915.97 also issued under 5 U.S.C. 553.

Section 1915.99 also issued under 5 U.S.C. 553.

PART 1917—MARINE TERMINALS

3. The authority citation for Part 1917 would continue to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable; 29 CFR Part 1911.

Section 1917.28 also issued under 5 U.S.C. 553.

PART 1918—SAFETY AND HEALTH REGULATIONS FOR LONGSHORING

4. The authority citation for Part 1918 would continue to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable.

Section 1918.90 also issued under 5 U.S.C. 553 and 29 CFR Part 1911.

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

5. The authority citation for Subpart D of Part 1926 would continue to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable.

Section 1926.59 also issued under 5 U.S.C. 553 and 29 CFR Part 1911.

PART 1910, 1915, 1917, 1918, AND 1926—[AMENDED]

§§ 1910.1200, 1915.99, 1917.28, 1918.90 and 1926.59 [Amended]

6. It is proposed to amend §§ 1910.1200, 1915.99, 1917.28, 1918.90, and 1926.59 by revising paragraphs (b)(5)(ii), (b)(6)(v), (b)(6)(viii), (d)(5)(iv), (f)(2), (f)(5)(ii), and (g)(7); by revising the definitions of "article," "hazard warning," and "material safety data sheet" in paragraph (c); by adding paragraphs (b)(6)(ix)-(xi), (e)(5); by adding the definition of "commercial account" to paragraph (c); and by adding Appendix E as follows (b)(5), (b)(6), and (f)(5) introductory texts are republished):

§ _____ *Hazard communication.*

* * * * *

(b) *Scope and application.*

(5) This section does not require labeling of the following chemicals:

* * * * *

(ii) Any food, food additive, color additive, drug, cosmetic, or medical or veterinary device or product, including materials intended for use as ingredients in such products (*e.g.*, flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*) or the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158) and regulations issued under those Acts, when they are subject to the labeling requirements under those Acts by either the Food and Drug Administration or the Department of Agriculture.

* * * * *

(6) This section does not apply to:

* * * * *

(v) Food, drugs, cosmetics, or alcoholic beverages in a retail establishment which are packaged for sale to consumers, and food or alcoholic beverages used or prepared on the premises of a retail establishment (such as a restaurant or drinking place) for customer consumption;

* * * * *

(viii) Any drug, as that term is defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*) when it is in solid, final form for direct administration to the patient (*e.g.*, tablets or pills);

(ix) Nuisance particulates for which, when evaluated in accordance with the provisions of paragraph (d) of this section, no evidence is found to indicate that they pose any covered physical or health hazard;

(x) Ionizing or nonionizing radiation; and,

(xi) Biological hazards.

(c) *Definitions.*

"Article" means a manufactured item, other than a fluid or particle: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities, *e.g.*, minute or trace amounts, of a hazardous chemical (as determined under paragraph (d) of this section) and does not pose a physical hazard or a health risk to employees.

* * * * *

"Commercial account" means an arrangement whereby a retail distributor sells hazardous chemicals to an employer, generally in large quantities over time and at costs that are below the regular retail price.

* * * * *

"Hazard warning" means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the specific physical and health hazard(s), including target organ effects, of the chemical(s) in the container(s). (See the definitions for "physical hazard" and "health hazard" to determine the hazards which must be conveyed.)

* * * * *

"Material safety data sheet (MSDS)" means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section. For hazardous chemicals which are drugs regulated by the Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), an approved package insert or drug information in the *Physicians' Desk Reference* will be considered a MSDS for purposes of compliance with this rule in the non-manufacturing sector.

* * * * *

(d) *Hazard determination.*

* * * * *

(5) * * *

(iv) If the chemical manufacturer, importer, or employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health risk to employees in those centrations, the mixture shall be assumed to present the same hazard.

* * * * *

(e) *Written hazard communication program.*

* * * * *

(5) Where employees must travel between workplaces during a workshift, *i.e.*, their work is carried out at more than one geographical location, the written hazard communication program may be kept at a central location at the primary workplace facility.

(f) *Labels and other forms of warning.*

* * * * *

(2)(i) For solid metal (such as a steel beam or a metal casting), solid wood, or plactic items that are not exempted as articles due to their downstream use, or shipments of whole grain, the required label may be transmitted to the customer at the time of the initial shipment, and need not be included with subsequent shipments to the same employer unless the information on the label changes;

(ii) The label may be transmitted with the initial shipment itself, or with the material safety data sheet that is to be provided prior to or at the time of the first shipment; and,

(iii) This exception to requiring labels on every container of hazardous chemicals is only for the solid material itself, and does not apply to hazardous chemicals used in conjunction with, or known to be present with, the material and to which employees handling the items in transit may be exposed (for example, cutting fluids or pesticides in grains).

* * * * *

(5) Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged, or marked with the following information:

* * * * *

(ii) Appropriate hazard warnings, or words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemical, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with specific information regarding the physical and health hazards of the hazardous chemical.

* * * * *

(g) *Material safety data sheets.*

* * * * *

(7)(i) Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers with their initial shipment and with the first shipment after a material safety data sheet is updated.

(ii) The distributor shall either provide material safety data sheets with the shipped containers, or send them to the other distributor or employer prior to or at the time of the shipment;

(iii) Retail distributors which sell hazardous chemicals to employers having a commercial account shall provide a material safety data sheet to such employers upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available;

(iv) If an employer which does not have a commercial account purchases a hazardous chemical from a retail distributor which does not have material safety data sheets on file (*i.e.*, it does not have commercial accounts and does not use the materials), the retail distributor must provide the employer, upon request, with the name, address, and telephone number of the chemical manufacturer, importer, or distributor from which a material safety data sheet can be obtained; and,

(v) Chemical manufacturers, importers, and distributors need not provide material safety data sheets to retail distributors which have informed them that the retail distributor does not sell the product to commercial accounts or open the sealed container to use it in their own workplaces.

* * * * *

Appendix E to _____ (Advisory)—Guidelines for Employer Compliance

The Hazard Communication Standard (HCS) is based on a simple concept—that employees have both a need and right to know the hazards and identities of the chemicals they are exposed to when working. They also need to know what protective measures are available to prevent adverse effects from occurring. The HCS is designed to provide employees with the information they need.

Knowledge acquired under the HCS will help employers provide safer workplaces for their employees. When employers have information about the chemicals being used, they can take steps to reduce exposures, substitute less hazardous materials, and establish proper work practices. These efforts

will help prevent the occurrence of work-related illnesses and injuries caused by chemicals.

The HCS addresses the issues of evaluating and communicating hazards to workers. Evaluation of chemical hazards involves a number of technical concepts, and is a process that requires the professional judgment of experienced experts. That's why the HCS is designed so that employers who simply use chemicals, rather than produce or import them, are not required to evaluate the hazards of those chemicals. Hazard determination is the responsibility of the producers and importers of the materials. Producers and importers of chemicals are then required to provide the hazard information to employers that purchase their products.

Employers that don't produce or import chemicals need only focus on those parts of the rule that deal with establishing a workplace program and communicating information to their workers. This appendix is a general guide for such employers to help them determine what's required under the rule. It does not supplant or substitute for the regulatory provisions, but rather provides a simplified outline of the steps an average employer would follow to meet those requirements.

1. Becoming Familiar With the Rule

OSHA has provided a simple summary of the HCS in a pamphlet entitled "Chemical Hazard Communication," OSHA Publication Number 3084. Some employers prefer to begin to become familiar with the rule's requirements by reading this pamphlet. A copy may be obtained from your local OSHA Area Office, or by contacting the OSHA Publications Office at (202) 523-9667.

The standard is long, and some parts of it are technical, but the basic concepts are simple. In fact, the requirements reflect what many employers have been doing for years. You may find that you are already largely in compliance with many of the provisions, and will simply have to modify your existing programs somewhat. If you are operating in an OSHA-approved State Plan State, you must comply with the State's requirements, which may be different than those of the Federal rule. Many of the State Plan States had hazard communication or "right-to-know" laws prior to promulgation of the Federal rule. Employers in State Plan States should contact their State OSHA offices for more information regarding applicable requirements.

The HCS requires information to be prepared and transmitted regarding all hazardous chemicals. The HCS covers both physical hazards (such as flammability), and health hazards (such as irritation, lung damage, and cancer). Most chemicals used in the workplace have some hazard potential, and this will be covered by the rule.

One difference between this rule and many others adopted by OSHA is that this one is performance-oriented. That means that you have the flexibility to adapt the rule to the needs of your workplace, rather than having to follow specific, rigid requirements. It also means that you have to exercise more judgment to implement an appropriate and effective program.

The standard's design is simple. Chemical manufacturers and importers must evaluate the hazards of the chemicals they produce or import. Using that information, they must then prepare labels for containers, and more detailed technical bulletins called material safety data sheets (MSDS).

Chemical manufacturers, importers, and distributors of hazardous chemicals are all required to provide the appropriate labels and material safety data sheets to the employers to which they ship the chemicals. The information is to be provided automatically. Every container of hazardous chemicals you receive must be labeled, tagged, or marked with the required information. Your supplier must also send you a properly completed material safety data sheet (MSDS) at the time of the first shipment of the chemical, and with the next shipment after the MSDS is updated with new and significant information about the hazards.

You can rely on the information received from your supplier. You have no independent duty to analyze the chemical or evauate the hazards or it.

Employers that "use" hazardous chemicals must have a program to ensure the information is provided to exposed employees. "Use" means to package, handle, react, or transfer. This is an intentionally broad scope, and includes any situation where a chemical is present in such a way that employees may be exposed under normal conditions of use or in a foreseeable emergency.

The requirements of the rule that deal specifically with the hazard communication program are found in the standard in paragraphs (e), written hazard communication program (f), labels and other forms of warning; (g), material safety data sheets; and (h), employee information and training. The requirements of these paragraphs should be the focus on your attention. Concentrate on becoming familiar with them, using paragraph (b), scope and application, and (c), definitions, as references when needed to help explain the provisions.

There are two types of work operations where the coverage of the rule is limited. These are laboratories and operations where chemicals are only handled in sealed containers (*e.g.*, a warehouse). The limited provisions for these workplaces can be found in paragraph (b), scope and application. Basically, employers having these types of work operations need only keep labels on containers as they are received; maintain material safety data sheets that are received, and give employees access to them; and provide information and training for employees. Employers do not have to have written hazard communication programs and lists of chemicals for these types of operations.

The limited coverage of laboratories and sealed container operations addresses the obligation of an employer to the workers in the operations involved, and does not affect the employer's duties as a distributor of chemicals. For example, a distributor may have warehouse operations where employees would be protected under the limited sealed container provisions. In this situation, requirements for obtaining and maintaining MSDSs are limited to providing access to those received with containers while the substance is in the workplace, and requesting MSDSs when employees request access for those not received with the containers. However, as a distributor of hazardous chemicals, that employer will still have responsibilities for providing MSDSs to downstream customers at the time of the first shipment and when the MSDS is updated. Therefore, although they may not be required for the employees in the work operation, the distributor may, nevertheless, have to have MSDSs to satisfy other requirements of the rule.

2. Identify Responsible Staff

Hazard communication is going to be a continuing program in your facility. Compliance with the HCS is not a "one shot deal." In order to have a successful program, it will be necessary to assign responsibility for both the initial and ongoing activities that have to be undertaken to comply with the rule. In some cases, these activities may already be part of current job assignments. For example, site supervisors are frequently responsible for on-the-job training sessions. Early identification of the responsible employees, and involvement of them in the development of your plan of action, will result in a more effective program design. Evaluation of the effectiveness of your program will also be enhanced by involvement of affected employees.

For any safety and health program, success depends on commitment at every level of the organization. This is particularly true for hazard communication, where success requires a change in behavior. This will only occur if employers understand the program, and are committed to its success, and if employees are motivated by the people presenting the information to them.

3. Identify Hazardous Chemicals in the Workplace

The standard requires a list of hazardous chemicals in the workplace as part of the written hazard communication program. The list will eventually serve as an inventory of everything for which an MSDS must be maintained. At this point, however, preparing the list will help you complete the rest of the program since it will give you some idea of the scope of the program required for compliance in your facility.

The best way to prepare a comprehensive list is to survey the workplace. Purchasing records may also help, and certainly employers should establish procedures to ensure that in the future purchasing procedures result in MSDSs being received before a material is used in the workplace.

The broadest possible perspective should be taken when doing the survey. Sometimes people think of "chemicals" as being only liquids in containers. The HCS covers chemicals in all physical forms—liquids, solids, gases, vapors, fumes, and mists—whether they are "contained" or not. The hazardous nature of the chemical and the potential for exposure are the factors which determine whether a chemical is covered. If it's not hazardous, it's not covered. If there is

no potential for exposure (*e.g.*, the chemical is inextricably bound and cannot be released), the rule does not cover the chemical.

Look around. Identify chemicals in containers, including pipes, but also think about chemicals generated in the work operations. For example, welding fumes, dusts, and exhaust fumes are all sources of chemical exposures. Read labels provided by suppliers for hazard information. Make a list of all chemicals in the workplace that are potentially hazardous. For your own information and planning, you may also want to note on the list the location(s) of the products within the workplace, and an indication of the hazards as found on the label. This will help you as you prepare the rest of your program.

Paragraph (b), scope and application, includes exemptions for various chemicals or workplace situations. After compiling the complete list of chemicals, you should review paragraph (b) to determine if any of the items can be eliminated from the list because they are exempted materials. For example, food, drugs, and cosmetics brought into the workplace for employee consumption are exempt. So rubbing alcohol in the first aid kit would not be covered.

Once you have compiled as complete a list as possible of the potentially hazardous chemicals in the workplace, the next step is to determine if you have received material safety data sheets for all of them. Check your files against the inventory you have just compiled. If any are missing, contact your supplier and request one. It is a good idea to document these requests, either by copy of a letter or a note regarding telephone conversations. If you have MSDSs for chemicals that are not on your list, figure out why. Maybe you don't use the chemical anymore. Or maybe you missed it in your survey. Some suppliers do provide MSDSs for products that are not hazardous. These do not have to be maintained by you.

You should not allow employees to use any chemicals for which you have not received an MSDS. The MSDS provides information you need to ensure proper protective measures are implemented *prior* to exposure.

4. Preparing and Implementing a Hazard Communication Program

All workplaces where employees are exposed to hazardous chemicals must have a written plan which describes how the standard will be implemented in that facility. Preparation of a plan is not just a paper exercise—all of the elements must be implemented in the workplace in order to be in compliance with the rule. *See* paragraph (e) of the standard for the specific requirements regarding written hazard communication programs. The only work operations which do not have to comply with the written plan requirements are laboratories and work operations where employees only handle chemicals in sealed containers. *See* paragraph (b), scope and application, for the specific requirements for these two types of workplaces.

The plan does not have to be lengthy or complicated. It is intended to be a blueprint for implementation of your program—an assurance that all aspects of the requirements have been addressed.

Many trade associations and other professional groups have provided sample programs and other assistance materials to affected employers. These have been very helpful to many employers since they tend to be tailored to the particular industry involved. You may wish to investigate whether your industry trade groups have developed such materials.

Although such general guidance may be helpful, you must remember that the written program has to reflect what you are doing in your workplace. Therefore, if you use a generic program it must be adapted to address the facility it covers. For example, the written plan must list the chemicals present at the site, indicate who is to be responsible for the various aspects of the program in your facility, and indicate where written materials will be made available to employees.

If OSHA inspects your workplace for compliance with the HCS, the OSHA compliance officer will ask to see your written plan at the outset of the inspection. In general, the following items will be considered in evaluating your program.

The written program must describe how the requirements for labels and other forms of warning, material safety data sheets, and employee information and training, are going to be met in your facility. The following discussion provides the type of information compliance officers will be looking for to decide whether these elements of the hazard communication program have been properly addressed:

A. Labels and Other Forms of Warning

In-plant containers of hazardous chemicals must be labeled, tagged, or marked with the identity of the material and appropriate hazard warnings. Chemical manufacturers, importers, and distributors are required to ensure that every container of hazardous chemicals they ship is appropriately labeled with such information and with the name and address of the producer or other responsible party. Employers purchasing chemicals can rely on the labels provided by their suppliers. If the material is subsequently transferred by the employer from a labeled container to another container, the employer will have to label that container unless it is subject to the portable container exemption. *See* paragraph (f) for specific labeling requirements.

The primary information to be obtained from an OSHA-required label is an identity for the material, and appropriate hazard warnings. The identity is any term which appears on the label, the MSDS, and the list of chemicals, and thus links these three sources of information. The identity used by the supplier may be a common or trade name ("Black Magic Formula"), or a chemical name (1,1,1,-trichloroethane). The hazard warning is a brief statement of the hazardous effects of the chemical ("flammable," "causes lung damage"). Labels frequently contain other information, such as precautionary measures ("do not use near open flame"), but this information is provided voluntarily and is not required by the rule. Labels must be legible, and prominently displayed. There are no specific requirements for size or color, or any specified text.

With these requirements in mind, the compliance officer will be looking for the following types of information to ensure that labeling will be properly implemented in your facility:

1. Designation of person(s) responsible for ensuring labeling of in-plant containers;
2. Designation of person(s) responsible for ensuring labeling of any shipped containers;
3. Description of labeling system(s) used;
4. Description of written alternatives to labeling of in-plant containers (if used); and,
5. Procedures to review and update label information when necessary.

Employers that are purchasing and using hazardous chemicals—rather than producing or distributing them—will primarily be concerned with ensuring that every purchased container is labeled. If materials are transferred into other containers, the employer must ensure that these are labeled as well, unless they fall under the portable container exemption (paragraph (f)(7)). In terms of labeling systems, you can simply choose to use the labels provided by your suppliers on the containers. These will generally be verbal text labels, and do not usually include numerical rating systems or symbols that require special training. The most important thing to remember is that this is a continuing duty—all in-plant containers of hazardous chemicals must always be labeled. Therefore, it is important to designate someone to be responsible for ensuring that the labels are maintained as required on the containers in your facility, and that newly purchased materials are checked for labels prior to use.

B. Material Safety Data Sheets

Chemical manufacturers and importers are required to obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Distributors are responsible for ensuring that their customers are provided a copy of these MSDSs. Employers must have an MSDS for each hazardous chemical which they use. Employers may rely on the information received from their suppliers. The specific requirements for material safety data sheets are in paragraph (g) of the standard.

There is no specified format for the MSDS under the rule, although there are specific information requirements. OSHA has developed a non-mandatory format, OSHA Form 174, which may be used by chemical manufacturers and importers to comply with the rule. The MSDS must be in English. You are entitled to receive from your supplier a data sheet which includes all of the information required under the rule. If you do not receive one automatically, you should request one. If you receive one that is obviously inadequate, with, for example, blank spaces that are not completed, you should request an appropriately completed one. If your request for a data sheet or for a corrected data sheet does not produce the information needed, you should contact your local OSHA Area Office for assistance in obtaining the MSDS.

The role of MSDSs under the rule is to provide detailed information on each hazardous chemical, including its potential hazardous effects, its physical and chemical

characteristics, and recommendations for appropriate protective measures. This information should be useful to you as the employer responsible for designing protective programs, as well as to the workers. If you are not familiar with material safety data sheets and with chemical terminology, you may need to learn to use them yourself. A glossary of MSDS terms may be helpful in this regard. Generally speaking, most employers using hazardous chemicals will primarily be concerned with MSDS information regarding hazardous effects and recommended protective measures. Focus on the sections of the MSDS that are applicable to your situation.

MSDSs must be readily accessible to employees when they are in their work areas during their workshifts. This may be accomplished in many different ways. You must decide what is appropriate for your particular workplace. Some employers keep the MSDSs in a binder in a central location (*e.g.*, in the pick-up truck on a construction site). Others, particularly in workplaces with large numbers of chemicals, computerize the information and provide access through terminals. As long as employees can get the information when they need it, any approach may be used. The employees must have access to the MSDSs themselves—simply having a system where the information can be read to them over the phone is only permitted under the mobile worksite provision, paragraph (g)(9), when employees must travel between workplaces during the shift. In this situation, they have access to the MSDSs prior to leaving the primary worksite, and when they return, so the telephone system is simply an emergency arrangement.

In order to ensure that you have a current MSDS for each chemical in the plant as required, and that employee access is provided, the compliance officers will be looking for the following types of information in your written program:

1. Designation of person(s) responsible for obtaining and maintaining the MSDSs;
2. How such sheets are to be maintained in the workplace (*e.g.*, in notebooks in the work area(s) or in a computer with terminal access), and how employees can obtain access to them when they are in their work area during the work shift;
3. Procedures to follow when the MSDS is not received at the time of the first shipment;
4. For producers, procedures to update the MSDS when new and significant health information is found; and,
5. Description of alternatives to actual data sheets in the workplace, if used.

For employers using hazardous chemicals, the most important aspect of the written program in terms of MSDSs is to ensure that someone is responsible for obtaining and maintaining the MSDSs for every hazardous chemical in the workplace. The list of hazardous chemicals required to be maintained as part of the written program will serve as an inventory. As new chemicals are purchased, the list should be updated. Many companies have found it convenient to include on their purchase orders the name and address of the person designated in their company to receive MSDSs.

C. Employee Information and Training

Each employee who may be "exposed" to hazardous chemicals when working must be provided information and trained prior to initial assignment to work with a hazardous chemical, and whenever the hazard changes. "Exposure" or "exposed" under the rule means that "an employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.) and includes potential (*e.g.*, accidental or possible) exposure." *See* paragraph (h) of the standard for specific requirements. Information and training may be done either by individual chemical, or by categories of hazards (such as flammability or carcinogenicity). If there are only a few chemicals in the workplace, then you may want to discuss each one individually. Where there are large numbers of chemicals, or the chemicals change frequently, you will probably want to train generally based on the hazard categories (*e.g.*, flammable liquids, corrosive materials, carcinogens). Employees will have access to the substance-specific information on the labels and MSDSs.

Information and training is a critical part of the hazard communication program. Information regarding hazards and protective measures are provided to workers through written labels and material safety data sheets. However, through effective information and training, workers will learn to read and understand such information, determine how it can be obtained and used in their own workplaces, and understand the risks of exposure to the chemicals in their workplaces as well as the ways to protect themselves. A properly conducted training program will ensure comprehension and understanding. It is not sufficient to either just read material to the workers, or simply hand them material to read. You want to create a climate where workers feel free to ask questions. This will help you to ensure that the information is understood. You must always remember that the underlying purpose of the HCS is to reduce the incidence of chemical source illnesses and injuries. This will be accomplished by modifying behavior through the provision of hazard information and information about protective measures. If your program works, you and your workers will better understand the chemical hazards within the workplace. The procedures you establish regarding, for example, purchasing, storage, and handling of these chemicals will improve, and thereby reduce the risks posed to employees exposed to the chemical hazards involved. Furthermore, your workers' comprehension will also be increased, and proper work practices will be followed in your workplace.

If you are going to do the training yourself, you will have to understand the material and be prepared to motivate the workers to learn. This is not always an easy task, but the benefits are worth the effort. More information regarding appropriate training can be found in OSHA Publication No. 2254 which contains voluntary training guidelines prepared by OSHA's Training Institute. A copy of this document is available from OSHA's Publications Office at (202) 523-9667.

In reviewing your written program with regard to information and training, the following items need to be considered:

1. Designation of person(s) responsible for conducting training;
2. Format of the program to be used (audiovisuals, classroom instruction, etc.);
3. Elements of the training program (should be consistent with the elements in paragraph (h) of the HCS); and
4. Procedure to train new employees at the time of their initial assignment to work with a hazardous chemical, and to train employees when a new hazard is introduced into the workplace.

The written program should provide enough details about the employer's plans in this area to assess whether or not a good faith effort is being made to train employees. OSHA does not expect that every worker will be able to recite all of the information about each chemical in the workplace. In general, the most important aspects of training under the HCS are to ensure that employees are aware that they are exposed to hazardous chemicals, that they know how to read and use labels and material safety data sheets, and that, as a consequence of learning this information, they are following the appropriate protective measures established by the employer. OSHA compliance officers will be talking to employees to determine if they have received training, if they know they are exposed to hazardous chemicals, and if they know where to obtain substance-specific information on labels and MSDSs.

The rule does not require employers to maintain records of employee training, but many employers choose to do so. This may help you monitor your own program to ensure that all employees are appropriately trained. If you already have a training program, you may simply have to supplement it with whatever additional information is required under the HCS. For example, construction employers that are already in compliance with the construction training standard (29 CFR 1926.21) will have little extra training to do.

An employer can provide employees information and training through whatever means found appropriate and protective. Although there would always have to be some training on-site (such as informing employees of the location and availability of the written program and MSDSs), employee training may be satisfied in part by general training about the requirements of the HCS and about chemical hazards on the job which is provided by, for example, trade associations, unions, colleges, and professional schools. In addition, previous training, education and experience of a worker may relieve the employer of some of the burdens of informing and training that worker. Regardless of the method relied upon, however, the employer is always ultimately responsible for ensuring that employees are adequately trained. If the compliance officer finds that the training is deficient, the employer will be cited for the deficiency regardless of who actually provided the training on behalf of the employer.

D. Other Requirements

In addition to these specific items, compliance officers will also be asking the following questions in assessing the adequacy of the program:

Does a list of the hazardous chemicals exist in each work area or at a central location?

Are methods the employer will use to inform employees of the hazards of non-routine tasks outlined?

Are employees informed of the hazards associated with chemicals contained in unlabeled pipes in their work areas?

On multi-employer worksites, has the employer provided other employers with information about labeling systems and precautionary measures where the other employers have employees exposed to the initial employer's chemicals?

Is the written program made available to employees and their designated representatives?

If your program adequately addresses the means of communicating information to employees in your workplace, and provides answers to the basic questions outlined above, it will be found to be in compliance with the rule.

5. Checklist for Compliance

The following checklist will help to ensure you are in compliance with the rule:

Obtained a copy of the rule ..... ——
Read and understood the requirements.. ——
Assigned responsibility for tasks ..... ——
Prepared an inventory of chemicals ..... ——
Ensured containers are labeled ..... ——
Obtained MSDS for each chemical ..... ——
Prepared written program ..... ——
Made MSDSs available to workers ..... ——
Conducted training of workers ..... ——
Established procedures to maintain current program ..... ——
Established procedures to evaluate effectiveness ..... ——

6. Further Assistance

If you have a question regarding compliance with the HCS, you should contact your local OSHA Area Office for assistance. In addition, each OSHA Regional Office has a Hazard Communication Coordinator who can answer your questions. Free consultation services are also available to assist employers, and information regarding these services can be obtained through the Area and Regional offices as well.

The telephone number for the OSHA office closest to you should be listed in your local telephone directory. If you are not able to obtain this information, you may contact OSHA's Office of Information and Consumer Affairs at (202) 523–8151 for further assistance in identifying the appropriate contacts.

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Part IV

Department of Agriculture

Food and Nutrition Service

7 CFR Part 277

Food Stamp Program: Automated Data Processing Equipment and Services; Conditions for Federal Financial Participation; Proposed Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 277

[Amdt. No. 305]

Food Stamp Program; Automated Data Processing Equipment and Services; Conditions for Federal Financial Participation

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This action proposes changes to the requirements and conditions under which State and local governments may request and claim Federal funds for the costs associated with the planning, design, development, acquisition or installation of automated data processing (ADP) equipment and services in the administration of the Food Stamp Program. These changes are being proposed by the Food and Nutrition Service (FNS) and, in a separate publication, by the Department of Health and Human Services (HHS), to streamline the procedures for submission, review and approval of Advance Planning Documents, and to ensure consistency among Federal agencies in policies and procedures relating to the acquisition and use of ADP equipment in public assistance programs.

DATE: Comments on this proposed rulemaking must be received by October 7, 1988, to be assured of consideration.

ADDRESS: Comments should be directed to: Thomas O'Connor, Director, Program Development Division, Food and Nutrition Service, USDA, Alexandria, Virginia 22302. All written comments will be open to public inspection during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia, Room 716.

FOR FURTHER INFORMATION CONTACT: Questions regarding this rulemaking should be directed to Mr. O'Connor at the above address, or by telephone at (703) 756–3414.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Department has reviewed this action under Executive Order 12291 and Secretary's Memorandum No. 1512–1. The rule will affect the economy by less than 100 million a year. The action will not significantly raise costs or prices for consumers, industries, government agencies or geographic regions. There will not be a significant adverse effect on competition, employment, investment, productivity, innovation or on the ability of United States enterprises to compete with foreign-based enterprise in domestic or export markets. Therefore, the Department has classified this action as "not major".

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.651. For the reasons set forth in the final rule and related notice to 7 CFR 3015, Subpart V (48 FR 29115), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This action has also been reviewed in relation to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354, 94 Stat. 1164, September 19, 1980). Anna Kondratas, Administrator of the Food and Nutrition Service (FNS), has certified that this action will not have a significant economic impact on a substantial number of small entities. The changes will affect State and local agencies which administer the Food Stamp Program. This action is principally directed toward the development of Statewide ADP systems. It is anticipated that Federal funding would be requested for only a small number of county or local government systems under the provisions of this proposed rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the information collection requirements that are included in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB). Such provisions shall not be effective until OMB approval has been obtained. Other organizations and individuals desiring to submit comments on the information collection requirements should address them to Mr. O'Connor at the above address, and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building (Room 3028), Washington, DC 20503, ATTN: Desk Officer for FNS–USDA.

Background

The Department published a rule on December 30, 1980, at 45 FR 85699, which set forth the requirements for payment of certain administrative costs of State agencies which operate the Food Stamp Program. These requirements are codified at 7 CFR Part 277 and Appendix A of that Part, and derived from four Federal Management Circulars (FMC's): FMC 74–4, issued originally by the General Services Administration, but now under the Office of Management and Budget (OMB); OMB Circular A–90, "Cooperating with State and Local Governments to Coordinate and Improve Information Systems"; OMB Circular A–102, "Uniform Requirements for Grants to State and Local Governments"; and OMB Circular A–87, "Cost Principles for State and Local Governments." The procedures and funding conditions for State agencies to request Federal funds for the acquisition of ADP equipment and services to support the administration of the Food Stamp Program are set forth in Section B. (*Costs allowable with approval of FNS*) of Appendix A, to 7 CFR Part 277.

On June 11, 1982, the Department published a rule at 47 FR 25496 to implement Section 129 of Pub. L. 96–249, which allowed enhanced Federal financial participation (FFP) at the 75 percent level for costs associated with the planning, design, development, acquisition, or installation of ADP systems. In section 277.18, the Department codified the requirements and procedures for State agencies to receive 75 percent funding for certain ADP developmental projects. The existing requirements of § 277.18, in conjunction with those of Appendix A to part 277, currently apply to ADP developmental projects to be funded at the 75 percent funding rate. The conditions of Appendix A alone currently apply to ADP projects to be funded at the regular 50 percent rate.

In August 1985, an Interdepartmental Task Force was established consisting of representatives from FNS, the Health Care Financing Administration, the Family Support Administration, and the Office of Human Developmental Services. The Interdepartmental Task force conducted a comprehensive review of the current Federal policies and procedures involved in the review, approval and funding of State agency ADP developmental projects in order to streamline, improve and standardize the overall process and requirements among the affected Federal agencies. Specifically, the Task Force examination and revision of the current HHS and FNS regulatory requirements and procedures were intended to meet the following principal objectives:

1. Streamline the Advance Planning Document (APD) review and approval process to eliminate redundant Federal and State reviews;

2. Enhance State planning for developmental projects;
3. Improve project development continuity;
4. Allow for a more comprehensive Federal review and more timely response to APD's;
5. Standardize procedures and requirements among participating Federal agencies; and
6. Enhance the cooperative partnership between State and Federal agencies to achieve ADP and management information system applications that advance the efficiency and effectiveness of State administration of Federal programs.

The principal changes recommended by the Task Force involve the procedures and conditions under which States may request and receive funding for ADP developmental projects through the submission, review and approval of APD's and other related documents. The procedures proposed herein comprise the revised APD process and are being proposed by both FNS and HHS to ensure standardization, whenever possible, among Federal agencies.

Significant Proposed Changes in APD Process

1. Increased APD Prior Approval Cost Thresholds—Section 277.18(c)

Current rules in Section B of Appendix A require written prior approval from FNS for the acquisition of ADP equipment or services with a combined Federal and State cost of $100,000 or more over a 12-month period, or a cost of $200,000 or more (Federal *or* State) for the total acquisition. Revised § 277.18(c) would increase the Federal prior approval cost thresholds for ADP development projects to be funded at the 50 percent matching rate from $100,000 to $200,000 in total Federal and State costs over any 12-month period, and from $200,000 to $300,000 for total acquisition costs. State agencies would be required to obtain the prior written approval of FNS for ADP acquisitions exceeding the revised standards. The revised cost thresholds are intended to permit State agencies to implement smaller systems or system changes more quickly, reduce the number of small acquisitions requiring Federal prior approval, and reduce paperwork burden. These changes would also make Food Stamp Program prior approval cost thresholds and procedures consistent with those of HHS agencies, which were revised in a final rule at 51 FR 45321, published on December 18, 1986. This proposed rule also clarifies that *all* ADP developmental projects for which 75 percent Federal funding is requested are subject to FNS prior approval requirements, regardless of cost.

2. Establishment of Two-Phase APD Process—Section 277.18(d)

State agencies would request prior approval for ADP services and equipment acquisitions, as outlined above, through the submission of an Advance Planning Document (APD). The proposed APD process would consist of two distinct phases—the Project Planning Phase and the Implementation Phase. The Project Planning Phase would represent all activities necessary for the State agency to determine whether the acquisition and application of ADP services or equipment are necessary and feasible, and to develop plans to design and prepare for the ADP acquisition. The Project Implementation Phase consists of all activities involved in the acquisition, installation and implementation of ADP systems, services and/or equipment. To request and obtain FFP for allowable costs of the Project Planning and Implementation Phases, State agencies would be required to submit a Planning APD and an Implementation APD for the prior approval of FNS. States agencies would be entitled to receive the 75 percent funding rate for approved costs of both the Project Planning and Implementation Phases, provided that the proposed ADP system or application was determined by FNS to meet all applicable conditions for 75 percent funding.

The Department is proposing the two-phase APD process to address a major concern with the current process for requesting and approving funds for ADP developmental projects. The current process does not provide a means to request and receive commitment for up-front Federal funding for the purpose of planning major ADP system acquisitions, before initiating system development. Without a firm up-front commitment of Federal funding, the level of planning for system development has frequently been inadequate. The current process requires submission and prior approval of an APD for total system development prior to the acquisition of any ADP services or equipment for projects exceeding the prior approval cost thresholds. In the past, State agencies have submitted APD funding proposals for total system development without sufficiently planning the entire acquisition, in order to comply with current approval requirements and initiate Federal funding as soon as possible. As a result, many APD proposals and funding requests have been submitted which are inadequate and premature, causing substantial subsequent revisions, time and cost overruns, and, in some cases, project termination due to lack of sufficient prior planning.

The proposed process establishes a separate Project Planning Phase, in which State agencies could request Federal funding only for project planning activities. The Department believes that this approach would contribute to more effective, efficient and economical acquisitions of ADP equipment and services by providing for more comprehensive planning by State agencies prior to full system development. State agency requests to receive FFP for Project Planning Phase activities would be made through the submission of a Planning APD. The costs for project planning activities which are eligible for FFP include, but are not limited to the costs associated with: requirements and systems analyses, feasibility studies and alternatives analyses, general system design, and preparation of an Implementation APD. A State agency's Planning APD may request funding to complete all necessary planning activities, or may request funding to a preliminary step (e.g., feasibility study) with additional funding subsequently requested based on the results of the completed activities. The Planning APD is subject to the prior approval of FNS. Appropriate written prior approval is required before the State agency may proceed with any contractual or other commitments for ADP planning services.

The Planning APD would describe the State agency's needs, objectives, intended planning activities and proposed budget, and would also represent commitment by the State agency to perform necessary planning activities as a condition for FFP for those planning activities. Planning APD funding requests and approvals would be limited to planning activities only, including contractual support; no significant hardware or software development costs would be eligible for funding in the Project Planning Phase.

Upon successful completion of project planning activities, the State agency should be fully prepared to request funding for and proceed with Implementation Phase activities for the acquisition, development, installation and implementation of the proposed ADP system. State agency requests to receive FFP for Implementation Phase activities would be made through submission of an Implementation APD. The Implementation APD represents a written plan of action to acquire,

develop and install the proposed ADP equipment or services.

Following review of the Planning or Implementation APD, FNS will provide written notification to the State agency of approval or the reasons for disapproval. The approval letters will specify the amount of FNS FFP authorized for each separate phase in project development.

A State agency would not receive FFP for planning costs unless a Planning APD is submitted and approved. However, State agencies could submit an Implementation APD directly, without prior submission or approval of the Planning APD, if the State agency does not wish to receive FFP for project planning activities.

3. Reduction in Prior Approval Requirements—Section 277.18(c)

To simplify the APD process, reduce paperwork burden and enhance project development continuity, the Department proposes to reduce the number of documents currently required for the prior approval of FNS. FNS prior approval is currently required for the following documents related to ADP equipment or services acquisitions: Advance Planning Documents; Requests for Proposal (RFP's); contracts; and service agreements. In addition to representing a significant paperwork burden, State agencies have commented that the numerous prior approval decision points have caused disruption and temporary discontinuation of project development schedules and activities, resulting in increased project costs. The Department proposes to alleviate these problems by limiting prior approval requirements to those necessary to maintain appropriate control and management of developmental project activities and funding.

The Department proposes that FNS written prior approval be limited to:

—Both the Planning APD and the Implementation APD for all projects to be funded at the 75 percent funding rate, regardless of total project cost, and projects to be funded at the regular FFP rate which exceed the prior approval cost thresholds proposed in § 277.18(c);
—RFP's, when specifically required by FNS; and
—Contracts or contract amendments, when specifically required by FNS.

As indicated above, FNS may require prior approval for RFP's, contracts and/or contract amendments for certain ADP acquisitions due to the complexity of the procurement, the amount of funds involved, or previous State problems with procurement actions. However, RFP's or contracts which are less than $100,000 for regular FFP or $50,000 for enhanced FFP, and are an integral part of the approved APD need not be submitted to FNS; contract amendments under $50,000 for either funding level need not be submitted. FNS would formally notify the State agency of such prior approval requirements at the time of approval of the APD or subsequent Annually Updated APD's, as discussed below and in § 277.18(e). Unless FNS specifically requires prior approval for certain RFP's or contracts, the only documents requiring prior FNS approval would be the Planning and Implementation APD's.

The Department believes that two other documents may be a such importance in the development of certain ADP projects as to warrant the approval (although not the *prior* approval) of FNS. Approval and prior approval differ in that written "prior approval" must be obtained before the State agency may enter into any contractual agreements or make any other commitments for acquiring the ADP equipment or services to be funded with FFP; "approval" means that FNS written approval of specific APD process documents must be obtained before the State agency may claim FFP for certain costs, but State agencies may enter contractual agreements and/or make commitments for the ADP acquisition without first obtaining Federal approval.

Section 277.18(c)(3)(i)(A) would provide for the submission of the feasibility study to FNS for approval within 90 days of completion for certain ADP projects. This approval requirement would be applicable only if specified by FNS as a condition for approving the Planning APD, when a systems development project is particularly large or complex, or when a State agency has experienced previous problems in this area. Section 277.18(d)(2)(ii) would require that the feasibility study and alternatives analyses supporting the selected system design generally be submitted as part of the Implementation APD for FNS approval. Thus, all feasibility studies and associated alternatives analyses would be submitted to FNS and would be subject to approval, either within 90 days after completion or upon submission of the Implementation APD.

Section 277.18 (c)(3)(i)(B) would also require the approval of Annually Updated APD's, as discussed later in this preamble. State agency service agreements would not be submitted to FNS for review or informational purposes. All service agreements would be maintained on file at the State agency and be made available to FNS upon request.

4. Annually Updated APD—Section 277.18(f)

The Department is proposing a new paragraph (e) to § 277.18 which would require the submission and approval of an annual report, the Annually Updated APD, on the status of approved ADP developmental projects. The annually Updated APD would represent a self-certification by the State agency of the status of project activities and expenditures in relation to the provisions of the approved Planning or Implementation APD over the past year. The report would be submitted annually as a condition for continued FFP for the ADP development project and would consist of three components:

1. A report on the status of major project activities, milestones and deliverables for the past year;

2. A detailed accounting of all expenditures for the ADP developmental project for the past year as compared to the budget of the Planning or Implementation APD as approved; and

3. Changes to the approved provisions of the Planning and Implementation APD. Such changes may be submitted as they occur during the year or at one time as a component of the Annually Updated APD. The Annually Updated APD would be used by FNS to monitor project development and expenditures within the context of the approved provisions of the APD.

However, for projects funded at the regular FFP rate, the Annually Updated APD need not be submitted unless any of the following changes occur:

(a) A change of $50,000 in total approved project costs over the course of the project;

(b) An extension of 60 days or more in timeframes for projected milestones;

(c) A change in procurement activities; or

(d) A significant change in system concept.

Changes in approved procurement activities include:

—A change in procurement methodology that would limit competition beyond what was decribed in the APD (e.g., a change from competitive to noncompetitive procurement);
—A reduction or increase in the procurement activities which were described in the APD; or
—A change from an acquisition which supports the needs of more than the State agency (e.g., a "blanket"

contract) to an acquisition which would benefit solely the State agency.

Significant changes in approved system concept include:

—A proposal of a different system alternative;
—A proposal for a different "mix" of system hardware and software;
—A change in project plan;
—A change in the cost/benefits projection; or
—A change to the approved cost allocation methodology.

Federal approval, no later than at the time of the next Annually Updated APD, is required for project changes before FFP for the change may be claimed. However, State agencies may proceed with the change without first obtaining Federal approval, to avoid disruption in project activities. In such instances, the State agency would be liable for costs associated with the project change until FNS approval is granted. If the Annually Updated APD is subsequently disapproved, FFP would not be allowed for the costs associated with the project change.

5. Emergency ADP Acquisitions—Section 277.18(h)

The Department is proposing procedures for the acquisition of ADP equipment or services for emergency situations in a new paragraph (h) to § 277.18. The Department recognizes that situations may arise which preclude a State agency from following the prior approval requirements of § 277.18(c) before acting to correct an emergency situation in order to meet program requirements. The proposed procedures for State agencies to request approval of FFP for emergency situations, FNS' response to such requests, and subsequent submission of ADP documentation parallel the emergency acquisition procedures currently in place for HHS agencies at 45 CFR 95.624. The Department would consider "emergency situations" to be those which could not be reasonably anticipated by the State agency. Examples of such situations include equipment failure due to physical damage or destruction caused by natural or other disasters, or changes imposed by Federal legislative requirements which necessitate immediate acquisition of ADP equipment or services. The Department would not consider emergency situations to be circumstances arising from poor planning on the part of the State agency. In determining whether a situation should be considered as an emergency, the State agency would be required to demonstrate that its need to immediately acquire ADP equipment or services was unexpected and could not have been anticipated or planned.

System Transfer—Section 277.18(d)

On September 18, 1987, the Department published a final rule, titled "Food Stamp Program: Automation of Data Processing (ADP) Model Plan" (52 FR 35221). That rule set forth a requirement for State agencies to submit to the Department their plans for automation in the Food Stamp Program. That rule also addressed the issue of system transfer, and the consideration a State agency must give to modifying an existing system when determining how to best fulfill an identified automation need.

In the analysis of comments received on the model plan rule, it was determined that the actual assessment of potentially transferable systems was more appropriately a part of the Advance Planning Document process, rather than part of the model plan requirements. Therefore language is proposed in the ADP approval requirements at § 277.18(d)(2)(ii) to require that State agencies consider the transfer or modification of an existing system in the Implementation APD, as part of the feasibility study and associated alternatives analyses. The model plan rule, however, continues to require at 7 CFR 272.10(a)(2) and (3) that State agencies show in their plans that system transfer will be considered in the planning process.

In this rule, the Department proposes that State agencies must include an examination of the transfer or modification of an existing system from a similar State or jurisdiction as a component of all feasibility studies. State agencies planning automation using any method other than transfer, or State agencies planning to develop new systems must include a specific analysis of their consultations with other State agencies. The analysis must show that the State agencies they consulted were similar to them in terms of whether the States were urban or rural; whether or not the States' programs were county-administered; the geographic size of the States; and the size of the caseload in each State. In addition, State agencies rejecting transfer must provide a specific analysis describing barriers to transfer. Each barrier must be accompanied by an analysis comparing the costs of overcoming the problem to the cost of developing a new system.

Common reasons cited in opposition to transfer include: the State agency is required to use a central data processing facility and the (otherwise) transferable system is incompatible with it; the State agency's data base management software is incompatible with the transferable system; the State agency's ADP experts are not familiar with the software/hardware used by the transferable system and acquiring new expertise would be expensive; the transferable system is interactive or uses "generic" caseworkers, while the receiving State agency does not, and it would be expensive to modify the existing system and/or procedures; and transfer would provoke disputes with the State agency's personnel union. Demonstration of any of these or similar problems alone is insufficient justification for rejecting transfer or adaptation. While these reasons for rejecting transfer are not unacceptable, State agencies which cite any of these reasons should not expect *automatic* approval. Rather, the State agency will be expected to show, as part of the APD, why the barrier to transfer cannot be overcome.

The Department also recognizes that FNS has an important role to play in regard to the analysis of potential system transfers. The model plan rule cited previously includes a provision at 7 CFR 272.10(a)(3)(iii) which states that FNS will assist State agencies that request assistance in determining what other States have systems that should be considered as possible transfers. The Department believes that some State agencies may request such assistance as one of the Project Planning Phase activities.

Disallowance of Federal Financial Participation—Section 277.18(o).

A new paragraph (o), Disallowance of Federal Financial Participation (FFP), would be added to § 277.18 which provides that, if the Department finds that any equipment or services acquisition approved or modified under the provisions of § 277.18(c) fails to substantially comply with the criteria, requirements, and other undertakings prescribed in the approved APD, payment of FFP may be disallowed. The Department approves FFP on the basis that the equipment or services acquisitions proposed under APD's will add to the proper and efficient operation of the Food Stamp Program. By the same token, if the Department finds that a State agency fails to substantially comply with the terms of an approved APD, to the detriment of the proper and efficient operation of the program, the Department may disallow FFP. The reasons for which the Department may disallow FFP include, but may not be limited to, failure of the proposed system to meet program effectiveness

and efficiency objectives contained in the approved APD, and schedule slippages which result in cost overruns which eliminate expected future cost savings or otherwise adversely affect cost-benefit projections.

ADP System Security Provisions—Section 277.18(p)

The Department is proposing a new paragraph (p) to § 277.18 titled "ADP System Security Requirements and Review Process" to establish minimum standard requirements for the security of non-Federal ADP systems used by State and local governments in the administration of the Food Stamp Program. The Department believes that increased reliance on automated systems to administer the Program, and greater sophistication and complexity of the systems have resulted in the need to establish standard regulatory requirements to ensure the security of ADP facilities, equipment and operations and the privacy of information. The need for standard regulatory requirements was demonstrated by a recent audit of the security of non-Federal ADP systems conducted by the U.S. Department of Agriculture's Office of the Inspector General (USDA/IG).

The USDA/IG reviewed the security of thirteen non-Federal ADP systems used by State and loca governments to support the administration of the FNS Food Stamp Program and Special Supplemental Food Program for Women, Infants and Children. The USDA/IG Audit Report 50651–2–CH, issued in October 1985, disclosed a wide range of computer security weaknesses and related problems. Some of the more serious problems concerned inadequate controls over physical security which could allow unrestricted access to computer hardware, and inadequate software controls which could permit improper manipulation of data or payments. The USDA/IG found weaknesses in the organizational controls of data processing in all of the thirteen State agencies audited. Further, the USDA/IG found that none of the thirteen State agencies audited had established formal procedures or requirements to ensure that such ADP systems met minimum ADP security standards. A copy of this report can be obtained by contacting the USDA/IG for Audit, Room 247–E, Administration Building, Washington, DC, NW., 20250.

The proposed new paragraph on ADP system security requires State agencies to establish a security program for ADP systems and operations used in the administration of the Food Stamp Program. The security program would consist of three principal components: appropriate State agency ADP security standards and requirements to ensure proper control of ADP equipment, facilities and information; State agency procedures and processes for meeting the established security standards and requirements; and security reviews for ensuring that established standards and requirements are met. Specifically, the proposed ADP security provisions establish the following principal requirements.

1. State agencies are responsible for the development of appropriate standards and requirements to properly safeguard ADP resources and information processing. This requirement is intended to establish a baseline in each State agency for safeguarding ADP resources and information processing against which the effectiveness of the State agency's security program may be measured. The Department considers the establishment of such baseline requirements to be critical to the effective safeguarding of ADP resources and information processing and to subsequent evaluation of the effectiveness of a State agency's security program.

The Department believes that it is more appropriate to allow State agencies to determine the specific minimum standards and requirements to govern the security of their own ADP systems based on the unique circumstances of each State, rather than mandate general standards to apply for all State and local agencies. The rule proposes that, in developing appropriate ADP security standards and requirements, State agencies use standards currently governing the security of Federal ADP systems or recognized industry standards as the basis for the development of State-specific standards and requirements.

2. State agencies would be required by § 277.18(p) to establish an ADP security program to implement plans, policies and procedures to meet the State agency's ADP security standards and requirements and to maintain an ongoing program for conducting periodic risk analyses to evaluate potential threats to the system and incorporate appropriate safeguards. The ongoing ADP security program represents the State agency's policies and operational procedures, and the organizational responsibilities which would be undertaken to meet the standards and requirements to properly safeguard ADP resources and information processing. The Department believes that such procedures are critical to meeting the ADP security standards and requirements established by a State agency. The rule proposes eight specific areas of ADP security which must, at a minimum, be included in the State agency's ADP security requirements and program:

—Physical security of ADP resources;
—Equipment security to protect equipment from theft and unauthorized use;
—Software and data security;
—Telecommunications security;
—Personnel security;
—Contingency plans to meet critical processing needs in the event of short- or long-term interruption of service;
—Emergency preparedness; and
—Designation of an Agency ADP Security Manager.

These eight areas comprise what the Department has determined to be the principal critical components of a security program for automated data processing activities. The Department has made this determination based on experience gained from dealing with the security of internal Department automated data processing activities, dealings with other Federal agencies in this area, and dealings with private industry on matters pertaining to automated data processing security.

3. State agencies would be required to establish an ongoing program of reviews of the security of ADP installations to ensure adequacy of safeguards and controls. The Department is proposing the performance of such reviews on a biennial basis and the submission of ADP system review reports to FNS upon completion.

The proposed rule specifies that the proposed ADP security provisions would apply to all developmental ADP projects and currently operating ADP systems. The Department does not intend that the State agency's ADP security standards, requirements or plans would be submitted to FNS for review or approval. It would be the responsibility of the State agency to ensure proper security of the ADP system and information processing. The completed State agency ADP security reviews would be required to be submitted to FNS, in order to identify and monitor any necessary corrective action.

Other Proposed Revisions

Several changes and additions to the existing regulatory language are being proposed to increase consistency with HHS in the terminology and policies defined in this section.

1. The "Definitions" currently contained in Part 277 Appendix A would

be moved to § 27.18(b) and revised as follows:

"Advance Planning Document (APD) for Project Planning", "APD for Project Implementation" and "Annually Updated APD" would be added to the list of definitions, to correspond to the revised APD approval procedures which are being proposed concurrently by HHS and FNS.

"Enhanced funding" or "enhanced FFP rate" would be added to specify the 75 percent funding level for the planning, design, development and installation of computerized systems as authorized by § 227.4(b)(1)(ii). A corresponding definition for "regular funding" or "regular FFP rate" would also be added. These definitions are intended to clarify the specific requirements which pertain only to projects funded at the 75 percent level, as opposed to those which apply to any other authorized funding level.

"Emergency situation" would be defined, to correspond to current HHS provisions at 45 CFR 95.605, as discussed previously.

"System design" would be removed from the current list of definitions in Part 277 Appendix A, and would be replaced with the definition of "General Systems Design".

"Requirements analysis" would be defined, to correspond to current HHS provisions at 45 CFR 95.605.

2. Regulatory language is proposed for § 277.18(f) regarding requirements for service agreements when data processing services are to be provided by a State central data processing facility or another State or local agency. In addition to removing the requirement for submission of service agreements to FNS, this paragraph would expand the definition of "Service agreement" currently contained in Part 277 Appendix A, to correspond to current HHS provisions at 45 CFR 95.605.

3. The Department's policy regarding the depreciation of capital expenditures when claiming the costs of ADP equipment having unit or total aggregate acquisition costs of more than $25,000, would be set forth in proposed § 277.18(i)(3). This provision would allow the State agency to request a waiver from the requirement to depreciate such costs, thereby allowing the costs to be "expensed" or claimed at the time of acquisition. The Department wishes to clarify, however, that the approval of a waiver would not affect the approved level of FFP for allowable costs. That is, for projects approved at the 75 percent funding level, only the proportionate share of the costs of capital assets assignable to the developmental phase of the project may be claimed at the enhanced level. This requirement would not preclude the approval of a waiver to expense the costs of such acquisitions, as long as the FFP levels for developmental and operational costs were determined in accordance with the provisions of these regulations.

4. In order to further clarify the delineation between the developmental and operational phases, for purposes of approving and claiming costs at the 75 percent funding level, this rule proposes a provision at § 277.18(g)(6) which would limit pilot tests and parallel processing for test purposes to a period not to exceed three months, unless specifically extended by FNS. The Department believes that three months represents an average and adequate period of time for pilot testing in most systems. However, the Department is interested in receiving comments as to whether or not this provision is consistent with previous State agency experiences.

Structural Changes to Part 277

The Department is proposing several structural changes to Part 277 to provide greater clarity, avoid redundancy, and consolidate the requirements and procedures for the FNS APD process in one section of Part 277. Current rules governing the acquisition of ADP services and equipment at the 75 percent funding rate are provided in 7 CFR 277.18. Rules for ADP acquisitions at the regular 50 percent funding rate are contained in Part 277 Appendix A, Section B. The two sections defining the APD process are duplicative and can be confusing, and the Department is proposing to consolidate all procedures, conditions and requirements governing the acquisition of ADP services and equipment in a new proposed § 277.18. The consolidation of the section and appendix would result in the following revisions.

1. Paragraph 277.18(b) would be deleted. This paragraph provided for the retroactive entitlement to the 75 percent funding rate for Advance Planning Documents approved before the June 11, 1982 publication date of the 75 percent funding provisions. As funding for all such projects has already occurred or been resolved, this provision no longer applies.

2. Paragraphs 277.18 (e)(1) and (e)(2) would be deleted. These paragraphs describe the prior approval and document submission processes for projects funded at the 75 percent rate. The provisions of these paragraphs would be redundant, as the revised process would establish the same approval and document submission procedures for ADP projects at either funding rate in new § 277.18(c).

3. Paragraph 277.18(h) would be deleted. This paragraph describes the requirements for system specifications approval, procurements, ownership rights, and the title, use and disposition of property for ADP developmental projects funded at the enhanced rate. Similar requirements are restated in Part 277 Appendix A, Section B. The proposed rule would eliminate duplication by consolidating the requirements in new § 277.18 only. The proposed rule in new § 277.18(c) and (d) would require that system specifications included as part of the general systems design be submitted for prior approval in the Implementation APD for ADP developmental projects.

Part 277 Appendix A, Sections B(5) and B(9) governing procurement requirements and ownership rights, use, title and disposition of property would be redesignated as § 277.18(k) and (m), respectively.

4. Part 277 Appendix A, Sections B(3) and B(6) which provided for general Federal and State agency approval requirements for APD proposals would be deleted. The proposed new § 277.18(c) would provide for all submission and approval requirements for Advance Planning Documents and other associated documents.

5. Part 277 Appendix A, Section B(12), which describes the conditions for applying the provisions governing ADP acquisitions and funding contained in Part 277 Appendix A, would be deleted, as all of the procedures and conditions for requesting and approving funding for ADP acquisitions would be deleted from Part 277 Appendix A and located in proposed new § 277.18. Proposed new § 277.18(a) would describe the conditions and scope of the provisions of the revised § 277.18.

List of Subjects in 7 CFR Part 277

Food Stamps, government procedure, Grant programs-social programs, Investigations, Records, Reporting and recordkeeping requirements.

Accordingly, 7 CFR Part 277 is proposed to be amended as follows:

PART 277—PAYMENTS OF CERTAIN ADMINISTRATIVE COSTS OF STATE AGENCIES

1. The authority citation for Part 277 continues to read as follows:

Authority: 7 U.S.C. 2011–2029.

2. Section 277.18 is revised to read as follows:

§ 277.18 Establishment of an Automated Data Processing (ADP) and Information Retrieval System.

(a) *Scope and application.* This section establishes conditions for initial and continuing authority to claim Federal financial participation (FFP) for the costs of the planning, development, acquisition, installation and implementation of ADP equipment and services used in the administration of the Food Stamp Program. Due to the nature of the procurement of ADP equipment and services, current State agency approved cost allocation plans for ongoing operational costs shall not apply to ADP system development costs under this section unless documentation required under paragraph (c) of this section is submitted to and approvals are obtained from FNS.

(b) *Definitions.*

"*Acceptance Documents*" means written evidence of satisfactory completion of an approved phase of work or contract, and acceptance thereof by the State agency.

"*Advance Planning Document for Project Implementation*" or "*Implementation APD*" means a written plan of action requesting Federal financial participation (FFP) to acquire and implement ADP services and/or equipment.

"*Advance Planning Document for Project Planning*" or "*Planning ADP*" means a document that requests FFP to accomplish the planning necessary for a State agency to determine the need for and plan the acquisition of ADP equipment and/or services, and to acquire information necessary to develop a general system design and Implementation APD.

"Annually Updated APD" means an annual self-certification by the State agency on the status of project development activities and expenditures in relation to the approved Planning APD or Implementation APD.

"Automated Data Processing" or *"ADP"* means data processing performed by a system of electronic or electric machines so interconnected and interacting as to minimize the need for human assistance or intervention.

"Automated Data Processing Equipment" or *"hardware"* means:

(1) Electronic digital computers, regardless of size, capacity, or price, that accept data input, store data, perform calculations, and other processing steps, and prepare information;

(2) All peripheral or auxiliary equipment used in support of electronic digital computers whether selected and acquired with the computer or separately;

(3) Data transmission or communications equipment that is selected and acquired solely or primarily for use with a configuration of ADP equipment which includes an electronic digital computer; and

(4) Data input equipment used to enter directly or indirectly into an electronic digital computer, peripheral or auxiliary equipment, or data transmission, or communication equipment.

"Automated Data Processing Services" means:

(1) Services to operate ADP equipment, either by private sources, or by employees of the State agency, or by State or local organizations other than the State agency; and/or

(2) Services provided by private sources or by employees of the State agency or by State and local organizations other than the State agency to perform such tasks as feasibility studies, system studies, system design efforts, development of system specifications, system analysis, programming and system implementation. This includes system training, systems development, site preparation, data entry, and personal services related to automated systems development and operations that are specifically identified as part of a Planning APD or Implementation APD.

"Data Processing" means the preparation of source media containing data or basic elements of information and the use of such source media according to precise rules of procedures to accomplish such operations as classifying, sorting, calculating, summarizing, recording, and transmitting.

"Emergency situation" means as a situation where:

(1) The State agency can demonstrate to FNS an immediate need to acquire ADP equipment or services in order to continue operation of the Food Stamp Progam; and

(2) The State agency can clearly document that the need could not have been anticipated or planned for the State is prevented from following the prior approval requirements of § 277.18(c).

"Enhanced funding" or *"enhanced FFP rate"* means Federal reimbursement at the 75-percent level for allowable costs for State agency planning, design, development or installation of computerized systems, as authorized by § 277.4(b)(1)(ii), and in accordance with the requirements at § 277.18(g).

"Feasibility Study" means a preliminary study to determine whether it is sufficiently probable that effective and efficient use of ADP equipment or systems would warrant a substantial investment of staff, time, and money being requested, and whether the plan can be accomplished successfully.

"General Systems Design" means a combination of narrative and diagrams describing the generic architecture of a system as opposed to the detailed architecture of the system. A general systems design may include a systems diagram; narrative identifying overall logic flow and systems functions; a description of equipment (including capacity) requirements; a description of other resource requirements which will be necessary to operate the system; a description of system performance requirements; and a description of the environment in which the system will operate, including how the system will function within that environment (e.g., how workers will interface with the system).

"Regular funding" or *"regular FFP rate"* means any Federal reimbursement rate authorized by § 277.4(b), except the 75-percent funding rate for State agency planning, design, development or installation of computerized systems, as specified at § 277.4(b)(1)(ii).

"Request for Proposal" or *"RFP"* means the document used for public solicitations of competitive proposals from qualified sources as outlined in § 277.14(g)(3).

"Requirements Analysis" means determining and documenting the information needs and the functional and technical requirements the proposed computerized system must meet.

"*Service Agreement*" means the document, described in § 277.18(f), signed by the State or local agency and the State or local central data processing facility whenever a central data processing facility provides ADP services to the State or local agency.

"*Software*" means a set of computer programs, procedures, and associated documentation used to operate the hardware.

"*System specifications*" means information about the new ADP systems, such as: workload descriptions, input data, information to be maintained and processed, data processing techniques, and output data, which is required to determine the ADP equipment and software necessary to implement the system design.

"*System study*" means the examination of existing information flow and operational procedures within an organization. The study consists of three basic phases: data gathering or investigation of the present system and new information requirements; analysis of the data gathered in the investigation; and synthesis, or refitting, of the parts

and relationships uncovered through the analysis into an efficient system.

(c) *General Acquisition Requirements.*—(1) *Requirement for prior FNS approval.* A State agency shall obtain prior written approval from FNS as specified in paragraph (c)(2) of this section when it plans to acquire ADP equipment or services with proposed FFP at the regular funding rate which it anticipates will have total acquisition costs of $200,000 or more in Federal and State funds over any 12-month period, or $300,000 or more in Federal and State funds for the acquisition. A State agency shall obtain prior written approval from FNS as specified in paragraph (c)(2) of this section when it plans to acquire ADP equipment or services with proposed FFP at the 75 percent funding rate authorized by this part, regardless of the cost of the acquisition. The State agency shall request FNS' prior approval by submitting the Planning APD or Implementation APD signed by the appropriate State official to the FNS Regional Office. A State agency shall also obtain prior written approval from FNS when it plans to noncompetitively acquire ADP equipment or services from a non-governmental source:

(i) Which cost more than $100,000 in Federal and State funds, for any acqusition with proposed FFP at the regular funding rate; or

(ii) for any acquisition, regardless of cost, with proposed FFP at the 75 percent funding rate.

(2) *Specific prior approval requirements.* (i) For ADP equipment and services acquisitions which require prior approval as specified in paragraph (c)(1) of this section, the State agency shall obtain the prior written approval of FNS for:

(A) The Planning APD prior to entering into contractual agreements or making any other commitment for acquiring the necessary planning services;

(B) The Implementation APD prior to entering into contractual agreements or making any other commitment for the acquisition of ADP equipment or services.

(ii) For ADP equipment and services acquisitions requiring prior approval as specified in paragraph (c)(1) of this section, FNS may specifically require prior approval of the following documents associated with such acquisitions as a condition to approving either the ADP or a subsequent Annually Updated APD:

(A) RFP's; when required by FNS, the State agency shall obtain prior written approval of the RFP before the RFP may be released. However, RFP's which are less than $100,000 at the regular funding rate or $50,000 at the enhanced funding rate, and are an integral part of the approved APD need not be submitted to FNS.

(B) Contracts; when required by FNS, the State agency shall obtain prior written approval before the contract may be signed by the State agency. However, contracts which are less than $100,000 at the regular funding rate or $50,000 at the enhanced funding rate, and are an integral part of the approved APD need not be submitted to FNS.

(C) Contract amendments; when required by FNS, the State agency shall obtain prior written approval before the contract amendment may be signed by the State agency. However, contract amendments which are less than $50,000 and are an integral part of the approved APD need not be submitted to FNS.

(iii) The State agency must obtain prior written approval from FNS as specified in paragraphs (c)(2)(i) and (ii) of this section in order to claim and receive reimbursement for the associated costs of the ADP acquisition.

(3) *Approval requirements.* (i) For ADP equipment and service acquisitions requiring prior approval as specified in paragraph (c)(1) of this section, the State agency shall submit the following documents to FNS for approval:

(A) Feasibility studies, when specifically required by FNS as a condition of approving the Planning APD. When required by FNS for approval, the State agency shall submit the feasibility study no later than 90 days after its completion.

(B) Annually Updated APD's as required by paragraph (e) of this section, within 90 days after the annual anniversary date of FNS' approval letter for the Planning APD or the Implementation APD.

(ii) The State agency must obtain FNS approval of the documents specified in paragraph (c)(3)(i) of this section in order to claim and receive reimbursement for the associated costs of the ADP acquisition.

(4) *Approval by the State agency.* Approval by the State agency is required for all documents specified in this regulation prior to submission for FNS approval. In addition, State agency approval is also required for those acquisitions of ADP equipment and services not requiring prior approval by FNS.

(d) *APD Content Requirements*—(1) *Planning APD.* The State agency may request FFP at the regular or enhanced funding rate for the costs of determining the need for and planning the acquisition of ADP equipment or services through the submission of the Planning APD. The State agency may request FFP for the costs of planning activities beginning with initial project inception through the performance of necessary systems and alternatives analyses, selection and design, including the completion of a general systems design. The Planning APD shall contain the following information:

(i) The State agency shall describe the programmatic and organizational needs and/or problems to be addressed by the proposed ADP acquisition and the specific objectives to be accomplished under the Planning APD;

(ii) The State agency shall commit to complete a requirements analysis, feasibility study, alternatives analysis, cost-benefit analysis, and a general system design as part of project planning activities. If an existing ADP system is to be transferred, the State agency may plan to use the general system design of the transferred system. State agencies requesting FFP at 75 percent funding rate shall include a statement of commitment that the proposed ADP acquisition would meet the functional requirements of § 272.10;

(iii) The State agency shall describe the organization, required State and contractual resources and availability of those resources, and the assignments of roles and responsibilities for project planning activities. The State agency shall include a description of resources to be procured and procurement methods;

(iv) The State agency shall indicate the schedule of activities and deliverables during project planning, including a description and schedule of procurement activities to be undertaken in support of the planning project; and

(v) The proposed budget shall identify costs for project planning activities by Federal fiscal year. The budget shall include an estimate of prospective cost distribution to participating Federal agencies and the method for cost allocation. The State agency shall also include an estimate of the total project costs, including both the cost of the planning project and the cost of any eventual ADP equipment and/or services acquisition, which will be used only for determining whether the thresholds of § 277.18(c)(1) are met.

(2) *Implementation APD.* The State agency may request FFP at the regular or enhanced funding rate to acquire ADP equipment and services through the submission of the Implementation APD. The State agency may request FFP for the necessary activities to develop, acquire, install and implement the proposed ADP system or acquisition.

The Implementation APD shall contain the following information:

(i) The State agency shall complete and submit a requirements analysis;

(ii) The State agency shall submit a feasibility study and associated alternatives analyses, which include the transfer or modification of an existing system from a similar State or jurisdiction in the examination of alternatives. State agencies which reject the transfer or modification of an existing system must provide an analysis describing the barriers to system transfer as part of the feasibility study. The analysis of barriers to system transfer shall include a comparison of the costs of overcoming the problem in transferring an operational system to the costs of developing a new system;

(iii) The State agency shall submit the new or transferred general systems design and shall also document the intended approaches, plans and techniques to develop or modify specific aspects of the proposed ADP system or acquisition including hardware, software, telecommunications, system testing, and data security;

(iv) The State agency shall describe the anticipated resource requirements for implementation of the ADP project, the resources planned to be available for the project, and plans for augmenting resources to meet resource requirements;

(v) The State agency shall indicate the principal events and schedule of activities, milestones, and deliverables during implementation of the project;

(vi) The State agency shall submit a proposed budget which identifies costs for intended project development and implementation activities by Federal fiscal year and shall include a consideration of all possible Implementation APD activity costs (e.g., system conversion, computer capacity planning, supplies, training, and miscellaneous ADP expenses). The budget shall contain an estimate of prospective cost distribution and methods for allocating costs to participating Federal agencies;

(vii) The State agency shall document the scope, methodology, evaluation criteria and results of cost-benefit analyses for evaluating the selected design and alternatives. The cost-benefit analysis shall include a statement indicating the period of time the State agency intends to use the proposed equipment or system; and

(viii) The State agency shall describe the security and interface requirements to be employed and the backup and contingency procedures available.

(3) *APD Budget.* The proposed budget for both the Planning APD and the Implementation APD shall include cost distribution plans containing the bases for proposed rates, both direct and indirect, for costs associated with system planning, development, acquisition or implementation, as appropriate. The budget proposals accompanying the Implementation APD shall also include proposed cost distribution plans and the bases of proposed rates for the operation of the ADP system. The budget activities shall be presented on a Federal fiscal year basis in a clear fashion to associate costs with each planned activity. The budgets must identify all development costs separately from any ongoing operational costs. Costs must be distinguished by developmental projects and developmental time periods. Actual costs claimed must be reconcilable to projected costs as proposed and approved by FNS in the ADP.

(e) *Annually Updated APD.*— (1) *General submission requirements.* The State agency shall submit an Annually Updated APD for FNS approval for all approved Planning and Implementation APD's, unless the conditions described in paragraph (e)(3) of this section are met. The Annually Updated APD shall be submitted to the FNS Regional Office within 90 days after the annual anniversary date of the original APD approval, unless the submission date is specifically altered by FNS. The Annually Updated APD requirements apply to ADP development projects at both the regular and enhanced funding rates.

(2) *Content requirements.* The Annually Updated APD represents a self-certification by the State agency of project status in relation to the provisions of the approved Planning APD and Implementation APD. The Annually Updated APD shall include:

(i) Project activity status.

(A) The status of all major tasks and milestones in the approved Planning APD, Implementation APD or previous Annually Updated APD's for the past year. The Annually Updated APD shall include all major tasks and milestones completed in the past year and degree of completion for unfinished tasks.

(B) The status of all project deliverables completed in the past year and degree of completion for unfinished products.

(C) Reports of past and/or anticipated problems or delays in meeting target dates in the approved Planning APD, Implementation APD or previous Annually Updated APD's for the remainder of the project. The Annually Updated APD shall include an explanation of the need to extend any major project target dates.

(ii) Project expenditures.

(A) A detailed accounting for all expenditures for project development over the past year.

(B) An explanation of differences between projected expenses in the approved Planning or Implementation APD, or previous Annually Updated APD's, and actual expenditures for the past year. If changes in costs are reported, FNS may require the submission of a revised cost-benefit analysis as a condition for approval of the Annually Updated APD.

(C) Changes to the allocation basis in the approved APD's cost allocation methodology.

(iii) Changes to the approved APD.

(A) Revised language for all changes to the approved APD or previous Annually Updated APD's shall be submitted as part of the Annually Updated APD, unless submitted separately by the State agency as the changes occurred throughout the year.

(B) Changes in project management and/or contractor services.

(3) *Exceptions to requirements.* Annually Updated APD's for projects funded at the regular FFP rate need not be submitted unless any of the following changes occur:

(i) A change of $50,000 in total approved project costs over the course of the project;

(ii) An extention of 60 days or more in timeframes for projected milestones;

(iii) A change in procurement activities; or

(iv) A significant change in system concept.

(f) *Service agreements.* The State agency shall execute service agreements when data processing services are to be provided by a State central data processing facility or another State or local agency. Service agreements shall be kept on file by the State agency and be available for Federal review, and shall:

(1) Identify the ADP services that will be provided;

(2) Include, preferably as an amendable attachment, a schedule of charges for each identified ADP service, and a certification that these charges apply equally to all users;

(3) Include a description of the method(s) of accounting for the services rendered under the agreement and computing services charges;

(4) Include assurances that services provided will be timely and satisfactory;

(5) Include assurances that information in the computer system as well as access, use and disposal of ADP data will be safeguarded in accordance

with provisions of §§ 272.1(c) and 277.13;

(6) Require the provider to obtain prior approval pursuant to § 277.18(c)(1) from FNS for ADP equipment and ADP services that are acquired from commercial sources primarily to support the Food Stamp Program and requires the provider to comply with § 277.14 for procurements related to the service agreement. ADP equipment and services are considered to be primarily acquired to support the Food Stamp Program when the Program may reasonably be expected to either: be billed for more than 50 percent of the total charges made to all users of the ADP equipment and services during the time period covered by the service agreement, or directly charged for the total cost of the purchase or lease of ADP equipment or services;

(7) Include the beginning and ending dates of the period of time covered by the service agreement; and

(8) Include a schedule of expected total charges to the Program for the peiod of the service agreement.

(g) *Entitlement to 75 percent FFP rate.* (1) A State agency may, at its option, request reimbursement at a 75 percent FFP rate for the costs of planning, design, development or installation of ADP and information retrieval systems. State agency requests for the 75 percent FFP rate shall be made in accordance with this section, and appropriate instructions issued by FNS.

(2) The 75 percent funding level may be approved by FNS if the proposed system will:

(i) Assist the State agency in meeting the requirements of the Food Stamp Act;

(ii) Meet the program standards specified in § 272.10(b) (1), (2) and (3), except for the requirements in § 272.10(b)(2) (vi) and (vii) and (3)(ix) to eventually transmit data directly to FNS;

(iii) Be likely to provide more efficient and effective administration of the program; and

(iv) Be compatible with other such systems utilized in the administration of State plans under the program of Aid to Families with Dependent Children (AFDC).

(3) State agencies seeking an enhanced level of funding for the planning, design, development or installation of automated data processing and information retrieval systems shall develop statewide systems which are integrated with AFDC. In cases where a State agency can demonstrate that a local, dedicated, or single function (issuance or certification only) system will provide for more efficient and effective administration of the program, FNS may grant an exception to the statewide integrated requirement. These exceptions will be based on an assessment of the proposed system's ability to meet the State agency's need for automation. Systems funded as exceptions to this rule, however, should be capable, to the extent necessary, of an automated data exchange with the State system used to administer AFDC. In no circumstances will funding be available for systems which duplicate other State agency systems, whether presently operational or planned for future development.

(4) The system developed in response to these regulations shall contain the following elements, where appropriate:

(i) A data base which receives information, sorts, performs calculations, and stores information;

(ii) An information retrieval system which will have the ability to access the data base, display or print data, and update the data in numerical or alphabetical form;

(iii) Hardware, in addition to that required for the data base, which will include visual display terminal(s) with an attached keyboard, connected to the data base hardware components by telecommunication networks;

(iv) Software which will include system programs for data recall and input, budget calculation capability when not included in the data base system, printout and display for data entry and inquiry terminals, and for network control; and

(v) Technological safeguards and managerial procedures which will be established and applied to computer hardware, software, and data, in accordance with paragraph (p) of this section, in order to ensure the protection of the integrity of the system and individual privacy. System security shall be inherent in the system and provided for in the Implementation APD submitted for approval. The system will process machine readable data files used for the authorized exchange of information between levels of government (i.e., State to State, State to Federal).

(5) Approval of the Planning APD and Implementation APD for payment by FNS of costs at the 75 percent level will be limited to:

(i) Planning and design, i.e. requirements and systems analyses, feasibility studies, preliminary cost benefits analyses, alternatives analyses, and general systems design;

(ii) Development, i.e. detailing of system and program specifications, programming and testing;

(iii) Procurement of ADP equipment and/or services; and

(iv) Installation, i.e. conversion, training of staff, and turnover to operational status.

(6) Costs may not be funded at 75 percent when the approved system produces automated processing of food stamp recipient applications, issuance authorizations or other reports (operations) on a continuing basis for use by State agency personnel for administration of the Food Stamp Program. Operations include the use of purchased or rented computer equipment and software directly required for and used in the operation of the automated data processing and information retrieval system. For ADP development projects with phased installation and implementation, counties, districts or other subdivisions of the State shall be considered operational at the time that the approved system produces automated application processing and/or issuance authorizations for the food stamp caseload for that subdivision of the State. Pilot testing and an initial period of parallel processing for test purposes may be considered developmental costs and eligible for 75 percent funding for a period not to exceed 3 months, unless specifically extended by FNS.

(7) If FNS suspends approval of an APD in the course of a State agency's planning, designing, development, or installation, the 75 percent level of funding shall not be allowable for any costs incurred until such time as the conditions for approval are met.

(8) Cost elements. Incident to the activities listed in paragraph (g)(5) of this section, a State agency may seek payment for the following expenses at a 75 percent level.

(i) Personnel. Salaries, wages, travel, and benefits of personnel actually engaged in design, development, or installation of approved ADP systems.

(ii) Materials, equipment, facilities, and supplies. Costs of materials, equipment, facilities and supplies used in design, development, or installation of approved ADP systems. Only the proportionate share of the costs of capital assets assignable to the period of time or prorated for usage may be claimed during the design, development or installation of these systems. This share must be determined based on acquisition costs and/or depreciation or approved usage rates. Data with respect to such costs shall be submitted with the request for funding.

(iii) Contracted services. Services obtained under the provisions of contracts which meet the procurement standards of this part for the design,

development, or installation of FNS approved systems.

(iv) Management studies and preparation of other planning documents. The cost of resources used to produce the Planning APD may be funded at the 75 percent level regardless of final approval or denial of the Planning APD.

(h) *Emergency acquisition requirements.* The State agency may request FFP for the costs of ADP equipment and services acquired to meet emergency situations which preclude the State agency from following the prior approval requirements of § 277.18(c). In order for FNS to consider providing FFP in emergency situations, the following conditions must be met:

(1) The State agency must submit a written request to FNS prior to the acquisition of any ADP equipment or services. The written request must be sent by registered mail and shall include:

(i) A brief description of the ADP equipment and/or services to be acquired and an estimate of their costs;

(ii) A brief description of the circumstances which result in the State agency's need to proceed with the acquisition prior to obtaining formal FNS approval; and

(iii) A description of the adverse impact which would result if the State agency does not immediately acquire the ADP equipment and/or services.

(2) Upon receipt of a written request for emergency acquisition FNS will provide a written reponse to the State agency within 14 days. The FNS response will:

(i) Inform the State agency that the request has been disapproved and the reason for disapproval; or,

(ii) Inform the State agency that FNS recognizes that an emergency situation exists and the State agency must submit a formal request for approval by FNS which includes the information specified at § 277.18(d)(2) within 90 days from the date of the State agency's initial written request.

(iii) If FNS approves the request submitted under paragraph (h)(1) of this section, FFP will be available from the date the State agency acquires the ADP equipment and services.

(i) *Cost Determination and Claiming Costs*—(1) *Cost determination.* Actual costs must be determined in compliance with an FNS appoved budget and Appendix A to this part, and must be reconcilable with the FNS funding level. There shall be no payments pursuant to this section to the extent that a State agency is reimbursed for such costs pursuant to any other Federal program or uses ADP systems for purposes not connected with the Food Stamp Program. The State agency approved cost allocation plan must be amended to disclose the methods which will be used to identify and classify costs to be claimed at the 75 percent rate. This methodology must be submitted to FNS as part of the request for FNS approval of funding at the 75 percent rate as required in paragraph (d)(3) of this section. Any costs funded pursuant to these regulations shall be excluded in determining the State agency's administrative costs under any other section of this part.

(2) *Cost identification for purposes of FFP claims.* State agencies shall assign and claim the costs incurred under an approved APD in accordance with the following criteria:

(i) Development costs. Using its normal departmental accounting systems, the State agency shall specifically identify what items of costs constitue development costs, assign these costs to specific project cost centers, and distribute these costs to funding sources based on the specific identification, assignment and distribution outlined in the approved APD. The mehods for distributing costs set forth in the APD should provide for assigning identifiable costs, to the extent practicable, directly to program/functions. The State agency shall amend the cost allocation plan required by § 277.9 to include the approved APD methodology for the identification, assignment and distribution of the development costs.

(ii) Operational costs. Costs incurred for the operation of an ADP system shall be identified and assigned by the State agency to funding sources in accordance with the approved cost allocation plan required by § 277.9.

(iii) *Service agreement costs.* States that operate a central data processing facility shall use their approved central service cost allocation plan required by OMB Circular A–87 to identify and assign costs incurred under service agreements with the State agency. The State agency will then distribute these costs to funding sources in accordance with paragraphs (i)(2) (i) and (ii) of this section.

(3) *Capital expenditures.* The State agency shall charge the costs of ADP equipment having unit acquisition costs or total aggregate costs, at the time of acquisition, of more than $25,000 by means of depreciation or use allowance, unless a waiver is specifically granted by FNS. If the equipment acquisition is part of an APD that is subject to the prior approval requirements of paragrph (c)(2) of this section, the State agency may submit the waiver request as part of the APD.

(4) *Claiming costs.* Prior to claiming funding under this section the State agency must have complied with the requirements for obtaining approval and prior approval of § 227.18(c).

(5) *Budget authority.* FNS approval of requests for funding will provide notification to the State agency of the budget authority and dollar limitations under which such funding may be claimed. FNS shall provide this amount as a total authorization for such funding which may not be exceeded unless amended by FNS. FNS's determination of the amount of this authorization will be based on the budget submitted by the State agency. Activities not included in the approved budget, as well as continuation of approved activities beyond scheduled deadlines in the approved plan, shall require FNS approval of an amended State budget for payment. Requests to amend the budget authorization approved by FNS must be submitted to FNS prior to claiming such expenses.

(j) *Procurement requirements.* (1) Procurements of ADP equipment and services are subject to the procurement standards prescribed by § 277.14 regardless of any conditions for prior approval. Those standards include a requirement for maximum practical open and free competition regardless of whether the procurement is formally advertised or negotiated.

(2) The standards prescribed by § 277.14, as well as the requirement for prior approval, apply to ADP services and equipment acquired by a State or local agency, and the ADP services and equipment acquired by a State or local central data processing facility primarily to support the Food Stamp Program.

(3) The competitive procurement policy prescribed by § 277.14 shall be applicable except for ADP services provided by the agency itself, or by other State or local agencies.

(k) *Access to system and records.* Access to the system in all aspects, including design, development, and operation, including work performed by any source, and including cost records of contractors and subcontractors, shall be made available by the State agency to FNS or its authorized representatives at intervals as are deemed necessary by FNS, in order to determine whether the conditions for approval are being met and to determine the efficiency, economy and effectiveness of the system. Failure to provide full access by appropriate State and Federal representatives to all parts of the system shall result in suspension and/or

termination of Food Stamp Program funds for the costs of the system and its operation.

(l) *Ownership Rights.* (1) *Software.* (i) The State or local government shall include a clause in all procurement instruments which provides that the State or local government shall have all ownership rights in any software or modifications thereof and associated documentation designed, developed or installed with FFP under this section.

(ii) FNS reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use the Federal Government purposes, such software, modifications, and documentation.

(iii) Proprietary operating/vendor software packages (e.g., ADABAS or TOTAL) which are provided at established catalog or market prices and sold or leased to the general public shall not be subject to the ownership provisons in paragraphs (k)(2) (i) and (ii) of this section. FFP is not available for proprietary applications software developed specifically for the Food Stamp Program.

(2) *Automated data processing equipment.* The policies and procedures governing title, use and disposition of property purchased with Food Stamp Program funds, which appear at 7 CFR 277.13 are applicable to automated data processing equipment.

(m) *Use of ADP Systems.* ADP systems designed, developed or installed with FFP shall be used for the period of time specified in the APD, unless FNS determines that a shorter period is justified.

(n) *Basis for continued federal financial participation.* FNS will continue FFP at the levels approved in the Planning APD and the Implementation APD provided that project development proceeds in accordance with the conditions and terms of the approved APD and that ADP resources are used for the purposes authorized. FNS will use the Annually Updated APD to monitor ADP project development. The submission of the report prescribed in § 277.18(e) for the duration of project development is a condition for continued FFP. In addition, periodic onsite reviews of ADP project development and State and local agency ADP operations may be conducted by or for FNS to assure compliance with approved APD's, proper use of ADP resources, and the adequacy of State or local agency ADP operations.

(o) *Disallowance of federal financial participation.* If FNS finds that any system approved under the provisions of § 277.18(c) fails to comply substantially with the criteria, requirements, and other undertakings prescribed in the approved or modified APD for a proper and efficient system, payment of FFP may be disallowed.

(p) *ADP system security requirements and review process*—(1) (*ADP system security requirements.* State and local agencies are responsible for the security of all ADP projects under development, and operational systems involved in the administration of the Food Stamp Program. State and local agencies shall determine appropriate ADP security requirements based on recognized industry standards or standards governing security of Federal ADP systems and information processing.

(2) *ADP security program.* State agencies shall implement and maintain a comprehensive ADP Security Program for ADP systems and installations involved in the administration of the Food Stamp Program. ADP Security Programs shall include the following components.

(i) Determination and implementation of appropriate security requirements as prescribed in paragraph (p)(1) of this section.

(ii) Establishment of a security plan and, as appropriate, policies and procedures to address the following areas of ADP security:

(A) Physical security of ADP resources;

(B) Equipment security to protect equipment from theft and unauthorized use;

(C) Software and data security;

(D) Telecommunications security;

(E) Personnel security;

(F) Contingency plans to meet critical processing needs in the event of short- or long-term interruption of service;

(G) Emergency preparedness; and

(H) Designation of an Agency ADP Security Manager.

(iii) Periodic risk analyses. State agencies shall establish and maintain a program for conducting periodic risk analyses to ensure that appropriate, cost-effective safeguards are incorporated into new and existing systems. In addition, risk analyses shall be performed whenever significant system changes occur.

(3) *ADP system security reviews.* State agencies shall review the ADP system security of installations involved in the administration of the Food Stamp Program on a biennial basis. At a minimum, the reviews shall include an evaluation of physical and data security, operating procedures, and personnel practices. State agencies shall provide copies of ADP system security review reports to FNS upon completion, which will be used to identify and monitor necessary corrective action.

(4) The security requirements of this section apply to all ADP systems used by State and local governments to administer the Food Stamp Program.

(5) Costs incurred for complying with the provisions of paragraphs (p)(1) through (3) of this section are considered regular administrative costs which are funded at the regular FFP level unless they meet the requirements for funding at the 75 percent FFP level.

3. In Part 277, Appendix A, *Standards for Selected Items of Cost*, Section B, paragraphs B(1) through B(12) are removed, paragraphs B(13) through B(20) are redesignated as paragraphs B(2) through B(9), and a new paragraph B(1) is added, to read as follows:

Appendix A—Principles for Determining Costs Applicable to Administration of the Food Stamp Program by State Agencies.

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B. *Costs allowable with approval of FNS.*

(1) Automated Data Processing. The costs of acquiring data processing equipment and services used in the administration of the Food Stamp Program are allowable. The costs of ADP equipment and services acquisitions to be funded at the 75 percent rate or which exceed the prior approval cost thresholds specified in s277.18(c) are allowable upon the prior written approval of FNS. Requests for prior approval of such costs shall be in accordance with the provisions of s277.18.

* * * * *

Date: August 1, 1988.

Anna Kondratas,

Administrator.

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Part V

The President

Proclamation 5844—Thanksgiving Day, 1988

Federal Register
Vol. 53, No. 152
Monday, August 8, 1988

Presidential Documents

Title 3—

The President

Proclamation 5844 of August 4, 1988

Thanksgiving Day, 1988

By the President of the United States of America

A Proclamation

The celebration of Thanksgiving Day is one of our Nation's most venerable and cherished traditions. Almost 200 years ago, the first President of these United States, George Washington, issued the first national Thanksgiving Day Proclamation under the Constitution and recommended to the American people that they "be devoted to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be." He called upon them to raise "prayers and supplications to the Great Lord and Ruler of Nations," not merely for continued blessings on our own land but on all rulers and nations that they might know "good government, peace, and concord."

A century ago, President Grover Cleveland called for "prayers and song of praise" that would render to God the appreciation of the American people for His mercy and for the abundant harvests and rich rewards He had bestowed upon our Nation through the labor of its farmers, shopkeepers, and tradesmen. Both of these Proclamations included something else as well: a recognition of our shortcomings and transgressions and our dependence, in total and in every particular, on the forgiveness and forbearance of the Almighty.

Today, cognizant of our American heritage of freedom and opportunity, we are again called to gratitude, thanksgiving, and contrition. Thanksgiving Day summons every American to pause in the midst of activity, however necessary and valuable, to give simple and humble thanks to God. This gracious gratitude is the "service" of which Washington spoke. It is a service that opens our hearts to one another as members of a single family gathered around the bounteous table of God's Creation. The images of the Thanksgiving celebrations at America's earliest settlement—of Pilgrim and Iroquois Confederacy assembled in festive friendship—resonate with even greater power in our own day. People from every race, culture, and creed on the face of the Earth now inhabit this land. Their presence illuminates the basic yearning for freedom, peace, and prosperity that has always been the spirit of the New World.

In this year when we as a people enjoy the fruits of economic growth and international cooperation, let us take time both to remember the sacrifices that have made this harvest possible and the needs of those who do not fully partake of its benefits. The wonder of our agricultural abundance must be recalled as the work of farmers who, under the best and worst of conditions, give their all to raise food upon the land. The gratitude that fills our being must be tempered with compassion for the needy. The blessings that are ours must be understood as the gift of a loving God Whose greatest gift is healing. Let us join then, with the psalmist of old:

O give thanks to the Lord, call on His name,
Make known His deeds among the peoples!
Sing to Him, sing praises to Him,
Tell of all His wonderful works!
Glory in His holy name;
Let the hearts of those who seek the Lord rejoice!

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim Thursday, November 24, 1988, as a National Day of Thanksgiving, and I call upon the citizens of this great Nation to gather together in homes and places of worship on that day of thanks to affirm by their prayers and their gratitude the many blessings God has bestowed upon us.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of August, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

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Monday, August 8, 1988

INFORMATION AND ASSISTANCE

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 523-6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).

S. 2527/Pub. L. 100-379

Worker Adjustment and Retraining Notification Act. (Aug. 4, 1988; 102 Stat. 890; 6 pages) Price: $1.00

Upon expiration of the 10-day period prescribed by the Constitution of the United States, S. 2527 became law on Aug. 4, 1988, without the President's signature.

CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

New units issued during the week are announced on the back cover of the daily **Federal Register** as they become available.

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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1987. The CFR volume issued January 1, 1987, should be retained.

[3] No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1988. The CFR volume issued as of Apr. 1, 1980, should be retained.

[4] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[5] No amendments to this volume were promulgated during the period July 1, 1986 to June 30, 1988. The CFR volume issued as of July 1, 1986, should be retained.

[6] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.