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January 27, 1989

Briefings on How To Use the Federal Register—
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WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

WASHINGTON, DC

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Presidential Documents

Title 3—

The President

Executive Order 12668 of January 25, 1989

President's Commission on Federal Ethics Law Reform

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish, in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2), an advisory committee on reform of the Federal ethics laws, it is hereby ordered as follows:

Section 1. *Establishment.* (a) There is established the President's Commission on Federal Ethics Law Reform. The Commission shall be composed of not more than eight members appointed by the President. These members shall be distinguished individuals with broad experience in ethics and public service.

(b) The President shall designate a Chairman and Vice Chairman from among the members of the Commission.

Sec. 2. *Functions.* (a) The Commission shall review Federal ethics laws, Executive orders, and policies and shall make recommendations to the President for legislative, administrative, and other reforms needed to ensure full public confidence in the integrity of all Federal public officials and employees.

(b) The Commission shall report to the President by March 9, 1989, and shall provide a copy of its report to the Attorney General.

Sec. 3. *Administration.* (a) The heads of Executive agencies and the Director of the Office of Government Ethics, to the extent permitted by law, shall provide the Commission such information, advice, and assistance as it may require for purposes of carrying out its functions.

(b) Members of the Commission shall serve without compensation for their work on the Commission. However, while engaged in the work of the Commission, members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law (including 5 U.S.C. 5701–5707), to the extent funds are available therefor.

(c) The Attorney General, to the extent permitted by law and subject to the availability of appropriations, shall provide the Commission with such administrative services, funds, facilities, staff, and other support services as may be necessary for the performance of its functions.

Sec. 4. *Counsel to the President.* Following the submission of the Commission's report, the Counsel to the President shall provide the President with periodic reports regarding the implementation of reforms to Federal ethics laws, Executive orders, and policies.

Sec. 5. *General.* (a) Notwithstanding any other Executive order, the functions of the President under the Federal Advisory Committee Act, as amended, except that of reporting to the Congress, which are applicable to the Commission, shall be performed by the Attorney General, in accordance with guidelines and procedures established by the Administrator of General Services.

(b) The Commission shall terminate 30 days after its report, unless sooner extended.

George Bush

THE WHITE HOUSE,
January 25, 1989.

[FR Doc. 89-2106
Filed 1-25-89; 4:27 pm]
Billing code 3195-01-M

Editorial note: For the President's remarks on signing Executive Order 12668 and a White House announcement on the appointment of the membership of the Commission, released Jan. 25, see the *Weekly Compilation of Presidential Documents* (vol. 25, no. 4).

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

7 CFR Part 1763

Architectural and Engineering Services—Telephone Program

AGENCY: Rural Electrification Administration, USDA.

ACTION: Final rule.

SUMMARY: The Rural Electrification Administration (REA) hereby adds Part 1763, Architectural and Engineering Services—Telephone Program, to 7 CFR Chapter XVII of the Code of Federal Regulations. This new part sets forth the provisions and requirements of the RE Act and the REA administrative policies, requirements, and procedures for the provisions of architectural and engineering services for the planning and construction activities for telecommunication facilities and systems for telephone borrowers with REA loan funds.

All borrowers that are parties to the planning and construction of borrowers' telecommunication facilities and systems will be affected by this rule.

EFFECTIVE DATE: This final rule is effective January 27, 1989.

FOR FURTHER INFORMATION CONTACT: William F. Albrecht, Director, Telecommunications Staff Division, Rural Electrification Administration, Room 2835 South Building, U.S. Department of Agriculture, Washington, DC 20250, telephone number (202) 382-8663. The Final Regulatory Impact Analysis describing the options considered in developing this rule amendment is available on request from the above named individual.

SUPPLEMENTARY INFORMATION: This rule is issued in conformity with Executive Order 12291, Federal Regulation. This action will not (1) have an annual effect on the economy of $100 million or more, (2) result in a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies, or geographic regions; or (3) result in significant adverse effects on competition, employment, investment or productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, this rule has been determined to be "not major."

This action does not fall within the scope of the Regulatory Flexibility Act. REA has concluded that promulgation of this rule would not represent a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.* (1976)) and, therefore, does not require an environmental impact statement or an environmental assessment.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.851, Rural Telephone Loans and Loan Guarantees, and 10.852, Rural Telephone Bank Loans. For the reasons set forth in the final rule related Notice to 7 CFR Part 3015, Subpart V (50 FR 47034, November 14, 1985), this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

The reporting and record keeping provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507 *et seq.*) contained in this rule have been approved by the Office of Management and Budget (OMB) under clearance number 0572-0064.

Public reporting burden for this collection of information is estimated to average .9 of an hour 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 Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, DC 20250; and to the Office of Information and Regulatory Affairs, ATTN: Desk Officer for REA, Office of Management and Budget, Washington, DC 20503.

Background

The following existing REA Bulletins contain the present policies, requirements, and procedures for providing architectural and engineering services for REA telephone borrowers:

340-1 Final Payments to Contractors, Engineers, and Architects-Telephone Program
341-1 Final Statement of Engineering Fee and Certificate of Engineer, Telephone Engineering Service Contract
341-3 Engineering Services for Telephone Borrowers
342-1 Architectural Services for Telephone Borrowers
380-3 Weekly Progress Report of Telphone Construction and Engineering Services
387-3 Final Documents Required to Close Out Construction of Buildings—Telephone Program.

These Bulletins contain certain policies, requirements, and procedures that are incorporated into this 7 CFR Part 1763 and other CFR Parts. When these CFR Parts are published as final rules, the above Bulletins will be rescinded.

On July 29, 1988, REA published in the **Federal Register** Proposed Rule 7 CFR Part 1763, Architectural and Engineering Services—Telephone Program, containing the provisions regarding architectural and engineering services performed by or for REA telephone borrowers. In the proposed rule REA invited interested parties to file comments on or before August 29, 1988.

Comments

Comments and recommendations were received from the Association of Communication Engineers (ACE), representing 36 engineering firms actively engaged in providing engineering services to REA telephone borrowers; Reed Veach, Wurdeman and Associates (RVW), a consulting engineering firm providing engineering services to several REA telephone borrowers; AT&T Network Systems; National Telephone Cooperative Association (NTCA); and filing as a group, the United States Telephone Association (USTA), the National Rural Telcom Association (NRTA), and the

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO). The comments and recommendations are summarized as follows:

Section 1763.1 General.

USTA, NRTA and OPASTCO stated that (1) the Proposed Rule would restrict funding for a purpose permitted by the Rural Electrification Act; (2) many requirements are placed inappropriately on engineers and architects where they should be placed on borrowers; (3) the rule perpetuates nonregulatory language directly from REA Bulletins; and (4) in order for the public to have an opportunity to thoroughly review and comment on REA's regulations, a 60-day comment period should be granted.

Response. The language of this regulation merely reflects the provisions of 7 CFR Part 1745 with respect to the criteria for loan purposes or amounts of funds to be included in a loan and does not independently restrict these purposes. This regulation addresses only the provisions of architectural and engineering services for the purposes provided for in approved loans.

Regarding the second comment, the wording in several sections has been changed to place the requirements on the borrowers and not on the architects and engineers. As to the third point, appropriate explantatory and advisory language has been retained in the Final Rule. REA believes such information is helpful to borrowers, improves communications, and enhances program administration. Regarding the fourth point, a 30-day comment period was used because of the deadline imposed by the Omnibus Budget Reconciliation Act of 1987. REA continued to accept comments after the 30-day period.

1763.1(b)—RVW recommended that engineers performing services for REA borrowers, whether by contract or by force account, meet applicable State registration and licensing requirements.

Response: For many years telephone borrowers with qualified employees have been permitted to provide engineering services by the force account method for facilities financed with REA loan funds. The results have been satisfactory. The Final Rule sets forth experience requirements for borrowers' employees that will ensure continued satisfactory engineering services by the force account method.

Regarding architects and engineers hired under contract by borrowers, USTA, NRTA, and OPASTCO commented that the Proposed Rule imposes registration and licensing requirements on these architects and engineers, whereas it should require borrowers that employ architects and engineers under contract to employ only those who meet the specified requirements.

Response: REA agrees, and § 1763.1 (c) and (d) have been worded to place the requirement upon the borrower.

Section 1763.1(c)—USTA, NRTA, and OPASTCO stated that the requirement for an architect on all building projects financed with loan funds places unnecessary burdens on borrowers and that REA should list the types of building projects that are exempt from this requirement.

Response: REA agrees, and has added a new paragraph § 1763.1(d) listing the types of building construction that will require professional architectual or engineering services.

Section 1763.2 Definitions.

USTA, NRTA, and OPASTCO commented that the definition of "Project" is not clear and the term "rural telephone system" is not defined in the Rural Electrification Act (the Act).

Response: The definition of "Project" has been clarified in the Final Rule and the term "rural telephone system" has been deleted.

Section 1763.4 List of engineers.

USTA, NRTA, and OPASTCO commented that informing the public that REA keeps a list of participating engineers could suggest that borrowers limit their choices to those on the list.

Comment: REA is discontinuing the list.

Section 1763.5 Insurance requirements.

USTA, NRTA, and OPASTCO proposed certain changes in the language requiring architects and engineers performing work for borrowers to meet certain insurance requirements.

Response: 7 CFR Part 1788, which has been in effect since July 17, 1986, sets forth the insurance coverages which borrowers must require be maintained by contractors performing work on REA-financed construction. REA has added paragraph § 1763.4 to the Final Rule to require borrowers to employ only those architects and engineers who have and maintain such insurance coverages.

Section 1763.21 Architectual services contract.

RVW commented that there is a conflict between § 1763.2(a) of the Proposed Rule and the existing REA policy in Bulletins 341-3 and 342-1, which permits using either Form 165 or Form 217 for architectual services for unattended central office buildings.

Response: The Final Rule has been revised to permit the use of either Form 165 or Form 217 for architectural services for unattended central office buildings.

USTA, NRTA, and OPASTCO objected to all "advisory" sections of the CFR, suggesting that advice should not be contained in a regulation. Specifically mentioned were REA's suggestion that borrowers obtain legal counsel to ensure modified contracts are properly prepared and executed and that borrowers reach written agreements with architects for preliminary services required prior to REA approval of the Form 165 contract.

Response: REA is committed to the elimination of unnecessary requirements and advice to borrowers. REA believes, however, that it is appropriate to include advice in regulations when it will improve communications, prevent problems, or otherwise further effective program administration. The advice for legal counsel is retained in the Final Rule, but the advice on a written agreement with the architect for preliminary services has been deleted.

USTA, NRTA, and OPASTCO commented that if it is REA's intent for forms to contain requirements under the regulation, the forms should be published with the relevant rule or incorporated by reference to permit public notice and opportunity for comment. The comment specifically concerned the Form 165 Contract.

Response: REA believes it more appropriate to publish all of its forms under one CFR, rather than have them scattered throughout many sections. Therefore, REA contract forms have been published in the **Federal Register** under 7 CFR Part 1762. Specifications and drawings to be made a part of the contract are incorporated by reference in the **Federal Register** under 7 CFR Part 1772.

In § 1763.21(b) of the Final Rule, the term "required" has been changed to "set forth" to reflect REA's intent that any modification to Form 165 not affect the contractual obligations of the architect as set forth in the form.

Section 1763.22 Closeout of architectual services contract.

USTA, NRTA, and OPASTCO commented that the Proposed Rule places the requirement for obtaining REA Form 284, Final Statement of Architectual Fees, on the architect, rather than on the borrower.

Response: The Final Rule places the requirement on the borrower to obtain the completed Form 284 from the architect.

RVW commented there is a conflict between §§ 1763.21(c) and 1763.42(a) concerning the submission of contracts to REA.

Response: The review by the GFR is essential for the approval of contracts. Section 1763.21(c) in the Final Rule has been revised to require submission of the REA Form 165 contracts to REA through the GFR.

Section 1763.40 Preloan engineering.

Paragraph (a)—USTA, NRTA, and OPASTCO objected to advising borrowers to discuss their proposed method of obtaining preloan engineering services with the GFR before proceeding.

Response: REA believes that discussion with the GFR will often minimize the burden on borrowers and has retained the advisory language in the Final Rule.

Paragraph (b)—USTA, NRTA, and OPASTCO objected to REA suggesting that Form 835 be used for contracting preloan engineering services.

Response: In many cases, following this advice will minimize problems for borrowers. The advisory language is retained in the Final Rule.

Section 1763.41 Preloan engineering procedures.

USTA, NRTA, and OPASTCO commented that § 1763.41(a), referring to the borrower's selection of a preloan engineer, and § 1763.41(c), referring to requesting an advance to cover the cost of preloan engineering services, impose no requirements and should be stricken from the regulation.

Response: These items have been deleted in the Final Rule.

NTCA commented that the acronym FRS needs to be defined.

The Final Rule contains a definition for FRS in § 1763.2.

Section 1763.42 Postloan engineering by contract.

Paragraph (a)—RVW commented that the requirement to submit the REA Form 217, Postloan Engineering Service Contract, through the GFR adds one to two weeks or more to the time to process the contracts.

Response: Since the GFR has firsthand knowledge of the project, his review is essential for approval of the contracts. The requirement has been retained.

AT&T Network Systems commented that the requirement for postloan engineering services by contract to be on REA Form 217, Postloan Engineering Service Contract, subject to REA approval, and where REA may withhold approval if the form is modified, is not conducive to flexibility and freedom to structure business arrangements.

Response: There are many reasons for using standard forms of contract. Standard forms comply with the rules and regulations of the various Government entities administering the use of Government-provided funds. They provide essential security for the REA loans. All parties are familiar with them. They are readily accepted in all States and territories where REA telephone borrowers are located, and by the contractors. Their use has promoted efficient and economical facilities to the benefit of the rural subscribers. The use of nonstandard contracts could lessen these benefits and increase the complexity and cost of program administration, resulting in delays.

Paragraph (b)—RVW commented that the requirement that a letter be sent to REA giving the name of the firm and the name and license number of the individual who will sign the work order certification is unnecessary.

Response: REA agrees. The Final Rule does not contain the requirement for this letter.

Section 1763.43 Postloan engineering by force account.

Paragraph (a)—ACE recommended that REA require professional registration for new applicants seeking approval to perform force account engineering, but that REA allow all borrowers' employees whom REA has previously approved to direct force account engineering activities to continue in this capacity.

RVW commented that procedures would be streamlined and made administratively manageable by requiring that borrowers' engineers receive State registration before they may perform force account engineering.

Response: REA believes that an alternative to requiring State registration should be retained for those directing force account engineering. REA's experience with nonregistered engineers in this capacity has been satisfactory. The alternative qualifications have been retained in the Final Rule.

Section 1763.44 Loan funds for engineering services.

RVW commented that § 1763.1(g) states that REA approval of Form 245, Engineering Service Contract, Special Services—Telephone, is not required, but that § 1763.44(e) implies that approval is required in order for the borrower to obtain loan funds.

Response: REA approval of the Form 245 contract is not required. REA funds, if provided in the loan for this purpose, will be advanced upon the submission of the final invoice from the engineer. Section 1763.44(e) has been deleted.

USTA, NRTA, and OPASTCO commented that § 1763.44(a) is an attempt to codify REA behavior which could be arbitrary and capricious.

Response: REA will make loan funds available up to the amounts provided in the loan for these purposes, if all of the conditions for advance have been met as discussed in 7 CFR Part 1754. Section 1763.43 has been clarified and portions that duplicated 7 CFR Part 1754 have been deleted.

Section 1763.45 Engineering progress reports.

RVW agreed with the concept of progress and status reports but felt the requirements for the engineer should be in the REA Form 217 Postloan Engineering Services Contract, not in the Part 1763 regulation.

Response: REA states its requirements for borrowers in these regulations. The contract forms contain the borrower's requirements of contractors. It is REA's intent to require the borrower to obtain progress reports, so that requirement must be in this regulation.

USTA, NRTA, and OPASTCO commented that the borrower should be required to obtain the reports, rather than requiring the engineer to provide them. They also questioned whether the progress reports should cover only outside plant construction.

Response: The Final Rule contains revised language in § 1763.44 (a) and (b), which clarifies that progress reports are required for all telephone facilities.

Section 1763.45 Closeout of the postloan engineering contract.

RVW commented that upon REA approval of Form 506, Final Statement of Engineering Fee, one copy should be sent to the borrower and one copy to the engineer.

USTA, NRTA, and OPASTCO commented that this provision should be reworded to place on the borrower the requirement for obtaining Form 506.

Response: REA agrees with both comments. Final Rule § 1763.45(a) requires the borrower to obtain the REA Form 506 from the engineer. Section 1763.45(c) requires REA to send one copy of Form 506 to the borrower and one copy to the engineer after approval by REA.

List of Subjects in 7 CFR Part 1763

Loan programs—communications, Telecommunications, Telephone.

Therefore, REA adds new Part 1763 to 7 CFR Chapter XVII as follows:

PART 1763—ARCHITECTURAL AND ENGINEERING SERVICES—TELEPHONE PROGRAM

Subpart A—General

Subpart B—Architectural Services

Subpart C—Engineering Services

Authority: 7 U.S.C. 901 *et seq.*, 7 U.S.C. 1921 *et seq.*

Subpart A—General

§ 1763.1 General.

(a) The standard REA Loan Documents (*See* 7 CFR Part 1758) contain provisions regarding engineering and architectural services performed by or for REA telephone borrowers. This part implements certain of the provisions by setting forth the requirements and procedures to be followed by borrowers in selecting architects and engineers and obtaining architectural and engineering services by contract or by force account.

(b) Preloan architectural and engineering services may be provided by qualified personnel on the borrower's staff or by consultants. Neither the selection of a preloan architect or engineer by a borrower, nor the contractual arrangements with them, requires REA approval.

(c) Postloan architectural and engineering services shall be obtained by borrowers from registered architects and engineers licensed in the State in which the facilities will be located, except where REA has approved the borrower to provide these services by the force account method. When the extent of the proposed major or minor construction is such that the postloan engineering involved is within the capabilities of employees on the borrower's staff, the borrower may request REA approval to provide such services. This method of providing engineering services is referred to as force account engineering. Refer to § 1763.42.

(d) To be considered for REA financing, the following contract requirements must be met for postloan architectural and engineering services:

(1) For major construction, services provided by architects and engineers not on the borrower's staff must be provided under Form 165, Architectural Services Contract—Telephone, or Form 217, Postloan Engineering Service Contract—Telephone. These contracts require REA approval.

(2) For minor construction, borrowers may use the contracts in § 1763.1(d)(1) for postloan architectural or engineering services or any other form of contract, such as Form 245, Engineering Service Contract, Special Services—Telephone. REA approval of contracts for postloan architectural or engineering services associated with minor construction, except for buildings covered in 1763.1(e), is not required.

(e) For buildings to be constructed with REA funds, postloan architectural or engineering services shall be obtained if (1) the construction cost exceeds $50,000 (prefab buildings using manufacturer's specifications approved by REA are exempt from this requirement) or (2) soil or seismic conditions require special design considerations.

§ 1763.2 Definitions.

For the purpose of this Part 1763:

(a) *Contract*—The services contract between the borrower and its architect or engineer.

(b) *Force Account Engineering*—Any preloan or postloan engineering services performed by the borrower's staff.

(c) *FRS*—REA Form 481 (OMB-No. 0572-0023) Financial Requirement Statement. See 7 CFR Part 1754.

(d) *GFR*—REA General Field Representative assigned to the Project.

(e) *Loan*—Any loan made or guaranteed by REA.

(f) *Loan Design (LD)*—Supporting data for a loan application. See § 1749.32 for further information.

(g) *Loan Funds*—Funds provided by REA through direct or guaranteed loans.

(h) *Major Construction*—A telephone plant project, estimated to cost more than $100,000, including all labor and materials.

(i) *Minor Construction*—A telephone plant project, estimated to cost $100,000 or less, including all labor and materials.

(j) *Non-loan Funds*—All funds other than REA loan funds.

(k) *Postloan Engineering Services*—The design, procurement, and inspection of construction to accomplish the objectives of a loan as stated in a LD approved by REA.

(l) *Preloan engineering services*—The planning and design work performed in preparing a LD. This consists of helping the borrower determine the objectives for a loan, selecting the most effective and efficient methods of meeting loan objectives, and preparing the LD which describes the objectives and discusses the method selected.

(m) *Project*—The construction described in the plans and specifications.

§ 1763.3 Availability of REA forms.

Single copies of REA forms and publications cited in this part are available free from Administrative Services Division, Rural Electrification Administration, United States Department of Agriculture, Washington, DC 20250-1500. These forms and publications may be reproduced.

§ 1763.4 Insurance requirements.

(a) All outside architects and engineers employed by REA telephone borrowers shall have insurance coverage as required by 7 CFR Part 1788.

(b) Borrowers shall ensure that their architects and engineers comply with the insurance requirements of their contracts. See 7 CFR 1788.54.

§ 1763.5 Payments.

(a) Borrowers shall make prompt payments to architects and engineers as required by the contract.

(b) REA shall not make loan funds available for late payment interest charges.

§§ 1763.6-1763.19 [Reserved]

Subpart B—Architectural Services

§ 1763.20 Selection of architects.

The borrower shall be responsible for selecting an architect to perform the architectural services required in the design and construction of buildings.

§ 1763.21 Architectural services contract.

(a) When contracting for architectural services for major construction, the borrower shall use Form 165, except for unattended central office buildings, in which case either Form 165 or Form 217 shall be used. Except for preloan studies (see 7 CFR Part 1749), the borrower shall incur no obligation for architectural services until REA has approved this agreement. A borrower shall not enter into the architectural services contract for major construction before REA has approved the borrower's LD.

(b) Reasonable modifications or additions to the terms and provisions in

Form 165 may be made in order to obtain the specific services needed for a particular undertaking. Changes shall not be made that relieve the architect of any of the responsibilities set forth in the standard form. Borrowers should obtain assistance from their legal counsel to ensure that the contracts are properly prepared and executed.

(c) Three copies of Form 165 executed by the borrower and the architect shall be sent to the GFR to be forwarded to REA for approval. If REA approves the contract, one copy will be sent to the architect and one to the borrower.

(d) Loan funds will not be available to pay for the preliminary architectural services if a loan is not made for the construction project, or if the construction project is abandoned.

(e) Subpart B of 7 CFR Part 1765 sets forth the requirements and procedures to be followed by borrowers constructing central office, warehouse, and garage buildings with REA loan funds.

§ 1763.22 Closeout of architectural services contract.

(a) REA telephone borrowers shall obtain two copies of a completed Form 284, Final Statement of Architect's Fees, when all services and obligations required under the architectural services contract have been completed. All fees shown on the statement shall be supported by detailed information where appropriate. For example: out-of-pocket expense, cost plus, and per diem types of compensation shall be listed separately with labor, transportation, etc., itemized for each service involving these types of compensation.

(b) If Form 284 and supporting data are satisfactory, the borrower shall approve the statement, sign both copies, and send one copy to the GFR.

(c) Upon approval of Form 284 by REA, the borrower shall promptly make final payment to the architect.

§ 1763.23–1763.39 [Reserved]

Subpart C—Engineering Services

§ 1763.40 Preloan engineering.

(a) All engineering services required by a borrower to support its application for a loan shall be rendered by a qualified engineer selected by the borrower or by qualified employees on the borrower's staff. The selection of the preloan engineer, the form of preloan engineering service contract, and the contract itself, are not subject to REA approval. Borrowers, however, should discuss their proposed method of obtaining preloan engineering services with the GFR before proceeding with any arrangements.

(b) Form 835, Preloan Engineering Service Contract, Telephone System Design, is a suggested form of preloan engineering service contract. While use of this form of contract is not required, it will be helpful in determining the tasks to be performed. Any form of contract used shall specify that preloan engineering services conform to REA requirements for preloan studies. See Subpart D of 7 CFR Part 1749.

§ 1763.41 Postloan engineering by contract.

(a) *Major construction.* (1) Three copies of Form 217 executed by the borrower and the engineer shall be sent to the GFR to forward to REA for approval. The engineer's estimate of the engineering fees, on Form 506, shall be included.

(2) REA will review the contract terms and conditions. REA will not approve the contract if, in REA's judgement:

(i) Unacceptable modifications have been made to the contract form.

(ii) The contract will not accomplish loan purposes.

(iii) The engineering service fees are unreasonable.

(iv) The contract presents unacceptable loan security risk to REA. (See 7 CFR Part 1758).

(b) *Minor construction.* When a borrower contracts for an engineering firm to inspect and certify construction accounted for under the work order procedure or the Contract for Miscellaneous Construction Work and Maintenance Services, Form 773 (See 7 CFR Part 1765 Subpart G), the borrower shall require that the certification be signed by a licensed engineer.

§ 1763.42 Postloan engineering by force account.

(a) *Major construction.* When the extent and complexity of the proposed construction is such that the engineering involved is within the capabilities of employees on the borrower's staff, borrowers may request REA approval to provide such services.

(1) The request shall include:

(i) A description of services to be performed.

(ii) The name and qualifications of the employee to be in charge. REA requires this employee to meet the State experience requirements for registered engineers. In the absence of specific State experience requirements, the employee must have at least eight years experience in the design and construction of telecommunication facilities, with at least two years of the work experience at a supervisory level. REA does not require professional registration of this employee.

(iii) The names, qualifications, and responsibilities of other principal employees who will be associated with providing the engineering services. Form 179 may be used to submit the employee qualifications.

(iv) A letter signed by an authorized representative of the borrower authorizing the engineering services to be performed by force account and certifying the information supporting the request.

(2) REA shall notify the borrower by letter of approval or disapproval to perform force account engineering. The letter shall set forth any conditions associated with an approval or the reasons for disapproval.

(3) REA's approval of force account engineering for major construction shall be only for the specific projects named in the notice of approval.

(b) *Minor construction.* (1) When the borrower proposes to perform the inspection and certification of minor construction, the following shall be submitted to the REA:

(i) A copy of the employee's qualifications and experience record on Form 179, unless previously submitted. REA requires a minimum of four years of construction and inspection experience. The employee cannot be engaged in the actual construction.

(ii) A letter signed by an authorized representative of the borrower authorizing the performance of these services by the employee, subject to REA approval, and certifying the supporting information.

(2) REA shall notify the borrower by letter of approval or disapproval of the borrower's staff employee to perform the inspection and certification of construction. The approval shall be limited to the employee's area of expertise.

§ 1763.43 Loan funds for engineering services.

(a) Subject to the requirements of this part and other applicable regulations, REA will make loan funds available for the architectural and engineering services up to the amounts included in the approved loan.

(b) Advance of funds shall be requested on an FRS as set forth in 7 CFR Part 1754.

§ 1763.44 Engineer's progress reports.

(a) The borrower shall obtain monthly progress reports from the engineer during the design and construction of all telephone facilities, unless the contract requires more frequent reporting. The report shall reflect, beginning with the start of engineering activities for any

facility, the progress of planning and construction until completion. Form 521, Progress Report of Telephone Construction and Engineering Services, may be used, but is not required. One copy of each progress report shall be submitted to the GFR.

(b) The borrower shall obtain Status of contract and Force Account Proposal (FAP) reports from the engineer once each month. The report shall show for each contract of FAP the approved contract or FAP amount, the date of approval, scheduled date construction was to begin and the actual date construction began, the scheduled completion date, the estimated or actual completion date, the estimated or actual date of submission of closeout documents, and an explanation of delays or other pertinent data relative to progress of the project. One copy of the report must be submitted to the GFR.

§ 1763.45 Closeout of the postloan engineering service contract.

(a) Upon completion of all services required under the engineering service contract Form 217, the borrower shall obtain from the engineer four copies of the Final Statement of Engineering Fee, Form 506.

(b) If the statement is satisfactory, the borrower shall sign all copies and send three to the GFR.

(c) After REA approval of Form 506, one copy shall be sent to the borrower and one copy sent to the engineer.

(d) The borrower shall promptly make final payment to the engineer.

§ 1763.46–1763.99 [Reserved]

Dated: January 13, 1989.

Jack Van Mark,

Acting Administrator.

[FR Doc. 89–1979 Filed 1–26–89; 8:45 am]

BILLING CODE 3410–15–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21 and 25

[Docket No. NM–26; Special Conditions No. 25–ANM–23]

Special Conditions: Airbus Industrie Model A320 Series Airplane

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Airbus Industrie Model A320 airplane. This airplane will have novel and unusual design features when compared to the state of technology envisioned in the airworthiness standards of Part 25 of the Federal Aviation Regulations (FAR). This notice contains the additional safety standards which the Administrator considers necessary to establish a level of safety equivalent to that provided by the airworthiness standards of Part 25.

EFFECTIVE DATE: December 15, 1988.

FOR FURTHER INFORMATION CONTACT: Gregory J. Holt, FAA, Standardization Branch, ANM–113, Transport Airplane Directorate, Aircraft Certification Service, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168; telephone (206) 431–1918.

SUPPLEMENTARY INFORMATION

Background

On February 7, 1984, Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, applied for type certification of their Model A320 by the Direction Generale de l'Aviation Civile (DGAC) under the provisions of Joint Airworthiness Requirements–25 (JAR–25) and by the FAA under the provisions of § 21.29 of the FAR and an existing bilateral airworthiness agreement with the government of France.

The bilateral agreement was reached in 1973 to facilitate French acceptance of aeronautical products exported from this country and reciprocal U.S. acceptance of such products imported from France. The bilateral agreement provides, in part, for U.S. acceptance of certification by the DGAC that the Model A320 complies with the applicable U.S. laws, regulations and requirements, or with the applicable French laws, regulations and requirements, plus any additional requirements the U.S. finds necessary to ensure that the Model A320 meets a level of safety equivalent to that provided by the applicable U.S. laws, regulations and requirements. The DGAC has elected to certify that the Model A320 complies with the French laws, regulations and requirements, plus any necessary special requirements.

The DGAC has advised that the French laws, regulations and requirements applicable to the Model A320 (i.e. the French type certification basis) consist of JAR–25 with changes 1 through 11 thereto and including the French National Variants, Joint Airworthiness Requirements-All Weather Operation (JAR–AWO), and Special Conditions and interpretations applied specifically to the Model A320. JAR–25 is a document developed jointly and accepted by the airworthiness authorities of various European countries, including France, for type certification of large airplanes. JAR–25 is based on Part 25 of the FAR, however there are certain specified differences in the requirements of the two documents. In addition, JAR–25 also contains requirements, known as National Variants, that are peculiar to individual accepting countries. "Orange Papers" are interim amendments which are eventually consolidated as a change to JAR–25. Special conditions are also applied where JAR–25 does not contain adequate or appropriate safety standards due to novel or unusual design features. In order to preclude confusion, these special conditions will be referred to herein as the "French Special Conditions." JAR–AWO contains additional requirements applicable to all weather operations.

The Airworthiness Authorities of Germany, England, and the Netherlands participated with France in a joint certification of the A320 in February 1988. U.S. type certification of the A320 is scheduled for December 15, 1988.

Based on the February 7, 1984, date of application for type certificate, the applicable U.S. laws, regulations and requirements, as established under the provisions of §§ 21.17 and 21.29 of the FAR, are Part 25 of the FAR with Amendments 25–1 through 25–56 thereto and the special conditions contained herein. When the applicable regulations do not contain adequate or appropriate safety standards because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 of the FAR in order to establish a level of safety equivalent to that established in the regulations.

A comparison has been made of the French type certification basis and the above noted U.S. laws, regulations and requirements, including the respective French and U.S. special conditions. Based on this comparison, the FAA has prescribed the additional requirements that are necessary to ensure that the Model A320 meets a level of safety equivalent to that provided by the U.S. laws, regulations and requirements.

Noise certification is beyond the scope of the bilateral agreement; however, French test data are accepted by separate arrangement. The French noise certification basis is their "Arrete" (order) dated November 26, 1981 (ICAO Annex 16). The U.S. noise certification basis for the Model A320 is Part 36 of the FAR with Amendments 36–1 through 36–12 thereto and any subsequent amendments adopted prior to the date on which the U.S. type certificate is issued. French noise certification test data will be reviewed by the FAA for compliance with the U.S. noise certification basis.

The Model A320 must also comply with the engine emission requirements of Special Federal Aviation Regulation No. 27 (SFAR 27) with Amendments 27–1 through 27–5 thereto and any subsequent amendments adopted prior to the date on which the U.S. type certificate is issued. Engine emission requirements are also beyond the scope of the bilateral agreement; however, certification of compliance by the DGAC will be accepted by separate arrangement. Lastly, the statutory provisions of Pub. L. 92–574, "Noise Control Act of 1972," require that the FAA issue a finding of regulatory adequacy pursuant to Section 611 of that Act.

The French type certification basis, together with the additional requirements discussed above, Part 36 of the FAR, SFAR 27, and the Noise Control Act of 1972, will comprise the U.S. type certification basis for the Model A320.

A320 Design Features

General

The Model A320 airplane presented for U.S. type certification is a short to medium-range, twin-turbofan, transport category airplane with a seating capacity of 120 to 179 passengers, a maximum takeoff weight of 162,037 pounds, and a maximum operating altitude of 39,000 feet.

The structure of the A320 is generally of conventional design and construction, but with considerable use of composite materials. Elements of primary structure (the fin and horizontal tailplane) are constructed of composites as well as components such as flaps, spoilers, ailerons, engine cowls, and the leading and trailing edge access panels. In addition, the structural design makes limited use of overspeed protection and active controls in the form of load alleviation.

The model A320 utilizes fly-by-wire (FBW) flight controls for the elevators, ailerons, spoilers, tailplane trim, slats and flaps, speed brakes, trim in yaw, and engine control. The aerodynamic surfaces are positioned relative to the pilot's command by electronic signals sent via airplane wiring from the flight control computers to hydraulic actuators. Conventional mechanical control is provided for the rudder and tailplane trim hydraulic actuators. Should a short-term interrupt occur in the electronic flight controls, flight could be maintained for a period of time through the use of mechanical control of rudder and tailplane trim.

Normal electrical power is supplied by a constant frequency generator on each engine. An auxiliary power unit (APU) driven electrical generator is also available. A continuous source of electrical power is required by the A320 fly-by-wire flight controls. In the event of the loss of normal electrical power, a ram air turbine (RAT) is automatically deployed. The RAT provides hydraulic power which is used by a constant frequency generator to supply electrical power. Until the RAT powered generator comes on line (approximately 7 seconds), the flight control system is powered from the airplane's batteries. RAT deployment may also be selected manually by pushing switches either on the electrical or the hydraulic overhead panel. Hydraulic power to the flight control system is simultaneously provided by three independent hydraulic systems. Functions are shared among these systems in order to ensure airplane control in the event of loss of one or two systems. Two of the systems are pressurized by variable displacement pumps driven by the engine accessory gearbox, and the third system is powered by an electrically driven pump or by the RAT hydraulic pump in case of loss of normal electrical power.

The airplane has two basic engine configurations: the SNECMA-General Electric CFM56–5 engines, and the International Aero Engines; (IAE) V2500 engines. Both engine types have a takeoff rating of 25,000 pounds of thrust (sea level, static). The engine control system consists of a dual channel Full Authority Digital Engine Control (FADEC) mounted on the fan case of each engine. Each FADEC interfaces with various airplane computer systems. The FADEC provides gas generator control, engine limit protection, power management, thrust reverser control, and engine parameter inputs for the flight deck displays. In addition to control of the engines from the flight deck through changes in power lever position, an autothrust mode is provided which commands thrust changes directly to the FADEC without a corresponding change in power lever position. In this mode of operation, the position of the power lever sets the upper limit for thrust, except when alpha floor is reached. At alpha floor, the engines are commanded to full thrust, regardless of lever position, as part of the high angle-of-attack (AOA) protection. The autothrust mode can be disengaged by pushing a button on the power lever or by moving the thrust lever to TOGA or IDLE. The engine FADEC and associated airplane related systems form the complete propulsion control system.

Pitch and roll control inputs are made through flight deck side stick controllers mounted on the lateral consoles of the pilot and copilot positions, in place of central control columns. The flight instruments are displayed on six cathode ray tube (CRT) displays. Two CRT's are mounted directly in front of both the pilot and copilot and display primary flight instruments and navigational information. The other two CRT's are located in the center of the instrument panel and display engine parameters, warnings, and system diagnostics.

The proposed type design of the A320 contains novel or unusual design features not envisioned by the applicable Part 25 airworthiness standards and therefore special conditions are considered necessary.

Discussion of Comments

Notice of Proposed Special Conditions No. SC–87–5–NM for the Airbus Industrie Model A320 series airplanes was published in the **Federal Register** on October 19, 1987 (52 FR 38772).

Some of the comments received were of an editorial or clarifying nature and have been incorporated where appropriate. A discussion of the remainder of the comments follows, corresponding to the specific special condition as proposed in Notice No. SC–87–5–NM.

1. Electronic Flight Controls

Paragraph 1(a). One commenter expresses concern about the electrical power availability for the flight test instrumentation while the test is being conducted without the availability of normal electrical power sources. The FAA acknowledges these concerns. The test configuration must be tailored to the airplane and the electrical power demands for the flight instrumentation.

One commenter states that the compliance section should provide guidance on the test duration. The FAA agrees. The duration of the test demonstration after the loss of normal engine generated electrical power may be negotiated with the FAA on a case-by-case basis for test durations greater than 4 hours.

Another commenter proposes a clearer definition of normal and standby power. The FAA does not believe that the special condition wording should be changed but provides the following discussion for clarification for this commenter. Normal engine generated electrical power includes power supplied by the engine driven generators. Standby electrical power includes other means to generate

electrical power on demand using, for example, Auxiliary Power Unit (APU) generators, Ram Air Turbine (RAT) driven generators, Hydraulic Motor Generators (HMG), etc. Batteries are time-limited emergency power sources.

One commenter suggests the FAA retain §§ 25.1351(d) (1), (2), and (3) in conjunction with this special condition. The FAA disagrees because of the reference made to a time period of not less than five minutes. This is no longer relevant with modern aircraft designs.

One commenter suggests a clarification of the parenthetical sentence under the discussion. The FAA agrees and proposes "A reasonable assumption can be made that transport airplanes will not have to remain in IMC for more than 30 minutes after experiencing the loss of normal electrical power."

Another commenter suggests that after 30 minutes in IMC, the airplane should be capable of continuous flight in VMC for a time sufficient to reach an alternate airport. The FAA disagrees because it is not feasible to so estimate what that time might be, in view of airline service on a world-wide basis and the variety of factors that affect routes and schedules. The FAA maintains that electrical power availability must parallel flight endurance.

One commenter requests further clarification about flight following loss of normal electrical power. The FAA requires that after 30 minutes of operation in IMC, the airplane should be demonstrated to be capable of continuous safe flight and landing in VMC. The length of time in VMC conditions must be computed based on the maximum flight duration capability for which the airplane is being certified. Consideration for speed reductions from the associated failure must be made and supported by performance calculations and a failure analysis.

Paragraph 1(b)(1)(i). One commenter suggests the removal of the words "when the failure or malfunctions occur within the operational flight envelope." The FAA agrees that this requirement could be too severe in cases of extreme failure combinations and flight envelope conditions. The words "operational flight envelope" have therefore been removed from the special condition. However, to ensure that the intent of the special condition is maintained, the manufacturer must present a document for FAA approval which contains: failure cases based on a failure analysis of the systems that affect the flight control systems, details of the analysis which was conducted to support the flying qualities, a listing of flight configurations with simulated faults, an overall description of the test facilities, and methodology used to validate the aerodynamic models used in the simulation.

Paragraph 1(b)(1)(i)(B). One commenter requests clarification of the wording of this paragraph. The FAA has revised the special condition to require that the airplane must be able to withstand the transient loads induced by the failure multiplied by a safety factor. It is further noted that acceptable airplane loads are defined under Special Condition 2(c). The factor of safety varies from 1.0 to 1.5 depending on the probability of failure of the system.

Paragraph 1(c). One commenter requests this paragraph be changed to read: "In addition to compliance with § 25.671, it must be shown that Electronic Flight Control System (EFCS) signals cannot be altered unintentionally, or that the altered signal characteristics are such that * * *" The FAA concurs as this properly reflects the system involved. The special condition is revised accordingly.

Paragraph 1(c)(1). One commenter proposes that the wording of this special condition be changed from "Stable gain and phase margins are maintained" to "no residual oscillations exist". The FAA does not concur. Stable gain and phase margins insure that the selected loop gains have been investigated for stability of the system throughout the flight envelope. Residual oscillation may occur as a result of wear, tolerance build-up in mechanical systems, etc. or other causes that are not related to the system's stability.

Paragraph 1(d). One commenter suggests that the requirement for powered control integrity of hydraulic powered systems be deleted because such designs are covered by existing regulations. The FAA disagrees. The A320 has a reduced number of power control actuators (PCAs) when compared to previously certified airplanes with hydraulic flight controls (i.e., 3 PCA's on other recently certified large transports vs. 2 on the A320). Equivalent redundancy is achieved on the A320 by using computers and associated sensors which enhance the ability to detect faults. The electronic control system is now an integral part of the electro-hydraulic actuation system which requires a stronger technical emphasis when finding compliance.

Another commenter requests paragraph 1(d) be revised to add the statement that, in addition to compliance with the requirements of § 25.671 of the FAR, the airplane control system must be designed to allow for continued safe flight and landing after any failure condition to the flight critical powered system which is not shown to be extremely improbable. The FAA concurs with this change, and the special condition is revised accordingly.

One commenter expresses concern about the lack of a back-up system for the Fly-by-Wire (FBW) flight controls, and recommends that an independent mechanical back-up system be required. The FAA does not concur with this commenter's premise that there is lack of experience with FBW flight controls and that with today's technology, FBW flight controls cannot be made to be as reliable as conventional mechanical systems. Fly-by-wire flight controls are currently operating successfully in service in military aircraft, on the space shuttle, and on commercial airplanes and helicopters for secondary flight controls such as flaps, slats, spoilers, yaw dampers, and brakes. Furthermore, the A320 design has mechanical controls for the rudder and for back-up stabilizer trim. These controls allow for pitch trim and directional control to the airplane, independent of the FBW flight controls.

One commenter expresses concern for the consequences of an electrical fire in the electronic bay, in view of the greatly increased reliance on electrical power in this airplane. The FAA notes this commenter's concerns; however, the existing regulations, together with these special conditions, are sufficient to address these concerns, including interruption of electrical, hydraulic, and pneumatic power supplies to the essential flight systems. This situation is addressed in the airplane by physical separation of the computers in the electronic bay and separation of the wire bundles. There is also a smoke detection system and specific procedures to be followed in case of smoke from the electronic bay.

2. Active Controls

Paragraph 2(a)(1)(ii). One commenter requests a definition for "the prescribed value of the current requirement." The FAA concurs with this comment and that statement has been replaced with the following: "for an airplane of similar characteristics without an active control system."

Paragraph 2(a)(1)(iv). Two commenters state that if there were nonlinearities in loads beyond limit load, there could be a change in the traditional ultimate load factor of 1.5. They further state that the proposed special condition did not define this factor. The FAA did not propose a factor to replace the current ultimate load factor of 1.5. The factor is dependent

upon the nonlinear response of the system and would vary depending upon the system the FAA is approving. The FAA therefore does not believe that it is appropriate to define the load factor in the special condition.

Paragraph 2(a)(2)(i). Two comments were received. The first commenter believes that if there is a failure in the active control system with no compensating corrective action, the failure would not have to be detected prior to the next flight but would be detected within a time interval directly related to the probability of failure and the impact on structural capability. The second commenter believes that the flightcrew must be aware of any failure conditions which affect the structural capability of the airplane, whether or not a compensating procedure exists. The FAA does not concur with either comment. It is not necessary for the flightcrew to be aware of a failure in the active control system during the flight on which the failure occurs if there is no available corrective action; however, the airplane should not be exposed to the failure condition for an extended period of time. The flightcrew must therefore be alerted to the failure condition prior to the next flight. The second commenter also states that the words "operational limitations" in the first sentence should be replaced with the words "flight limitations." Flight limitations refers to a limitation imposed upon the airplane after an inflight failure and is the correct term. The FAA concurs, and the special condition is revised accordingly.

Paragraph 2(a)(2)(ii). One commenter discussed what was necessary to document compliance with the rule. The FAA agrees with the requirements the commenter discussed but it concerns the method of compliance and is outside the scope of the notice.

Paragraph 2(a)(2)(ii)(A)(1). One commenter believes that it is necessary to conduct a damage tolerance evaluation for compliance with § 25.571(b) to require limit loads be multiplied by a factor of 1.5. The commenter misunderstood this paragraph, and the FAA has revised this paragraph to state that the damage tolerance evaluation must be accomplished based upon the limit loads.

Paragraph 2(a)(2)(ii)(B)(1)(i). Two commenters state that in the figure the safety factor should be 1.5 for probability of failure equal to or less than 10^{-3}, to agree with the text. The FAA concurs and the final special condition is revised to correct this error.

Paragraph 2(a)(2)(ii)(B)(1)(ii). One commenter objects to the statement, "* * * the residual strength level must be at least 1g flight loads combined with ⅔ of the gust or maneuver conditions specified in FAR 25.571(b)." The commenter states that this requirement is more stringent than the criteria in Advisory Circular (AC) 25.672–1. The FAA concurs that combining 1g flight loads with ⅔ of the gust or maneuver conditions of § 25.571(b) can be more severe. The special condition is therefore revised to reflect the criteria in AC 25.672–1.

Paragraph 2(a)(2)(ii)(B)(2). Three comments were received. The first commenter states that the minimum floor of $1.15V_C$ for the flutter margin between V_C and V_D may penalize the use of a speed limiting system. The FAA agrees that this may be true in some cases; however, this special condition is necessary because the speed limiting may result in a margin between V_C and V_D that is too small to be used as an analytical fail-safe margin for flutter clearance. The analytical margin is provided because it is not possible to substantiate flutter speeds more accurately than 15 percent for fail-safe conditions. The margin is not directly related to the probability that the airplane may fly 15 percent faster; consequently, it is not proper to establish the minimum analytical margin based solely on the dive speed definition for this airplane.

The same commenter requests that the last sentence of this special condition be clarified or removed since it implies that V_D can become a variable as a function of the type of failure. The FAA disagrees. This sentence applies to types of failures that may not only affect flutter but also affect the performance of the speed limiting system. In these cases the value of V_D as used for flutter clearance must be the value of V_D that would be defined for the airplane with the speed limiting system operating at the reduced effectiveness. This should not be confused with "the" V_D, it is only the V_D that would be used as the fail-safe flutter clearance speed for analytical flutter substantiation.

Another commenter supports the 1.15 minimum floor, but believes that the transition between $M_C+.05$ and $1.15\ V_C$ is not adequately addressed. Although the FAA did not provide a specific transition boundary, the transition is addressed in an equivalent manner. The special condition contains the statement "the fail-safe flutter speed at any altitude need not exceed the value of V_D that would result from compliance with § 25.335(b) without a high speed protection system." This statement was provided as a convenient method of establishing the transition boundary for an airplane that is relatively conventional without the speed protection system.

Paragraph 2(b)(1). One commenter states that realistic gust fields for the purpose of design and certification have not been defined. The commenter further states that existing gust criteria used with yaw dampers for load alleviation have provided adequate levels of safety. The FAA has not defined a gust field as part of the special condition; however, it is incumbent upon the applicant to propose and justify a gust field for FAA approval prior to certification.

Paragraph 2(b)(2). Two comments were received. One commenter states that realistic conditions of severe turbulence are not defined. The FAA did not define severe turbulence in the notice as the applicant is expected to propose and justify a level of severe turbulence for FAA approval. Both commenters object to the requirement to consider combinations of maneuvers and gusts. The FAA disagrees with these commenters. The load alleviation system must be evaluated for adequate power supply and control authority with combinations of maneuvers and gusts to assure that the system will perform its intended function.

Paragraph 2(b)(4). Two commenters believe that paragraph 2(b)(4) should be deleted. The first commenter states that monitoring this flight critical system is an inappropriate type certification requirement and that a system failure analysis must be performed to substantiate acceptable failure probabilities. This commenter also states that periodic data collection which may be required will be instituted through the FAA Maintenance Review Board. The second commenter states that in-service monitoring and implementation of corrective actions is standard procedure and covered by § 25.1529. The FAA does not agree with these commenters. Since the airplane design criteria for load levels are dependent on the reliability of the active controls, the probability of loss of system function must be evaluated in a realistic or conservative manner before certification. If the system proves less reliable in service than assessed for certification, adjustments in maintenance schedules, load levels, and/or operating limitations may be required. This necessitates monitoring of the systems for a sufficient period of time to substantiate an adequate level of reliability. Neither the FAA Maintenance Review Board nor the instructions for continued airworthiness contained in § 25.1529 contain requirements for reporting failures of

components in an aircraft system. The monitoring equipment is necessary to assure an adequate safety record for this flight crucial system.

Paragraphs 2(b)(5) (i) through (iv). One commenter states that these paragraphs contain advisory material which should be removed from the special condition and handled as an Issue Paper. The FAA disagrees. These paragraphs are necessary to define an acceptable level of safety, and compliance is required for FAA certification.

A second commenter states that the requirements of paragraphs 2(b)(5) (i) and (iii) go beyond previous experience by requiring a flight test with extensive instrumentation and long flights in search of "adequate" turbulence. The FAA disagrees with this comment and expects the flight testing to demonstrate that the active control system does, in fact, provide the anticipated load relief. This can be accomplished by verifying loads achieved in flight with the loads from analysis.

A third commenter states that paragraph 2(b)(5)(iv) should be changed from "An investigation * * *." to "An analytical or test evaluation * * *." The commenter believes this paragraph requires testing of the active control system after structural damage. The FAA concurs. Testing is not the only way to achieve compliance with paragraph 2(b)(5)(iv), but the proposed change does provide additional clarification; therefore, the final special condition is revised accordingly.

Paragraph 2(b)(5)(iv)5. One commenter states that the reference for the definition of failure condition should be changed from Advisory Circular (AC) 25.1309–1 to AC 25.672–1. The FAA does not concur. The special condition was written based on the accepted definition provided in AC 25.1309–1.

3. Engine Controls and Monitoring

Paragraph 3(a). One commenter suggests that the words "loss of thrust control" used in the discussion portion of this special condition imply that the intent was to limit the reliability evaluation to only those control failures which would prevent continued safe flight and landing of the airplane. This commenter therefore recommends that the control failures in question be limited to only those associated with loss of more than 50 percent thrust. Another commenter contends that the reliability criteria should apply only to those failures which would prevent continued safe flight and landing of the airplane. The FAA does not agree. The flightcrew's inability to control thrust to the desired level would likely result in an in-flight shutdown (IFSD) and, for a twin-engine airplane such as the A320, an emergency being declared and subsequent diversion on a single engine. The intent of this special condition is to ensure that the probability of either single engine events or a multiple engine event is no more likely on a FADEC-equipped propulsion system than on current hydro-mechanical controlled engines certified to current standards.

One commenter suggests that the special condition for FADEC reliability is not necessary since compliance with the "single failures" requirements of § 25.901(c) and the "isolation" requirements of § 25.903(b) provides the same degree of safety as current propulsion systems. This commenter believes that requiring a level of reliability for one propulsion subsystem is not necessary or appropriate. The FAA does not agree. It is true that the "failsafe" and "isolation" requirements of Part 25 provide a degree of safety essential for transport category twin engine aircraft, regardless of the engine control type. This safety experience has been accumulated, however, on the vast majority of turbine engines incorporating hydro-mechanical control systems. The intent of this special condition is to clearly identify an expected level of reliability for an engine subsystem employing a technology which has not yet accumulated a large amount of service experience as an engine control. This special condition is in addition to the requirements of § 25.901(c) for a control system failing safely, and § 25.903(b) for isolation.

Paragraph 3(b). One commenter recommends that the thrust levers should move corresponding to autothrust commands. This commenter believes that the proposed wording "provide adequate cues for the flightcrew to monitor thrust changes during normal operation * * *" is too subjective. The FAA agrees that the original proposal could more clearly state the objective of this requirement and has therefore reworded it to emphasize the adequacy of the cues needed to monitor the system. The FAA does not agree, however, that the thrust levers would necessarily have to move during autothrust operation, provided the same (or greater) degree of information feedback regarding thrust commands is being provided to the crew. It is the intent of this special condition to require a satisfactory degree of monitoring capability to be incorporated in the design in order to compensate for the lack of thrust lever motion during autothrust operation.

Two commenters suggest the addition of a new paragraph 3(b)(5) highlighting the need to consider critical flight phases such as takeoff, approach, and landing. One of these commenters recommends that the ATS system should provide thrust lever motion at flight phases below 1500 feet above ground level (AGL) because this is where current autothrottle systems are most effective and important in providing tactile feedback to the pilot through movement of the thrust levers. The FAA agrees that takeoff, approach, and landing are especially important flight phases to be considered in assessing the effectiveness of the ATS command cues, as well as the ease and effectiveness of the disconnect. The FAA does not agree, however, that this may only be accomplished by means of physically moving the thrust levers. The special condition has been reworded to make it more clear as to the objectives of monitoring and override capability, and a new paragraph (5) has been added to address takeoff, approach, and landing.

Paragraph 3(c). One commenter acknowledges that the "black cockpit" concept is preferred, whereby items are not displayed unless they are required. This same commenter considers, however, that engine instruments are important enough to be continuously displayed. The FAA agrees that propulsion instruments, because of their role in communicating to the crew needed information relating to the engine's condition, are of vital importance. This is especially true since, for some engine conditions, rapid crew response is necessary in order to avoid engine failure. The FAA does not agree, however, that this can only be achieved by the permanent display of all engine parameters. The special condition has been reworded to more clearly state the objectives necessary for inhibited and shared propulsion displays for the A320.

Another commenter recommends that the loss of all propulsion system displays be shown to be extremely improbable. The FAA agrees, and paragraph 3(c) now contains the "extremely improbable" objectives for those failure conditions which would provide hazardously misleading information, rather than limit the requirement to only "loss of all propulsion system displays."

4. Protection from Lightning and Unwanted Effects of Radio Frequency (RF) Energy

RF Comments. One commenter notes that the RF threat only addresses the critical functions, and that the essential

functions were omitted from consideration. The FAA believes that not specifying RF protection levels for the essential and nonessential functions is reasonable, since a failure of this category will not result in critical maneuvers or cause loss of control. It is noted that the FAA specifies minimum requirements; the manufacturer is well advised to consider additional requirements to protect his designs from RF interference for the essential and nonessential functions.

Several commenters express concern regarding the severity of the requirements that critical systems must not be affected when exposed to electromagnetic radiation. The intent of the special condition is to ensure that systems performing critical functions are not adversely affected by RF. The word "adversely" is not used in this special condition because it is a difficult word to define quantitatively. The determination of whether a critical system is adversely affected must be made on a case-by-case basis. An example of an acceptable condition would be a case where a computer input is perturbed by RF spurious signals, but the output signal remains within the design tolerances with the result that the system affected is able to continue in its selected mode of operation unaffected by the perturbation. It is not permissible that exposure to electromagnetic radiation could result in a large system upset. Pilot intervention to restore the system following an upset is not an acceptable means to restore that system to its normal state of operation.

One commenter expresses concern that no consideration was made to account for RF attenuation by the aluminum airframe. The FAA has proposed two methods to simulate the RF threat. One is based on 200 volts per meter average field strength from 10KHz to 20 GHz, applied without fuselage shielding, and the other method is to apply average and peak voltages in nine specified frequency ranges, taking into account the effects of fuselage shielding.

One commenter expresses the need for an international agreement for the control and location of large output RF emitters. The FAA has no disagreement with this comment, but it is beyond the scope of this action.

One commenter believes the threat cannot be precisely defined and proposes that an interim requirement of 100 volts per meter, applicable to Eletronic Engine Control (EEC) and its wiring, exclusive of airframe shielding, be used until more formal standards can be developed. Another commenter proposed to accept the RTCA–DO–160B test procedures and field strength levels to validate the Electronic Flight Control System (EFCS). A third commenter suggests that 100 volts per meter be used when applied directly at the system level, without the benefit of airframe shielding. Based on the Electromagnetic Compatibility Analysis Center (ECAC) study referenced in the notice and the high degree of integration of the electronic systems on this aircraft, the FAA has determined that the 200 volts per meter standard is necessary.

One commenter notes that the U.S. model representing peak and average values of electromagnetic threat is more severe than the equivalent European model and requests considerations for re-examination of the threat presented in this special condition. The FAA, in defining the external envelope, considered the information provided by a variety of organizations regarding strength and characteristics of RF emissions, including the ECAC group. So far the information obtained from these groups has not indicated a need to change the U.S. threat model.

Another commenter proposes to differentiate between the source of the threat defining a likely RF encounter, including airports and enroute flights, as opposed to hypothetical RF encounters which involve powerful emitters outside the normal airway traffic patterns of civil transport airplanes. The FAA has elected to define the most severe threat as a design requirement which includes all potential encounters, in view of the impracticality of imposing a complex set of operational restrictions. Only those system that have been determined to perform flight critical functions need to be hardened to this level of electromagnetic threat.

The same commenter discusses a means of showing compliance when it can be demonstrated that a safe flight and landing can be achieved, and when the threat exceeds the normal RF environment. The effects of the threat would be evaluated in terms of mode changes and recoverable interrupts, which affect one or several of the subsystems. The FAA disagrees. Such an approach would make the determination of compliance highly subjective and difficult to evaluate. Furthermore, the precise behavior of systems which are affected by RF levels equal to those specified in the special condition is not predictable in the actual operating environment. The FAA has adopted a different approach, specifying that critical systems must not be affected when exposed to levels of electromagnetic radiation specified by this special condition. RF exposure at these levels should not cause a system upset involving reconfiguration of the control laws or system capability degradation.

Another commenter notes that the external threat model has average and peak levels of 100 volts per meter at two frequency ranges. The alternate model requires 200 volts per meter over all frequencies. The commenter requests that the alternate model be adjusted downward to 100 volts per meter over the entire frequency range. The FAA disagrees and will require 200 volts per meter over the frequency range of 10 KHz to 20 GHz. Furthermore, the tests must be conducted with either the external or internal threat model over the total frequency range.

Another commenter states that the field effects of RF emitters which are located within existing prohibited areas should not be considered and thus removed from the field strength data in the external threat model. The FAA disagrees because EF emitters can be turned on at any time, emitting various field strengths and signal characteristics. It is noted that a number of emitters are installed onboard naval vessels and are free to move.

Lightning Protection Comments

One commenter expresses concern regarding the special condition requirement that critical systems must not be affected when exposed to lightning. It is argued that a minor upset that it is not perceptible to the flighcrew and which returns to normal operation after the upset is an "effect" and thus would not meet the requirement. The intent of the special condition is to ensure that systems performing critical functions not be adversely affected by lightning. The word "adversely" is not used in the special condition because it is a difficult word to define explicitly. The determination of whether a critical system is adversely affected must be made on a case-by-case basis. An example of an acceptable condition would be a case where a computer input is perturbed by lightning spurious signals, but the output signal remains within the design tolerances and is able to continue in its selected mode of operation unaffected by the perturbation. It is not permissible that a lightning strike could result in a major system upset, even though the effect would not prevent continued safe flight and landing.

One commenter proposes new wording to distinguish between lightning effects that would prevent the system from functioning and those systems that would continue with reduced capability. The FAA has considered this approach but adopted a distinction which

recognizes systems that perform critical functions and essential functions.

Another commenter believes that the requirements specifying the acceptable level of lightning strike effect on the affected systems are vague. The FAA has revised the wording and specifies that systems which perform critical functions must be designed so that they are not affected. Essential systems are allowed to recover automatically or by pilot action.

5. Flight Characteristics

Paragraph 5(a). One commenter questions the need for a handling qualities rating system special condition and proposes the subject be addressed through an issue paper. Another commenter believes the proposed special condition lacks detail as to how the handling qualities ratings are to be used, specifically under what test conditions the airplane handling qualities must be satisfactory, adequate, or controllable. The FAA disagrees. The special condition should contain only the basic requirements for a handling qualities rating system. The detailed information, as it applies to the A320, is contained in an Issue Paper. The A320 will be the first airplane in which the FAA will use a systematic handling qualities rating system approach for flight control system failure states, and it is believed that a detailed special condition would not allow latitude in the application of the requirements.

Paragraph 5(b). One commenter recommends that the wording "suitable handling qualities" be changed to "satisfactory" handling qualities, degrading to "adequate," and then degrading to "controllable" handling qualities. The FAA disagrees. The effect of the special condition requiring "suitable dynamic and static longitudinal stability" is essentially the same as the commenter's proposal. Although the proposed special condition for a handling qualities rating (5(a)) is specifically for flight control system failure states, the ratings of satisfactory, adequate, and controllable, and their definitions, are applicable for all handling qualities tasks.

Paragraph 5(c). One commenter suggests that the rudder pedal force limit for sideslip be limited to 150 pounds, rather than 180 pounds. This commenter points out that this change was proposed during the promulgation of Amendment 25–42, effective March 1, 1978. Under Amendment 25–42, the rudder pedal force limit was changed from 180 pounds to 150 pounds for air minimum control speed under § 25.149, but was not changed for static lateral-directional requirements under § 25.177. The FAA does not agree with this commenter. Special conditions are developed for novel or unique features for which the present regulations do not provide adequate standards. The A320 design is not novel or unique in regard to the rudder system; therefore, the present regulations are applicable.

Paragraph 5(d). One commenter suggests that the wording of this special condition be changed to require flight control position annunciation "unless it can be shown that no flight condition exists in which near-full surface authority (not crew commanded) is being utilized for prolonged periods." The FAA does not agree. The intent of this special condition is to require control surface position annunciation for any unforeseen flight condition or configuration, as well as those flight conditions which can be analyzed. The FAA questions whether every possible flight condition or configuration can be analyzed; and, due to the lack of surface deflection feedback to the sidestick controller, flightcrews must be immediately aware of control surface saturation that is not crew commanded so that appropriate action may be taken.

Another commenter suggests replacing the words "near full surface authority" with "near-maximum achievable deflection." This commenter points out that actuators are rarely sized to provide full deflection at all possible operating conditions. While the commenter's suggestion is valid and control surfaces are subject to blow down, etc., the design of a control surface annunciation which would account for all "achievable deflections" would be extremely complex and would not add significantly to the intent of the special condition. The special condition has been revised to require annunciation when a flight condition exists where, without being commanded by the crew, control surfaces are coming so close to their limits that return to the normal flight envelope or continuation of safe flight requires a specific crew action.

The same commenter suggests adding a paragraph 5(e) to require that saturation of the flight control surfaces will not occur so frequently as to significantly degrade the proper functioning of the system. The FAA disagrees. Special Condition 1(b), Electronic Flight Control System (EFCS) Failure and Mode Annunciation, adequately addresses control surface saturation and a specific flight special condition is not required. This commenter also suggests adding a Paragraph 5(f) to deal with handling qualities transients when flight control system mode changes occur. The FAA disagrees. Special Conditions 1(b) and 6(a) are adequate to deal with handling qualities requirements for flight control mode system changes.

6. Flight Envelope Protection

Paragraph 6(a)(2). One commenter recommends requiring provisions by which the limit protection can be overridden. According to this commenter, studies show that pilots want to be able to override the limit protection. This commenter does not give specifics regarding which parameters are considered most important. This comment is addressed to the "failure state" portion of this special condition (general limiting requirements) and may be offered in belief that the FAA requirement (against undue parameter limiting) will not be successfully implemented or complied with. The selected limit values (NZ, AOA, pitch, roll, high speed) for the NORMAL control state are broad enough to satisfy safe and controllable maneuvering. For failure states, this special condition, as well as the handling qualities rating method of Special Condition 5(a), are available to determine suitable safe characteristics. It should also be noted that in the A320 design, limit protections are dropped for certain failure states. It may also be helpful to note that if abnormal attitudes are unexpectedly encountered, Special Condition 6(a)(3) also requires recovery capability.

Paragraph 6(b). Several commenters request the traditional use of V_{MIN} be retained as an alternate means of V_S definition. The FAA disagrees. These special conditions address design features which are such that traditional V_{MIN} testing would not be an acceptable alternate to V_{S1-g}.

Paragraph 6(b)(1)(i). One commenter requests that a delta symbol be inserted before "F_G" in the equation, and that a note be added to indicate that the delta F_G is the increment in gross thrust required to reduce the net thrust to zero. The commenter cites the § 25.103(a)(1) reference to zero (net) thrust at the stalling speed as the justification for this change. The following two FAA comments should aid understanding as to why the equation was provided, and why it still remains valid for this part of the special condition.

First, the equation, as presented in the special condition, is a correct expression of the aerodynamic lift capability of the airplane. In fact, if the 1–g stall speed is to be defined as speed at C_{LMAX}, divided by $\sqrt{N_{ZW}}$, then alternate C_L expressions would suffice to determine the speed at which C_{LMAX} occurred, as long as

ignoring, modifying, or retaining the thrust term only shifted the level of C_{LMAX}, and not the speed at which it occurred. The exact expression of the C_L equation only becomes a concern for those who wish to reconstruct the requested 1–g stall speed ($V/\sqrt{N_{ZW}}$) from exactly such an equation. Once the speed at C_{LMAX} has been noted and corrected for the load factor, it can be retrieved from an intermediate expression, which might assume N_{ZW} = 1.0 and only involve GW (or Mach) as the primary independent variable.

Secondly, Special Condition 6(b)(2)(iii) allows IDLE thrust, not exclusively zero net thrust, as required by § 25.103(a)(1), to be used in the determination of stalling speed.

A second commenter notes that "F_G" and "iF_G" are undefined terms in the CL equation of Paragraph 6(b)(1)(i). The FAA assumes that these terms are commonly used symbology. For clarification, "F_G" means gross thrust, and "iF_G" means incidence of the gross thrust relative to the airplane fuselage reference line. AOA (angle of attack) is also measured relative to the fuselage reference line.

Several commenters note that the new $V_{S1\text{-}g}$ usage has not been uniformly applied throughout all Part 25 subparts. As configured for operation, the A320 is prevented from stalling by the incorporation of an angle-of-attack limiting feature. This feature would then not allow demonstration of the stall speeds used for structural design. During development flight testing, Airbus deactivated the stall protection feature and demonstrated compliance with the existing rules as currently interpreted both in the clean and flaps down configurations. Therefore, the special condition was not proposed for Subparts C&D.

Paragraph 6(b)(2)—Table B.2. One commenter strongly disagrees with the 25 degree bank limit before ALPHA floor operation at V_2, because the operation of ALPHA floor in either all engines operating or engine-out cases is beneficial to safety. The commenter suggests a 20 degree bank limit as being a much more appropriate value, and that if the FAA requirement prevails, the ALPHA floor feature might be deleted, which would be detrimental to safety. The FAA does not agree that requesting a 25 degree bank capability (free of ALPHA floor) at V_2 takeoff condition is unreasonable. Neither does the FAA look at removal of this feature as the only answer to achieving a 25 degree bank capability, since a deficiency (if one were to exist at all) can be made up by a slight V_{2MIN} increase. The 25 degree V_2 bank requirement is reasonably consistent with the 40 degree bank objectives for landing, and on all-engine takeoff climb capability at V_2 + 10 to 15. Specifically, the theoretical (zero thrust) ALPHA floor settings for a landing condition (V_{REF} = 1.23 $V_{S1\text{-}g}$) and a takeoff condition (V_{2MIN} = 1.13 $V_{S1\text{-}g}$) for 40 degree and 25 degree bank, respectively, would be about 1.077 $V_{S1\text{-}g}$ and 1.076 $V_{S1\text{-}g}$. If a 20 degree bank were allowed, the takeoff relationship would be mismatched at 1.096 $V_{S1\text{-}g}$.

Another way of looking at the lower 20 degree recommendation is that in straight flight V_{MIN} engine-inoperative climb, only about 4+ kts margin would exist for airspeed variation before automatic thrust increase at ALPHA floor during a FLEX (reduced thrust) takeoff. This could easily be eroded in gusty conditions. The 25-degree requirement strikes an appopriate balance between non-nuisance operation and compatibility with other operating speeds. The French DGAC A320 requirement was also published as 25 degrees at V_{2MIN}.

One commenter notes Table B.2 has an undefined term, "WAT." The term "WAT" (Weight-Altitude-Temperature) is thought to be uniformly understood as the collective independent term for establishing a climb-limited takeoff. The term "WAT" will be defined as such in future regulatory and advisory documents.

One comemnter recommends that the Table B.2 enroute maneuvering bank angle in the enroute configuration at final takeoff speed be reduced from 40 degrees to 30 degrees. The reason offered is that the speed in question represents a short duration condition for the airplane, in its acceleration to the enroute speed (engine-inoperative) and that 30 degrees bank, compatible with V_2, has been demonstrated for many years. Since 1981, the FAA has sought to ensure adequate maneuverability at operating speeds by confirming the Table B.2 bank angles. For final climb, the target has been 40 degrees, not 30 degrees. When performance speed factors on stall speed were reformulated because of the 1-g basis, instead of minimum speed in the stall, all factors were reduced by about .94, except for the V_{FTO} factor which was reduced slightly less. For compatibility with the 40 degree bank objective at V_{REF} (1.23 $V_{S1\text{-}g}$), the V_{FTO} factor was reduced from 1.25 to 1.23. A full .94 reformatting for V_{FTO} would reduce the factor to 1.18. With a V_{2MIN} factor of 1.13, second segment and final climb would not share a compatible 30 degree capability. Optimum V_{FTO} or enroute climb speeds are normally well in excess of 1.18 $V_{S1\text{-}g}$, even for gear down dispatch. By authorizing an excessively low V_{FTO} (and consequent bank capability), the FAA would be widening the speed gap between AFM performance for final and enroute climbs. Also, for gear down dispatch, normally there is no restriction against flight into icing conditions. Since icing effects are normally not flight tested to confirm predictions for effects on gear down L/D, it does not seem warranted to reduce the V_{FTO} to such a minimum condition of 30 degrees/1.18 $V_{S1\text{-}g}$. Finally, because of buffet characteristics, the .94 relational factor between $V_{S1\text{-}g}$ and V_{MIN} does not generally prevail for flaps up, as it does for flaps down. For these reasons, the FAA has determined that the proposed bank/speed factor values for the A320, flaps up, are still appropriate.

Paragraph 6(b)(2)(viii). One commenter requests the V_{FTO} factor on $V_{S1\text{-}g}$ be reduced from 1.23 to 1.18. The FAA has responded to this comment in conjunction with the bank objective of Table B.2.

Paragraph 6(b)(2)(xi). Two commenters request deletion of this requirement, suggesting that § 25.143 of the FAR and AC 25–7, Flight Test Guide, already cover the operational assessment adequately. The FAA disagrees that § 25.143 and AC 25–7 provide adequate regulatory coverage, in view of the fact that this airplane incorporates significant EFCS mode changes and a limiter between approach AOA and AOA for C_{LMAX}. While definitive quantitative requirements, such as for path angle/delta speed, have not been promulgated, a reasonable assessment can be made in this critical area. The Joint European Authorities have published a somewhat similar special condition which deals with the effects of atmospheric disturbance on low speed flying qualities.

Paragraph 6(b)(2)(xii). One commenter recommends changing 40% to 30% in the reformulation of § 25.145(b)(1). This is a valid comment and the change has been accomplished for compatibility with other special condition changes.

Two commenters recommend changing V_{MIN} to V_{SW} in §§ 25.145(b)(6), 25.175(c), and 25.175(d). One commenter believes a typographical error was made in the notice, and the other commenter believes V_{SW} is needed for consistency with the 1-g stall speed reformulations. The FAA disagrees with both commenters. The published requirements, using V_{MIN} as the end point, are correct. The A320, in the normal EFCS state, has no artificial stall warning and probably will not have natural stall warning at the equivalent

speed. The term V_{MIN} relates to steady state minimum speed on the AOA limiter, is a higher speed than the V_{MIN} which would be measured in a full stall, and reasonably correlates with previous requirements.

Paragraph 6(b)(2)(xiv). Two commenters provide similar objections to the power-off, straight ahead 5KTS/5% stall-free margin requirement. These commenters state that 2KTS/2% is historically equivalent to the FAR, when reformatted to the 1-g basis. For turning flight stalls, the commenters object to the term "stall-free characteristics" as being undefined, and would essentially substitute a qualitative or non-hazardous finding for safe flight, once recovery is initiated one second after warning onset. The FAA disagrees. The stall warning requirements are intended for failure states, of which there could be many, including non-standard aerodynamic and EFCS configurations. Forward c.g. stalling speeds are not usually developed for these variations, which could present difficulties in basing warning margins solely on the "normal" 1-g stall speed. If warning margins were based upon 1-g stall speeds, the commenter's suggested 2KTS/2% margins would be inadequate for a normal state airplane, as well as for a failure state airplane. This is because realistic margin to useable lift, not just equivalent margin to stall end point, as derived from current minimum speed rules, must be considered. As to the argument that "stall-free characteristics" is an undefined term, if stall characteristics have been defined and evaluated for years, then absence of those same characteristics should not suddenly present a definition problem.

7. Side Stick Controllers

Paragraph 7(b). One commenter suggests that this special condition requires that the side sticks be connected because of delays which unconnected side stick controllers can cause. Another commenter recommends the wording be changed to require that the pilots are aware of their own inputs, as well as the other pilot's inputs, at all times. This commenter believes confusion exists if one pilot is not aware of the other pilot's inputs. A third commenter suggests the wording be changed to require overriding control inputs by either pilot with no unsafe characteristics during time critical control phases; e.g., landing flare and evasive maneuvers. All of the commenters are concerned about the lack of side stick controller interconnection, especially during critical phases of flight. The FAA is aware of concerns about the lack of feedback or coupling in the A320 side stick controller design. Studies and research conducted by several organizations have shown that although some form of controller coupling is highly desirable, the lack of coupling is not, in itself, an unsafe design. The special condition does not contain a firm requirement for side stick controller coupling, but it does require that the side stick controller design of the A320 be adequately evaluated.

8. Flight Data Recorder

One commenter states that since the rudders on the A320 are conventional in design, it should therefore suffice to record either the pedal position or the surface position. The FAA notes that inputs from the pilot, as well as command signals from the different computers to the rudder trim, rudder travel limitation, yaw damper and autopilot servo loops are also inputed to the rudder servos. For this reason, the FAA requires that the pilot inputs and the surface position be recorded.

Another commenter questions the need for additional parameters to record electrical inputs to control surfaces and engine commands in addition to the surface movements. The A320 is a flight-through-computer airplane. For that reason, there is no longer a linear relationship between pilot input and output of the computer to the surface servo actuators. It is therefore necessary to record the output of the sidestick, rudder pedals, throttles, and flap handles, as well as the surface positions, in order to reconstruct the pilot inputs and surface response.

One commenter requested, prior to the expiration of the comment period, an extension in order to provide an indepth analysis of what was considered necessary for an adequate analysis of system failures in case of an accident. This commenter states that their organization participated as observers in the investigation of the fatal accident of an A320 airplane in France. As a result of the insight into the uniqueness of the control systems of this airplane gained through analysis and augmented by the above accident participation, they request a number of additional parameters and changes in sampling rates. This commenter also states that Version 2 of the DFDR (design) characterisctics comes closest to their requirements. The FAA recognizes that major change requests submitted late in a type certification process can cause undue hardship on a manufacturer and is therefore very reluctant to agree to additions or changes. However, it is also considered that this situation is unique in that an accident was investigated prior to issuance of the U.S. type certificate, and a need for changes appears to be justified. Furthermore, Version 2 of the DFDR parameter is required by another airworthiness authority and thus already an available design. This commenter requests that Version 2 be modified to change certain sampling rates and to add others. Incorporation of those comments would utilize all of the remaining storage capacity of the DFDR system in an appropriate sampling mix of parameters which, in the view of the FAA, would enchance data retrieval for the purposes of aviation safety. Accordingly, this special condition has been revised, with the manufacturer's concurrence, to include all of the above requested parameters, except for auto-brake setting and brake pressure (left and right alternating).

Under standard practice, the effective date of these final special conditions would be 30 days after publication in the **Federal Register**. As the intended U.S. type certification date for the Airbus A320 is approximately December 15, 1988, the FAA finds that good cause exists to make these special conditions effective upon issuance.

Except as discussed above, the special conditions for the A320 are adopted as proposed.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability, and affects only the manufacturer who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Parts 21 and 25

Air transportation, Aircraft, Aviation safety, Safety.

The Special Conditions

Accordingly, the following special conditions are issued as part of the type certification basis for the Airbus Industrie Model A320 series airplane.

PARTS 21 AND 25—[AMENDED]

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 1857f–10, 4321 et. seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

1. Electronic Flight Controls.

(a) *Operation Without Normal Electrical Power.* In lieu of compliance with § 25.1351(d) of the FAR, it must be demonstrated by test

or combination of test and analysis that the airplane can continue safe flight and landing with inoperative normal engine generated electrical power (electrical power sources excluding the battery and any other standby electrical sources). The airplane operation should be considered at the critical phase of flight and include the ability to restart the engines.

Discussion: This special condition requires that the emergency electrical power system be designed to supply: (1) Electrical power required for immediate safety, which must continue to operate without the need for crew action following the loss of the normal electrical power system; (2) electrical power required to continued safe flight and landing; and (3) electrical power required to restart the engines. For compliance purposes, a test demonstration of the loss of normal engine generated power is to be established such that:

1. The failure condition should be assumed to occur during night instrument meteorological conditions (IMC) at the most critical phase of flight relative to the electrical power system design and distribution of equipment loads on the system.

2. After the unrestorable loss of the source of normal electrical power, it must be possible to restart the engines and continue operations in IMC until visual meteorological conditions (VMC) can be reached. (A reasonable assumption can be made that turbojet transport airplanes are able to enter into VMC conditions 30 minutes after experiencing the failure.)

3. After 30 minutes of operation in IMC, the airplane must be demonstrated to be capable of continuous safe flight and landing in VMC conditions. The length of time in VMC conditions must be computed based on the maximum flight duration capability for which the airplane is being certified. Consideration for speed reductions resulting from the associated failure must be made.

(b) *Electronic Flight Control System (EFCS) Failure and Mode Annunciation.*

(1) In lieu of compliance with § 25.672(c) of the FAR, it must be shown that after any single failure or combination of failures of the flight control system that are not shown to be extremely improbable—

(i) The airplane has the following characteristics:

(A) Suitable handling qualities;

(B) The airplane is able to withstand the transient loads induced by the failure multiplied by a safety factor;

(C) VD/MD is not exceeded.

(ii) The airplane has suitable handling qualities for continued safe flight and landing.

(2) In addition to compliance with § 25.672 of the FAR—

(i) If the design of the electronic flight control system or any other automatic or power-operated system has submodes of operation that significantly change or degrade the flight or operating characteristics of the airplane, a means must be provided to indicate to the crew the current submode of operation. Crew procedures must be available to ensure safe and proper operation for the annunicated flight control submode; and

(ii) The total loss of the electronically signaled flight control system (including its electrical or hydraulic power supplies), must be designed to be extremely improbable if its loss would prevent continued safe flight and landing.

Discussion: Suitable handling qualities, for the purpose of Special Condition 1(b)(1) above, are those determined from compliance with Special Condition 5a, *Flight Characteristic Compliance Determination by Handling Qualities Rating System for EFCS Failure Cases.* Note that Special Condition 5a is also in lieu of § 25.672(c). The safety factor for the purpose of Special Condition 1(b)(1) above is determined from compliance with Special Condition 2(ii)(B)(*l*)(i), *Effect of Electronic Flight Control System on Structure.* The safety factor is a function of the system's probability of failure.

(c) *Command Signal Integrity:* In addition to compliance with § 25.671 of the FAR, it must be shown that Electronic Flight Control System (EFCS) signals cannot be altered unintentionally, or that the altered signal characteristics are such that:

(1) Stable gain and phase margins are maintained for all aerodynamically closed-loop flight control systems.

(2) The control authority characteristics are not degraded to a level that will prevent continued safe flight and landing. Failures which refer to (1) and (2) above which would otherwise prevent the airplane from continued safe flight and landing need not be considered.

Discussion: It should be noted that:

(1) The wording "signals cannot be altered unintentionally" is used in this special condition to emphasize the need for design measures to protect the fly-by-wire control system from the effects of electromagnetic interference (EMI) and radio frequency energy (RF), fluctuations in electrical power, accidental damage caused by uncontained rotary machinery debris (engine burst is addressed in § 25.903(d) of the FAR), environmental factors such as temperature, local fires, and any other spurious signals or disruptions that affect the command signals as they are being transmitted from their source of origin to the Power Control Actuators.

(2) A gain margin is the minimum change in loop gain, at nominal phase, which results in an instability beyond that allowed as a residual oscillation.

(3) A phase margin is the minimum change in phase, at nominal loop gain, which results in an instability.

(4) "Control authority characteristics" refers to the ability of the aerodynamic control surfaces to move the airplane.

(5) "Aerodynamically closed loop" are those elements (electrical signals, cables, bellcranks, etc.) which connect sensors and command signals to the Power Control Actuator that moves the aerodynamic control surface (aileron, spoiler, stabilizer, etc.).

(d) *Powered Control Integrity:* In addition to compliance with the requirements of § 25.671 of the FAR, the airplane control system must be designed to allow for continued safe flight and landing after any failure condition to the flight critical powered system which is not shown to be extremely improbable, unless it is associated with a wholly-unrelated failure condition that would itself prevent continued safe flight and landing.

(e) *Maximum Control Surface Displacement.*

(1) In lieu of compliance with § 25.331(c)(1) of the FAR, the airplane is assumed to be flying in steady level flight (point A_1, § 25.333(b)) and, except as limited by pilot effort in accordance with § 25.397(b), the pitching control is moved to obtain the extreme positive (nose up) pitching acceleration. The maximum possible elevator deflections commanded by the Electronic Flight Control System (EFCS) must be considered during this maneuver, using the most adverse system tolerances. The dynamic response, or at the option of the applicant, the transient rigid body response of the airplane must be taken into account in determining the tail load. Airplane loads which occur subsequent to the normal acceleration at the center of gravity exceeding the maximum positive limit maneuvering load factor, n, need not be considered. It should also be established that maneuver loads included by the system itself (e.g. abrupt changes in orders made possible by electric rather than mechanical combination of different inputs) are acceptably accounted for, up to V_D/M_D.

(2) In lieu of compliance with § 25.349(a) of the FAR, the following conditions, speeds, spoiler and aileron deflections (except as the deflections may be limited by pilot effort) must be considered in combination with an airplane load factor of zero and of two-thirds of the positive maneuvering factor used in design. In determining the required aileron and spoiler deflections, the torsional flexibility of the wing must be considered in accordance with § 25.301(b). It should also be established that maneuver loads induced by the system itself (e.g. abrupt changes in orders made possible by electric rather than mechanical combination of different inputs) are acceptably accounted for, up to V_D/M_D.

(i) Conditions corresponding to steady rolling velocities must be investigated. In addition, conditions corresponding to maximum angular acceleration must be investigated. The investigation must include the maximum possible aileron and spoiler deflections commanded by the EFCS, using the most adverse system tolerances. For the angular acceleration conditions, zero rolling velocity may be assumed in the absence of a rational time history investigation of the maneuver.

(ii) At V_A, sudden deflection of the aileron and spoiler to the maximum possible positions are assumed.

(iii) At V_C, the aileron and spoiler deflections must be that required to produce a rate of roll not less than that obtained in paragraph (ii).

(iv) At V_D, the aileron and spoiler deflections must be that required to produce a rate of roll not less than one-third of that in paragraph (ii).

Discussion: These special conditions require the manufacturer to consider the critical deflection rates and deflections of the control surfaces, considering the entire A320

flight control system, as opposed to only the pilot's input, when demonstrating compliance with §§ 25.331 and 25.349 of the FAR.

2. Active Controls.

In addition to compliance with the structural requirements of Subpart C and D of the FAR, the airframe must be designed to meet the criteria in this special condition. These criteria are divided into two groups:

Basic Criteria: These criteria are considered necessary to define a certification basis. The objective of these criteria is to control, in a consistent way, the risk of catastrophic structural failure associated with each failure condition.

Supplementary criteria: The purpose of the supplementary criteria is to examine areas where the basic criteria may not be sufficient and to check certain situations which are considered realistic but not covered in the normal requirements. The precise need for additional requirements associated with these criteria and their level of severity will depend on the sensitivity of the airplane to these conditions and on the conclusion that these problems may show the airplane to have a lower level of safety compared to an airplane without active flight controls. These supplementary criteria will form the basis of required investigations to be performed by the manufacturer and will be evaluated by the certification authorities.

(a) *Basic Criteria.*

(1) *With the system operative.*

(i) *Determination of limit loads.* Limit loads must be derived in all normal operating configurations of the systems from all deterministic limit load conditions specified in Part 25, taking into account any special behavior of such systems or associated functions or any effect on the structural performance of the airplane which may occur up to limit loads. In particular, any significant nonlinearity (aerodynamic, aeroelastic, rate of displacement of control surfaces, and any other system limit nonlinearities) must be accounted for when deriving limit load conditions.

(ii) *Load conditions defined on a statistical basis.* In cases where Mission Analysis is used for continuous turbulence, all the systems failure conditions associated with their probability must be accounted for in a rational or conservative manner in order to ensure that the probability of exceeding the limit load is not higher than for an airplane of similar characteristics without an active control system.

(iii) *Strength requirements.* The airplane must meet the strength requirements of Part 25 (static strength, residual strength) using the appropriate factors specified in Part 25 to derive ultimate loads from the limit loads defined above.

(iv) *Nonlinearities above limit load.* When some systems present a nonlinear behavior beyond limit loads (e.g., saturation), an increase of the safety factors may be found necessary in order to ensure a protection of the airplane beyond the limit conditions comparable to an airplane not equipped with such systems, taking into account the physical limitations of the airplane established in a conservative way. It must also be shown that, between limit load and 1.5 times limit load, nonlinearities in the load alleviation function, including aeroelastic effects, will not result in a smaller load increment than the increment achieved at limit load due to load alleviation.

(2) *With the system in failure conditions.*

(i) Warnings must be provided to annunciate the existence of failure conditions which affect the structural capability of the airplane and for which the associated reduction in airworthiness can be minimized by suitable flight limitations. Failure conditions which affect the structural capability of the airplane and for which there is no suitable compensating flight limitation need not be annunciated to the flightcrew, but must be detected before the next flight.

(ii) In addition, the following conditions must be met for all failure conditions not shown to be extremely improbable and which have an impact on structural performance.

(A) *At the time of occurrence.* Starting from 1–g level flight conditions, a realistic scenario, including pilot corrective actions, must be established to determine the loads and speeds occurring at the time of failure and immediately after failure.

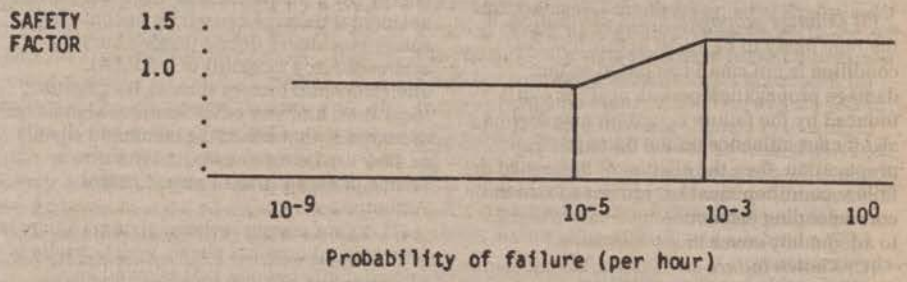
(*1*) The airplane must be able to withstand these loads, multiplied by a 1.5 factor of safety, to obtain ultimate loads. These loads without the 1.5 factor must also be included in the damage tolerance evaluation required by § 25.571(b) of the FAR, if the failure condition is probable.

(*2*) A flutter and divergence justification must be made in accordance with paragraph (2)(ii)(B) applied to failure conditions not shown to be extremely improbable. For failure conditions which result in speed increases beyond VC/MC, freedom from flutter and divergence must be shown to the speeds indicated by paragraph (2)(ii)(B) with VC/MC replaced by the maximum speed obtained during the above realistic scenario.

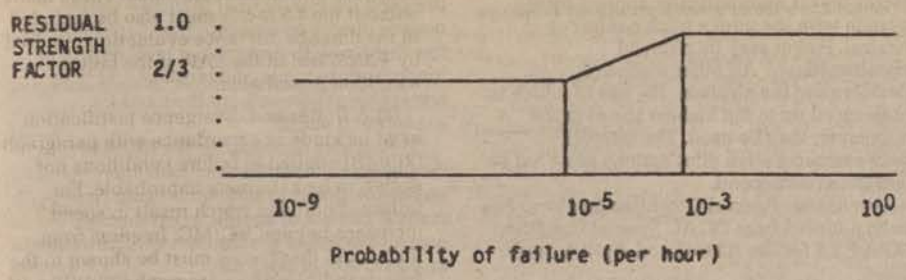
(B) *For continuation of the flight.* The new airplane configuration and associated flight limitations, if any, must be taken into account and the justification must cover:

(*1*) *A static and residual strength substantiation.* These investigations must take into account the loads induced by the failure condition (resulting from any single or combination of system failures not shown to be extremely improbable) in those cases where these loads will continue up to the end of the flight, in combination with the deterministic limit conditions specified in Part 25 (as maneuvers, discrete gust, design envelope for continuous turbulence, etc.)

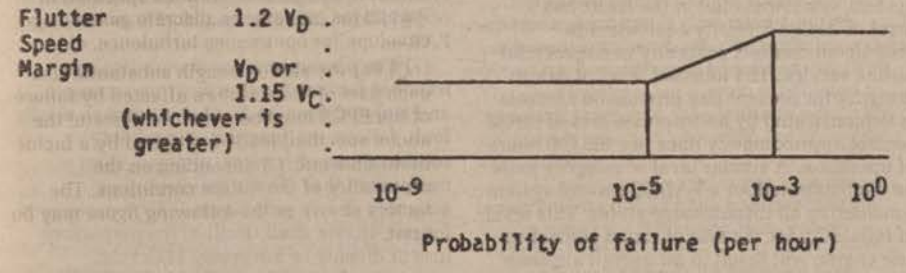
(*i*) For the static strength substantiation, each part of the structure affected by failure of the EFCS must be able to withstand the above specified loads multiplied by a factor between 1 and 1.5 depending on the probability of the failure conditions. The factors shown in the following figure may be used.



(*ii*) For structure affected by failure of the EFCS and with structural damage in combination with the EFCS failure conditions, a factor must be applied for the same purpose to the loads used for the justification of the airplane without system failure condition. In any case, the residual strength level must be at least ⅔ of the gust or maneuver conditions, combined with the normal operating cabin differential pressure (including the expected external aerodynamic pressures), specified in § 25.571(b) of the FAR. The residual strength factors shown in the following figure may be used.



(2) *Flutter and divergence substantiation.* Due to High Speed Protection, the speed margin between VC and VD, compared with an airplane without such protection, may be reduced. Therefore, compliance with § 25.629(d) must be shown to a speed of 1.15 VC or to VD, whichever is greater. However, at altitudes where VD is limited by Mach number, compliance may be shown to MD or MC + .05, whichever is greater. The failsafe flutter speed at any altitude need not exceed the value of VD that would result from compliance with § 25.335(b) without high speed protection. In addition, a margin up to 20% above VD/MD, depending on the probability of failure, must be provided for any system failure condition affecting the EFCS, the Load Alleviation Function (LAF), or High Speed Protection function. For probable failure conditions which affect the High Speed Protection function, this value of VD/MD must be the particular value defined for this failure condition. The margins shown in the following figure may be used.



(3) *Damage propagation substantiation.* If the time likely to be spent in this failure condition is not small compared to the damage propagation period, or if the loads induced by the failure condition may have a significant influence on the damage propagation, then the effects of the particular failure condition must be addressed and the corresponding inspection intervals adjusted to adequately cover this situation.

(C) *Known failure conditions.* The airplane may be considered to be airworthy in a system failure condition which reduces the structural performance if the effects of flight and operational limitations, when combined with those of the failure condition, allow the airplane to meet all Part 25 structural requirements. The consequences of subsequent system failures must also be considered.

(b) *Supplementary Criteria.*

(1) *Realistic Gust Fields.* Realistic representations of gust and turbulence must be accounted for. This is both to provide confidence that design assumptions based on idealized turbulence will not lead to optimistic estimates of the degree of load alleviation likely to be achieved and to avoid unnecessary constraints on control system design.

(2) *Availability of control authority and power supply to control systems.* Adequate power supply to the control systems (e.g., hydraulic power) and adequate control authority must be available for load alleviation and flight control under realistic conditions of severe turbulence. Maneuvers, gusts, and combinations of maneuvers and gusts must be considered.

(3) *Effects of control input on loads in turbulence.* The effects of loads induced by control activity during flight in turbulence on the LAF effectiveness in reducing the total loads in turbulence must be assessed.

(4) *System Reliability.* If the systems prove less reliable in service than assessed for certification, adjustments in maintenance schedules, load levels, and/or operating limitations may be required. The systems must be monitored for a sufficient period of time to substantiate an adequate level of reliability. Details of the reliability verification program must be based on system criticality and the degree of conservatism inherent in the system design and analysis. Periodic checks for system reliability may be required throughout the service life of the systems.

(5) *Test demonstration.* The purpose of the test demonstration is to show that the airplane meets the regulatory requirements by carrying out performance and fault tests at selected conditions. The tests shall include, in addition to those normally required by Part 25, the following simulator, ground, and flight demonstrations:

(i) The system effectiveness in alleviating loads must be demonstrated by flight tests for selected conditions within the airplane design envelope. Airplane response to oscillatory as well as hardover failures must be similarly verified by tests, unless these conditions are shown to be extremely improbable.

(ii) Maneuvering to limit load factors or load factors which produce light buffeting at both low speed and high speed must be explored for system effectiveness.

(iii) If the airplane is proposed to be dispatched with failures in the EFCS (MEL configurations), the tests described in paragraph (i) above must include selected conditions in the MEL configuration.

(iv) An analytical or test evaluation must be made to determine that EFCS signals at various frequencies will not cause structural feedback resulting in control system instability. The frequency range must include the highest and lowest frequencies (including system failures not shown to be extremely improbable) which result in movement of a control surface and the lowest structural or rigid body frequency of the airplane. The effects of structural damage considered under §§ 25.571 (b) and (e) must be included. The investigation must cover all points in the v-n envelope.

The following definitions apply to the terms as they are used in this special condition.

1. *Structural performance.* Capability of the airplane to meet the requirements of Part 25 relating to structures.

2. *Flight limitations.* Limitations which can be applied to the airplane flight conditions following an in-flight occurrence and which are included in the flight manual, (e.g., speed limitations, avoidance of severe weather conditions, etc.).

3. *Operational limitations.* Limitations, including flight limitations, which can be

applied to the airplane operating conditions before dispatch (e.g., payload limitations).

4. *Probabilistic terms.* The probabilistic terms (probable, improbable, extremely improbable) used in this special condition should be understood as defined in AC 25.1309–1.

5. *Failure condition.* The term "failure condition" should also be understood as defined in AC 25.1309–1, but this special condition applies only to system failure conditions which have a direct impact on the structural performance of the airplane (e.g., failure conditions which induce loads or change the response of the airplane to inputs such as gusts or pilot actions).

Discussion: The criteria in this special condition address only the direct structural consequences of the system's responses and performances and therefore cannot be considered in isolation but must be included in the overall safety evaluation of the airplane. The presentation of these criteria may, in some instances, duplicate standards already established for this evaluation. However, this presentation is used: (1) to keep explicit the links between the different items to be covered and the continuity with former requirements; and (2) to place in a proper context the specific additional structural requirements. These criteria are applicable to primary structure which, if failed, would prevent continued safe flight and landing. It is advisable to use the same basis for the whole of the structure, but some relief may be considered for cases leading to structural failures which would not prevent continued safe flight and landing.

(c) *Dive Speed Definition.* In lieu of compliance with § 25.335(b)(1) of the FAR, if the flight control system includes functions which act automatically to initiate recovery before the end of the 20-second period specified in § 25.335(b)(1) the greater of the speeds resulting from the following conditions may be used:

(i) From an initial condition of stabilized flight at V_c/M_c, the airplane is upset so as to take up a new flight path 7.5 degrees below the initial path. Control application, up to full authority, is made to try and maintain this new flight path. Twenty seconds after initiating the upset, manual recovery is made at a load factor of 1.5 g (0.5 g acceleration increment), or such greater load factor that is automatically applied by the system with the pilot's pitch control at neutral. The speed increase occurring in this maneuver may be calculated, if reliable or conservative aerodynamic data is used. Power, as specified in § 25.175(b)(1)(iv) of the FAR, is assumed until recovery is made, at which time power reduction and the use of pilot controlled drag devices may be assumed.

(ii) From a speed below V_c/M_c, with power to maintain stabilized level flight at this speed, the airplane is upset so as to accelerate through V_c/M_c, at a flight path 15 degrees below the initial path (or at the steepest nose down attitude that the system will permit with full control authority if less than 15 degrees). Recovery may be initiated two seconds after operation of high speed, attitude, or other alerting system by application of a load factor of 1.5 g (0.5 g acceleration increase), or such greater load factor that is automatically applied by the system with the pilot's pitch control at neutral. Power may be reduced simultaneously. All other means of decelerating the airplane, the use of which is authorized up to the highest speed in the maneuver, may be used. The interval between successive pilot actions must not be less than one second.

Discussion: Special Condition 2c above has been adapted from DGAC Special Condition SC-A 2.2.3 for the A320 dated April 4, 1986.

3. Engine Controls and Monitoring.

(a) *Full Authority Digital Engine Control System (FADEC).* In addition to compliance with the requirements of §§ 25.901(c) and 25.903(b) of the FAR, the components of the propulsion control system for each engine, both airframe and engine furnished, that effect thrust in either the forward or reverse direction and are required for continued safe operation, must have the level of integrity and reliability of a hydromechanical system (HMC) meeting current airworthiness standards.

Discussion: An acceptable method to demonstrate compliance with this special condition is to show that the engine control system, when installed in the A320, has a level of design integrity equivalent to propulsion controls presently in commercial airline service. The inherent level of design integrity for present day propulsion controls is demonstrated by an inservice loss of thrust control approximately once per 100,000 hours of operation. A similar level of integrity must be demonstrated for a FADEC control system considering all dispatchable states. This level of reliability for the loss of thrust control on one engine will result in an overall airplane propulsion control system reliability that is consistent with the guidance associated with § 25.1309(b)(1), assuming an independence of the failure conditions that contribute to the loss of thrust control. Proper compliance with §§ 25.901(c) and 25.903(b) should not result in any control system functions for one engine that are critical to continued safe flight and landing, that are totally dependent on FADEC system reliability to meet the objectives of § 25.1309(b)(1). Sources of information which are necessary in order to establish a meaningful determination of reliability include assessing service experience of like controls in similar environments, testing (e.g., bench, flight, etc.) and analysis. Service experience of a complex system such as the FADEC could involve similar units in a similar installation, military experience of like installations, or possibly identical installations on other aircraft. In each of these cases, the type and degree of exposure would depend upon various factors such as service history of previous systems produced by the manufacturers involved, or the number and type of failures observed during the service evaluation. The minimum dispatch configuration will have to be taken into account.

(b) *Engine Thrust Levers During Autothrust System Operation.* In lieu of compliance with § 25.1143(c) of the FAR, it must be established by analysis and test that the A320 automatic thrust system:

(1) Provides adequate cures for the flightcrew to monitor thrust changes without the need for exceptional diligence during normal operation and provides capability for the flightcrew to recognize a malfunction or inappropriate mode of operation and take corrective action without the need for exceptional skills.

(2) Provides a means for the flightcrew to disengage or otherwise override the automatic thrust system and regain regain manual control of engine thrust through normal motion of the thrust levers as defined in § 25.779(b) of the FAR.

(3) Provides visual cues for any disengagements, and provides visual and aural alerts during uncommanded disengagements.

(4) Functions reliably and does not allow the exceedance of any approved engine operating limit during normal system operation.

(5) Compliance with paragraphs 1 through 3 above shall include consideration of faults within the automatic thrust system which could affect any or all engines during critical flight operations, such as takeoff, approach and landing.

(c) *Display of Powerplant Parameters.* In addition to compliance with the requirements of §§ 25.1305, 25.1321, and 25.1337 of the FAR—

(1) The powerplant parameter displays required for certification must be arranged and isolated from each other so that no single fault, failure, malfunction, or probable combinations of failures, of any system or component that affects the display or accuracy of any propulsion system parameter for one engine shall result in the permanent loss of display or adversely affect the accuracy of any parameter display for the remaining engines.

(2) No single fault, failure, or malfunction, or probable combinations of failures, shall result in the permanent loss of display or adversely affect the accuracy of more than one propulsion unit parameter display for any single engine.

(3) Combinations of failures which would result in the display of hazardously misleading information for any powerplant parameter that affects more than one engine must be extremely improbable.

(4) Each powerplant parameter display required for certification that is not continuously displayed must have an operating limit or threshold established so that the appropriate engine, auxiliary power unit (APU), or fuel system parameters are automatically displayed for any condition that requires immediate crew awareness. In addition, those parameter displays must be manually selectable by the flightcrew.

(5) For designs incorporating shared displays, the engine parameters must have higher display priority for concurrent propulsion and airplane system failures, unless it is shown that crew attention to another propulsion or airplane system display is more critical for continued safe operations of the airplane. If the engine parameters are not concurrently displayed, it must be established that this condition does not jeopardize the safe operation of the airplane.

(6) Propulsion system parameters essential for determining the health and operational status of the engines and for taking appropriate corrective action, including engine restart, must be automatically displayed after the loss of normal electrical power.

(7) If individual fuel tank quantity information is not continuously displayed, there must be adequate automatic monitoring of the fuel system to alert the crew of both system malfunctions and abnormal fuel management.

Discussion: Section 25.1305 specifies the required powerplant instruments. Section 25.1321(c)(2) requires that powerplant instruments vital to the safe operation of the airplane must be plainly visible to the appropriate crewmembers, and § 25.1309(a) requires that the powerplant instruments function properly and perform their intended functions under any foreseeable operating condition. The instruments function properly if they accurately display the required parameter. The instruments are considered to be performing their intended function if they are displayed when the crew needs them to determine the health or operational status of the engines, or to monitor correct fuel system operation. Any foreseeable operating condition encompasses the entire range of normal airplane and engine operation, as well as engine or airplane system failures. Vital powerplant instruments are not plainly visible to the appropriate crewmembers if they are not being displayed.

4. Protection From Lightning and Unwanted Effects of Radio Frequency (RF) Energy.

(a) In the absence of specific requirements for protection from the unwanted effects of RF energy, the following apply:

(1) Each electronic system which performs critical functions must be designed and installed to ensure that the operation and operational capabilities of these critical systems are not affected when the airplane is exposed to externally radiated electromagnetic energy.

(2) For the purpose of this special condition, critical functions are functions whose failure would contribute to or cause a failure condition which would prevent the continued safe flight and landing of the airplane.

Discussion: It is not possible to precisely define the RF energy to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for RF energy. Based on surveys and analysis of existing RF emitters, an adequate level of protection exists when compliance with the above special condition is shown for the field strengths specified in either paragraph 1 or 2 below:

1. A minimum RF threat of 200 volts per meter average electric field strength from 10 KHZ to 20 GHZ.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. An alternate means of compliance is presented which considers the effect of shielding. That threat has the following field strengths for the frequency ranges indicated.

Frequency	Average (V/m)	Peak (V/m)
10 KHz–3 MHz	100	100
3 MHz–30 MHz	1,000	1,000
30 MHz–100 MHz	100	100
100 MHz–200 MHz	200	3,000
200 MHz–1 GHz	2,000	6,000
1 GHz–2 GHz	2,000	14,000
2 GHz–8 GHz	600	14,000
8 GHz–10 GHz	2,000	14,000
10 GHz–40 GHz	1,000	8,000

To establish the values in paragraph 2 above, an analysis was performed using a model of U.S. airspace and the Electromagnetic Compatibility Analysis Center (ECAC) data base, which contains the characteristics of all U.S. emitters. This analysis assumed a minimum separation distance between the airplane and emitters as follows: in the airport environment, 250 ft. for fixed emitters and 50 ft. for mobile emitters; for the air-to-air environment, 50 ft. from interceptor aircraft and 500 ft. from non-interceptor aircraft; for the ground-to-air environment, 500 ft.; and for the ship-to-air environment, 1,000 ft. The results of this analysis were then combined with the results of a study of emitters in European countries. The above values are therefore believed to represent the worst case levels to which an airplane would be exposed in the operating environment.

(b) In addition to compliance with the requirements of §§ 25.581 and 25.954 of the FAR concerning lightning protection—

(1) Each electronic system which performs critical functions must be designed and installed to ensure that the operation and operational capabilities of these critical systems are not affected when the airplane is exposed to lightning.

(2) Each electronic system which performs essential functions must be protected to ensure that the operation and operational capabilities of these essential functions can be recovered automatically or by simple pilot action after the system has been exposed to lightning. Fault annunciation must be provided if crew action is required.

(3) For the purpose of this special condition, the following definitions apply:

(i) *Critical Functions.* Functions whose failure would contribute to or cause a failure condition which would prevent the continued safe flight and landing of the airplane.

(ii) *Essential Functions.* Functions whose failure would contribute to or cause a failure condition which would significantly impact the safety of the airplane or the ability of the flightcrew to cope with adverse operating conditions.

Discusson: The current airworthiness regulations address lightning protection for fuel vapor ignition (§ 25.954) and for damage caused to the structural and skin details of the airplane (§ 25.581). However, application of the design requirements of these rules does not provide an equivalent level of safety to fly-by-wire applications when compared to the traditional designs which utilize mechanical means to connect the flight controls and the engines to the flight deck.

The following "threat definition" is proposed as a basis to sue in demonstrating compliance with this special condition.

The lightning current waveforms defined below, along with the voltage waveforms in JAR AMC–S5 or Advisory Circular (AC) 20–53A, will provide a consistent and reasonable requirement which is acceptable for use in evaluating the effects of lightning on the airplane. These waveforms depict threats that are external to the airplane. How these threats affect the airplane and its systems depend upon airplane geometry, the system's installation configuration, materials, shielding, etc. Therefore, tests (including tests on the completed airplane or an adequate simulation) and/or verified analysis need to be conducted in order to obtain the resultant internal threat to the installed systems. The individual systems may then be evaluated with this internal threat in order to determine their susceptibility to upset and malfunction.

In addition to the use of the Severe Strike/Restrike, Component A or D, to address the direct effects per AC 20–53A, the possible effects or upset that an avionics system or data transmission might experience needs to be identified. To evaluate the induced effects to these systems, three considerations are required:

1. *First Return Stroke:* (Severe Strike—Component A or Restrike—Component D). As identified above, this external threat needs to be evaluated to obtain the resultant internal threat and to verify that the level is sufficiently below the equipment "hardness" level; then

2. *Multiple Stroke Flash:* A lightning strike is often composed of a number of successive strokes, referred to as a multiple-stroke. Although multiple strokes are not necessarily a salient factor in a damage assessment, they can be the primarty factor in a system upset analysis. Multiple strokes can induce a sequence of transients over an extended period of time. While a single event upset of input/output signals may not affect system performance, multiple signal upsets over an extended period of time (2 seconds) may affect the systems under consideration. Repetitive pulse testing and/or analysis need to be carried out in response to the multiple stroke environment to demonstrate that the system response meets the safety objective. This external multiple stroke environment consists of 24 pulses and is described as a single Component A followed by 23 randomly spaced restrikes of ½ magnitude of component D (Peak Amplitude of 50,000 amps), all within 2 seconds. An analysis or test needs to be accomplished in order to obtain the resultant internal threat environment for the system under evaluation.

And,

3. *Multiple Burst:* In-flight data-gathering projects have shown bursts of multiple, low amplitude, fast rates of rise, short duration pulses accompanying the airplane lightning strike process. While insufficient energy exists in these pulses to cause direct (physical damage) effects, it is possible that indirect effects resulting from this environment may cause upset to some digital processing systems.

The representation of this interference environment is a repetition of low amplitude, high peak rate of rise, double exponential pulses which represent the multiple bursts of current pulses observed in these flight data gathering projects. This component is intended for an analytical (or test) assessment of functional upset of the system. Again, it is required that this component be translated into an internal environmental threat in order to be used. This "Multiple Burst" consists of 24 random sets of 20 strokes within a period of 2 seconds. Each set of 20 strokes is made up of 20 "Multiple Burst" waveforms randomly distributed within a period of one millisecond. The individual "Multiple Burst" waveform is defined below.

The following current waveforms constitute the "Severe Strike" (Component A), Restrike/ "Swept Stroke" (Component D), "Multiple Stroke" (½ Component D), and the "Multiple Burst" (Component H).

These components are defined by the following double exponential polynomial equations:

$$i(t) = I_0 (e^{-at} - e^{-bt})$$

where:
t = time in seconds,
i = current in amperes, and

	Severe Strike (Component A)	Restrike (Component D)	Multiple Stroke (½ Component D)	Multiple Burst (Component H)
I_0, amp	218,810	109,405	54,703	10,572
a, sec^{-1}	11,354	22,708	22,708	187,191
b, sec^{-1}	647,265	1,294,530	1,294,530	19,105,100
These equations produce the following characteristics:				
i_{peak}	200KA	100 KA	50 KA	10 KA
and				
$(di/dt)_{max}$ (amp/sec)	1.4×10^{11} @t=0+sec	1.4×10^{11} @t=0+sec	0.7×10^{11} @t=0+sec	2.0×10^{11} @t=0+sec
di/dt, (amp/sec)	1.0×10^{11} @t=.5 us	1.0×10^{11} @t=.25 us	0.5×10^{11} @t=.25 us	
Action Integral (amp^2 sec)	2.0×10^{6}	0.25×10^{6}	$.0625\times10^{16}$	

5. Flight Characteristics.

(a) *Flight Characteristic Compliance Determination by Handling Qualities Rating System for EFCS Failure Cases.* In lieu of compliance with § 25.672(c) of the FAR, a handling qualities rating system will be used for evaluation of EFCS configurations resulting from single and multiple failures not shown to be extremely improbable. The handling qualities ratings are:

(1) Satisfactory: Full performance criteria can be met with routine pilot effort and attention;

(2) Adequate: Adequate for continued safe flight and landing; full or specified reduced performance can be met, but with heightened pilot effort and attention.

(3) Controllable: inadequate for continued safe flight and landing, but controllable for return to a safe flight condition, safe flight envelope and/or reconfiguration so that the handling qualities are at least Adequate. Handling qualities will be allowed to progressively vary with failure state, atmospheric disturbance level, and flight envelope. Specifically within the normal flight envelope, the pilot-rate handling qualities must be satisfactory/adequate in moderate atmospheric disturbance for probable failures, and must not be less than adequate in light atmospheric disturbance for improbable failures.

(b) *Longitudinal Stability.* In lieu of compliance with the requirements of §§ 25.171, 25.173, 25.175, and 25.181(a) of the FAR, the airplane must be shown to have suitable dynamic and static longitudinal stability in any condition normally encountered in service, including the effects of atmospheric disturbance.

(c) *Lateral-Directional Stability.*

(1) In lieu of compliance with § 25.171 of the FAR, the airplane must be shown to have suitable static lateral-directional stability in any condition normally encountered in service, including the effects of atmospheric disturbance.

(2) In lieu of compliance with §§ 25.177(b) and 25.177(c), the following applies: In straight, steady, sideslip (unaccelerated forward slips) the rudder control movements and forces must be substantially proportional to the angle of sideslip, and the factor of proportionality must lie between limits found ncessary for safe operation throughout the range of sideslip angles appropriate to the operation of the airplane. At greater angles, up to the angle at which full rudder control is used or a rudder pedal force of 180 pounds is obtained, the rudder pedal forces may not reverse and increased rudder deflection must produce increased angles of sideslip. Unless the airplane has suitable sideslip indication, there must be enought bank and lateral control deflection and force accompanying sideslipping to clearly indicate any departure from study unyawed flight.

(d) *Control Surface Awareness.* In addition to compliance with §§ 25.143, 25.671, and 25.672 of the FAR, when a flight condition exists where, without being commanded by the crew, control surfaces are coming so close to their limits that return to the normal flight envelope and/or continuation of safe flight requires a specific crew action, a suitable flight control position annunciation shall be provided to the crew, unless other existing indications are found adequate or sufficient to prompt that action.

Note: The term suitable also indicates an appropriate balance between nuisance and necessary operation.

6. Flight Envelope protection

In the absence of specific requirements for flight envelope protection, the following apply:

(a) *General Limiting Requirements.*

(1) *Normal Operation.*

(i) Onset characteristics of each envelope protection feature must be smooth, appropriate to the phase of flight and type of maneuver, and not in conflict with the ability of the pilot to satisfactorily change airplane flight path, speed, or attitude as needed.

(ii) Limit values of protected flight parameters (and if applicable, associated warning thresholds) must be compatible with:

(A) Airplane structural limits;

(B) Required safe and controllable maneuvering of the airplane; and

(C) Margin to critical conditions. Unsafe flight characteristics/conditions must not result if dynamic maneuvering, airframe and system tolerances (both manufacturing and in-service), and non-steady atmospheric conditions, in any appropriate combination and phase of flight, can produce a limited flight parameter beyond the nominal design limit value.

(iii) The airplane must be responsive to intentional dynamic maneuvering to within a suitable range of the parameter limit. Dynamic characteristics such as damping and overshoot must also be approrpiate for the flight maneuver and limit parameter in question.

(iv) When simultaneous envelope limiting is engaged, adverse coupling or adverse priority must not result.

(2) *Failure States.* EFCS (including sensor) failures must not result in a condition where a parameter is limited to such a reduced value that safe and controllable maneuvering

is no longer available. The flightcrew must be alerted by suitable means if any change in envelope limiting or maneuverability is produced by single or multiple failures of the EFCS not shown to be extremely improbable.

(3) *Abnormal Attitudes.* In case of abnormal attitude or excursion of any other flight parameters outside the protected flight boundaries, the operation of the EFCS, including the automatic protection functions, must not hinder airplane recovery.

(b) *Angle-of-Attack Limiting.*

(1) *FAR Part 1, § 1.2, Abbreviations and Symbols.*

(i) In lieu of the definition of V_S is 1.2, the following applies in subparts B, E, F, and G of FAR 25: "V_S means the reference stalling speed."

Discussion: This calibrated speed is determined in the stalling maneuver and expressed as $V_{CLMAX}/\sqrt{N_{ZW}}$, where V_{CLMAX} is the speed occurring where C_L is first a maximum, and N_{ZW} is the flight path normal load factor (not greater than 1.0) at the same point; C_L can be expressed as

$$\frac{N_{ZW}W - F_G \sin (AOA + i_{FG})}{qS}$$

Conditions associated with the determination of the stalling speed are those provided in § 25.103 of the FAR.

(ii) In lieu of the definition of V_{SO} given in § 1.2, the following applies: "V_{SO} means the reference stalling speed in the landing configuration."

(iii) In lieu of the definition of V_{S1} given in § 1.2, the following applies: "V_{S1} means the reference stalling speed in a specific configuration."

(iv) In addition to the definitions given, the following also apply:

"V_{REF} means the steady landing approach speed, selected by the applicant for manual landing, for a defined landing configuration."

"V_{MIN} means the minimum speed obtained by conducting a stalling maneuver."

"V_{SW} means the speed at which onset of natural or artifical stall warning occurs."

(2) FAR Part 25—Airworthiness Standards: Transport Category Airplanes.

(i) In lieu of compliance with § 25.21(b), the following applies: "The flying qualities will be evaluated at speeds based upon the forward CG stalling speed."

(ii) In lieu of compliance with § 25.103(a), the following applies: "V_S is the reference stalling speed with——"

(iii) In lieu of compliance with § 25.103(a)(1), the following applies: "Stalling speed determined at not greater than IDLE thrust (NOTE: automatic go-around thrust application feature must be disengaged)."

(iv) In lieu of compliance with § 25.103(b)(1), the following applies: "From a stabilized straight flight condition at any speed not less than 1.16 V_S (or speed at AOA protection onset, if greater) nor more than 1.30 V_S, apply elevator control to decelerate the airplane so that the speed reduction at the stall does not exceed one knot per second."

(v) In lieu of § 25.107(b)(1), the following applies: "1.13V_S for——"

(vi) In addition to compliance with §§ 25.107(c) (1) and (2), the following also applies: "A speed selected by the applicant which provides fixed-speed maneuvering capability, which is free of stall warning and Alpha floor, not less than the values shown in TABLE B.2."

Note: Unless AOA protection system production tolerances are acceptably small, so as to produce insignificant changes in performance determinations, the flight test settings for features such as Alpha floor and stall warning should be set at the low AOA tolerance limit; high AOA tolerance limits should be used for characteristics evaluations.

TABLE B.2

Configuration	Speed	Maneuvering bank angle	Maximum thrust representative of:
Takeoff	V_2	30° (stall warning) 25° (Alpha floor)	WAT-limited V_2 climb.
Takeoff	*V_2+XX	40°	Climb rating (all engines).
Enroute	+V_{FTO}	40°	WAT-limited final climb.
Landing	V_{REF}	40°	−3° Flight path.

*Airspeed approved for all-engines initial climb.

+ Airspeed at end of final takeoff (FTO) flight path for engine-out performance.

Note.—FWD CG symmetrical thrust is acceptable.

(vii) In lieu of compliance with § 25.119(b), the following applies: "A climb speed of not more than V_{REF}."

(viii) In lieu of compliance with § 25.121(c) the following applies: "Final takeoff. In the enroute configuration at the end of the takeoff path determined in accordance with § 25.111, the steady gradient of climb may not be less than 1.2 percent at a speed not less than: * 1.23 V_S or * a speed which provides fixed-speed maneuvering capability which is free of stall warning and Alpha floor, not less than the value shown in TABLE B.2, and with—"

(ix) In lieu of compliance with § 25.121(d)(3), the following applies: "A climb speed established in connection with normal landing procedures but not exceeding 1.4V_{S1}."

(x) In lieu of compliance with § 25.125(a)(2), the following applies: "A stabilized approach, with a calibrated airspeed of not less than V_{REF}, must be maintained down to the 50-foot height. V_{REF} may not be less than: (a) 1.23 V_{SO}, or (b) the speed selected by the applicant which provides a fixed-speed maneuvering capability, which is free of stall warning and Alpha floor, not less than the value shown in TABLE B.2."

(xi) In addition to compliance with the requirements of § 25.143, the following also apply: "(1) The airplane must be shown to have suitable flight-path stability and control characteristics both in normal flight and when windshear is encountered in a takeoff or landing configuration. This may be shown by an appropriate combination of simulation and flight test." NOTE: Suitable characteristics are those no worse than conventionally controlled airplanes in similar conditions. "(2) Operation of automatic features (such as significant EFCS stability or control changes) must not adversely affect normal flight operations, including during expected levels of atmospheric disturbance."

(xii) In lieu of the speeds given in the following Part 25 regulations, comply with speeds as follows:

§ 25.145(a), V_{MIN} in lieu of V_S.
§ 25.145(b(1)–(4), 1.3V_{S1} in lieu of 1.4V_{S1}.
§ 25.145(b)(1), Change 40 percent to 30 percent.
§ 25.145(b)(6), 1.3V_{S1} in lieu of 1.4V_{S1}.
§ 25.145(b)(6), V_{MIN} in lieu of 1.1V_{S1}.
§ 25.145(6), 1.6V_{S1} in lieu of 1.7V_{S1}.
§ 25.145(c), 1.13V_{S1} in lieu of 1.2V_{S1}.
§§ 25.147(a), (a)(2), (c), (d), 1.3V_{S1} in lieu of 1.4V_{S1}.
§ 25.149(c), 1.13V_S in lieu of 1.2V_S.
§§ 25.161(b), (c)(1), (c)(2), (c)(3), (d), 1.3V_{S1} in lieu of 1.4V_{S1}.
§§ 25.175(a)(2), (b)(1), (b)(2), (b)(3), (c)(4), 1.3V_{S1} in lieu of 1.4V_{S1}.
§ 25.175(b)(2)(ii), (V_{MO}+1.3V_{S1})/2 in lieu of (V_{MO}+1.4V_{S1})/2.
§ 25.175(c), V_{MIN} and 1.7V_{S1} in lieu of 1.1V_{S1} and 1.8V_{S1}.
§ 25.175(d), V_{MIN} and 1.7 V_{SO} in lieu of 1.1V_{SO} and 1.3V_{SO}.
§ 25.175(d)(5), 1.3V_{SO} in lieu of 1.4V_{SO}.

Note: The stability requirements for §§ 25.173 and 25.175 are further amended by the special condition associated with longitudinal stability.

§ 25.177(a), (b)(1), (1.13V_{S1} in lieu of 1.2V_{S1}.
§ 25.201(a)(2), 1.5V_{S1} in lieu of 1.6V_{S1}.

(xiii) In lieu of compliance with § 25.203(c), the following applies: "With the EFCS operating normally and autothrust ON, the airplane must be shown to have suitable

handling characteristics when decelerating at various rates and up to 1.5$_g$ in turning flight to the AOA Limit."

(xiv) In lieu of compliance with § 25.207(a), the following applies: "With the AOA limiter operating normally, stall warning is not required. For failure states with the AOA limiter inoperative, sufficient stall warning margin must be provided in the following straight and turning flight conditions:

(1) Stall-free characteristics must be shown in power-off, straight ahead stall approaches to a speed five percent (but not less than five knots) below V_{SW}.

(2) Stall-free characteristics must be shown in turning flight stall approaches, at entry rates up to three knots per second, when recovery is initiated not less than one second after the onset of stall warning."

(xv) The requirements of § 25.207(c) are not applicable.

(c) *Normal Load Factor (g) Limiting.* In addition to compliance with the requirements of § 25.143, the following apply:

(1) The positive limiting load factor must not be less than 2.5g (2.0g with high-lift devices extended) for the EFCS normal state.

(2) The negative limiting load factor must be equal to or more negative than minus 0.5g (0.0g with high lift devices extended) for the EFCS normal state.

Discussion: This allows an incremental plus or minus 1.5g for maneuvering flaps up, and plus or minus 1.0g flaps extended. This Special Condition does not impose an upper bound for the limiter, nor does it require that the limiter exist. If the limited is set at a value beyond the structural design limit maneuvering load factor "n" of §§ 25.333(b) and 25.337 (b) and (c), there should be a very positive tactile feel built into the controller and obvious to the pilot that serves as a deterrent to inadvertently exceeding the structural limit.

(d) *High-Speed Limiting.* In addition to compliance with the requirements of § 25.143 of the FAR, the following applies: "Operation of the high-speed limiter during all routine and descent procedure flight must not impede normal attainment of speeds up to overspeed warning."

(e) *Pitch and Roll Limiting.* In addition to compliance with the requirements of § 25.143 of the FAR, the following applies: "Operation of the pitch and roll limiter must not:

(1) Impede normal maneuvering for pitch angles up to the maximum required for normal maneuvering, including a normal all-engine takeoff, plus a suitable margin to allow for satisfactory speed control.

(2) Restrict or prevent attainment of roll angles up to 65 degrees or pitch attitudes necessary for emergency maneuvering."

7. Side Stick Controllers.

(a) *Pilot Strength.* In lieu of the "strength of pilots" limits of § 25.143(c) for pitch and roll, and in lieu of specific pitch force requirements of §§ 25.145(b) and 25.175(d), the following applies: "It must be shown that the temporary and maximum prolonged force levels for the side stick controllers are suitable for all expected operating conditions and configurations, whether normal or non-normal."

(b) *Controller Coupling.* In the absence of specific requirements for controller coupling, the following applies: "The electronic side stick controller coupling design must provide for corrective and/or overriding control inputs by either pilot with no unsafe characteristics. Annunciation of controller status must not be confusing to the flightcrew."

(c) *Pilot Control.* In the absence of specific requirements for side stick controllers, the following applies: "It must be shown by flight tests that the use of sidestick controllers does not produce unsuitable pilot-in-the-loop control characteristics when considering precision path control/tasks and turbulence."

(d) *Autopilot Quick-Release Control Location.* In lieu of compliance with § 25.1329(d) of the FAR, quick release (emergency) controls must be on both side stick controllers. The quick release means must be located so that it can readily and easily be used by the flightcrew.

8. Flight Recorder.

(a) In addition to compliance with the requirements of § 25.1459(a) of the FAR, the flight recorder must record the following parameters in addition to those required by Appendix B of Part 121:

(1) Pilot and copilot sidestick pitch controller, pitch control surface position, pilot and copilot sidestick roll controller, aileron surface position, spoiler surface position, rudder pedal position, rudder surface position, auto thrust system commanded thrust parameter, total air temperature (TAT), and frame counter.

(2) The following for each engine installation: Actual thrust (N1/N2), electronic engine control, commanded thrust, and thrust lever position.

(b) In lieu of compliance with § 25.1459(a)(4) of the FAR, there must be an aural or visual means for preflight checking that data are being recorded.

Issued in Seattle, Washington, on December 15, 1988.

Leroy A. Keith,

Manager, Transport Airplane Directorate Aircraft Certification Service.

[FR Doc. 89-1744 Filed 1-26-89; 8:45 am]

BILLING CODE 4910-13-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1207

Standards of Conduct

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Additions to final rule.

SUMMARY: On June 16, 1987, NASA revised and republished 14 CFR Part 1207, "Standards of Conduct" (52 FR 22755). Subpart G, "Administrative Enforcement Procedures for Alleged Violations of 18 U.S.C. 207," and Subpart H, "Post-Employment Regulations," were included in NASA's original "Standards of Conduct" regulations. Unfortunately, these two subparts were inadvertently left out of the revision. They are added by this rule. NASA is publishing these regulations to ensure conformity with current ethical standards of conduct required of NASA employees in carrying out their duties and responsibilities.

EFFECTIVE DATE: January 27, 1989.

ADDRESS: Office of General Counsel, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Elizabeth Siegel, 202-453-2465.

SUPPLEMENTARY INFORMATION: To ensure conformity to the Ethics in Government Act of 1987, NASA published its revised regulations in the **Federal Register** on June 16, 1987 (52 FR 22755), and a correction to § 1207.405 was published in the **Federal Register** on September 28, 1987 (52 FR 36234).

The National Aeronautics and Space Administration has determined that:

1. This rule is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, since it will not exert a significant economic impact on a substantial number of small entities.

2. This rule is not a major rule as defined in Executive Order 12291.

List of Subject in 14 CFR Part 1207

Administrative practice and procedures, Conflict of interest, Post-employment exemption.

For reasons set forth in the Preamble, 14 CFR Part 1207 is amended as follows:

PART 1207—STANDARDS OF CONDUCT

1. The authority citation for 14 CFR Part 1207 is revised to read as follows:

Authority: Ethics in Government Act of 1978, as amended by Pub. L. 96-19 and Pub. L. 96-28; EO 11222; 18 U.S.C. 201-219; 5 CFR Parts 734, 735, 737, 738, and 755.

2. The Table of Contents for Part 1207 is amended by adding entries for Subparts E, F, G, and H to read as follows:

Sec.

* * * * *

Subpart E—[Reserved]

Subpart F—Standards of Conduct for Special Government Employees [Reserved]

Subpart G—Administrative Enforcement Procedures for Alleged Violations of 18 U.S.C. 207

1207.700 Scope of subpart.
1207.701 Policy.
1207.702 Procedures for administrative disciplinary hearing.

Sec.

3. Subparts E and F are added and reserved. Subparts G and H are added to read as follows:

Subpart E—[Reserved]

Subpart F—Standards of Conduct for Special Government Employees [Reserved]

Subpart G—Administrative Enforcement Procedures for Alleged Violations of 18 U.S.C. 207

§ 1207.700 Scope of subpart.

The subpart establishes NASA's administrative enforcement procedures for handling allegations of violations of 18 U.S.C. 207, the Federal criminal prohibition against post-employment conflicts of interest by former Government employees. It implements 18 U.S.C. 207(j) which requires each agency to establish such procedures and the guidelines of the Office of Government Ethics (OGE) which appear at 5 CFR 737.27.

§ 1207.701 Policy.

Any allegation that a former NASA employee has violated 18 U.S.C. 207 will be thoroughly and impartially investigated following the guidelines of the OGE and the procedural requirements of this subpart before a final decision is reached.

§ 1207.702 Procedures for administrative disciplinary hearing.

(a) *Allegations of violations.* Any allegation that a former NASA employee has violated 18 U.S.C. 207 in connection with duties performed while the individual worked for NASA shall be referred to the NASA Inspector General for investigation. The Inspector General shall coordinate, as appropriate, with the Director of the OGE and the Criminal Division of the Department of Justice.

(b) *Initiation of hearing.* When the NASA Inspector General determines after appropriate review that there is reasonable cause to believe that a former NASA employee has violated 18 U.S.C. 207(a), (b), or (c), or any implementing regulations, the Inspector General shall prepare and issue the notice to the former employee required by 18 U.S.C. 207(j) which shall include:

(1) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Government employee to prepare an adequate defense;

(2) Notification of the right to a hearing; and

(3) An explanation of the method by which a hearing may be requested.

(c) *Appointment of examiner.* The Associate Deputy Administrator shall appoint an examiner upon issuance of a notice under paragraph (b) of this section. Any duly appointed examiner is hereby delegated authority to conduct an administrative hearing and to make an initial decision under the procedures of this subpart. The examiner shall be impartial and shall not have participated in any manner in the circumstances giving rise to the proceedings or the decision to initiate the proceedings. The examiner shall have a degree in law, be admitted to the bar, and be experienced in the conduct of administrative hearings.

(d) *Time, date, and place of hearing.* Upon a request for a hearing by the former employee, the examiner shall schedule a hearing as promptly as possible, with due regard for the former employee's need for adequate time to prepare a defense and expeditious resolution of potentially damaging allegations. The examiner shall observe the procedural requirements of 18 U.S.C. 207 and this subpart in conducting the hearing.

(e) *Rights of the former employee.* In connection with a hearing, the former employee shall have the right:

(1) To represent oneself or to be represented by counsel;

(2) To introduce and examine witnesses and to submit evidence;

(3) To confront and cross-examine witnesses;

(4) To present argument;

(5) To request a transcript or recording of the proceedings.

(f) *Burden of proof.* The agency shall have the burden of proof and must establish by substantial evidence that a violation has occurred.

(g) *Initial decision.* (1) The examiner shall make an initial determination based exclusively on matters of record in the proceedings.

(2) When a former employee does not elect a hearing, the examiner shall consider all available evidence, including any documentary evidence submitted by the parties, and shall issue an initial decision based thereon.

(3) The written initial decision shall set forth all findings of fact and conclusions of law relevant to the matter at issue.

§ 1207.703 Appeal from initial decision.

Within 30 days after the date of the initial decision, either party may appeal the initial decision to the Associate Deputy Administrator. The Associate Deputy Administrator will review the pertinent record of the proceedings and any written arguments submitted by the parties concerning the appeal. If the Associate Deputy Administrator modifies or reverses the initial decision, he or she shall specify the findings of fact and conclusions of law that are different than those of the examiner.

§ 1207.704 Administrative sanctions.

(a) The final agency decision shall be:

(1) The decision of the Associate Deputy Administrator on an appeal under § 1207.703; or

(2) The decision of the examiner which shall become final if no appeal is taken within the 30-day time limit.

(b) If the final decision of the agency is that a violation of 18 U.S.C. 207 (a), (b), or (c), or of implementing regulations has occurred, the following sanctions may be ordered by the Administrator against the former employee:

(1) Prohibiting the individual from making, on behalf of any other person (except the United States), any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, NASA on any matter of business for a period not to exceed 5 years, which may be accomplished by directing NASA employees to refuse to participate in any such appearance or to accept any such communication; or

(2) Taking other appropriate disciplinary action.

(c) Any person found to have participated in a violation of 18 U.S.C. 207 (a), (b), or (c) or implementing regulations under the procedures of this subpart may seek judicial review of the administrative determination and shall be notified of the opportunity of such review in the final decision of the agency.

Subpart H—Post-Employment Regulations

§ 1207.800 Scope of subpart.

This subpart provides guidance to former NASA government employees who are subject to the restrictions of Title V of the Ethics of Government Act of 1978, as amended, and who want to

communicate scientific or technical information to NASA.

§ 1207.80 Scope of subpart

This subpart provides guidance to former NASA government employees who are subject to the restrictions of Title V of the Ethics of Government Act of 1978, as amended, and who want to communicate scientific or technical information to NASA.

§ 1207.801 Exemption for scientific and technological communications.

(a) Whenever a former government employee who is subject to the constraints of post-employment conflict of interest, 18 U.S.C. 207, wishes to communicate with NASA under the exemption in section 207(f) for the making of a communication solely for the purpose of furnishing scientific or technological information, he or she shall state to the NASA employee contracted, the following information:

(1) That he or she is a former government employee subject to the post employment restrictions of 18 U.S.C. 207 (a), (b), or (c)—specify which;

(2) That he or she worked on certain NASA programs—enumerate which; and

(3) That the communication is solely for the purpose of furnishing scientific or technological information.

(b) If the former government employee has questions as to whether the communication comes within the scientific and technological exemption, he or she should contact the General Counsel, the designated agency ethics official.

Dale D. Myers,

Deputy Administrator.

January 23, 1989.

[FR Doc. 89-1880 Filed 1-26-89; 8:45 am]

BILLING CODE 7510-01-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 770, 772 and 778

[Docket No. 81149-8249]

Revision of Enforcement and Administrative Proceedings

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule with request for comments.

SUMMARY: The agency is revising Parts 770 (Export Licensing General Policy), 772 (Individual Validated Licenses) and 788 (Administrative Proceedings) of the Export Administration Regulations (Parts 770, 772 and 788, Title 15, Code of Federal Regulations). These revisions are limited to those changes mandated by the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418, 101 Stat. 1107), which amended and extended the Export Administration Act of 1979 (50 U.S.C. app. §§ 2401-2420 (1982 and Supp. III 1985)) (the Act). These changes implement both new and revised statutory provisions concerning violations and set forth procedures governing the denial of export privileges for persons convicted of violating specified statutes.

DATES: Interim rule effective January 27, 1989; comments must be received on or before March 28, 1989.

ADDRESS: Written comments (six copies when possible) should be sent to: Daniel C. Hurley, Jr., Attorney-Advisor, Office of Chief Counsel for Export Administration, U.S. Department of Commerce, Room H-3329, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Daniel C. Hurley, Jr., Office of the Chief Counsel for Export Administration, 202/377-5311.

SUPPLEMENTARY INFORMATION: This rule revises the Export Administration Regulations to reflect changes in the Export Administration Act (for example, prescribes the method by which denials of export privileges to persons convicted of specified offenses may be extended to related persons), to conform specific procedural provisions to the Export Administration Act, and to reflect organizational changes within the Bureau of Export Administration.

The rule notes the availability of judicial review of final agency decisions in export control cases. Pursuant to Section 13(c) of the Act, the written order of the Secretary [1] is the final agency action, except that the charged party may, within 15 days after the order is issued, appeal the order to the United States Court of Appeals for the District of Columbia Circuit which may, while the appeal is pending, stay the order of the Secretary.

The rule also implements statutory changes governing temporary denial orders. Pursuant to Section 13(d) of the Act, the period for which temporary denial orders may be issued or renewed has been extended from 60 days to 180 days. In addition, a person subject to an order of the Under Secretary affirming, in whole or in part, the issuance of a temporary denial order may, within 15 days after the order is issued, appeal the order to the United States Court of Appeals for the District of Columbia Circuit.

Rulemaking Requirements

1. Because this rule concerns a foreign and military affairs function of the United States, it is not a rule or regulation within the meaning of Section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no preliminary or final Regulatory Impact Analysis has to be or will be prepared.

2. This rule does not contain a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553), or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility analysis has to be or will be prepared.

5. Section 13(a) of the Export Administration Act of 1979 (EAA), as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule is also exempt from those APA requirements because it involves a foreign and military affairs function of the United States. Section 13(b) of the EAA does not require that this rule be published in proposed form because this rule does not impose a new control. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

However, consistent with the intent of Congress set forth in Section 13(b) of the Act to provide public participation in rulemaking, these regulations are issued in interim form and comments will be considered in developing final regulations.

The period for submission will close March 28, 1989. All comments received before the close of the comment period will be considered by the Department in the development of final regulations.

[1] Pursuant to Department Organization Order 10-16, effective March 22, 1988, the Secretary's authority to issue final orders in administrative proceedings was delegated to the Under Secretary for Export Administration.

While comments received after the end of the comment period will be considered if possible, their consideration cannot be assured. Public comments that are accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason will not be accepted. Such comments and materials will be returned to the submitter and will not be considered in the development of final regulations.

All public comments on these regulations, whenever received, will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, comments in written form are preferred. If oral comments are received, a written summary will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Room H-4886, Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Ms. Margaret Cornejo, the Bureau of Export Administration Freedom of Information Officer, at the above address or by calling 202/377-2593.

List of Subjects in 15 CFR Part 770

Exports, Reporting and recordkeeping requirements.

List of Subjects in 15 CFR Part 772

Exports, Validated License and recordkeeping requirements.

List of Subjects in 15 CFR Part 788

Administrative practice and procedure. Denial of export privileges. Exports, Temporary denial of export privileges.

Accordingly, Parts 770, 772 and 788 of the Export Administration Regulations (15 CFR Parts 768-799) are amended as follows:

1. The authority citations for Parts 770 and 772 are revised to read as follows:

Authority: Pub. L. 96-72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97-145 of December 29, 1981, 95 Stat. 1727, by Pub. L. 99-64 of July 12, 1985, 99 Stat. 120, and by Pub. L. 100-418 of August 23, 1988, 102 Stat. 1107; E.O. 12525 (3 CFR 377 (1986)) E.O. 12214 (3 CFR 256 (1981)), and E.O. 12002 (3 CFR 133 (1978)).

2. 15 CFR Part 770 is amended by revising § 770.15(a) to read as follows:

§ 770.15 Administrative action denying permission to apply for or use export licenses.

(a) *General.* The Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, may deny permission to apply for or use any export license, including any general license, to any person who has been convicted of a violation of the Export Administration Act, or any regulation, license, or order issued under the Act; any regulation, license or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706); 18 U.S.C. 793, 794 or 798; Section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or Section 38 of the Arms Export Control Act (22 U.S.C. 2778).

* * * * *

§ 770.15 [Amended]

3. 15 CFR Part 770 is amended by redesignating existing paragraphs (c) through (f) of § 770.15 as paragraphs (d) through (g), and by adding new § 770.15(c) to read as follows:

* * * * *

(c) *Criteria.* In determining whether to deny U.S. export privileges to a person previously convicted of one or more of the statutes set forth in paragraph (a) of this section, the Director, Office of Export Licensing may take into consideration any relevant information, including, but not limited to, the seriousness of the offense involved in the criminal prosecution, the nature and duration of the criminal sanctions imposed, and whether the person has undertaken any corrective measures.

* * * * *

§ 770.15 [Amended]

4. 15 CFR Part 770 is amended by adding § 770.15(h) to read as follows:

* * * * *

(h) *Applicability to related person.* The Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, may, through the Chief Counsel for Export Administration, notify any person related through affiliation, ownership, control, or position or responsibility to any person denied export privileges under paragraph (a) of this section, of his intent to deny that person permission to apply for or use any export license, including any general license. Such person so notified may request a hearing by filing a request for a hearing with the Office of The Administrative Law Judge, Room H6716, 14th Street and Constitution Avenue NW., Washington, DC 20230 and by serving a copy of the request for a hearing on the Office of the Chief Counsel for Export Administration. The sole issue to be raised and ruled on under this paragraph is the question whether such person so notified is related to any person denied export privileges under paragraph (a) of this section, and not the scope or duration of the underlying denial. The provisions of Part 788 of this chapter shall apply to any hearing requested under this paragraph (h).

§ 772.1 [Amended]

5. 15 CFR Part 772 is amended by revising § 772.1(h) to read as follows:

§ 772.1 General provisions.

* * * * *

(h) (1) *Administrative action revoking export licenses.* The Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, may revoke any export license, including any general license, issued or otherwise available to any person who has been convicted of a violation of the Export Administration Act, or any regulation, license, or order issued under the Act; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).

* * * * *

6. The authority citations for 15 CFR Part 788 are revised to read as follows:

Authority: Pub. L. 96-72 of September 29, 1979, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97-145 of December 29, 1981, 95 Stat. 1727, by Pub. L. 99-64 of July 12, 1985, 99 Stat. 120, and by Pub. L. 100-418 of August 23, 1988, 102 Stat. 1107; E.O. 12525 (3 CFR 377 (1986)), E.O. 12214 (3 CFR 256 (1981)), and E.O. 12002 (3 CFR 133 (1978)).

§ 788.19 [Amended]

7. 15 CFR Part 788 is amended by substituting the number "180" in place of "60" where it appears in § 788.19(b)(4).

§ 788.19 [Amended]

8. 15 CFR Part 788 is amended by substituting the number "180" in place of "60" where it appears in § 788.19(d)(1).

§ 788.19 [Amended]

9. 15 CFR Part 788 is amended by revising the last sentence in § 788.19(e)(5) to read as follows:

* * * * *

(e) * * *

(5) *Final decision.* * * * The Under Secretary's written order shall be final and is not subject to judicial review, except as provided in § 788.19(g).

* * * * *

§ 788.19 [Amended]

10. 15 CFR Part 788 is amended by adding new paragraph 788.19(g) to read as follows:

* * * * *

(g) *Judicial review.* The Under Secretary's written order may be appealed to the United States Court of Appeals for the District of Columbia pursuant to 50 U.S.C. app. 2412(d)(3).

§ 788.23 [Amended]

11. 15 CFR Part 788 is amended by removing the last sentence in § 788.23(c).

§ 788.23 [Amended]

12. 15 CFR Part 788 is amended by adding a new paragraph (e) to § 788.23 to read as follows:

* * * * *

(e) The Under Secretary's written order may be appealed within 15 days to the United States Court of Appeals for the District of Columbia pursuant to 50 U.S.C. app. 2412(c)(3).

Dated: January 18, 1989.

Michael E. Zacharia,

Assistant Secretary for Export Administration.

[FR Doc. 89-1797 Filed 1-26-89; 8:45 am]

BILLING CODE 3510-DT-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 107

[Docket No. 87N-0082]

Infant Formula Recall Requirements

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is, in accordance with the 1986 Infant Formula amendments to the Federal Food, Drug, and Cosmetic Act (the act), amending its recall regulations for infant formulas. These amendments: (1) Specify recall procedures that shall be used by manufacturers in removing from the marketplace adulterated or misbranded infant formula that the agency has determined may present a risk to human health; (2) require a manufacturer recalling an infant formula that presents a risk to human health to request that each retail establishment at which such infant formula is sold or available for sale post a notice of such recall; and (3) establish infant formula distribution records retention requirements.

EFFECTIVE DATE: March 28, 1989.

FOR FURTHER INFORMATION CONTACT: Curtis E. Coker, Jr., Center for Food Safety and Applied Nutrition (HFF-314), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-485-0024.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 13, 1987 (52 FR 30171), FDA proposed to amend its recall regulations for infant formulas to: (1) Specify recall procedures that shall be used by manufacturers in removing from the marketplace adulterated and misbranded infant formula that the agency has determined may present a risk to human health; (2) require a manufacturer recalling an infant formula that presents a risk to human health to request that each retail establishment at which such infant formula is sold or available for sale post a notice of such recall; and (3) establish infant formula distribution records retention requirements. FDA proposed these amendments to reflect changes in the infant formula provisions of the Federal Food, Drug, and Cosmetic Act (the act) contained in the Drug Enforcement Education and Control Act of 1986 (Pub. L. 99-570) (the 1986 amendments).

Interested persons were given until October 13, 1987, to comment on the proposal. FDA received comments from a trade association and a consumer group in support of the proposal. Both organizations suggested minor modifications to the proposed rule. The consumer group also commented on certain historical background information in the proposal's preamble. The agency is not responding to these comments on the historical background because they do not have a direct bearing on the proposed rule.

FDA initially proposed codifying the infant formula regulations in Part 7—Enforcement Policies (21 CFR Part 7), consisting of §§ 7.68 to 7.76. The agency has determined that because they specifically govern recalls of infant formulas and, because, in the case of a hazard to health, such recalls are mandatory, these regulations are more appropriately codified in Part 107—Infant Formula (21 CFR Part 107), consisting of §§ 107.200 to 107.280. The section headings have remained essentially the same. A summary of the pertinent comments and the agency's responses are as follows:

1. One comment requested that FDA revise the language in § 107.230(d) (21 CFR 107.230(d)) to require a 15-day limit on the time for displaying a notice of recall at retail establishments. (Section 107.230(d) was originally proposed as § 7.71(d) (21 CFR 7.71(d).) In support of this suggestion, the comment stated that a uniform and definite posting period would be advantageous because it would eliminate the need for two communications from the manufacturer to the retailer, and that two communications could create an opportunity for confusion.

Another comment opposed limiting the time period for the display of this notice and stated that the required posting should be for a substantially longer period of time, although the comment did not suggest a specific alternative. In support of its opposition to the 15-day period, this comment stated that parents often buy infant formula in large quantities and, therefore, could miss a recall notice displayed for only a 15-day period.

The agency does not agree with either comment. FDA's experience is that each recall is unique; some recalls are completed before 15 days and others require a substantially longer time to complete. (FDA's current policy is that a recall of an infant formula is complete when the recalling firm has actually impounded all outstanding product that could reasonably be expected to be recovered.)

FDA believes that requiring an infant formula recall notice to be posted at a retail establishment after completion of the recall could cause confusion and concern to consumers and could have an unnecessary adverse economic impact on the industry and the recalling firm, as well as consumers, without achieving any public health benefit. Likewise, FDA believes that the public health would not be adequately protected by permitting such recall notices to be removed before completion of the recall. For these reasons, the agency has concluded that manufacturers should be required to request that recall notices be posted at retail establishments for the duration of the recall. Accordingly, § 107.230(d) remains as originally proposed.

2. One comment also suggested amending proposed § 107.240(a) to make it clear that inconsequential or technical violations of the act, such as a minor typographical error on a label or insignificant deviations in current good manufacturing practices, need not be

reported to FDA. (Section 107.240(a) was originally proposed as § 7.72(a) (21 CFR 7.72(a).) In support, this comment cited statements by the amendments' cosponsors, Senators Hatch and Metzenbaum, made at the time the legislation was enacted. Another comment opposed this clarification and stated that FDA should be made aware of all deviations whether or not recall of a product results. The first comment also suggested a change in the format of § 107.240(a) to create two paragraphs in order to clarify that there are two separate instances in which notification to FDA is required.

The agency does not believe that the requested modification in the language of § 107.240(a) is warranted. The plain language of the notification provision of the 1986 amendments (section 412(e)(1) of the act, 21 U.S.C. 350a(e)(1) requires that a manufacturer with the requisite knowledge notify FDA of any infant formula that may not provide the required nutrients or that may otherwise be adulterated or misbranded; no exceptions from such notification for so-called technical violations are set forth in the statute. This plain language in the statute is controlling, in the absence of a clearly expressed legislative intent to the contrary. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

In this case, the legislative history of the amendments, when read as a whole, expresses no clear intention by Congress to limit the types of adulteration or misbranding for which an infant formula manufacturer is required to notify FDA. In fact, Senator Hatch's complete remarks show that he was principally concerned about limiting the instances in which recalls, not notification to FDA, would be required. (132 Cong. Rec. S14047 (daily ed. September 27, 1986).) The final rule is consistent with both the plain language of the statute and the amendments' legislative history in that FDA will require an infant formula manufacturer to conduct a recall only when the infant formula presents a risk to human health.

Although FDA is declining at this time to limit by regulation the instances of adulteration and misbranding that must be reported to FDA pursuant to § 107.240(a), the agency intends to monitor the notifications made to the agency under § 107.240(a) to determine whether any limitations should be established in the future, either by guideline or further regulation.

In addition, FDA notes that even if a manufacturer elects to remove from the marketplace an infant formula that is adulterated or misbranded in only a technical way, such market removal does not constitute a recall subject to this subpart. Under longstanding agency policy, a firm's removal from the market of a product that is violative in some minor way (e.g., inconsequential deviations from good manufacturing practices), but would not be subject to seizure under current agency policy, is deemed to be a market withdrawal and not a recall. To constitute a recall, the subject product must be both violative and actionable (21 CFR 7.3(g)). Thus, even though this rule may require an infant formula manufacturer to notify FDA of a technical or minor instance of adulteration or misbranding, such notification will not necessarily trigger an FDA-required or even a firm-initiated recall. Accordingly, FDA believes that § 107.240(a) accurately implements this part of the 1986 amendments. For this reason, the language of § 107.240(a) remains as originally proposed.

FDA does believe, however, that the change in format recommended for § 107.240 has merit and, thus, has implemented that suggestion in the final regulation. Furthermore, in order to clarify the status of market recalls under this rule, FDA is revising § 107.210 (originally proposed as § 7.69) to state clearly that a manufacturer's voluntary removal from the market of an infant formula that is adulterated or misbranded in only a minor way and that would not be subject to agency legal action constitutes a market withdrawal within the meaning of 21 CFR 7.3(j). As revised, § 107.210(b) states that manufacturers conducting a market withdrawal may, but are not required to, adhere to the requirements of this subpart pertaining to product recalls. Revised § 107.210(b) also clarifies that, as discussed above, a manufacturer conducting a market withdrawal must nevertheless notify FDA of the adulteration or misbranding, as required by § 107.240(a). FDA does not consider this revision of § 107.210 to be a substantive change requiring reproposal because the preamble to the proposed rule clearly indicated the agency's intent to exclude market withdrawals from the recall requirements. ("As revised, new § 7.69 [now § 107.210] would apply to an infant formula that has been distributed, that does not present a human health risk, but that is otherwise in violation of the laws and regulations administered by FDA and against which the agency could initiate legal or regulatory action." (See 52 FR 30171 and 30172; August 13, 1987.))

In addition to the modifications in the final rule discussed above, FDA is making minor editorial changes in §§ 107.200, 107.220, 107.230, 107.240, and 107.250 to achieve greater clarity and consistency in the final rule. (These sections were originally proposed as §§ 7.68, 7.70, 7.71, 7.72, and 7.73, respectively.) FDA has determined that none of these modifications initiated by the agency is a substantive change that requires reproposal of the regulation.

Environmental Impact

The agency has previously considered the environmental effects of this rule as announced in the proposed rule of August 13, 1987 (52 FR 3017). No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

Economic Impact

In accordance with the Regulatory Flexibility Act, the agency previously considered the potential effects that this rule would have on small entities, including small businesses. In accordance with section 605(b) of the Regulatory Felxibility Act, the agency has determined that no significant impact on a substantial number of small entities would derive from this action. FDA has not received any new information or comments that would alter its previous determination.

In accordance with Executive Order 12291, FDA has previously analyzed the potential economic effects of this final rule. As announced in the proposal, the agency has determined that the rule is not a major rule as defined by the Order. The agency has not received any new information or comments that would alter its previous determination.

Paperwork Reduction Act of 1980

Section 107.280 of this final rule contains collection of information requirements that were submitted for review and approval to the Director, Office of Management and Budget (OMB), as required by section 3504(h) of the Paperwork Reduction Act of 1980. The requirements were approved and assigned OMB control number 0910–0188.

List of Subjects in 21 CFR Part 107

Food labeling, Infants and children, Nutrition, Reporting and recordkeeping requirements, Signs and symbols.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 107 is amended as follows:

PART 107—INFANT FORMULA

1. The authority citation for 21 CFR Part 107 continues to read as follows:

Authority: Secs. 201 (n) and (aa), 403 (a) and (j), 412, 701, 52 Stat. 1041 as amended, 1047–1048 as amended, 1055–1056 as amended, 94 Stat. 1190–1193 (21 U.S.C. 321 (n) and (aa), 343 (a) and (j), 350a, 371); 21 CFR 5.11; § 107.100 issued only under secs. 201(aa), 412, 701(a), 52 Stat. 1055, 94 Stat. 1190–1193 (21 U.S.C. 321(aa), 350a, 371(a)); 21 CFR 5.11; Subparts A and C are issued under secs. 201 (n) and (aa), 403(a), 412, 701(a), 52 Stat. 1041 as amended, 1047 as amended, 1055, 94 Stat. 1190 (21 U.S.C. 321 (n) and (aa), 343(a), 350a, 371(a)); 21 CFR 5.11.

2. A new Subpart E consisting of §§ 107.200 through 107.280 is added to read as follows:

Subpart E—Infant Formula Recalls

Sec.

Subpart E—Infant Formula Recalls

§ 107.200 Food and Drug Administration-required recall.

When the Food and Drug Administration determines that an adulterated or misbranded infant formula presents a risk to human health, a manufacturer shall immediately take all actions necessary to recall that formula, extending to and including the retail level, consistent with the requirements of this subpart.

§ 107.210 Firm-initiated product removals.

(a) If a manufacturer has determined to recall voluntarily from the market an infant formula that is not subject to § 107.200 but that otherwise violates the laws and regulations administered by the Food and Drug Administration (FDA) and that would be subject to legal action, the manufacturer, upon prompt notification to FDA, shall administer such voluntary recall consistent with the requirements of this subpart.

(b) If a manufacturer has determined to withdraw voluntarily from the market an infant formula that is adulterated or misbranded in only a minor way and that would not be subject to legal action, such removal from the market is deemed to be a market withdrawal, as defined in § 7.3(j) of this chapter. As required by § 107.240(a), the manufacturer shall promptly notify FDA of such violative formula and may, but is not required to, conduct such market withdrawal consistent with the requirements of this subpart pertaining to product recalls.

§ 107.220 Scope and effect of infant formula recalls.

(a) The requirements of this subpart apply:

(1) When the Food and Drug Administration has determined that it is necessary to remove from the market a distributed infant formula that is in violation of the laws and regulations administered by the Food and Drug Administration and that poses a risk to human health; or

(2) When a manufacturer has determined that it is necessary to remove from the market a distributed infant formula that:

(i) Is no longer subject to the manufacturer's control;

(ii) Is in violation of the laws and regulations administered by the Food and Drug Administration and against which the agency could initiate legal or regulatory action; and

(iii) Does not present a human risk.

(b) The Food and Drug Administration will monitor continually the recall action and will take appropriate actions to ensure that the violative infant formula is removed from the market.

§ 107.230 Elements of an infant formula recall.

A recalling firm shall conduct an infant formula recall with the following elements:

(a) The recalling firm shall evaluate in writing the hazard to human health associated with the use of the infant formula. This health hazard evaluation shall include consideration of any disease, injury, or other adverse physiological effect that has been or that could be caused by the infant formula and of the seriousness, likelihood, and consequences of the diseases, injury, or other adverse physiological effect. The Food and Drug Administration will conduct its own health hazard evaluation and promptly notify the recalling firm of the results of that evaluation if the criteria for recall under § 107.200 have been met.

(b) The recalling firm shall devise a written recall strategy suited to the individual circumstances of the particular recall. The recall strategy shall take into account the health hazard evaluation and specify the following: The extent of the recall; if necessary, the public warning to be given about any hazard presented by the infant formula; the disposition of the recalled infant formula; and the effectiveness checks that will be made to determine that the recall is carried out.

(c) The recalling firm shall promptly notify each of its affected direct accounts about the recall. The format of a recall communication shall be distinctive, and the content and extent of a recall communication shall be commensurate with the hazard of the infant formula being recalled and the strategy developed for the recall. The recall communication shall instruct consignees to report back quickly to the recalling firm about whether they are in possession of the recalled infant formula and shall include a means of doing so. The recalled communication shall also advise consignees how to return the recall infant formula to the manufacturer or otherwise dispose of it. The recalling firm shall send a followup recall communication to any consignee that does not respond to the initial recall communication.

(d) If the infant formula presents a risk to human health, the recalling firm shall request that each establishment, at which such infant formula is sold or available for sale, post at the point of purchase of such formula a notice of such recall at such establishment. The notice shall be provided by the recalling firm after approval of the notice by the Food and Drug Administration. The recalling firm shall also request that each retail establishment maintain such notice on display until such time as the Food and Drug Administration notifies the recalling firm that the agency considers the recall completed.

(e) The recalling firm shall furnish promptly to the appropriate Food and Drug Administration district office listed in § 5.115 of this chapter, as they are available, copies of the health hazard evaluation, the recall strategy, and all recall communications (including, for a recall under § 107.200, the notice to be displayed at retail establishments) directed to consignees, distributors, retailers, and members of the public.

§107.240 Notification requirements.

(a) *Notification of a violative infant formula.* A manufacturer shall promptly notify the Food and Drug Administration when the manufacturer has knowledge (as defined in section 412(e)(2) of the Federal Food, Drug, and Cosmetic Act (the act)) that reasonably supports the conclusion that an infant formula that has been processed by the manufacturer and that has left an establishment subject to the control of the manufacturer:

(1) May not provide the nutrients required by section 412(i) of the act and

by regulations promulgated under section 412(i)(2) of the act; or

(2) May be otherwise adulterated or misbranded.

(b) *Method of notification.* The notification made pursuant to § 107.240(a) shall be made, by telephone, to the Director of the appropriate Food and Drug Administration district office specified in § 5.115 of this chapter. After normal business hours (8 a.m. to 4:30 p.m.), FDA's emergency number, 202–857–8400, shall be used. The manufacturer shall send written confirmation of the notification to the Division of Regulatory Guidance (HFF-310), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 200 C St. SW., Washington, DC 20204, and to the appropriate Food and Drug Administration district office specified in § 5.115 of this chapter.

(c) *Reports about an infant formula recall*—(1) *Telephone report.* When a determination is made that an infant formula is to be recalled, the recalling firm shall telephone within 24 hours the appropriate Food and Drug Administration district office listed in § 5.115 of this chapter and shall provide relevant information about the infant formula that is to be recalled.

(2) *Initial written report.* Within 14 days after the recall has begun, the recalling firm shall provide a written report to the appropriate Food and Drug Administration district office. The report shall contain relevant information, including the following cumulative information concerning the infant formula that is being recalled:

(i) Number of consignees notified of the recall, and date and method of notification, including, for a recall pursuant to § 107.200 information about the notice provided for retail display and the request for its display.

(ii) Number of consignees responding to the recall communication and quantity of recalled infant formula on hand at the time it was received.

(iii) Quantity of recalled infant formula returned or corrected by each consignee contacted and the quantity of recalled infant formula accounted for.

(iv) Number and results of effectiveness checks that were made.

(v) Estimated timeframes for completion of the recall.

(3) *Status reports.* The recalling firm shall submit to the appropriate Food and Drug Administration district office a written status report on the recall at least every 14 days until the recall is terminated. The status report shall describe the steps taken by the recalling firm to carry out the recall since the last report and the results of these steps.

§ 107.250 Termination of an infant formula recall.

The recalling firm may submit a recommendation for termination of the recall to the appropriate Food and Drug Administration district office listed in § 5.115 of this chapter for transmittal to the Division of Regulatory Guidance, Center for Food Safety and Applied Nutrition, for action. Any such recommendation shall contain information supporting a conclusion that the recall strategy has been effective. The agency will respond within 15 days of receipt by the Division of Regulatory Guidance, Center for Food Safety and Applied Nutrition, of the request for termination. The recalling firm shall continue to implement the recall strategy until it receives final written notification from the agency that the recall has been terminated. The agency will send such a notification unless it has information, from FDA's own audits or from other sources, demonstrating that the recall has not been effective. The agency may conclude that a recall has not been effective if:

(a) The recalling firm's distributors have failed to retrieve the recalled infant formula; or

(b) Stocks of the recalled infant formula remain in distribution channels that are not in direct control of the recalling firm.

§ 107.260 Revision of an infant formula recall.

If after a review of the recalling firm's recall strategy or periodic reports or other monitoring of the recall, the Food and Drug Administration concludes that the actions of the recalling firm are deficient, the agency shall notify the recalling firm of any serious deficiency. The agency may require the firm to:

(a) Change the extent of the recall, if the agency concludes on the basis of available data that the depth of the recall is not adequate in light of the risk to human health presented by the infant formula.

(b) Carry out additional effectiveness checks, if the agency's audits, or other information, demonstrate that the recall has not been effective.

(c) Issue additional notifications to the firm's direct accounts, if the agency's audits, or other information demonstrate that the original notifications were not received, or were disregarded in a significant number of cases.

§ 107.270 Compliance with this subpart.

A recalling firm may satisfy the requirements of this subpart by any means reasonable calculated to meet the obligations set forth in this Subpart E. The recall guidelines in Subpart C of Part 7 of this chapter specify procedures that may be useful to a recalling firm in determining how to comply with these regulations.

§ 107.280 Records retention.

Each manufacturer of an infant formula shall make and retain such records respecting the distribution of the infant formula through any establishment owned or operated by such manufacturer as may be necessary to effect and monitor recalls of the formula. Such records shall be retained for at least 1 year after the expiration of the shelf life of the infant formula.

(Collection of information requirements in this section were approved by the Office of Management and Budget under OMB control number 0910–0188.)

Dated: December 22, 1988.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 89–1719 Filed 1–26–89; 8:45 am]

BILLING CODE 4160–01

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[T.D. ATF–281; Ref: Notice Nos. 620, 644, 647]

Stags Leap District Viticultural Area

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

ACTION: Final rule, Treasury decision.

SUMMARY: This final rule establishes a viticultural area in Napa County, California, to be known as "Stags Leap District." The northern boundary alone has been modified from that originally proposed, to the Yountville Cross Road. The establishment of viticultural areas and the subsequent use of viticultural area names as appellations of origin in wine labeling and advertising will help consumers better identify the wines they may purchase, and will help winemakers distinguish their products from wines made in other areas.

EFFECTIVE DATE: February 27, 1989.

FOR FURTHER INFORMATION CONTACT: James P. Ficaretta, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, Ariel Rios Federal Building, 1200 Pennsylvania Avenue NW., Washington, DC 20226 (202–566–7626).

SUPPLEMENTARY INFORMATION:

I. Background

A. History

On August 23, 1978, ATF published Treasury Decision ATF-53 (43 FR 37672, 54624) revising regulations in 27 CFR Part 4. These regulations allow the establishment of definite viticultural areas. The regulations also allow the name of an approved viticultural area to be used as an appellation of origin on wine labels and in wine advertisements.

On October 2, 1979, ATF published Treasury Decision ATF-60 (44 FR 56692) which added a new Part 9 to 27 CFR, providing for the listing of approved American viticultural areas, the names of which may be used as appellations of origin.

B. Regulatory Criteria

Section 4.25a(e)(1), Title 27, CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been delineated in Subpart C of Part 9. Section 4.25a(e)(2) outlines the procedure for proposing an American viticultural area. The petition should include—

(a) Evidence that the name of the proposed viticultural area is locally and/or nationally known as referring to the area specified in the petition;

(b) Historical or current evidence that the boundaries of the viticultural area are as specified in the petition;

(c) Evidence relating to the geographical characteristics (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas:

(d) A description of the specific boundaries of the viticultural area, based on features which can be found on United States Geological Survey (U.S.G.S.) maps of the largest applicable scale; and

(e) A copy of the appropriate U.S.G.S. map(s) with the boundaries prominently marked.

II. General Description—Final Rule

The Stags Leap District viticultural area is located east of the city of Yountville and approximately seven miles north of the city of Napa. It is bounded on the north by the Yountville Cross Road, on the east by the Stags Leap mountain range (400 foot contour line), on the south by a drainage creek that intersects the Silverado Trail at about the 60 foot contour line, and on the west by the Napa River. This viticultural area consists of approximately 2,700 acres, includes nine bonded wineries and approximately 1,350 acres of grapes, and is entirely within the Napa Valley viticultural area.

III. Rulemaking Proceeding

A. Petition

On August 22, 1985, the Stags Leap Appellation Committee (hereinafter referred to as Group A), petitioned ATF for establishment of a viticultural area in Napa Valley, California, to be known as "Stags Leap." The area proposed by the petitioners consisted of approximately 2,200 acres (including approximately 1,100 acres of vineyards), situated east of the city of Yountville, and five to eight miles north of the City of Napa. The proposed area was surrounded by hills to the north, east, and west, and was configured like a funnel.

Group A then submitted an amendment to its petition, dated December 18, 1985 (hereinafter referred to as the First Amendment) and requested, among other things, that the name of the proposed viticultural area be changed from "Stags Leap" to "Stags Leap District." This was done in order to underscore further the difference between the viticultural area designation and the names of two wineries within the proposed appellation, Stag's Leap Wine Cellars and Stags' Leap Winery.

On June 26, 1986, Group A submitted a second amendment and supplement to its original petition (hereinafter referred to as the Second Amendment). The Second Amendment requested a revision of the northern and western boundaries of the proposed Stags Leap District. Attached to the Second Amendment was a research document prepared by Silverado Vineyards, in support of Group A's contention that the Napa River, rather than the peaks of the hills west of the Silverado Trail, was the appropriate western boundary for the proposed viticultural area, and the ring of hills to the north was a more appropriate northern boundary. The revision of the northern and western boundaries added approximately 350 acres to the proposed viticultural area, for a total size of approximately 2,550 acres. Included within the extended boundaries were previously excluded vineyards owned by, among others, Silverado Vineyards and Mondavi Winery.

B. Notice

In response to the Second Amendment, ATF published Notice No. 620 in the **Federal Register** on February 11, 1987 (52 FR 4350), proposing establishment of the Stags Leap District viticultural area. The notice detailed the boundaries as proposed in the Second Amendment, and requested comments. Written comments were to be received on or before April 13, 1987.

C. Comments

ATF received two comments in response to the notice of proposed rulemaking. One comment in particular, dated April 10, 1987, was submitted by Mr. Stanley Anderson of S. Anderson Vineyard. Mr. Anderson, who owns a winery and vineyards located just north of the proposed northern boundary, requested that the northern boundary be extended approximately 500 yards. He suggested that the Yountville Cross Road would be a more appropriate boundary than the peaks of hills as proposed in Notice No. 620. The proposed revision would add 150 acres to the proposed Stags Leap District, for a total size of approximately 2,700 acres. With the exception of the northern boundary, Mr. Anderson supported the other boundaries as proposed in the notice.

Attached to Mr. Anderson's comment were letters from several neighboring vineyard owners who are also located in the proposed "northern extension," all of whom supported the extension of the northern boundary to the Yountville Cross Road. Mr. Anderson, and those of his neighbors who supported the northern extension, will hereinafter be referred to as Group B.

D. Hearing

In consideration of the comments received, ATF determined that the public interest would best be served by holding a public hearing on the matter. Pursuant to Notice No. 644, published on September 29, 1987 (52 FR 36431), ATF held a hearing on December 1 and 2, 1987, in Yountville, California, concerning establishment of the viticultural area. ATF heard oral comments from 32 persons. At the hearing, Mr. George Altamura (Altamura Vineyards & Winery), requested that the southern boundary of the proposed viticultural area be extended (approximately 2 miles) in order to include his vineyard and winery.

As specified in Notice No. 644, written comments were to be received on or before December 15, 1987. This date was then extended until January 15, 1988 (Notice No. 647, 52 FR 44917; November 23, 1987). In response to Notice Nos. 644 and 647, the Bureau received 167 comments, representing 172 signatures. ATF also received nine comments after the expiration of the comment period. All comments were given careful

consideration in the preparation of this final rule.

IV. Decision

After extensive consideration of the evidence and comments presented regarding establishment of a Stags Leap District viticultural area, ATF finds that the evidence submitted with respect to the boundaries proposed by Group B satisfies the regulatory criteria set forth in § 4.25a(e)(2) of Title 27, Code of Federal Regulations, for the establishment of the Stags Leap District viticultural area.

Although recognizing that there is evidence which would support both Group A and Group B in this matter, ATF finds that the greater weight of evidence supports the Group B proposal. ATF finds that the general area encompassed within the boundaries proposed by Group B is locally referred to as Stags Leap District. In the Bureau's view, Group B adequately demonstrated that their proposed area reflects the current definition of Stags Leap District.

Further, ATF finds that the distinguishing features in the area proposed by Group A are also present in the northern extension proposed by Group B. Specifically, the soils in the northern extension are more similar to the soils within the area originally proposed than to the soils outside the proposed Stags Leap District. ATF believes that the soils (including subsoils) are the primary distinguishing geographical feature of the Stags Leap District.

In contrast, ATF finds that the evidence submitted in support of the proposed extension of the southern boundary did not satisfy the regulatory criteria. Specifically, there was no evidence that the area within the proposed southern extension is locally or nationally known as "Stags Leap (District)."

The boundaries of the viticultural area established by this final rule generally correspond to the area initially proposed by Group B, with modifications to avoid dividing existing vineyards. The specific boundaries of the viticultural area may be found at § 9.117.

V. Evidence

The following summarizes the evidence on which this final rule is based. As applicable, the petition, amendments, comments, and public hearing transcripts and exhibits are cross-referenced. This is indicated by parenthetical notations such as (Petition, p. * * *), (Tr. Vol. * * *, p. * * *), (Hearing Exhibit * * *), etc. In addition, to distinguish between comments received in response to the notice of proposed rulemaking (NPRM) and comments received in response to the hearing notices, comments will be referred to as either (NPRM Comment * * *) or (hearing Comment * * *).

A. Name

Both Group A and Group B submitted evidence which clearly established that there exists an area in Napa County, California, east of Yountville, with a viticultural history, known both historically and currently as Stags Leap District. (Petition, pp. 2–17; NPRM Comment 1). The only dispute regarding the name Stags Leap District concerns the specific boundaries of the viticultural area known by that name. Accordingly, ATF finds, based on the evidence, that both Group A and Group B satisfied the criteria of 27 CFR 4.25a(e)(2)(i) concerning the name of the viticultural area.

B. Boundaries

Group A submitted evidence that historically, the name Stags Leap was used solely in reference to Horace and Minnie Chase's summer manor house (Stags Leap Manor) constructed in 1890, their winery built in 1893, and the rocky promontory overlooking the area. (Petition, pp. 2–7, p. 25). For example, the petitioners submitted a copy of a wine label from the Chase winery indicating the name "Stags' Leap." (Petition, Exhibit 4). They also stated that "when old timers talk about the boundaries of Stags Leap District, they are more likely to be referring to the old Chase place and its immediate vicinity than they are to the broader viticultural area, which did not begin to be called Stags Leap until some time in the 1970s." (Second Amendment, p. 12).

Since the early 1970's, Mr. Carl Doumani (Stags' Leap Winery) and Mr. Warren Winiarski (Stag's Leap Wine Cellars) have included various brand and trade names on their wine labels which incorporate the geographic designation Stags Leap. (Petition, pp. 11–12; Petition, Exhibit 10).

In a 1973 court decision involving litigation over the use of the name Stags Leap, the judge ruled that "to a person of ordinary intelligence * * * 'STAG'S LEAP' is a designation for a substantial area or a range of mountains or hills." (Petition, p. 10). Thereafter, in the 1974 promotional material for his winery, Mr. Winiarski noted that "Stag's Leap is a regional designation which should in time become as familiar to wine buyers as certain domaines in European wine-growing regions." (Petition, pp. 15–16; Petition, Exhibit 10). The name Stags Leap gained further prominence when, in 1976, Mr. Winiarski's 1973 Cabernet Sauvignon took first place at a blind tasting in Paris, France. (Petition, p. 14).

While there was general agreement about the history of Stags Leap, the issues of contention during this rulemaking proceeding have centered around the northern boundary in particular and, to a lesser degree, the southern and western boundaries.

1. Southern Boundary

At the public hearing, Mr. George Altamura (Altamura Vineyards & Winery) commented that the area in which his vineyards and winery are located shares many of the same geographical features found within the proposed Stags Leap District, including soil series, vegetation, and air-flow pattern. Because of this, Mr. Altamura proposed that the southern boundary of the viticultural area be extended, approximately two miles, to a point where Soda Creek flows into the Napa River. (Tr. Vol. III, pp. 139–145). Mr. Altamura submitted evidence indicating that certain soils in the proposed southern extension (e.g., Haire series) were also found in the proposed Stags Leap District. (Hearing Exhibit 39; Hearing Comment 81).

In a post-hearing written comment (Hearing Comment 48), Mr. Ernie Weir of Hagafen Cellars stated that if the southern boundary was to be extended to include Mr. Altamura, he would also like his vineyards and winery to be included, however, "perhaps a more appropriate and correct southern border will not include either of us."

Neither Mr. Altamura nor Mr. Weir submitted evidence which would indicate that the name "Stags Leap" was locally or nationally known as referring to the proposed southern extension.

As previously mentioned, the regulations in 27 CFR 4.25a(e)(2) outline the procedure for proposing an American viticultural area. In particular, §§ 4.25a(e)(2) (i) and (ii) specify that evidence must be submitted indicating that the name of the viticultural area is locally and/or nationally known as referring to the area in the petition, and that the boundaries of the viticultural area are as specified in the petition. Based on the information in the rulemaking record, there is no evidence as to name, either historical or current, to support an extension of the southern boundary from that proposed in Notice No. 620. Therefore, ATF is not extending the southern boundary as proposed by Mr. Altamura.

2. Northern Boundary

Conflicting evidence as to the northern boundary was submitted in the

petition, comments, and public hearing testimony. In its initial petition, Group A noted that there had been lively disagreement among the wine press over the boundaries of Stags Leap District. (Petition, p. 32). Group A and Group B both presented letters and declarations from long-time residents of the area, which presented conflicting recollections of the boundaries of the Stags Leap District. (Petition, Declarations B and C; NPRM Comment 1, Exhibits J–1 and P–1; Hearing Exhibit 2; Hearing Exhibit 28). Based on the evidence presented, ATF finds that while there are differences in the recollections of local residents as to the boundaries of the Stags Leap District, there is evidence to support the conclusion that the northern extension is known locally as part of Stags Leap District.

Mr. William F. Heintz, a wine historian, testified on behalf of Group A at the public hearing. Mr. Heintz stated that in the 1880s, the Napa Wine Growers Association created a series of sub-districts within the southern part of Napa Valley, for the purpose of gathering data. Mr. Heintz extrapolated from the available data that the boundaries of one of these sub-districts closely corresponded to the boundaries of the Stags Leap District, as proposed in Notice No. 620. (Tr. Vol. I, pp. 62–64). This evidence was disputed by Charles Sullivan, another wine historian, who contended that the evidence from the 19th century was too incomplete to draw any conclusions as to boundaries. Mr. Sullivan stated that for purposes of determining the validity of the appellation, only the history since the 1960s was relevant. (Hearing Comment 103). ATF finds that the evidence about the 19th century boundaries of the Napa Wine Growers Association sub-districts was inconclusive; therefore, this evidence was not considered to be significant for purposes of determining the current boundaries of the Stags Leap District.

Group A also presented evidence to the effect that the vineyard owners in the northern extension referred to themselves as being located in "Yountville" rather than "Stags Leap." (Hearing Comment 84, p. 8; Hearing Exhibit 10). Group A pointed to the fact that none of the grapes grown in the northern extension were used in wines that were labeled as "Stags Leap." (Hearing Comment 84, p. 9). They also pointed to the fact that one of the vineyard owners in the proposed extension, Mr. Jack Abruzzini, called his vineyard "J. Abruzzini's Yountville Vineyard," and considered himself as being within the Yountville area, rather than the "Stags Leap District." (NPRM Comment 2; Hearing Comment 29).

Group B presented evidence that the terms Yountville and Stags Leap District were not mutually exclusive, and stated that residents within the proposed Stags Leap Dsitrict and the proposed northern extension had ties to the cities of Napa and Yountville. Mrs. Dorothy Barboza, a vineyard owner in the northern extension, submitted evidence that various vineyards and wineries located within the boundaries of the proposed Stags Leap District were listed in the telephone book as being in Yountville and Napa. (Tr. Vol. III, p. 58; Hearing Exhibit 33). Mrs. Barboza also submitted evidence that three of the wineries in the proposed Stags Leap District were members of the Yountville Chamber of Commerce. (Hearing Exhibit 35). In addition, Mrs. Barboza submitted labels for one winery in the proposed Stags Leap District indicating Yountville as its location. (Hearing Exhibit 30).

Group B argued that there was no uniformity in self-description in the Stags Leap District; thus, there was no contradiction between using a Yountville address and being within the Stags Leap District viticultural area. ATF finds that the various wineries and vineyards within both the proposed Stags Leap District and the so-called "northern extension" used various names in geographical self-description, including Yountville and Napa. Thus, the Bureau does not find that this criteria is a useful means of distinguishing vineyards and wineries within the appellation from those outside the appellation.

Both Group A and Group B submitted various articles from the wine press and the general press to support the respective boundaries proposed. Most of the articles submitted did not articulate specific boundaries for the Stags Leap District, but merely referred to the fact that various wineries or vineyards were located within the boundaries of Stags Leap. Of the articles which did mention specific boundaries, there was no uniformity.

For example, one article implied that the Stags Leap District area extended as far west as the Napa River (Petition, Exhibit 13, *Trumpetvine Wines*, April 1985, "Stags Leap Saga, Part II"), while others implied that the Silverado Trail (Petition, Exhibit 13, *Connoisseur's Guide to California Wine*, Jan–Feb 1977), or perhaps an area to the west thereof (Hearing Exhibit 12, the Napa Register (4/17/81), "Napa Wines Take Tasting Honors") were the boundary. In one article, a vineyard/winery owner described the Stags Leap District as consisting of only 450 acres (Petition, Exhibit 13, *The Wine Spectator*, January 1–31, 1985, "Standing Fast for Cabernet"), while in another article, it was described as consisting of 1,000 acres. (Petition, Exhibit 13, *Friends of Wine*, April-May 1984, "Napa Winery Profiles: The Quest For Site").

Some of the evidence submitted was susceptible of more than one interpretation. For example, in support of the extended northern boundary, Group B submitted as evidence a map prepared by the U.S. Department of Agriculture (USDA) Soil Conservation Service (SCS) which included a sub-district known as "South East Yountville Stag's Leap Area." (NPRM Comment 1, pp. 6–7). The sub-district had as its northern boundary the Yountville Cross Road, and as its western boundary the Napa River. Although the southern boundary extended almost all the way to the city of Napa, it did *not* include the vineyards owned by Mr. Altamura or Mr. Weir.

Group A countered with the claim that the map supported its assertion tha the so-called northern extension was a part of Yountville. (Hearing Comment 84, p. 7). ATF contacted the SCS, and was informed by letter dated May 16, 1988, that the boundaries were drawn based on the property lines of "cooperators," i.e., ranches and farms being assisted by the SCS. (Requested Information 5). The map was for internal filing purposes only, and was not distributed to the public. In addition, the map submitted by Group B was a replacement for one originally drawn up during the 1950s, but which had been lost sometime before 1983. Consequently, as pointed out by the SCS, "* * * it is highly unlikely that the current map matches the original." Therefore, ATF has concluded that the map is not of great evidentiary weight, and that it does not support conclusively either Group A or Group B.

Both Group A and Group B have pointed for support to an article that appeared in the September 1981 issue of *Vintage Magazine*, entitled "How Many Stags in a Stag's Leap?" (Petition, Exhibit 13). In describing the Stags Leap District, the author of the article, Richard Paul Hinkle, defined its bounds "[f]or the immediate sake of argument, * * * as being Clos du Val on the south, the Silverado Trail on the west, an extension of the Yountville Cross Road on the north (just south of Rector Reservoir), and the rocky promontories of the eastern flank of the Mayacamus Mountains (also called Stags Leap) to the east."

Group B uses this article in support of its contention that the northern boundary goes as far north as the Yountville Cross Road. (NPRM Comment 1, p. 4, 8). Group A points to the fact that the boundaries as articulated by Mr. Hinkle would eliminate all vineyards located west of the Silverado Trail (Hearing Comment 84, p. 6) including, among others, the vineyards of S. Anderson Vineyard, Pine Ridge Winery, Silverado Vineyards, and Mondavi Winery. However, Mr. Hinkle's article does go on to say that "[a] significant chunk of acreage may be disputed when the western boundaries come up for discussion. Involved are the Disney (Silverado) vineyards * * *, Pine Ridge's vines * * *, and Mondavi's * * *."

ATF finds that neither the Hinkle article, nor any other article submitted in the rulemaking record, specifically lists boundaries identical to either proposal. In addition, none of the articles submitted provides a comprehensive, all-inclusive list of wineries and vineyards included in the area which would correspond to the boundaries proposed by Group A or Group B.

Most of the articles submitted were not intended to present definitive lists of the wineries and vineyards within the Stags Leap District. Therefore, ATF does not find that the fact that some vineyards or wineries were not mentioned is evidence that those vineyards or wineries are not within the Stags Leap District. Some of the smaller vineyards located in the center of the proposed Stags Leap District were not mentioned in any of the articles submitted. Instead, ATF has found the press articles useful in setting the parameters of the boundaries of the Stags Leap District.

With reference to the disputed northern boundary, it should be noted that Group A did not submit any articles which specifically placed the northern boundary at the hills, as proposed in Notice No. 620. However, Group B submitted one article which specifically included S. Anderson Vineyard on a map of the "Stag's Leap Area." (NPRM Comment 1, Exhibit E). In addition, Group B submitted a copy of a 1983 itinerary for a wine touring business, Wine Adventures, Inc., which refers to S. Anderson Vineyard as being located in the Stag's Leap region. (Hearing Comment 47; Requested Information 2). Thus, ATF finds that the weight of the evidence supported the northern addition proposed by Group B.

3. Western Boundary

With reference to the western boundary, although there was no dispute to the boundary among the participants at the hearing, ATF did receive conflicting evidence as to its correct location. Specifically, while Group A amended its petition to move the western boundary from the hills west of the Silverado Trail to the Napa River, articles were submitted which indicated that the western boundary was somewhere east of the Napa River. (Hearing Exhibit 12; Petition, Exhibit 13). This conflict was noted in the Hinkle article previously mentioned. However, Group A presented evidence which indicated that the Napa River was the western boundary of the Stags Leap District area. (Petition, Exhibit 13). In addition, Group A submitted articles which specifically included Silverado Vineyards and Mondavi Winery vineyards as part of the Stags Leap area. (Second Amendment, pp. 3–4; Petition, Exhibit 13). ATF finds that the weight of the evidence supports the placement of the western boundary at the Napa River, as proposed in Notice No. 620.

4. Examples of Evidence Utilized in Support of Decision

ATF has utilized over 40 pieces of information which, taken collectively, support the boundaries as adopted in this Treasury decision. In the following paragraphs, the Bureau will provide some examples of the evidence it used in establishing the boundaries of the Stags Leap District viticultural area.

Northern Boundary—S. Anderson Vineyard. (1) A copy of an itinerary (dated 10/13/83) for a wine touring business, Wine Adventures, Inc., which refers to S. Anderson Vineyard as being located in the Stags Leap wine region. (Hearing Comment 47; Requested Information 2).

(2) An article, entitled "(Sinskey) Winery Cleared Over Objections" (Napa Register, 2/5/87), includes S. Anderson Vineyard on a map of the "Stag's Leap Area." (NPRM Comment 1, Exhibit E).

(North) Eastern Boundary—Shafer Winery, Stags' Leap Winery. (1) Copies of certificates of label approval for Shafer brand 1978 Cabernet Sauvignon and 1980 Zinfandel (dated 5/20/80 and 3/5/82, respectively). The labels indicate that the "grapes were grown in the Stag's Leap area of the Napa Valley." The grapes were grown in Shafer's vineyards. (Petition, Exhibit 10; Requested Information 4).

(2) An article in the April–May 1984 issue of *Friends of Wine* (page 35) which describes Shafer Vineyards as being located in the Stags' Leap area. (Petition, Exhibit 13).

(3) A copy of a certificate of label approval (dated 8/20/82) for Pine Ridge brand 1980 Merlot. The label indicates that part of the wine was derived from grapes grown in the "Stag's Leap district." The grapes came from the vineyards of Stags' Leap Winery. (Petition, Exhibit 10; Requested Information 4).

(4) An article in the April 1985 issue of *Trumpetvine Wines*, entitled "Stags Leap Saga, Part II," describes Stags' Leap Winery as being located in the "Stags Leap area." (Petition, Exhibit 13).

Southern Boundary—Clos du Val Winery. (1) In the revised edition of Bob Thompson's "The Pocket Encyclopedia of California Wines" (Copy. 1985), a reference is made that "most of the grapes (to make Clos du Val wines) come from winery-owned vineyards around the cellars at Stag's Leap * * *"

(2) In the third edition of Alexis Lichine's "New Encyclopedia of Wines & Spirits" (Copy. 1984), Clos du Val Winery is described as having "about 300 acres * * * of vineyards in the Stag's Leap and Carneros districts * * *"

Western Boundary—Silverado Vineyards, Robert Mondavi Winery. (1) A copy of a photograph that appeared in the January 1–31, 1982 issue of *The Wine Spectator*, with the caption "Silverado Vineyard, in Napa's Stag's Leap area, takes form." (Petition, Exhibit 13).

(2) In a review of Silverado's 1981 Cabernet, the *California Grapevine* (April–May 1984) noted that the "grapes were estate-grown in the Stag's Leap area." (Second Amendment, p. 5).

(3) In an article appearing in the *San Francisco Examiner* (3/9/83), writer Harvey Steiman notes that "Robert Mondavi has vineyards here (Stag's Leap District)." (Petition, Exhibit 13).

(4) An article in the April 1985 issue of *Trumpetvine Wines* (previously mentioned), includes the vineyards of Robert Mondavi, east of the Napa River and west of the Silverado Trail, as being included in the "Stags Leap area." (Petition, Exhibit 13).

Central Area—Pine Ridge Winery, Steltzner Vineyards, Stag's Leap Wine Cellars, Nathan Fay Vineyards. (1) In the September 1981 issue of the *Alabama Wine Guide* (Vol. 1, No. 4), Pine Ridge Winery is described as being "located in the Stag's Leap district of the Napa Valley." (Hearing Exhibit 12).

(2) In an article that appeared in the June 1, 1983 edition of the *San Francisco Chronicle*, entitled "Cabernets of Stag's Leap," writer Anthony Dias Blue mentions some of the wineries in the "Stags Leap district" including Pine

Ridge and Stag's Leap Wine Cellars. Reference is also made to the vineyards of Richard Steltzner as being located in the Stags Leap area. (Petition, Exhibit 13).

(3) In the third edition (revised) of "The Connoisseurs' Handbook of California Wines" by Charles E. Olken, Earl G. Singer and Norman S. Roby (Copy. 1984), Stag's Leap is described as being east of Yountville and including Stag's Leap Wine Cellars. (Petition, Exhibit 13).

(4) Point of sale literature for St. Andrew's Vineyard brand 1981 Cabernet Sauvignon which indicates that part of the wine was derived from grapes grown in the "Stag's Leap area in the Napa Valley." The grapes were grown in Richard Steltzner's vineyards. (Petition, Exhibit 11; Requested Information 1).

(5) A copy of a certificate of label approval (dated 3/15/82) for San Francisco Symphony brand 1979 Cabernet Sauvignon which indicates "Stag's Leap District" as the origin of the wine. The label states that the grapes came from the vineyards of Richard Steltzner.

(6) A copy of a certificate of label approval (dated 10/30/80) for Berkeley Wine Cellars brand 1978 Cabernet Sauvignon which indicates the "Stag's Leap Region of Napa Valley" as the origin of the wine. The grapes came, in part, from the vineyards of Nathan Fay. (Petition, Exhibit 11; Requested Information 1).

(7) A copy of a certificate of label approval (dated 6/1/84) for Bay Cellars brand 1982 Clarion red wine. The label indicates that the wine was produced, in part, from grapes grown in the "Stag's Leap region." The grapes came from Nathan Fay's vineyards. (Petition, Exhibit 11; Requested Information 1).

After consideration of all of the evidence presented, ATF has concluded that there is sufficient evidence to substantiate that the additional area proposed by Group B has been and is currently considered within the Stags Leap District by the general public. Consequently, ATF finds that the area encompassed within the boundaries proposed by Group B accurately reflects the grape growing region known as Stags Leap District.

C. Geographical Features

Group A contends that their proposed area is distinguished from surrounding areas by geographical features. They maintain that the topography, climate, and soils which characterize their proposed area combine to produce unique growing conditions. Moreover, they contend that the additional area encompassed by the Group B proposal is characterized by geographical features which are more similar to the Napa Valley floor than to their proposed area.

On the other hand, Group B maintains that there are no significant differences in topography or climate between the area proposed in Notice No. 620 and the northern extension area. Group B presented evidence that the soils in the northern extension were the same as the soils in the proposed area.

1. Topography

In their initial petition, Group A submitted evidence that the proposed Stags Leap (District) viticultural area had a distinct microclimate, resulting from the orographic configuration of the area. They contended that the area, surrounded on three sides by hills or mountains, was configured like a funnel, which accentuated the inflow of cool air from San Pablo Bay, which is located south of the proposed area. (Petition, pp. 38–39). As stated in the weather report of Irving P. Krick Associates, Inc. (Petition, p. 39):

> The wide end of the funnel faces south to receive the bay breeze and the frequent fogs and low clouds which accompany it. These breezes are then guided into the area by its unique topography, including the mountains to the east of the Silverado Trail and the series of contiguous hills to the west of the Trail, which serve as the two sides of the funnel.

The Krick report goes on to state that the topography of the area also controls the movement of air out of the area, "[s]pecifically, the air exits to the mountain elevations to the north or, * * * to the main valley floor through the narrow passes at the north of Stags Leap." (Petition, p. 39).

However, with the subsequent extension of the western boundary from the hills west of the Silverado Trail to the Napa River (Second Amendment), as proposed in Notice No. 620, ATF does not believe that the topography of the viticultural area is a significant geographical feature in determining a western boundary. As meteorologist Donald Schukraft (Weather Network, Inc.) stated at the public hearing in discussing the extended (western) area, "[t]here is no funnel effect here. This area is open to the Valley." (Tr. Vol. I, p. 125).

Similarly, ATF does not believe that topography is a significant geographic feature in determining the northern boundary of the Stags Leap District viticultural area. Although the petitioners had noted that the northern ring of hills, just south of the Yountville Cross Road, defined part of the "funnel," no evidence was submitted in the rulemaking proceeding which conclusively demonstrated a difference between the area north and south of the hills.

2. Climate—Temperature

In their Second Amendment, Group A included a weather study of the proposed viticultural area (as specified in Notice No. 620), prepared by Weather Network, Inc. Weather data was obtained from thermographs and automatic weather stations located both inside and outside (e.g., approximately ½ mile west of) the proposed viticultural area. As noted in the report (Second Amendment, p. 34):

> * * * the daily maximum and minimum temperatures recorded by the stations in Stags Leap District were generally several degrees higher than those recorded by the weather station to the west of the Napa River and near the center of the Valley floor. On some days the differences between the two stations were over ten degrees.

However, Weather Network, Inc. did not set up a weather station in the proposed northern extension area. Consequently, there is no data available from that area. Moreover, the petitioners had conceded that actual maximum temperature values were not significantly different from those in nearby areas. (Petition, p. 40). In the aforementioned Krick report, it was stated that the funnel effect did not cause degree day values as currently calculated to vary appreciably between the Stags Leap area and the adjacent Napa Valley areas, and "for this reason it would be misleading to use only degree-days as a criteria for evaluating the microclimate of the various vineyards within short distances of Stags Leap." (Petition, p. 40).

At the public hearing, Mr. Donald Schukraft, a certified consulting meteorologist, commented that the hills along the northern boundary of the proposed Stags Leap area "provide changes in the wind-flow pattern that consequently produce changes in the temperatures and humidity in the vineyards to the north and south of the hills. These changes * * * are not found at the Yountville Cross Road." (Tr. Vol. I, p. 118). For example, Mr. Schukraft asserted that on a day when the wind-flow is from the south, the air would flow around the northern hills (south of the Yountville Cross Road) and exit the area south of the northern hills, resulting in temperatures that are lower and humidity that is higher than the area north of the hills. However, Mr. Schukraft presented no climatological data to support those conclusions.

ATF received conflicting reports from vineyard owners both within the proposed area and within the northern extension as to the effects of the wind on their respective grape vines.

Mr. Richard Chambers, who owns a vineyard in the northern extension, stated at the public hearing that the area in the northern extension (south of the Yountville Cross Road) also receives the breezes from the San Pablo Bay. (Tr. Vol. III, p. 25). To support this contention, he provided photographs of his vineyard and other vineyards in the northern extension (S. Anderson Vineyard and Missimer Vineyard) which depicted grape vines bent over, growing toward the north, away from the south wind. On the other hand, in the area around Yountville (west of the Napa River), Mr. Chambers noted only neutral vine growth. (Hearing Exhibit 27). As to how far north the strong wind extended, Mr. Chambers stated that "it undoubtedly crosses the Yountville Cross Road," before dissipating in the area further up State Lane. (Tr. Vol. III, p. 26).

However, Group A submitted evidence to the contrary. In their post-hearing brief (Hearing Comment 84, Exhibit P), Mr. John Stuart of Silverado Vineyards stated that in Silverado's vineyards in Yountville, cane growth is also oriented toward the north, with subsequent wind damage. Mr. Robert Egan submitted a post-hearing comment (Hearing Comment 85) which included photographs of Mr. Chambers' vineyard and Mr. Anderson's vineyard indicating that the wind had little or no effect on the vines or canes in either vineyard.

Mr. Egan provided photographs of his own vineyard, located just south of the northern hills, and suggested that the vines tended to lean to the north as a result of the wind.

ATF finds that the evidence presented as to the effect of the wind within the proposed viticultural area is too inconclusive to support a finding that the northern hills provide a significant barrier to the winds from the south, with resulting differences in temperature. ATF notes that the evidence presented at the hearing indicated that there was no "funnel effect" from the area west of the hills west of the Silverado Trail to the Napa River. ATF does not believe that the "funnel effect" represents a significant geographical feature of the entire viticultural area as proposed by Group A. Therefore, ATF does not believe that climate, with regard to temperature, is a significant distinguishing geographical feature in determining the boundaries of the Stags Leap District viticultural area.

3. Climate—Precipitation/Moisture

Based on data presented in the USDA SCS *Soil Survey of Napa County, California* (August 1978), average annual precipitation within the Stags Leap District is 25 to 30 inches.

Similar amounts of rainfall can be expected in the areas west and south of the viticultural area, while average rainfall north and east of the viticultural area increases to between 30 and 35 inches. ATF notes that there is no conclusive evidence that the area between the Yountville Cross Road and the northern hills has different precipitation patterns from the proposed viticultural area.

Professor Elliott-Fisk, an expert witness for Group A, concluded that the types of plants and density of forests and woodlands on the ridges and hills of the proposed Stags Leap District indicate the entrapment of moist, marine air within the area. She also stated that with the exception of the oak-madrone woodland, other types of woodlands found within the proposed Stags Leap District, such as the oak forest, madrone forest, and conifer-hardwood forest, do not continue to the north and south of the proposed district. (Hearing Comment 84, Exhibit M. p. 2). This evidence was disputed by Mrs. Dorothy Barboza, a vineyard owner in the northern extension, who sent photographs of conifer trees in the northern extension. (Post Hearing Comment Period 3). The Bureau has determined that there is insufficient evidence on this issue to support a finding that the types of vegetation in the northern extension differ significantly from the types of vegetation found in the proposed Stags Leap District.

4. Soil—General

Based on the evidence submitted in this rulemaking procedure, ATF has concluded that the soil (including the subsoil) is the primary geographical feature that distinguishes Stags Leap District from the surrounding areas.

According to the SCS soil survey, there are 31 soil series within Napa County. Approximately 45% of these soil series are present within the Stags Leap District, as adopted by this Treasury decision. Certain of these soil series, such as Millsholm, Perkins, and Kidd, are found within the viticultural area but not in the surrounding areas. However, within the Stags Leap District area, the Bale soil series predominates. Bale soils are also found to the north of the viticultural area, but not in the surrounding areas to the east, south, or west. The SCS describes Bale soils as being somewhat poorly drained on alluvial fans, flood plains, and low terraces. As described in the soil survey, they are formed in alluvium derived from rhyolite and basic igneous rock. In the following paragraphs, the Bureau will discuss the reasons why it concluded that the soils of the Stags Leap District form the best geographical basis for distinguishing the District from the areas which surround it.

a. Eastern Boundary. The Stags Leap mountain range is located just east of the Stags Leap District. Consequently, this area consists mainly of Rock outcrop and, to a lesser degree, the Hambright soil series. The SCS soil survey notes that these types of soils are not used for growing wine grapes, either because they are not suitable or there is no water available for irrigation. (SCS Soil Survey, August 1978, pp. 40–43).

b. Southern Boundary. The dominant soils south of the viticultural area include the Hambright series, the Haire series, the Yolo series, and the Cole series. These four soil series converge just south of the viticultural area and, in effect, "pinch" it off. In addition, in its post-hearing comment, Group A noted that there is a confluence of three drainage systems just south of the viticultural area—the Napa River, Dry Creek, and Hopper Creek. (Hearing Comment 84, Exhibit U).

c. Western Boundary. In Group A's initial petition, they submitted a report on soils from viticultural consultant Richard Nagoaka. Mr. Nagoaka stated that the dominant soils west of the Napa River include the Yolo series, the Cole series, and the Clear Lake Series. (Petition, p. 48). Mr. Nagoaka also stated that:

> The soils to the east of the (Napa) river (the Stags Leap side) were deposited by alluvial forces from parent materials from the Vaca Range on the eastern rim of the Napa Valley. By contrast, the soils to the west of the Napa River were deposited from parent materials from the Mayacamus Range on the western rim of the valley. These two ranges not only appear different, but are composed of profoundly different materials. (Petition, p. 45).

According to Mr. Nagoaka, the Vaca mountain range was formed about ten million years ago through volcanic activity. In contrast, the Mayacamus mountain range formed about 30 million years ago, and is composed of fines and sedimentary materials. Thus, as Mr. Nagoaka pointed out, soils west of the Napa River "tend to be deeper, more fertile and of greater water-holding capacity" than those east of the Napa River. (Petition, p. 46). Because of the greater water-holding capacity, soils west of the Napa River do not require

late irrigation. Mr. Nagoaka compared the water-holding capacity of the Cole silt loam soils (west of the Napa River) with the Bale clay loam soils east of the Napa River. He found that the Bale soils contained 0.08–0.11 inches of available water per inch of soil, while the Cole soils contained 0.16–0.21 inches of water per inch of soil, approximately double the water-holding capacity. Mr. Nagoaka concluded that "[v]iticulturally, the management of vineyards west and east of the river is profoundly influenced by the different soil types and their characteristics." (Petition, p. 50).

d. Northern Boundary. The public hearing and subsequent comments produced much conflicting evidence as to classification of the soils in the proposed northern extension. Based upon the following evidence, however, ATF has concluded that the soils in the northern extension are more similar to the soils in the area proposed in Notice NO. 620 than to the area to the north of the Yountville Cross Road. The following evidence was considered by ATF:

i. Elliott-Fisk Geography Report. At the hearing, Professor Deborah Elliott-Fisk, an Assistant Professor, Department of Geography, University of California, Davis, testified on behalf of Group A. Professor Elliott-Fisk stated, on the basis of soil samples taken in the area north of the Yountville Cross Road, that she believed that the soils south of the Yountville Cross Road had been incorrectly mapped as Bale clay loam on SCS maps. (Tr. Vol. I, p. 94–95).

Professor Elliott-Fisk conceded, however, that she had not taken any soil samples from the area south of the Yountville Cross Road. In their post-hearing brief, Group A summarized the findings of Professor Elliott-Fisk, as follows:

> The vineyard area within (the proposed) Stags Leap District, which once served as the channel of the Napa River, contains alluvial sub-soils derived from volcanic and sedimentary bedrock and from Napa River deposits. These soils have never been covered by fan deposits and are fine, well-weathered and well-drained. By contrast, the sub-soils of the areas north and south of (the proposed) Stags Leap District are comprised of more recent deposits of the well-defined Rector Canyon Fan and Soda (Canyon) Creek Fan, respectively. (Hearing Comment 84, p. 11).

Professor Elliott-Fisk stated that the beginning of the Rector Canyon Fan abutted the northern edge of the hills which were proposed as the northern boundary of Stags Leap District. She stated that the Soda Canyon Fan began at approximately the southern boundary of the proposed viticultural area. (Tr. Vol. I, p. 98; Hearing Exhibit 6).

In support of the above conclusions, Professor Elliott-Fisk stated that (subsequent to the hearing) she had sampled and analyzed soils from both within and outside of the proposed viticultural area. The samples within the proposed viticultural area were taken from the Egan property (just south of the northern hills), and the Silverado Vineyards property (just inside the proposed western boundary, east of the Napa River). Samples were also taken from the Simonson property in the northern extension (just north of the proposed northern boundary, and south of the Yountville Cross Road), and from another Egan property (just north of the Yountville Cross Road, and west of State Lane), and from two sites just south of the proposed southern boundary of Stags Leap District (Shafer Winery's Oak Knoll vineyard).

In her report (Hearing Comment 113), Professor Elliott-Fisk noted that her analyses of the above-mentioned samples indicated the following:

(a) The soils on the properties of Simonson (located in the northern extension), and Egan (located just north of the Yountville Cross Road), were both formed on the Rector Canyon Fan; however, the Egan soil is "at the outer margin of the Rector Canyon Fan and the outer margin of the Napa River flood-plain/historic terrace." (Hearing Comment 113, p. 6).

(b) The soil on the Egan property within the proposed Stags Leap District is on the old (former) Napa River channel;

(c) The Silverado Vineyards property shares soil similarities with the more central portion of the proposed Stags Leap District, and;

(d) The soils on the Shafer property, just south of the proposed viticultural area, are on the Soda Canyon Fan.

Group A also contended that the different sub-soil profiles and compositions "are particularly relevant viticulturally because grape vines typically root in the sub-soil, not just the topsoil." (Hearing Comment 84, p. 11).

ii. Zinke Geography Report. In its post-hearing comment (Hearing Comment 101), S. Anderson Vineyard included a soils report prepared by Professor Paul Zinke, a professor in the Department of Forestry, University of California, Berkeley. Professor Zinke concluded, on the basis of observations he made while visiting the proposed Stags Leap District and its surrounding area, a review of various soil surveys, soil maps and topographical maps, and soil samples taken on a second visit to the proposed viticultural area, that the soils of the Stags Leap District (including the northern extension), are consistent throughout the properties stretching from a line following the small drainage channel approximately parallel to and immediately north of the Yountville Cross Road, west of the Silverado Trail, south to a point near the Chimney Rock Golf Course. He found that:

> The distinctive soil aspect of the Proposed Stags Leap District, including the Northern Extension, is a catena or topographic sequence of soils beginning in the east with a terrace against the base of the Stags Leap Ridge at an elevation of approximately 200 feet, continuing with an alluvial fan on which soils of the Bale series occur, then to the lower end where the fan buries deposits of the Napa River in the west. These distinctive combinations of soils occur several places in the Stags Leap District from immediately north of the Yountville Cross Road to near the Chimney Rock Golf Course. (Hearing Comment 101, Zinke Report, p. 1).

Professor Zinke stated that the Reactor Creek (Canyon) Fan begins at a drainage ditch which is approximately parallel to, and just north of the Yountville Cross Road. According to Professor Zinke:

> This is the line where the soils change from those of the Stags Leap District to the coarser soils of the Rector Creek Fan. North of this drainage ditch the soils begin to be dominated by the Rector Creek alluvial fan. (Hearing Comment 101, Zinke Report, p. 8).

SCS and USGS Reports. ATF was thus presented with conflicting reports from two experts in the field as to the characteristics of the soils in the northern extension. Both Professors Elliott-Fisk and Zinke acknowledged the presence of a Rector Canyon (Creek) Fan, and believed that Rector Canyon soils were different from Stags Leap District soils. However, whereas Professor Elliott-Fisk believed that the Rector Canyon Fan begins at the northern hills at the northern boundary of the proposed viticultural area, Professor Zinke believed that it began some 500 yards north of the hills, on the north side of the Yountville Cross Road.

The evidence submitted led ATF to the conclusion that the soils and subsoils were the primary geographical feature that distinguished the Stags Leap District from surrounding areas. In order to better evaluate the conflicting expert evidence which had been submitted on the issue of soils, ATF forwarded copies of the reports of Professors Elliott-Fisk and Zinke to the SCS and the United States Geological Survey (USGS) for their review and response.

By letter dated May 16, 1988, the SCS responded to ATF's request. (Requested

Information 5). The SCS was unable to reach any definitive conclusions from the evidence before it, but did address Professor Elliott-Fisk's assertion that the soils in the northern extension had been incorrectly classified on the SCS map. The SCS included with its response an internal memorandum, dated May 5, 1988, which stated that almost all soil delineations contain small areas of other soils, often quite contrasting soils, which are called "inclusions." The letter stated that "it is important to note that the sample sites in her (Professor Elliott-Fisk's) report do not necessarily confirm that Bale soils similar to those described south of the 'Rector Canyon Fan' line do not exist within the northern extension proposed by Zinke."

By letter dated June 9, 1988, the USGS submitted its review of the data. (Requested Information 7). The letter noted that the reviewer was merely analyzing the reports, and did not have the advantage of a field review, detailed photographic review, or review of the data collected by either consultant. The reviewer concluded that there were reasonable arguments and data to support either position of the northern boundary.

The USGS reviewer noted the heterogeneity of soil types within the proposed Stags Leap District. (As previously mentioned, of the 31 soil series present within Napa County, approximately 45% of these are found in the viticultural area.) Thus, because of the diversity of soil types, the USGS believed that it was important to ascertain whether the soils in the northern extension were similar to those in the proposed viticultural area, or uniquely different.

In addition, the USGS believed it important to determine whether the soils in the northern extension were more like the Rector Canyon (Fan) deposits and soils than the Stags Leap District soils since, as previously noted, both Professors Elliott-Fisk and Zinke believed that Rector Canyon soils were different from Stags Leap District soils.

The USGS concluded that, in their opinion, there was insufficient data available to argue that the soils in the northern extension (south of the Yountville Cross Road) are significantly different from those within the proposed Stags Leap District. Further, the USGS opined that a more detailed study could conclude that the soils in the northern extension are transitional to both the Rector Canyon Fan and the Stags Leap materials. In any event, based on the available data, the USGS concluded that the soils in the northern extension appear to be more similar to the soils within the proposed viticultural area than to the soils north of the Yountville Cross Road.

Although the USGS stated that it could not recommend that a solely geologic, geomorphologic, or soils basis be used to determine the northern boundary of the district, the Bureau would note that viticultural area boundaries are not based solely on geographical features.

On the basis of geographical criteria, ATF finds that the area within the proposed Stags Leap District and the area within the northern extension are not distinguishable from one another. The evidence indicates that the climate, soil, precipitation, etc. within the area proposed by Group A, and the area within the northern extension proposed by Group B, are virtually the same. Although there are differences, ATF finds that there is insufficient evidence to indicate that these differences distinguish the proposed areas from one another.

ATF finds that the weight of the evidence supports the SCS map's classification of the soils in the northern extension as being predominantly Bale clay loam. Further, ATF finds that the evidence supports the conclusion of the USGS that the soils within the northern extension are more similar to the soils found in the proposed Stags Leap District than to the soils found north of the Yountville Cross Road. Therefore, ATF concludes, based on the evidence, that the northern extension area is distinguished by viticultural features from the remaining surrounding areas.

In summation, ATF finds that the boundaries proposed by Group B satisfy the criteria of 27 CFR 4.25a(e)(2)(iii) by encompassing an area that possesses generally homogeneous viticultural features different from surrounding areas which are distinguished by geographical features.

VI. Final Rule—Boundary Modifications

Based on the evidence in the rulemaking record, with the exception of the northern boundary, ATF is adopting the boundaries of the Stags Leap District viticultural area as proposed in Notice No. 620. ATF finds that the evidence submitted by Group B satisfies the criteria specified in § 4.25a(d)(2) of the regulations, and the northern boundary of the Stags Leap District viticultural area as proposed in Notice No. 620 is, therefore, modified to extend to the Yountville Cross Road.

VII. Boundaries of the Area

The boundaries of the Stags Leap District viticultural area may be found on one United States Geological Survey (U.S.G.S.) map of the 7.5 minute series, titled Yountville, California. The boundaries are described in § 9.117.

VIII. Additional Information

A. Miscellaneous

ATF does not want to give the impression that, by approving "Stags Leap District" as a viticultural area, 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 in advertisements as to the origin of the grapes. Any commercial advantage can only come from consumer acceptance of "Stags Leap District" wines.

B. 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 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.

C. Executive Order 12291

In compliance with Executive Order 12291, the Bureau has determined that this regulation 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.

D. 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.

E. Disclosure

A copy of the petition (and amendments), the hearing transcript and exhibits, and the comments received are available for inspection during normal business hours at the following location: ATF Reading Room, Room 4412, Disclosure Branch, 1200 Pennsylvania Avenue, NW., Washington, DC.

F. Drafting Information

The principal author of this document is James P. Ficaretta, Wine and Beer Branch, Bureau of Alcohol, Tobacco, and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practice and procedure, Consumer protection, Viticultural areas, and Wine.

IX. Authority and Issuance

Par. 1. The authority citation for 27 CFR Part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

PART 9—AMERICAN VITICULTURAL AREAS

Par. 2. The table of sections in 27 CFR Part 9, Subpart C, is amended to add the heading of § 9.117 to read as follows:

Subpart C—Approved American Viticultural Areas

Sec.

* * * * *

9.117 Stags Leap District.

* * * * *

Par. 3. Subpart C is amended by adding § 9.117 to read as follows:

Subpart C—Approved American Viticultural Areas

* * * * *

§ 9.117 Stags Leap District.

(a) *Name.* The name of the viticultural area described in this section is "Stags Leap District."

(b) *Approved map.* The appropriate map for determining the boundaries of the Stags Leap District viticultural area is one U.S.G.S. topographic map in the 7.5 minute series, scaled 1:24000, titled "Yountville, Calif.," 1951 (photorevised 1968).

(c) *Boundaries.* The Stags Leap District viticultural area is located in Napa County, California, within the Napa Valley viticultural area. The boundaries are as follows:

(1) Commencing at the intersection of the intermittent stream (drainage creek) with the Silverado Trail at the 60 foot contour line in T6N/R4W, approximately 7 miles north of the city of Napa.

(2) Then southwest in a straight line, approximately 900 feet, to the main channel of the Napa River.

(3) Then following the main branch of the Napa River (not the southern branch by the levee) in a northwesterly then northerly direction, until it intersects the medium-duty road (Grant Bdy) in T7N/R4W, known locally as the Yountville Cross Road.

(4) Then northeast along the Yountville Cross Road until it intersects the medium-duty road, the Silverado Trail.

(5) Then north along the Silverado Trail approximately 590 feet to a gully entering the Silverado Trail from the east.

(6) Then northeast along the center line of that gully, approximately 800 feet, until it intersects the 400 foor contour line in Section 30 of T7N/R4W.

(7) Then in a generally southeast direction, following the 400 foot contour line through Sections 29, 32, 33, 4, and 3, until it intersects the intermittent stream in the southwest corner of Section 3 in T6N/R4W.

(8) Then in a generally southwest direction along that intermittent stream to the beginning point, at the intersection with the Silverado Trail.

Signed: December 20, 1988.

Stephen E. Higgins,

Director.

Approved: January 6, 1989.

John P. Simpson,

Deputy Assistant Secretary (Regulatory, Trade and Tariff Enforcement).

[FR Doc. 89-1841 Filed 1-26-89; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF DEFENSE

Department of the Army

35 CFR Part 253

Regulations of the Secretary of the Army (Panama Canal Employment System); Employment Policy

AGENCY: Department of the Army, Defense.

ACTION: Final rule.

SUMMARY: The final rule removes language in § 253.8 of title 35, Code of Federal Regulations, which had previously excluded bureau directors and heads of independent units of the Panama Canal Commission from eligibility for the overseas recruitment or retention differential authorized by section 1217 of the Panama Canal Act of 1979. The removal of this exclusionary language allows these Commission officials to receive the appropriate differential. The revisions also reflect changes in titles and positions within the Commission.

EFFECTIVE DATE: January 27, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Rhode, Jr., Assistant to the Chairman and Secretary, Panama Canal Commission, 2000 L Street NW., Washington, DC 20036-4996 (Telephone: 202-634-6441) or Mr. John L. Haines, Jr., General Counsel, Panama Canal Commission, APO Miami 34011-5000 (Telephone in Balboa Heights, Republic of Panama: 011-507-52-7511).

SUPPLEMENTARY INFORMATION: Issuance of a notice of proposed rulemaking under 5 U.S.C. 553 is not necessary because this final rule pertains only to personnel of agencies covered by these regulations. Section 1217 of the Panama Canal Act of 1979 (22 U.S.C. 3657), authorizes the head of the Panama Canal Commission to pay an overseas recruitment of retention differential to eligible employees. In addition to the statutory requirements of the Act, agency regulations published at 35 CFR 251.31 (tropical differential) and 35 CFR 251.32 (Panama Area differential) contain requirements governing eligibility for the differentials. Bureau directors and heads of independent units of the Panama Canal Commission, however, are not covered by either the statute or the regulations due to the exclusionary language of 35 CFR 253.8(d). The final rule reflects the Commission's desire that these Commission officials receive the appropriate differential as do other Commission employees.

The final rule revises § 253.8(d) to apply the provisions of 22 U.SC. 3657, 35 CFR 251.31 and 251.32, except for §§ 251.31(b)(4) and 251.32(b)(2) to bureau directors and heads of independent units. Accordingly, the bureau directors and heads of independent units may receive the differential subject to the same eligibility requirements as other Commission employees, except that these officials will not be subject to the provisions of §§ 251.31(b)(4) and 251.32(b)(2), which limit payment of the diffferential to an amount which, when combined with basic compensation, does not exceed the current rate of step 5, GS-17 of the General Schedule set out in 5 U.S.C. 5332(a). In other words, bureau directors and heads of independent units will not be subject to the step 5, GA-17 limitation, but rather, will receive, in addition to basic compensation, the appropriate differential regardless of the amount of

aggregate compensation. The final rule also applies the provisions of § 251.25 to bureau directors and heads of independent units. Section 251.25 defines basic compensation or the rate of pay as the base salary plus the appropriate differential. This is significant for pay alignment purposes.

The final rule also makes two revisions in 35 CFR 253.8(b)(1) to reflect current position titles and alignment. To reflect the realignment of the Chief Financial Officer position from the Commission Officer Group to the Commission Executive Group, that position is removed from 35 CFR 253.8(b)(1). The Chief Financial Officer is instead considered included in the category of bureau directors and heads of independent units covered by 35 CFR 253.8(d).

The final rule also revises the title of the Secretary to reflect the current designation of Assistant to the Chairman and Secretary.

This is not a major rule for the purposes of Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

List of Subjects in 35 CFR Part 253

Panama Canal Commission, Pay allowances and differentials, Personnel policy.

For the reasons set forth in the preamble, 35 CFR Part 253 is amended as follows:

PART 253—REGULATIONS OF THE SECRETARY OF THE ARMY (PANAMA CANAL EMPLOYMENT SYSTEM)—EMPLOYMENT POLICY

1. The authority citation for Part 253 continues to read as follows:

Authority: 22 U.S.C. 3641–3701, E.O. 12173, 12215.

2. Section 153.8, paragraph (b)(1) and (d) are revised to read as follows:

§ 253.8 Exclusions.

* * * * *

(b) * * * (1) The Administrator, Deputy Administrator, Chief Engineer, Assistant to the Chairman and Secretary, Assistant to the Secretary for Congressional Affairs of the Panama Canal Commission.

* * * * *

(d) All Bureau Directors and Heads of Independent Units of the Panama Canal Commission, and the incumbents thereof, are excluded from the provisions of section 1212 of the Panama Canal Act which provide for merit selection for employment, sections 1213, 1215 and 1216 of the said Act, Subparts B and C of the regulations in this part, and Subpart B of Part 251, except for §§ 251.25, 251.31 and 251.32; provided, however, that the Bureau Directors and Heads of Independent Units are not subject to the limitations of §§ 251.31(b)(4) and 251.32(b)(2).

* * * * *

Date: January 23, 1989.

William R. Gianelli,

Chairman, Panama Area Personnel Board.

[FR Doc. 89–1883 Filed 1–26–89; 8:45 am]

BILLING CODE 3710-02-M

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Rocky Mountain National Park Fishing Regulations

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service has modified the fishing regulations in Rocky Mountain National Park. The rule changes allow fishing in streams and lakes in Rocky Mountain National Park as designated by the Superintendent pursuant to authority provided by National Park Service general regulations. The park's active monitoring program has identified preservation concerns which include protecting and restoring native fish populations while affording a high quality fishing experience within limits necessary to perpetuate fish populations and riparian vegetation. The changes to the regulations address these concerns and will correct, on an annual basis, problems identified with the current regulations. With these changes in place, the park staff will be able to more effectively manage the fishery resources by manipulating season dates, bait and terminal gear restrictions, and the use of creel limits (including catch-and-release). Effects of the rules are expected to be minimal. This rulemaking will not alter to any degree the number of angler days presently occurring.

EFFECTIVE DATE: February 27, 1989.

FOR FURTHER INFORMATION CONTACT: David R. Stevens, Research Biologist, Rocky Mountain National Park, Estes Park, CO 80517. Phone: (303) 586–2371 or David J. Essex, Chief Park Ranger, Rocky Mountain National Park, Estes Park, CO 80517. Phone: (303) 586–2371.

SUPPLEMENTARY INFORMATION:

Background

The present Rocky Mountain National Park fishing regulations are codified in 36 CFR 7.7(a). They permit fishing in selected waters of the park with a variety of regulations for specific lakes and streams.

Technical fishing assistance has been provided to Rocky Mountain National Park by the U.S. Fish and Wildlife Service for 30 years. The present objectives have evolved since the late 1950s to closely coincide with the park's primary purpose, which is to preserve natural environments and native plant and animal life, and to provide for the enjoyment of the same in ways that maintain natural conditions.

Thus, the specific objectives of the park's fishery program are: 1. Protect and restore native fish populations, and meet the requirements of the Endangered Species Act of 1973.

2. Maintain a high quality fishing experience for the anglers.

3. Allow angler use according to National Park Service policy, and within limits necessary to perpetuate fish populations and reparian vegetation.

Attainment of these objectives requires that angler harvests do not alter natural replenishment rates or age structure, or significantly reduce numbers, biomass, or sizes, from those occurring in unfished populations. This management policy necessitates both a philosophical and literal distinction between recreational angling and removing fish for consumption.

Protective policies of the National Park Service that have prevented significant degradation of the aquatic habitat have also restricted the use of maintenance stocking in park waters. Given these constraints, special angling regulations have become the primary means to accomplish park fishery objectives.

Regulations used to protect fish and maintain angling quality have included manipulating season dates, bait and terminal gear restrictions, and the use of creel limits (including catch-and-release).

Of the 147 lakes within Rocky Mountain National Park, only 42 lakes are capable of maintaining reproducing fish populations due to cold water temperatures or lack of spawning habitat. Of the 42 lakes that sustain reproducing fish populations, 11 lakes and 11 streams contain pure populations of native trout species. The majority of these native fish populations were restored since 1973, under the Endangered Species Act.

Because of the sensitivity of these native fish populations, the park staff must be able to respond rapidly to changes that occur in a dynamic ecosystem resulting from human activities and natural events.

The park's fishing regulations are currently codified in 36 CFR 7.7(a). In order for even minor changes to be made in these regulations through normal rulemaking procedures, approximately eight months are required. This process involves extensive review at various Government levels and includes a period set aside for public review and comment.

The new park fishing regulations allow the Superintendent the ability to make routine changes in the regulations locally and in a timely manner, using discretionary authority provided by National Park Service general regulations in 36 CFR 1.5. This procedure will afford greater protection to the park's fishery resources, be more responsive to public needs and allow park managers greater flexibility to respond to specific situations.

Public notice of restrictions established by the Superintendent will be provided through signs, maps, brochures, newspaper notices or other appropriate methods as required by 36 CFR 1.7. Detailed information pertaining to the nature and extent of fishing restrictions will be readily available to anglers in the park. Permanent or otherwise significant closures of park waters (such as the ones listed in paragraph (a)(3) of this rulemaking) are subject to the rulemaking requirements of 36 CFR 1.5(b) and will continue to be codified in 36 CFR 7.7.

The National Park Service published a proposed rulemaking in the **Federal Register** on August 16, 1988 (53 FR 30849) and provided a 30-day period for public comments on the proposed revisions. No comments were received. Therefore, the proposed rules are published unchanged, in final.

The park's fishing regulations will be reviewed at least annually by park staff and the U.S. Fish and Wildlife Service, and recommendations for changes, if any, will be made to the Superintendent.

Drafting Information

The primary authors of these regulations are David Essex, Chief Park Ranger, and David Stevens, Research Biologist, both of Rocky Mountain National Park.

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. 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) Increase public angling to the extent of impacting the aquatic 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 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 recordkeeping requirements.

In consideration of the foregoing, 36 CFR Chapter I 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); § 7.96 also issued under D.C. Code 8–137 (1981) and D.C. Code 40–721 (1981).

2. By revising § 7.7(a) to read as follows:

§ 7.7 Rocky Mountain National Park.

(a) *Fishing*—(1) Fishing restrictions, based on management objectives described in the park's Resources Management Plan, are established annually by the Superintendent.

(2) The Superintendent may impose closures and establish conditions or restrictions, in accordance with the criteria and procedures of §§ 1.5 and 1.7 of this chapter, on any activity pertaining to fishing, including, but not limited to species of fish that may be taken, seasons and hours during which fishing may take place, methods of taking, size, creel, and possession limits.

(3) Fishing in closed waters or violating a condition or restriction established by the Superintendent is prohibited.

Becky Norton Dunlop

Assistant Secretary for Fish and Wildlife and Parks.

Date: December 19, 1988.

[FR Doc. 89–1854 Filed 1–26–89; 8:45 am]

BILLING CODE 4310–70–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[(FRL 3509–5); TN–076B]

Approval and Promulgation of Implementation Plans; Tennessee: Plan Revision for Volatile Organic Compounds (VOCs)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA today approves a request by Tennessee that an amendment to Regulation #7, Section (7–1)(11), Control of VOCs, be incorporated into the Nashville/Davidson County portion of the Tennessee State Implementation Plan (SIP). This amendment removes the deficiency in Nashville/Davidson County's VOC definition.

DATE: This action will become effective on March 28, 1989 unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

ADDRESSES: Written comments should be addressed to Diane Altsman of EPA Region IV's Air Programs Branch (See Region IV address below). Copies of the materials submitted by Tennessee may be examined during normal business hours at the following locations:

Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street, NE., Atlanta, Georgia 30365.

Tennessee Department of Health and Environment, Customs House, 701 Broadway, Nashville, Tennessee 37219–5403.

Public Information Reference Unit, Library Systems Branch, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Diane Altsman, Air Programs Branch, EPA Region IV, at the above address and telephone number (404) 347–2864 or FTS 257–2864.

SUPPLEMENTARY INFORMATION: On June 15, 1988, the State of Tennessee's Department of Health and Environment submitted to EPA, an amendment to Regulation No. 7, Section 7–1(11) of the Nashville/Davidson County portion of the SIP. Paragraph 11 of Section 7–1, references the definition of a VOC. The amendment to this regulation deletes paragraph(11) of Section 7–1, in its entirety and replaces it with a definition that is consistent with the EPA definition for VOC. This amendment removes the deficiency in Nashville/Davidson County's VOC definition. Due to the simplicity of this change, no Technical Support Document has been prepared. EPA issued final clarification of this regulation, after the State had adopted this VOC definition in Paragraph 11, 7–1. We are clarifying our understanding of Nashville/Davidson County, Tennessee's intent of the EPA approved definition of a VOC, within Part 52, Chapter I, Title 40, CFR, Subpart RR, 3 of this **Federal Register** notice.

Final Action. EPA approves the changes made in Tennessee Regulation No. 7, Section 7–1, Paragraph (11). This action is being taken without prior proposal because the change is noncontroversial and EPA anticipates no significant comments on it. The public should be advised that this action will be effective 60 days from the date of this **Federal Register** notice. However, if notice is received within 30 days that someone wishes to submit adverse or critical comments, this action will be withdrawn and two subsequent notices will be published before the effective date. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 28, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone.

Note: The Director of the **Federal Register** approves the incorporation by reference of the Tennessee SIP on July 1, 1982.

Date: January 19, 1989.

Dee M. Thomas,

Administrator.

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

PART 52—[AMENDED]

Subpart RR—Tennessee

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

Authority: 42 U.S.C. 7401–7642.

2. Section 52.2220 is amended by adding paragraph (c)(90) to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

(90) An amendment to Section 7–1 of the Nashville/Davidson County regulations was submitted on June 15, 1988, by Tennessee's Department of Health and Environment.

(i) Incorporation by reference.

(A) Tennessee Department of Health and Environment, Division of Air Pollution Control, Board Order 11–88 approved on June 8, 1988.

(B) Letter of June 15, 1988, from the Tennessee Department of Health and Environment.

(ii) Other material-none.

§ 52.2222 [Amended]

3. Section 52.2222, Paragraph (C), is amended as follows. EPA approves Nashville/Davidson County, Tennessee's VOC Regulation No. 7, Section 7–1(11), which replaces the definition of Volatile Organic Compound (VOC) with a definition for VOC that is consistent with the EPA approved definition. The EPA approved definition defines VOC as any organic compound that participates in atmospheric photochemical reactions. However, it excludes organic compounds which have negligible photochemical reactivity. These compounds are as follows: methane, ethane, methyl chloroform (1,1,1-trichloroethane), CFC–113 (trichlorotrifluoroethane), methylene chloride, CFC 11 (trichlorofluoromethane), CFC–12 (dichlorodifluoromethane), CFC–22 (chlorodifluoromethane), FC–23 (trifluoromethane), CFC–114 (dichlorotetrafluoroethane), CFC–115 (chloropentafluoroethane). It is also our understanding that by adopting the EPA approved definition, Nashville/Davidson County, Tennessee will use EPA approved test methods for VOC.

[FR Doc. 89–1788 Filed 1–26–89; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Parts 261 and 268

[FRL–3508–4]

Identification and Listing of Hazardous Waste; Land Disposal Restrictions

AGENCY: Environmental Protection Agency.

ACTION: Administrative stay.

SUMMARY: The Environmental Protection Agency is today announcing an administrative stay of portions of its interpretation, stated most recently in the preamble to a final rule published August 17, 1988, that hazardous waste codes follow through to all wastes generated during the course of waste management.

DATE: January 13, 1989.

ADDRESSES: The OSW docket is located in the sub-basement at the following address, and is open from 9:00 to 4:00, Monday through Friday, excluding Federal holidays: EPA, RCRA Docket (OS–305), 401 M Street, SW., Washington, DC 20460.

The public must make an appointment (by calling (202) 475–9327) to review docket materials. Refer to "Docket number F–89–LDAS–FFFFF" when making appointments to review any background documentation for this rulemaking. The public may copy material at a cost of $0.15/page.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424–9346 or at (202) 382–3000. For technical information contact Barbara McGuinness, Office of Solid Waste (OS–333), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382–4770.

SUPPLEMENTARY INFORMATION: In the preamble of the final regulations prohibiting hazardous wastes in the first third of the schedule from land disposal, and establishing treatment standards for those wastes, EPA reiterated its interpretation that the waste codes for the initial hazardous wastes follow through and so apply to all further forms of the waste, such as residues from treating the waste. 53 FR 31146–47 (August 17, 1988). EPA believes that this interpretation is legitimate and correct. However, unanticipated short-term difficulties have arisen upon

promulgation of the final first-third regulation. These relate principally to the way that many existing hazardous waste permits are drafted. Although federal law does not require that hazardous waste permits be written in terms of waste codes, it appears that many permits are so drafted. As a result, when a residue carrying a series of waste codes (for example, wastes derived from incinerating a group of hazardous wastes) requires disposal, the disposal facility may not always have included all of these waste codes in its permit. Few facilities, for example, have included all of the P and U waste codes for § 261.33 wastes in their permits. The same difficulty can arise for treatment facilities which receive residues carrying multiple waste codes, such as intermediate treatment facilities receiving partially treated hazardous wastes carrying multiple waste codes. These difficulties arise notwithstanding that the disposal or treatment facility may already have been receiving this waste, and notwithstanding that the wastes may have been treated to meet all, or some (in the case of those wastes going to intermediate treatment) of the applicable section 3004(m) treatment standards. For at least one treatment facility, seeking treatment for its partially treated scrubber water, the situation is now an emergency since it is rapidly running out of storage capacity, and other treatment facilities are refusing to accept the partially treated waste.

EPA has solicited comment on regulatory changes which will alleviate these existing problems. See 53 FR 46477 (November 17, 1988) (soliciting comment on use of Class I permit modifications to allow facilities to receive certain types of treated and untreated wastes). In the interim, however, the Agency has determined to grant an administrative stay of portions of the wastecode carry-through principle, pursuant to 5 U.S.C. 705 and Rule 18 of the Federal Rules of Appellate Procedure, to facilitate treatment of prohibited hazardous wastes and thus to allow the orderly and successful implementation of the land disposal prohibition program. The stay applies to (1) all prohibited wastes that have been treated to meet BDAT, or which otherwise meet the BDAT treatment standards, and which are being sent to a disposal facility; (2) partially treated residues of prohibited hazardous wastes going to an intermediate treatment facility for further treatment, provided that such residues meet all treatment standards for organic constituents and require further treatment only for inorganic contaminants; and (3) residues from treating "soft hammer" restricted hazardous wastes by use of practically available technology which yields the greatest environmental benefit (as certified by the generator in the certification and demonstration required by § 268.8), which residues are being sent either to disposal facilities or to an intermediate treatment facility.

The stay will remain in effect until 30 days after EPA takes final action on the November 17 solicitation of comment. EPA has reviewed the comments on that notice and anticipates issuing a final rule in the near future. In the interim, the wastes described above, although still hazardous and subject to subtitle C standards (including those imposed by the land disposal prohibitions in Part 268, such as all of the treatment standards for the underlying wastes), need not be considered by their generators, intermediate treatment facilities, and land disposal facilities to carry all of the waste codes as the hazardous wastes from which they are derived. They may therefore be shipped to and accepted by intermediate treatment facilities and/or disposal facilities for treatment and/or disposal without permit modifications to allow their receipt. All applicable requirements in § 268.7 (a) and (b), as well as the soft hammer demonstration and certification in § 268.8, remain in effect. Consequently, these wastes must continue to be accompanied by all applicable notifications, demonstrations, and certifications required by Part 268, and must also be accompanied by a manifest.

The administrative stay does not apply to any of the listed dioxin-containing hazardous wastes (Hazardous Waste Codes F020, F021, F022, F023, F026, F027, and F028). With respect to the intermediate treatment facilities, the administrative stay also does not apply unless the treatment facility conducts treatment in non-land based units (i.e., normally tanks or containers) and does not add any new units or treatment processes. These distinctions are designed to limit the scope of this stay to situations that are environmentally innocuous, and for which Class 1 permit modifications may prove appropriate. (See 53 FR at 46475–77 (Nov. 17, 1988); see also § 270.42(o), 51 FR 40653 (Nov. 7, 1986), which provided for minor permit modifications in this situation.) Limiting the scope of the stay to residues already treated to meet standards for organics also is intended to assure that the stay apply only to situations posing minimal likelihood of adverse environmental effect, and to provide short-term relief for a particular emergency situation.

EPA is issuing this administrative stay for a number of reasons. The land disposal restrictions program requires proper treatment of hazardous wastes before land disposal. For the program to function, however, there must be a means to dispose of the treatment residues. If disposal facilities cannot accept these residues because of the multiple waste code classification, the system will not operate effectively. Treatment facilities, for example, may refuse to accept certain wastes because they lack disposal outlets. There are reports that these events already are occurring. This is not an environmentally beneficial result. (Indeed, were this a rulemaking, the Agency believes that the prospect of reduced availability of BDAT-level treatment plus the emergency faced by a particular treatment facility would constitute good cause to make the rule immediately effective.)

Second, the most pressing environmental reason for carrying through waste codes to residues from BDAT treatment (or to partially treated residues) is to make sure that disposal and intermediate treatment facilities are on notice of what the underlying waste was in order to verify that the waste has been treated to meet the applicable treatment standards. See, *e.g.*, § 268.7(c). EPA is not staying any aspect of this requirement. Thus all of the requirements in § 268.7 (b) and (c) (requiring notification and certification from treatment facilities as to applicable treatment standards) remain in effect.

EPA also stresses that it is not taking any action to reclassify those wastes that are derived from treating hazardous wastes as non-hazardous. Thus, the derived from rule classifying such wastes as hazardous, unless and until delisted, remains fully in force. Nor is the Agency withdrawing its interpretation that waste codes follow through to all aspects of a waste's subsequent management. The administrative stay is designed only to stop the adverse short-term effect of this interpretation in order to allow disposal of properly treated restricted hazardous wastes, and proper treatment of partially treated restricted wastes.

Date: January 13, 1989.

Lee M. Thomas,

Administrator.

[FR Doc. 89–1480 Filed 1–26–89; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 409, 410, 416, 421, 424, 441, and 489

[BERC-245-F]

Miscellaneous Medicare and Medicaid Amendments

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: These regulations make the following changes in the Medicare and Medicaid rules:

1. Remove from the Medicare rules the lists of deductible and coinsurance amounts that are revised annually.
2. Establish the conditions for Medicare Part B to pay for an antigen that is administered by someone other than the physician who prepares the antigen.
3. Provide that specified equipment is required to be available in an ambulatory surgical center (ASC) only if the medical staff of the ASC considers it necessary.
4. Clarify the rules on agreements with Medicare intermediaries and carriers and on coordination of their activities with the activities of peer review organization (PROs).
5. Correct an involuntary omission by adding "skilled nursing facility services for individuals under 21" to the list of Medicaid services for which Federal financial participation may be continued for up to 30 days after termination of the provider agreement.
6. Revise the rules on denial of Medicare provider agreements to reflect Bankruptcy Code changes under which a provider agreement may not be denied solely because of bankruptcy.

These amendments are necessary to simplify, clarify, or conform minor aspects of the Medicare rules on:

- Deductibles and coinsurance.
- Payment for antigens.
- Equipment required in ASCs.
- Agreements with intermediaries and carriers.
- Coordination of the activities of intermediaries and carriers and those of PROs.

The amendments also correct an omission in the Medicaid rules on Federal financial participation.

The first amendment is purely a matter of simplification. The other changes are intended to ensure that users of HCFA regulations have the clear understanding necessary for uniform application.

DATE: These regulations are effective February 27, 1989.

FOR FURTHER INFORMATION CONTACT:

James Hannon, (301) 966-4636, for changes that pertain to antigens.

Bernard Gelber, (301) 966-7416, for changes that pertain to agreements with Medicare intermediaries and carriers.

Luisa Iglesias, (202) 245-0383, other issues.

SUPPLEMENTARY INFORMATION:

I. Proposed Rules

On December 18, 1987 (at 52 FR 48127) we published an NPRM proposing the changes that are listed above in the summary.

We received 6 comments:

- One was from a State agency, expressing general support for the changes.
- One was from a Medicare intermediary, objecting to some of the changes proposed for intermediary agreements.
- Four responded to our specific request for suggestions on how to minimize the risks of allowing an antigen to be administered by someone other than the physician who prepares it.

The specific comments on the two proposals are discussed below under sections II B and II D. No comments were received on the other four proposals.

II. Provisions of the Regulations

A. Lists of Deductible and Coinsurance Amounts

1. Discussion

The amounts are revised for each calendar year, and published in the **Federal Register** no later than October 1 of the preceding year. The following practices ensure that interested persons are informed more effectively and more promptly than through annual amendments to the Medicare rules:

- Many newspapers and most publications aimed at retired persons pick up the information and reprint it.
- With the Old-Age, Disability, Dependents' and Survivors' Insurance (OASDI) check mailed December 3 or January 3, the Social Security Administration includes a stuffer prepared by HCFA.
- "Direct deposit" beneficiaries whose checks are mailed directly to their banks or other financial institutions are notified separately.
- Bills for premiums have the information printed on the bills, and beneficiaries whose SMI premiums are paid by third parties (employer, lodge, etc.) are also separately notified.

While this final rule was under development, the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100-360) was enacted. Section 102 of that law amends section 1813 of the Act to make several changes, one of which is the elimination of the hospital inpatient coinsurance requirement. As a result of this change, the whole of § 409.83 will be removed when HCFA rules are conformed to the changes made by Pub. L. 100-360.

2. Changes in the Regulations

We have amended §§ 409.82, 409.83, and 409.85 to remove the tables and specify that the amounts are published in the **Federal Register** for each calendar year no later than October 1, of the preceding year.

B. Conditions for Payment for Antigens Administered by Someone Other Than the Physician Who Prepared Them

1. Discussion

Previous regulations did not provide for antigens as a separate service because, before enactment of section 1861(s)(2)(G) of the Medicare statute, by section 938 of Pub. L. 96-499, antigens were covered only as "incident to" a physician's services.

Section 938 amended the definition of medical and other health services to include an antigen administered by a qualified person other than the physician who prepares the antigen "subject to quantity limitations prescribed in regulations by the Secretary".

2. Proposed Changes

In the December NPRM, we proposed to add a new § 410.64 (later corrected to be designated as § 410.66) to provide for Medicare Part B payment for a supply of antigen sufficient for not more than 12 weeks, prepared by a doctor of medicine or osteopathy, and administered by or under the supervision of the physician who prepared the antigen, or by another physician.

3. Comments

In the preamble to the proposed regulation, we noted that there might be some risks in allowing antigens to be administered by someone other than the physician who prepared them. We specifically requested comments on how this risk might be minimized. We received four comments: two from national professional allergy organizations, one from a county health care agency, and one from the physician advisor of a Medicare carrier.

Both of the professional organizations indicated that they were not aware of any serious safety problems arising from the administration of antigens by someone other than the physician who prepared them. They suggested, however, that the best way to ensure safe administration is to—

- Have them prepared by a qualified allergist who has examined the patient and developed a plan of treatment that includes appropriate dosage; and
- Have them administered according to the plan of treatment by an individual who has proper instructions.

The county health agency considered that administration by nonphysicians ought to be monitored by a physician. The physician advisor recommended that nonphysicians be qualified to administer the antigens.

4. Changes Responsive to Comments

In general, we have revised the proposed rule to—

- Reflect the suggestions of the two professional organizations; and
- More accurately reflect the requirements of section 1861(s)(2)(G) of the Act that the antigens be administered by or under the supervision of a physician.

The final rule requires that antigens—

- Be prepared by a doctor of medicine or osteopathy "who has examined the patient and developed a plan of treatment including dosage levels"; and
- Be administered "in accordance with the preparing physician's plan of treatment, by a doctor of medicine or osteopathy, or by a properly instructed person under the supervision of a doctor of medicine or osteopathy".

We did not accept the suggestion that the doctor who prepares the antigen must be a qualified allergist because—

- The law does not specifically require this; and
- As a technical/medical matter, there appears to be no reason to limit participation in this way.

The law specifies that the antigen be forwarded to another "qualified person" for administration to the patient. However, neither the law nor the legislative history defines the term or specifies the degree of physician supervision required for administration by a "qualified person".

In view of the latitude permitted by the statute and the comments received, we believe that the decision as to whether the doctor of medicine or osteopathy or another qualified person will administer the antigen should be left to the judgment of the patient's allergist or local family physician. We understand that many physicians prefer that antigens be administered by the physician or a trained nurse working under a physician's supervision. However, if the patient's allergist or family physician decides that the patient has been properly instructed for self-administration, this is permitted under the law and the final regulations.

We note that, if the patient administers the antigen, Medicare Part B pays only for the antigen itself. There is no statutory authority to pay for any other medical supplies that the patient might use.

C. Equipment Required in ASC Operating Rooms

1. Discussion

Under previous Medicare rules, as a condition of participation in Medicare, an ASC was required to have available in the operating room emergency equipment, including a thoracotomy set (for cutting through the rib cage into the chest cavity).

We proposed to revise § 416.44(c) to remove the requirement for thoracotomy set because—

- Thoracotomy sets are used to permit open heart massage, which is no longer the preferred method for resuscitation of patients with heart disease;
- It is unlikely that it would be needed in connection with the surgical procedures performed in ASCs; and
- Use of this equipment by medical personnel inexperienced in handling it could be risky.

We would, however, include emergency medical equipment in the list of items that the ASC must make available if the medical staff requests it. This means that a thoracotomy set would be required if the medical staff considered it necessary.

2. Changes in the Regulations

We have amended § 416.44(c) to remove "thoracotomy set" from the list of required emergency equipment, and add "Emergency equipment and supplies specified by the medical staff".

D. Intermediary Agreements, Carrier Contracts, and Coordination with PROs

1. Discussion

Previous Medicare regulations (§§ 421.100, 421.200 and 421.204)—

- Specified certain functions that must be included in the agreement or contract; and
- Provided that either party must give 90-day notice if it intends not to renew a carrier contract at the end of its term.

Experience had shown the need to make clear that the first provision did not preclude requiring the performance of other functions and to ensure greater flexibility than was provided under the second provision.

2. Proposed Changes

We proposed to amend §§ 421.100 and 421.200 to make clear the following:

1. HCFA's agreement with an intermediary or contract with a carrier may require the intermediary or carrier to perform functions in addition to those listed in the rules.

2. The PRO performs reconsiderations of its determinations.

3. The intermediary or carrier takes appropriate action on PRO determinations, as well as those for which the intermediary or carrier itself made a determination because the PRO had not assumed review responsibility.

We proposed to achieve the first objective by revising the introductory text of § 431.100 to read:

"An agreement between HCFA and an intermediary specifies the functions to be performed by the intermediary, which must include, but are not necessarily limited to, the following:"

We also proposed to—

- Revise § 421.204 to remove the requirement for 90-day notice of intent not to renew a carrier contract and require instead that notice be "in accordance with the provisions of the contract";
- Add a parallel provision (§ 421.111) applicable to intermediary agreements.

3. Comments

The only comments on this portion of the NPRM came from a Medicare intermediary. The writer—

- Objected to the revised introductory text as too open-ended; and
- Considered that the new language might be construed to require the contractor to perform whatever functions HCFA requested without regard to the contractor's need for funding or lead-time to implement.

The same writer also recommended that the 90-day minimum notice (of intent not to renew an intermediary or carrier contract) be retained in the regulations because—

- 90 days is an appropriate time frame for the Government and the contractor, a reasonable frame that provides the time needed for HCFA and the outgoing and incoming contractors to work out the problems inherent in a change of contractor; and
- Such an important time frame ought not to be left to the contracting parties (the writer is concerned that HCFA might seek a shorter time frame).

4. Response to Comments

We believe that the fears of this intermediary are unjustified. As the name of the document indicates, the content of an intermediary agreement must be agreed to by the organization. HCFA cannot unilaterally determine and impose functions that the other organization does not agree to perform. HCFA must pay the intermediary for all the functions it does perform, and no agreement can be executed without its concurrence. In other words, the amendment clarifies the rule but does not affect the process that is followed to determine the content of an agreement. The change in the advance notice provisions does not force either party to accept a particular period for advance notice. It simply affords greater flexibility for both parties to deal with situations in which a longer or shorter advance notice period may be necessary or desirable.

The final rules do not change the proposed amendents to §§ 421.100 and 421.200. They do remove § 421.204 and drop proposed § 421.111 and restate their content in a single new paragraph (f) in § 421.5 General provisions.

E. Federal Financial Participation (FFP) in State Expenditures for Skilled Nursing Facility (SNF) Services Furnished to Individuals under 21

1. Discussion

Section 441.11 of the Medicaid rules provides that FFP in State payments for individuals in a facility may continue for up to 30 days after the Medicaid agency terminates or does not renew the facility's provider agreement if—

- The individual was admitted to the facility before the effective date of termination or expiration of the provider agreement; and
- The agency makes reasonable efforts to transfer the individual to another facility or to alternate care.

Through and oversight, SNF care for individuals under 21 was not included in the list of services subject to the 30-day continuation.

We proposed to correct that oversight.

2. Change in the Regulations

We amended § 441.11(c) to add SNF services to individuals under 21 to the list of services subject to the 30-day continuation.

F. Bases for Denial of Provider Agreements

1. Discussion

Previous Medicare rules provided that HCFA could refuse to enter into or renew a provider agreement with a provider or potential provider that had been adjudged bankrupt or insolvent (§ 489.12(a)(3)).

Section 525 if the Revised Bankruptcy Code (11 U.S.C. 525) prohibits a "government unit" from denying a "license, permit, charter, franchise or other similar grant to" a person solely because the person has been a debtor under that title or a bankrupt under the Bankruptcy Act. The purpose of the prohibition is to ensure that the intent of the Code (i.e., to afford the bankrupt individual or entity the opportunity for a "fresh start") is not frustrated.

2. Change in the Regulations

Since previous § 489.12(a)(3) was in conflict with section 525 of the revised bankruptcy code, (it specified that "bankruptcy" or "insolvency" was of itself a basis for denial of a provider agreement), we have, as we proposed, revised that section to specify that an agreement may be denied if the entity is unable to assure compliance with the requirements of the Medicare statute (title XVIII of the Act).

III. Technical Correction

While this final rule was under development, we published final rules on Conditions for Medicare Payment (March 2, 1988, at 53 FR 6629) and later discovered and incorrect cross reference. We are taking advantage of the opportunity afforded by this document to make the needed technical amendment, at the end of the regulations text.

IV. Regulatory Impact Statement

Executive Order 12291

Executive Order 12291 requires us to prepare and publish a regulatory impact analysis for any rule that is likely to have an annual impact of $100 million or more on the economy, cause a major increase in costs or prices, or meet other thresholds specified in section 1(b) of the Order. The Secretary has determined that these rules will have little, if any, impact and that a regulatory analysis is not required.

Regulatory Flexibility Analysis

Consistent with the Regulatory Flexibility Act (RFA) and section 1102(b) of the Social Security Act, we prepare a regulatory flexibility analysis for each rule, unless the Secretary certifies that the particular rule will not have a significant economic impact on a substantial number of small entities, or a significant impact on the operation of a substantial number of small rural hospitals.

For purposes of the RFA, we consider all providers and suppliers of services to be small entities. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that has fewer that 50 beds, and is located anywhere but in a metropolitan statistical area.

We have determined, and the Secretary certifies, that these rules will not have a significant economic impact on a substantial number of small entities or a significant impact on the operation of a substantial number of small rural hospitals.

Paperwork Reduction Act

This document contains no information collection requirements that are subject to review under the Paperwork Reduction Act of 1980.

List of Subjects

42 CFR Part 409

Health facilities, Medicare.

42 CFR Part 410

Health facilities, Health professions, Kidney diseases, Laboratories, Medicare, Rural areas, X-rays.

42 CFR Part 416

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 421

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 424

Assignment of benefits, Claims for payment, Emergency services, Physician certification, Plan of treatment.

42 CFR Part 441

Family planning, Grant programs-health, Infants and children, Medicaid, Penalties, Prescription drugs, Reporting and recordkeeping requirements.

42 CFR Part 489

Health facilities, Medicare.

42 CFR Chapter IV is amended as set forth below:

A. Part 409 is amended as follows:

PART 409—HOSPITAL INSURANCE BENEFITS

1. The authority citation continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh) unless otherwise noted.

2. Section 409.82 is amended by revising paragraphs (b) and (c) to remove the tables and clarify

applicability of deductible amounts, to read as follows:

§ 409.82 Inpatient hospital deductible.

* * * * *

(b) *Specific deductible amounts.* The specific deductible amounts for each calendar year are published in the **Federal Register** no later than October 1 of the preceding year.

(c) *Exception to published amounts.* If the total hospital charge is less than the deductible amount applicable for the calendar year in which the services were furnished, the amount of the charge is the deductible for the year.

3. Section 409.83 is amended by revising paragraphs (b) and (c) to remove the tables and clarify applicability of the coinsurance amounts, to read as follows:

§ 409.83 Inpatient hospital coinsurance.

* * * * *

(b) *Specific coinsurance amounts.* The specific coinsurance amounts for each calendar year are published in the **Federal Register** no later the October 1 of the preceding year.

(c) *Exceptions to published amounts.* (1) If the actual charge to the patient for the 61st through the 90th day of inpatient hospital services is less than the coinsurance amount applicable for the calendar year in which the services were furnished, the actual charge per day is the daily coinsurance amount.

(2) If the actual charge to the patient for the 91st through the 150th day (lifetime reserve days) is less than the coinsurance amount applicable for the calendar year in which the services were furnished, the beneficiary is deemed to have elected not to use the days because he or she would not benefit from using them.

4. Section 409.85 is amended by revising paragraphs (b) and (c) to remove the tables and clarify applicability of the SNF coinsurance amounts, to read as follows:

§ 409.85 Skilled nursing facility (SNF) care coinsurance.

* * * * *

(b) *Specific coinsurance amounts.* The specific SNF coinsurance amounts for each calendar year are published in the **Federal Register** no later than October 1 of the preceding year.

(c) *Exception to published amounts.* If the actual charge to the patient is less than the coinsurance amount applicable for the calendar year in which the services were furnished, the actual charge per day is the daily coinsurance.

B. Part 410 is amended as follows:

PART 410—SUPPLEMENTARY MEDICAL INSURANCE (SMI) BENEFITS

1. The authority citation continues to read as follows:

Authority: Secs. 1102, 1832, 1833, 1835, 1861 (r), (s), and (cc), 1871, and 1881 of the Social Security Act (41 U.S.C. 1302, 1395(k), 1395l, 1395n, 1375x (r), (s) and (cc), 1395hh, and 1395rr).

2. A new § 410.68 is added, and the table of contents is amended to reflect this change.

§ 410.68 Antigens: Scope and conditions.

Medicare Part B pays for—

(a) Antigens that are furnished as services incident to a physician's professional services; or

(b) A supply of antigen sufficient for not more than 12 weeks that is—

(1) Prepared for a patient by a doctor of medicine or osteopathy who has examined the patient and developed a plan of treatment including dosage levels; and

(2) Administered—

(i) In accord with the plan of treatment developed by the doctor of medicine or osteopathy who prepared the antigen; and

(ii) By a doctor of medicine or osteopathy or by a properly instructed person under the supervision of a doctor of medicine or osteopathy.

C. Part 416 is amended as set forth below:

PART 416—AMBULATORY SURGICAL SERVICES

1. The authority citation continues to read as follows:

Authority: Secs.1102, 1832(a)(2), 1833, 1863, and 1864 of the Social Security Act (42 U.S.C. 1302, 1395k(a)(2), 1395l, 1395z, and 1395aa).

2. Section 416.44 is amended by revising paragraph (c) to remove the requirements for thoracotomy set and add "emergency medical equipment" as an item that the ASC must make available if the medical staff requests it, to read as follows:

§ 416.44 Condition for coverage—environment.

* * * * *

(c) *Standard: Emergency equipment.* Emergency equipment available to the operating rooms must include at least the following:

(1) Emergency call system.

(2) Oxygen.

(3) Mechanical ventilatory assistance equipment including airways, manual breathing bag, and ventilator.

(4) Cardiac defibrillator.

(5) Cardiac monitoring equipment.

(6) Tracheostomy set.

(7) Laryngoscopes and endotracheal tubes.

(8) Suction equipment.

(9) Emergency medical equipment and supplies specified by the medical staff.

* * * * *

D. Part 421 is amended as set forth below:

PART 421—INTERMEDIARIES AND CARRIERS

1. The authority citation continues to read as follows:

Authority: Secs. 1102, 1815, 1816, 1833, 1842, 1861(u), 1871, 1874, and 1875 of the Social Security Act (42 U.S.C. 1302, 1395g, 1395h, 1395l, 1395u, 1395x(u), 1395hh, 1395kk, and 1391l), and 42 U.S.C. 1395b-1.

2. Section 421.5 is amended to add a new paragraph (f), to read as follows:

§ 421.5 General provisions.

* * * * *

(f) *Provision for automatic renewal.* Agreements and contracts under this part may contain automatic renewal clauses for continuation from term to term unless either party gives notice, within timeframes specified in the agreement or contract, of its intention not to renew.

3. Section 421.100 is amended by revising the introductory text and paragraphs (a) and (f) to read as follows:

§ 421.100 Intermediary functions.

An agreement between HCFA and an intermediary specifies the functions to be performed by the intermediary, which must include, but are not necessarily limited to, the following:

(a) *Coverage.* (1) The intermediary ensures that it makes payments only for services that are:

(i) Furnished to Medicare beneficiaries;

(ii) Covered under Medicare; and

(iii) In accordance with PRO determinations when they are services for which the PRO has assumed review responsibility under its contract with HCFA.

(2) The intermediary takes appropriate action to reject or adjust the claim if—

(i) The intermediary or the PRO determines that the services furnished or proposed to be furnished were not reasonable, not medically necessary, or not furnished in the most appropriate setting; or

(ii) The intermediary determines that the claim does not properly reflect the kind and amount of services furnished.

* * * * *

(f) *Reconsideration of determinations.* The intermediary must establish and

maintain procedures approved by HCFA for the reconsideration of its determinations to deny payments to an individual or to the provider that furnished services to the individual. The PRO performed reconsideration of cases in which it made a determination subject to reconsideration.

4. Section 421.200 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 421.200 Carrier functions.

A contract between HCFA and a carrier specifies the functions to be performed by the carrier, which must include, but are not necessarily limited in the following:

(a) *Coverage.* (1) The carrier ensures that payment is made only for services that are:

(i) Furnished to Medicare beneficiaries;

(ii) Covered under Medicare; and

(iii) In accordance with PRO determinations when they are services for which the PRO has assumed review responsibility under its contract with HCFA.

(2) The carrier takes appropriate action to reject or adjust the claim if—

(i) The carrier or the PRO determines that the services furnished or proposed to be furnished were not reasonable, not medically necessary, or not furnished in the most appropriate setting;

(ii) The carrier determines that the claim does not properly reflect the kind and amount of services furnished.

* * * * *

§ 421-204 [Removed]

5. Section 421.204 is removed and the table of contents is amended to reflect the removal.

E. Part 441 is amended as set forth below:

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

1. The authority citation continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302) unless otherwise noted.

2. In § 441.11 the term "subchapter" is changed to "chapter" wherever it appears; the introductory text of paragraph (c) is reprinted, and a new paragraph (c)(8) is added, to read as follows:

§ 441.11 Continuation of FFP for institutional services.

* * * * *

(c) *Services for which FFP may be continued.* FFP may be continued for any of the following services, as defined in Subpart A of Part 440 of this chapter:

* * * * *

(8) Skilled nursing facility services for individuals under 21.

F. Part 489 is amended as set forth below:

PART 489—PROVIDER AGREEMENTS UNDER MEDICARE

1. The authority citation continues to read as follows:

Authority: Secs. 1102, 1861, 1864, 1866, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395x, 1395aa, 1395cc, 1395hh).

§ 489.12 [Amended]

2. Section 489.12 is amended by revising paragraph (a)(3) and removing and reserving paragraph (b), to read as follows:

(a) *Bases for denial.* * * *

(3) The provider or prospective provider is unable to give satisfactory assurance of compliance with the requirements of title XVIII of the Act.

(b) [Reserved]

G. Technical Amendments:

§ 409.61 [Amended]

1. In paragraph (b), the parenthetical statement at the end is removed.

§ 424.80 [Amended]

2. In paragraph (b)(6), "§ 411.73(b)(3)" is changed to "§ 424.73(b)(3)".

(Catalog of Federal Domestic Assistance Program No. 13,714, Medical Assistance Program; No. 13,773, Medicare-Hospital Insurance, and No. 13,774, Medicare-Supplementary Medical Insurance)

Dated: October 31, 1988.

William L. Roper,

Administrator, Health Care Financing Administration.

Approved: November 17, 1988.

Otis R. Bowen,

Secretary.

[FR Doc. 89-1606 Filed 1-26-89; 8:45 am]

BILLING CODE 4102-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 87-264; RM-5729; RM-6097]

Radio Broadcasting Services; Live Oak and St. Augustine, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Shull Broadcasting Co., Inc. substitutes Channel 250C2 for Channel 249A at St. Augustine, Florida, and modifies its license for Station WUVU to specify operation on the higher powered channel. Channel 250C2 can be allotted to St. Augustine in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.7 kilometers north to avoid a short-spacing to the proposed allotment of Channel 250C to Clearwater, Florida, and to the construction permit of Station WSCF, Channel 251C2 at Titusville, Florida. The coordinates for this allotment are North Latitude 30-00-00 and West Longitude 81-21-35. This action also denies the request of WNER Radio, Inc. to substitute Channel 251C for Channel 251C1 at Live Oak, Florida, and the modification of its license for Station WQHL accordingly. With this action, this proceeding is terminated.

EFFECTIVE DATE: March 10, 1989.

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. 87-264, adopted December 13, 1988, and released January 24, 1989. 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 contractor, 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.

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments for St. Augustine, Florida, is amended by deleting Channel 249A and adding Channel 250C2.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1955 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-386; RM-6413]

Radio Broadcasting Services; Orlando, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Radio Orlando, substitutes Channel 25C2 for Channel 255A at Orlando, Florida, and modifies its permit for Station WURG to specify operation on the higher powered channel. Channel 255C2 can be allotted to Orlando in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.7 kilometers (2.9 miles) west to avoid a short-spacing to Station WKGR, Channel 254C, Fort Pierce, Florida. The coordinates for this allotment are North Latitude 28-33-00 and West Longitude 81-25-30. With this action, this proceeding is terminated.

EFFECTIVE DATE: March 10, 1989.

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. 88-386, adopted December 20, 1988, and released January 24, 1989. 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 contractor, 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.

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments for Orlando, Florida, is amended by deleting Channel 255A and adding Channel 255C2.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1956 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-370; RM-6311]

Radio Broadcasting Services; Idaho Falls, ID

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 288C1 to Idaho Falls, Idaho, as that community's fourth local FM service, at the request of AJP Investment Co., Inc. The channel can be allotted in compliance with the Commission's minimum distance separation requirements at city reference coordinates 43-29-30 and 112-02-00. With this action, this proceeding is terminated.

DATES: Effective March 10, 1989; the window period for filing applications will open on March 13, 1989, and close on April 12, 1989.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 88-370, adopted November 30, 1988, and released January 24, 1989. 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.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended under Idaho by adding Channel 288C1 to Idaho Falls.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1954 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-282; RM-6300]

Radio Broadcasting Services; Greenwood, MS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes FM Channel 230A for 270A at Greenwood, Mississippi, in response to a petition filed by Itawamba County Broadcasting Company, Inc., licensee of Station WFTA, Fulton, Mississippi. The substitution at Greenwood was requested to allow Station WFTA to relocate its facility in order to eliminate power outages and off air time. The applicant for Channel 270A at Greenwood, Clay Ewing, has no objection to the substitution of channels. In accordance with Commission policy, we will retain applicant's cut off protection for Channel 270A when the applicant amends to specify Channel 230A, since the channels are equivalent. The coordinates for Channel 230A are 33-31-55 and 90-11-38. With this action, this proceeding is terminated.

EFFECTIVE DATE: March 9, 1989.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 88-282, adopted November 30, 1988, and released January 23, 1989. 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.

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Mississippi is amended by deleting Channel 270A and adding Channel 230A at Greenwood.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1957 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 90

[PR Docket No. 86-404; FCC 88-392]

Specialized Mobile Radio Systems; Eligible Users Expansion

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a petition for clarification and a petition for reconsideration, the Commission adopted a Memorandum Opinion and Order (MO&O) reconsidering its February 1988 decision to consolidate Subparts M and S of Part 90. The MO&O affirms the Commission's decision to expand the classes of eligible users that Specialized Mobile Radio System (SMRS) can serve to include federal government agencies and individuals. The MO&O also affirms the Commission's decision to transfer 200 trunked channels from Subpart M to Subpart S. Finally, the MO&O clarifies the portions of its decision related to private carrier operation above 800 MHz and loading standards in rural areas.

EFFECTIVE DATE: February 21, 1989.

FOR FURTHER INFORMATION CONTACT: Irene Bleiweiss, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, PR Docket No. 87-404, adopted on December 2, 1988 and released January 4, 1989. The full text of the Order is available for inspection and copying during normal business hours in the FCC Private Radio Bureau, Land Mobile and Microwave Division, Rules Branch (Room 5126), 2025 M Street, NW., Washington, DC. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

Summary of Memorandum Opinion and Order

1. In February 1988, the Commission adopted a *Report and Order* establishing one set of rules for most land mobile operations above 800 MHz. 3 FCC Rcd 1838 (1988). The *Memorandum Opinion and Order* affirms the action taken in the *Report and Order* and clarifies a few of the *Report and Order's* provisions.

2. The *Memorandum Opinion and Order* affirms the Commission's decision to expand SMR end user eligibility to include federal agencies and individuals. Eligibility of system users is not statutorily prescribed but is within the Commission's discretion. Expansion of eligibility would not affect the classification of SMR licensees as private carriers because SMR licensees do not resell for a profit the exchange services or facilities of a common carrier. Expanding end user eligibility would not overburden the spectrum because it does not require any SMR operator to serve either group, nor is it likely that all new eligible users will use the new option available to them.

3. The *Memorandum Opinion and Order* affirms the Commission's decision to transfer 200 trunked channels previously governed under Subpart M to the SMR pool governed by Subpart S. It is in the public interest to designate these channels for the category where they are used most and where the demand is greatest. SMR systems constitute 99 percent of current licensees on the channels. Non-SMR licensees can expand using available channels in their own pools, or they can ask for channels from the SMR pool through intercategory sharing.

4. The *Memorandum Opinion and Order* clarifies that non-profit communications cooperatives and community repeaters may continue to operate in the three non-SMR pools above 800 MHz. Entrepreneurial licensees, however, may operate above 800 MHz only in the SMR pool. The *Memorandum Opinion and Order* also clarifies the new relaxed loading standards that apply to trunked systems in rural areas. Finally, the *Memorandum Opinion and Order* amends the Commission's rules to correct errata.

Ordering Clauses

5. Accordingly, it is ordered, pursuant to 47 CFR 1.429(i), that the Joint Petition for Reconsideration filed on May 16, 1988 by the American Automobile Association, American Petroleum Institute, American Trucking Associations, Inc., Forest Industries Telecommunications, International Taxicab Association, Special Industrial Radio Service Association, Inc., and Utilities Telecommunications Council is denied.

6. It is further ordered that the Petition for Clarification filed by the National Association of Business and Educational Radio, Inc. on May 13, 1988, is granted.

7. It is further ordered that pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r), Part 90 of the Commission's Rules is amended as set forth in the Appendix below, effective February 21, 1989.

8. It is further ordered that this proceeding is terminated.

Donna R. Searcy,

Secretary.

1. Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

2. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303.

3. Section 90.7 is amended by revising the definition of Specialized Mobile Radio System to read as follows:

§ 90.7 Definitions.

* * * * *

Specialized Mobile Radio System. A radio system in which licensees provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this Part, Federal Government entities, and individuals.

* * * * *

§ 90.17, 90.19, 90.21, 90.23, 90.25, 90.53, 90.63, 90.65, 90.67, 90.69, 90.71, 90.73, 90.75, 90.79, 90.81, 90.89, and 90.91 [Amended]

4. Sections 90.17(c)(15), 90.19(e)(22), 90.21(c)(10), 90.23(c)(10), 90.25(c)(16), 90.53(b)(21), 90.63(d)(17), 90.65(c)(30), 90.67(c)(20), 90.69(c)(5), 90.71(c)(3), 90.73(d)(21), 90.75(c)(33), 90.79(d)(15), 90.81(d)(7), 90.89(c)(12), and 90.91(c)(13) are amended by removing the words "Subparts M and S contain" and substituting the words "Subpart S contains."

§ 90.93 [Amended]

5. Sections 90.93(c)(5) and 90.95(d)(10) are amended by removing the reference to Subpart M and substituting a reference to Subpart S.

§ 90.119 [Amended]

6. Section 90.119(g) is amended by removing the reference to § 90.390 in the parenthetical clause.

7. Section 90.129 is amended by revising paragraph (i) to read as follows:

§ 90.129 Supplemental information to be routinely submitted with applications.

* * * * *

(i) Showings required in connection with the use of frequencies as specified in Subpart S.

* * * * *

§ 90.155 [Amended]

8. Section 90.155 is revised by removing in paragraph (a) the reference to § 90.366(d) and (g) and by removing in paragraph (b) the reference to § 90.366.

9. Section 90.175 is amended by revising paragraphs (f)(7), (8), (10), and (11) to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(f) * * *

(7) [Reserved]

(8) Applications for frequencies listed in the SMR tables contained in §§ 90.617 and 90.619.

* * * * *

(10) Applications for mobile stations operating in the 470–512 MHz band or above 800 MHz if the frequency pair is assigned to a single system on an exclusive basis in the proposed area of operation.

(11) Applications for add-on base stations in multiple licensed systems operating in the 470–512 MHz band or above 800 MHz if the frequency pair is assigned to a single system on an exclusive basis.

* * * * *

10. Section 90.179 is amended by revising the introductory text and adding 90.179(g) to read as follows:

§ 90.179 Shared use of radio stations.

Licensees of radio stations authorized under this rule part may share the use of their facilities. A station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization. Shared use of a radio station may be either on a non-profit cost shared basis or on a for-profit private carrier basis. Shared use of an authorized station is subject to the following conditions and limitations:

* * * * *

(g) Above 800 MHz, shared use on a for-profit private carrier basis is permitted only by SMR and Private Carrier Paging licensees. See Subparts P and S of this Part.

§ 90.201 [Amended]

11. Section 90.201 is revised by deleting the reference to Subpart M in the last sentence.

§ 90.437 [Amended]

12. Section 90.437(d) is amended by removing the reference to § 90.390.

13. Section 90.492 is revised to read as follows:

§ 90.492 One way paging operations in the 806–824/851–869 MHz and 896–901/935–940 MHz bands.

Paging operations are permitted in these bands only in accordance with §§ 90.645(e) and (f).

14. Section 90.611(d) is revised to read as follows:

§ 90.611 Processing of applications.

* * * * *

(d) Applications for channels in the SMR category that can not be granted due to a lack of available channels in a particular area will be placed on a waiting list for that area. Waiting lists will consist of two groups. The first group will be comprised of applications from existing licensees who, in the area corresponding to the particular waiting list, operate trunked systems with 70 or more mobile units per channel. The second group will be comprised of applications to establish new systems or to obtain additional channels for conventional systems. Applications will be placed in the appropriate group according to filing dates, with the earliest date receiving the highest ranking. All applications in the first group will receive priority over any application in the second group regardless of filing date. When channels become available, the highest ranking application(s) will be granted based on the site specified and the Commission's mileage separation standards. Trunked systems that have had authorized channels canceled due to failure to meet the loading requirements in § 90.631 will not be permitted on the waiting list for a period of 6 months from the date of the issuance of the superseding license.

[FR Doc. 89–1951 Filed 1–26–89; 8:45am]

BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 14

Changes in the Import/Export License Fee and in the Collection of Import/Export Inspection Fees.

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service amends its regulations governing import/export license and inspection fees in 50 CFR Parts 13 and 14 to reduce the fee that it charges for an import/export license from $250 per year to $125 per year. The Service will also eliminate the five (5) prepaid wildlife shipments allowed under the current regulations. The Service will charge a $25 inspection fee for each shipment presented for clearance by a licensee. Further, the Service will change its policy for renewing import/export licenses and collecting import/export inspection fees. On October 1, 1988, the Service ceased billing importers and exporters for renewal of licenses or for inspection fees. The Service will now require import/export licensees to apply for renewal to the issuing office at least 30 days before the current license expires. The Service will also require import/export licensees to pay inspection fees before or at the time of inspection.

EFFECTIVE DATE: January 27, 1989.

FOR FURTHER INFORMATION CONTACT: Thomas L. Striegler, Acting Deputy Chief, Division of Law Enforcement, U.S. Fish and Wildlife Service, P.O. Box 28006, Washington, DC 20038–8006, telephone (202) 343–9242.

SUPPLEMENTARY INFORMATION: In 1986, the Service began charging import/export licensees a fee for inspecting wildlife shipments. The basic license fee was increased from $25 ($50 for two years) to $250 per year, and each licensee was allowed five (5) prepaid shipments. The Service charged a $25 inspection fee for each shipment in excess of five (5) that a licensee imported or exported during the license year. To collect these fees, the Service developed a computerized billing system and sent monthly bills to each licensee. The Service also used the system to bill licensees for the annual renewal of their licenses.

Recently the Service and the Department of the Interior (Department) identified several areas in which the inspection fee system was inconsistent with the Federal Government's financial management policies. First, the Service did not integrate the inspection fee billing system into the overall financial management system of the Service. Therefore, the Service could not maintain accounts receivable for the money owed to the Government. Second, the Service did not collect fees at the time it performed inspections. This resulted in what amounted to interest-free loans to licensees. Finally, the Service has not charged interest for late or unpaid bills.

To correct these problems, it was recommended that the Service collect inspection fees at the time of the inspection. The reviewers further recommended that the Service integrate

the license and inspection fee program into its overall financial management system. Accordingly, the Service is proposing regulatory changes to implement these recommendations.

Beginning October 1, 1988, the Service stopped billing licensees for license renewal fees. To renew a license, the licensee will have to submit an application at least 30 days before the expiration date of the current license. The Service will process applications for license renewals according to the procedures in § 13.24 of Title 50, Code of Federal Regulations. This does not amount to a change in regulations. The existing procedure of billing licensees for license renewal has been, in fact, a deviation from the requirements of the regulations in Part 13.

Also effective October 1, 1988, the Service ceased billing licensees for inspection fees. The Service will require licensees to pay for each shipment at or prior to the inspection. The Service issued its last bills for import/export fees on November 4, 1988.

Because it has been virtually impossible for the Service to manage the system of allowing five (5) prepaid shipments to each licensee, the Service will modify its user fee system. These changes will not increase any licensee's costs for user fees, and will reduce the user fee costs for those licensees who import or export fewer than five (5) shipments annually. The Service will reduce the annual import/export license fee from $250 to $125. The Service will eliminate the five (5) prepaid shipments and will charge a $25 inspection fee for each shipment. Therefore, those licensees who import or export five (5) or more shipments annually will pay the same fees as they have been paying. However, licensees who import or export fewer than five (5) shipments will pay less in user fees.

Public Comments

The proposed rule was published on September 8, 1988 (53 FR 34795). Three letters were received which offered comments on the proposal. A customs brokerage and a fur company suggested that the Service was moving backwards in returning to a manual fee collection system. The recommended the Service retain the computerized, monthly billing system for the convenience of businesses involved. The fur company indicated it would be inconvenient for their field representatives to use a credit card to charge inspection fees at the time of each wildlife clearance. The Service understands that the return to a manual fee collection system may cause occasional inconvenience and limited additional cost to some businesses engaged in the international wildlife trade. However, the Service has no choice for the moment but to comply with the requirements of the Department of the Interior and Federal financial management policies regarding the collection of fees. The Service is currently exploring other methods of user fee collection which would be more convenient to the public while remaining in compliance with the Government financial management system.

The third letter of comment was received from the Humane Society of the United States. The Humane Society objected to the reduction of the import/export license fee and recommended that it be increased to $500 per year to more fully compensate the Government for the expenses of processing and issuing licenses. As stated above, the Service is not actually reducing the fee charged for wildlife inspections, but simply omitting the five prepaid inspections for which an additional $125 was built into the license fee. The Service does not believe that a license fee of $500 is appropriate at this time, particularly for small businesses which engage in limited commerce in wildlife each year.

Note.—The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies that this proposed rule will not have a significant effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This final rule does not contain any new or additional information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* These changes in the regulations in Part 14 are regulatory and enforcement actions which are covered by a categorical exclusion from the National Environmental Policy Act procedures under 516 DM 6, Appendix 1, Sections 1.4(A)(1) and 1.5.

Author

The primary author of this final rule is Thomas L. Striegler, Special Agent in Charge, Division of Law Enforcement, U.S. Fish and Wildlife Service.

List of Subjects

50 CFR Part 13

Administrative practice and procedure, Exports, Fish, Imports, Penalties, Reporting requirements, Wildlife.

59 CFR Part 14

Exports, Fish, Imports, Labeling, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

For the reasons set out in the preamble, Title 50, Chapter I, Subchapter B of the Code of Federal Regulations is amended as set forth below.

PART 13—GENERAL PERMIT PROCEDURES

1. The authority citation for Part 13 is revised to read as follows:

Authority: 16 U.S.C. 668a; 16 U.S.C. 704, 712; 16 U.S.C. 742j–1; 16 U.S.C. 1382; 16 U.S.C. 1538(d); 16 U.S.C. 1539, 1540(f); 16 U.S.C. 3374; 18 U.S.C. 42; 19 U.S.C. 1202; E.O. 11911, 41 FR 15683; 31 U.S.C. 9701.

§ 13.11 [Amended]

2. Section 13.11(d)(4) is amended by revising the first entry under "Fee" to read "$125 & inspection fees."

PART 14—IMPORTATION, EXPORTATION, AND TRANSPORTATION OF WILDLIFE

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

Authority: Lacey Act, (18 U.S.C. 42–44); Lacey Act Amendment, 1981, as amended, (16 U.S.C. 3371 *et seq.*); Endangered Species Act of 1973, as amended, (16 U.S.C. 1532, 1538, 1541, 1542); Marine Mammal Protection Act (16 U.S.C. 1382); Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*); Pub. L. 97–1581, 96 Stat. 1051 (31 U.S.C. 9701).

§ 14.93 [Amended]

2. Section 14.93(f)(1) is amended by removing "$250" and inserting in lieu thereof "$125".

3. Section 14.93(f)(2) is amended by removing the second sentence of the paragraph.

Date: December 20, 1988.

Becky Norton Dunlop,

Assistant Secretary for Fish & Wildlife and Parks.

[FR Doc. 89–1698 Filed 1–26–89; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 282

[Docket No. 81134–8234]

South Pacific Tuna Fisheries

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Interim final rule with request for comments.

SUMMARY: The National Oceanic and Atmospheric Administration issues an interim final rule, with the concurrence of the Secretary of State, to implement the South Pacific Tuna Act of 1988

("Act"), which in turn implements the obligations of the United States under the "Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America" ("Treaty").

All U.S. tuna purse seine vessels are now required to obtain licenses under the Treaty [through the United States Government] in order to fish in a 10 million square mile area in the South Pacific Ocean. Albacore vessels using trolling gear fishing outside of the 200 nautical mile fisheries zones of the Pacific Island Parties are excluded from the Treaty's licensing requirements. U.S. tuna purse seine vessels which have had difficulties at times fishing in this area because of unresolved jurisdictional fishing claims over tuna will now be able to obtain licenses under an established fee schedule and have access to much of the area.

As a foreign affairs function implementing an international fisheries agreement which is now in effect, these regulations are not required to be published as proposed regulations. However, these regulations are being published as interim final regulations to provide a 30 day public comment period. Although the Treaty and the Act have dictated the specific content of virtually all of the provisions of the regulations, some changes may be possible in response to comments received. Under the provisions of the Treaty and the Act most of this rule is already in force with respect to U.S. citizens and nationals.

DATE: This rule is effective February 27, 1989, except for §§ 282.3 and 282.5 which contain information collection requirements and which will not be effective until approved by the Office of Management and Budget. The effective date for §§ 282.3 and 282.5 will be published in a separate notice. Comments on this rule must be submitted no later than February 27, 1989.

ADDRESS: Comments should be addressed to the Director, Southwest Region, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, 300 South Ferry Street, Room 2005, Terminal Island, California 90731. An environmental assessment is available upon request.

Send comments on the proposed collection of information to the Regional Director and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: E.C. Fullerton (Director, Southwest Region, NMFS), (213) 514–6196.

SUPPLEMENTARY INFORMATION: On April 2, 1987, after more than two years of negotiations, the United States signed a treaty with 12 Pacific island nations (Australia, Cook Islands, Federated State of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Papua New Guinea, Solomon Islands, Tuvbalu, and Western Samoa). The nations of Niue, Palau, and Vanuatu became signatories at a later date. Ten million square miles of South Pacific Ocean are encompassed by the Treaty area. On June 7, 1988, the President signed the implementing legislation into law as the South Pacific Tuna Act of 1988 (Pub. L. 100–330). The Treaty went into effect on June 15, 1988.

In the South Pacific Ocean, fisheries disputes between the United States and several Pacific island nations had resulted from conflicting juridical positions with respect to tuna. U.S. tuna purse seine vessels had been seized by island nations, causing retaliatory U.S. trade embargoes as mandated by the Magnuson Fishery Conservation and Management Act. The Treaty is a result of the efforts of the United States and Pacific island nations to resolve these problems.

The regulations set forth specifics of the implementation of the Treaty and the Act by the United States. The National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, is responsible for most of the day-to-day operational aspects of the Treaty obligations of the United States. The Department of State, in addition to having a consultative or concurrence role on many aspects of the regulations, is responsible for the formal country-to-country contacts under the Treaty. Certain obligations of the United States Government to the Pacific Island Parties relating to alleged infringements of the Treaty are not set forth in the regulations, nor are certain procedures established by the Act in regard to rulemaking authority and interagency operations. These matters are not obligations placed upon the public and were therefore not included in the regulations.

Licenses are required by all U.S. flag tuna fishing vessels to fish in the Treaty Area, except for albacore tuna fishing vessels using the trolling method outside of the 200 nautical mile fisheries zones of the Pacific Island Parties. Annual Licenses may be obtained from the Treaty Administrator, the Forum Fisheries Agency ("FFA"), by U.S. tuna purse seine vessels by completing an application form and providing it and some additional insurance, agent, and financial information along with the license fees required to the Southwest Regional Director, NMFS. The regulations set forth the criteria which the Commerce Department, in consultation with the Secretary of State, will use to determine whether a license application can be forwarded to the FFA for processing. License fees for the first year, which started on June 15, 1988, are a minimum of $50,000 a vessel for the first 40 licenses (fees for at least 35 licenses must be paid in the first licensing period). Licenses for 10 additional vessels are available for the first licensing period for $60,000 each. Fees for subsequent years are indexed to the price of tuna fish, with a minimum fee of $50,000. The licensing period is the same for all vessels, without any staggered periods or prorated fees.

Other requirements established by the Treaty and the Act which are addressed in the regulations cover (1) definitions; (2) compliance with certain laws of the Pacific island nations; (3) reporting requirements for vessels entering, within, and leaving the licensing area, and on fish caught and landed; (4) data confidentiality measures; (5) vessel and gear marking; (6) closed area fishing gear stowage measures; (7) radio monitoring frequencies; (8) prohibited acts; (9) civil penalty procedures; (10) vessel operators' rights to provide information bearing on an investigation of an alleged violation; (11) a "findings" procedure allowing the Secretary to order a vessel to leave various portions of the Treaty area under certain circumstances; (12) procedures on taking and treating observers and providing access aboard ship; and (13) inspection obligations.

Although these regulations reflect in very large part provisions specifically required by the Treaty and the Act, the Secretary does solicit comments on these interim final regulations and will consider them to the extent discretion exists to modify the regulations consistent with the Treaty and the Act. In this regard, comments are particularly encouraged on the following topics: (1) The specific license application procedures set forth in § 282.2; (2) the provisions defining and prescribing the duties of authorized inspectors set forth in §§ 282.2, 282.9, and 282.15; the cross-referencing in § 282.11 to the Agency's existing civil penalty procedures regulations; and the cross-referencing in § 282.4 to "applicable national laws."

Classification

The Assistant Administrator for Fisheries, NOAA, (Assistant Administrator) has determined that this rule will not have a significant impact on the human environment. NMFS has prepared an environmental assessment (EA) on the rule. The finding of the EA was that no significant impact on the human environment will occur as a result of this rule and that no environmental impact statement was required. The EA is available upon request (see ADDRESS).

This action is exempt from the provisions of Executive Order 12291 under section (2)(a)(1) because these regulations are issued with respect to a foreign affairs function of the United States.

The General Counsel of the Department of Commerce has certified to the Small Business Administration that the rule is exempt from the Regulatory Flexibility Act and the preparation of a regulatory flexibility analysis because it involves a foreign affairs function of the United States and notice and comment rulemaking is not required.

This action is not subject to section 553 of the Administrative Procedure Act because the implementation of this rule is a foreign affairs function. However, the Assistant Administrator will solicit public comments on the rule and will consider them to the extent discretion exists to modify the regulations consistent with the Treaty and the Act.

This rule includes a collection-of-information requirement subject to the Paperwork Reduction Act; effectiveness of the requirement is deferred until after approval by the Office of Management and Budget. A request to collect this information has been submitted to the Office of Management and Budget for approval. Public reporting burden for this collection of information is estimated to average 0.73 hours 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 Regional Director and to OMB (see **ADDRESSES**).

The rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

This rule does not directly affect the coastal zone of any state with an approved coastal zone management program.

List of Subjects in 50 CFR Part 282

Fisheries, Reporting and recordkeeping requirements, South Pacific Treaty.

Dated: January 23, 1989.

James W. Brennan,

Assistant Administrator For Fisheries, Fisheries Service.

For the reasons set forth in the preamble, 50 CFR Part 282 is added to Subchapter H as follows:

PART 282—SOUTH PACIFIC TUNA FISHERIES

Subpart A—General

Sec.

Authority: 16 U.S.C. 973–973r.

§ 282.1 Purpose and scope.

(a) The South Pacific Tuna Act of 1988 (16 U.S.C. 973–973r) authorizes the Secretary, with the concurrence of the Secretary of State, and after consultation with the Secretary of the Department in which the Coast Guard is operating, to promulgate regulations to implement the Act. The Act implements the obligations of the United States under the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America. The Treaty Area is an area of ocean in the South Pacific Ocean.

(b) This Part implements the Act and Treaty and applies to persons and vessels subject to the jurisdiction of the United States.

§ 282.2 Definitions

In addition to the definitions contained in the Act, and unless the context requires otherwise, the terms used in this Part 282 have the following meanings (some definitions in the Act have been repeated here to aid in understanding the regulations):

Act means the South Pacific Tuna Act of 1988, 16 U.S.C. 973–973r.

Authorized Inspector means any individual authorized by a Pacific Island Party or the Secretary to conduct inspections, to remove samples of fish, and to gather any other information relating to fisheries in the Licensing Area.

Authorized Officer means any officer who is authorized by the Secretary, or the Secretary of the department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an enforcement agreement with the Secretary under section 10(a) of the Act.

Authorized Party Officer means any officer authorized by a Pacific Island Party to enforce the provisions of the Treaty.

Applicable National Law means any provision of law of a Pacific Island Party which is described in paragraph 1(a) of Annex I of the Treaty.

Closed Area means any of the closed areas identified in Schedule 2 of Annex I of the Treaty.

Fishing means searching for, catching, taking, or harvesting fish; attempting to search for, catch, take, or harvest fish; engaging in any other activity which can reasonably be expected to result in the locating, catching, taking, or harvesting of fish; placing, searching for, or recovering fish aggregating devices or associated electronic equipment such as radio beacons; any operations at sea directly in support of, or in preparation for, any activity described in this paragraph; or aircraft use, relating to the activities described in this paragraph except for flights in emergencies involving the health or safety of crew members or the safety of a vessel.

Fishing Arrangement means an arrangement between a Pacific Island Party and the owner of a United States fishing vessel which complies with section 6(b) of the Act.

Fishing Vessel or *Vessel* means any boat, ship, or other craft which is used for, equipped to be used for, or of a type normally used for commercial fishing, and which is documented under the laws of the United States.

Licensing Area means all waters in the Treaty Area except for:

(a) Those waters subject to the jurisdiction of the United States in accordance with international law;

(b) Those waters within Closed Areas; and

(c) Those waters within Limited Areas closed to Fishing.

Licensing Period means the period of validity of licenses issued in accordance with the Treaty.

Limited Area(s) means those area(s) so identified in Scheduled 3 of Annex I of the Treaty.

Operator means any person who is in charge of, directs or controls a vessel, including the owner, charterer and master.

Pacific Island Party means a Pacific Island nation which is a party to the Treaty.

Party means a nation which is a party to the Treaty.

Person means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized, or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

Secretary means the Secretary of Commerce, or the designee of the Secretary of Commerce.

State means each of the several States, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, American Samoa, the Virgin Islands, Guam and any other Commonwealth, territory, or possession of the United States.

Treaty means the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, signed in Port Moresby, Papua New Guinea, April 2, 1987, and its Annexes, Schedules, and implementing agreements.

Treaty Administrator means the individual or organization designated by the Pacific Island Parties to act on their behalf under the Treaty and notified to the United States.

Treaty Area means the area described in paragraph l(k) of Article I of the Treaty.

§ 282.3 Vessel licenses.

(a) Each vessel fishing in the Licensing Area must have a valid license issued by the Treaty Administrator, unless excepted by § 282.10.

(b) The license shall be carried on board the vessel when in the licensing area or closed areas and shall be produced at the request of authorized officers, authorized party officers, or authorized inspectors. Prior to receipt of the license, the correct citation of the license number shall satisfy this requirement.

(c) Applications for licenses to fish in the Licensing Area must be requested by filing a Treaty license application form and a Regional Fishing Vessel Register Application Form with the Southwest Regional Director, National Marine Fisheries Service, 300 S. Ferry Street, Terminal Island, CA 90731, providing the information requested on the form. Copies of the two forms can be obtained from the Regional Director (address above). If any of the following information is not provided on these application forms, it must be provided separately:

(1) Identification of the year for which the license is requested;

(2) Name of agent for service of legal process located in Port Moresby, Papua, New Guinea;

(3) Insurance company statement establishing the vessel will be fully insured against all risks and liabilities normally provided in maritime liability insurance;

(4) A statement which explains how the owner or charterer has arranged for the provisions of reasonable financial assurance if the owner or charterer is the subject of proceedings under the bankruptcy laws of the United States;

(d) Treaty license fees must be included by certified check or money order payable to the "Forum Fishing Agency" for forwarding to the Treaty Administrator.

(1) The Treaty license fee for the license period beginning in 1988 is at least $50,000 a vessel for the first 40 licenses processed in order of receipt of a complete application with fee included. Another 10 licenses are available for the licensing period beginning in 1988 at a license fee of $60,000 a vessel. Additional licenses may be available in accordance with the Treaty. For the license period beginning in 1988 only, license fees totalling at least $1,750,000 must be received by the Secretary before any licenses will be forwarded to the Treaty Administrator for processing.

(2) After the first licensing period, license fees and availability will be announced by notice in the **Federal Register** when they are set in accordance with the Treaty.

(e) The Secretary, in consultation with the Secretary of State, may determine that a license application should not be forwarded to the Treaty Administrator for one of the following reasons:

(1) The application is not in accord with the requirements of the Secretary or the Treaty;

(2) The owner or charterer is the subject of proceedings under the bankruptcy laws of the United States, unless reasonable financial assurances have been provided to the Secretary;

(3) The owner or charterer has not established to the satisfaction of the Secretary that the fishing vessel is fully insured against all risks and liabilities normally provided in maritime liability insurance; or

(4) The owner or charterer has not paid any penalty which has become final, assessed by the Secretary in accordance with this Act.

(f) The Secretary may establish a system of allocating licenses in the event more applications are received than there are licenses available.

§ 282.4 Compliance with applicable national laws.

(a) The operator of the vessel shall comply with each of the applicable national laws, and the operator of the vessel shall be responsible for the compliance by the vessel and its crew with each of the applicable national laws, and the vessel shall be operated in accordance with those laws.

§ 282.5 Reporting requirements.

(a) License holders shall comply with the reporting requirements of part 4 of Annex I to the Treaty.

(b) Information provided by license holders under Schedule 5 of Annex I of the Treaty shall be provided on the designated Forum Fisheries Agency form(s) to the Southwest Regional Director of the National Marine Fisheries Service or the Director's designee within 2 days of reaching port.

(c) Information provided by license holders under Schedule 6 of Annex I of the Treaty shall be provided on the designated Forum Fisheries Agency form(s) to the Southwest Regional Director or the Director's designee within 2 days of completing unloading.

(d) Any information required to be recorded, or to be notified, communicated or reported pursuant to a requirement of these regulations, the Act, or the Treaty shall be true, complete and correct. Any change in circumstances which has the effect of rendering any of the information false, incomplete or misleading shall be communicated immediately to the Southwest Regional Director.

§ 282.6 Vessel and gear identification.

(a) While in the licensing area, a limited area closed to fishing, or a closed area, the international radio call sign of the vessel shall be painted in white on a black background, or in black on a white background, and be clear, distinct, and uncovered, in the following manner:

(1) Amid ships on both sides immediately below the gunwale, and on a horizontal plane on the superstructure, in letters and figures 8 inches apart, with each letter and figure being at least 40 inches high and 20 inches wide and with each line at least 5 inches wide;

(2) If a helicopter is being carried, on the body of the helicopter in a place clearly visible from sea level, in letters and figures 2 inches apart, with each letter and figure being at least 10 inches high, 4 inches wide and with each line being at least 1 inch wide; and

(3) On any other equipment being carried by an intended to be separated from the vessel during normal fishing operations, in letters and figures clearly legible to the naked eye.

§ 282.7 Closed area stowage requirements.

At all times while a vessel is in a Closed Area, the fishing gear of the vessel shall be stowed in a manner as not to be readily available for fishing. In particular, the boom shall be lowered as far as possible so that the vessel cannot be used for fishing, but so that the skiff is accessible for use in emergency situations; the helicopter, if any shall be tied down; and launches shall be secured.

§ 282.8 Radio monitoring.

The international distress frequency, 2.182 MHz, and 156.8 MHz (Channel 16, VHF) shall be monitored continuously from the vessel for the purpose of facilitating communication with the surveillance and enforcement authorities of the Parties.

§ 282.9 Prohibitions.

(a) Except as provided for in §282.10, it is unlawful for any person subject to the jurisdiction of the United States to do the following:

(1) To violate the Act or any provision of any regulation or order issued pursuant to Act;

(2) To use a vessel for fishing in violation of an applicable national law;

(3) To violate the terms and conditions of any fishing arrangement to which that person is a party;

(4) To use a vessel for fishing in a Limited Area in violation of the requirements set forth in Schedule 3 of Annex I of the Treaty on "Limited Areas";

(5) To use a vessel for fishing in any Closed Area;

(6) To falsify any information required to be reported, notified, communicated or recorded pursuant to a requirement of the Act or these regulations, or to fail to submit any required information, or to fail to report to the Secretary immediately any change in circumstances which has the effect of rendering the information false, incomplete or misleading;

(7) To intentionally destroy evidence which could be used to determine if a violation of these regulations, the Act or the Treaty has occurred;

(8) To refuse to permit any Authorized Officer of Authorized Party Officer to board a fishing vessel for purposes of conducting a search or inspection in connection with the enforcement of the Act or the Treaty;

(9) To refuse to comply with the instructions of an Authorized Officer or Authorized Party Officer relating to fishing activities under the Treaty;

(10) To refuse to permit an Authorized Inspector full access to any place where fish taken in the Licensing Area is unloaded;

(11) To refuse to allow an Authorized Inspector to remove samples of fish from a vessel which fished in the Licensing Area;

(12) To forcibly assault, resist, oppose, impede, intimidate, or interfere with:

(i) Any Authorized Officer, Authorized Party Officer or Authorized Inspector in the conduct of a search or inspection in connection with the enforcement of these regulations, the Act or the Treaty; or

(ii) An observer in the conduct of observer duties under the Treaty;

(13) To resist a lawful arrest for any act prohibited by these regulations or the Act;

(14) To interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section; or

(15) To ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of these regulations, the Act, or the Treaty, with the knowledge that the fish were so taken or retained.

(b) Except as provided for in § 282.10, it is unlawful for any person subject to the jurisdiction of the United States when in the Licensing Area:

(1) To use a vessel to fish unless validly licensed as required by the Treaty Administrator;

(2) To use a vessel for directed fishing for southern bluefin tuna or for fishing for any kinds of fish other than tunas, except that fish may be caught as a incidental by-catch;

(3) To use a vessel for fishing by any method, except the purse-seine method;

(4) To use any vessel to engage in fishing after the revocation of its license, or during the period of suspension of an applicable liclense;

(5) To operate a vessel in such a way as to disrupt or in any other way adversely affect the activities of traditional and locally based fishermen and fishing vessels;

(6) To use a vessel to fish in a manner inconsistent with an order issued by the Secretary under § 282.12 (section 11 of the Act); or

(7) Except for circumstances involving force majeure and other emergencies involving the health or safety of crew members or the safety of the vessel, to use aircraft in association with fishing activities of a vessel unless it is identified on the license application for the vessel, or any amendment thereto.

§ 282.10 Exceptions.

(a) The prohibitions of § 282.9 and the licensing requirements of § 282.3 shall not apply to fishing for albacore tuna by vessels using the trolling method outside of the 200 nautical mile fisheries zones of the Pacific Island Parties.

(b) The prohibitions of § 282.9 (a)(4), (a)(5), and (b)(3) shall not apply to fishing under the terms and conditions of a fishing arrangement.

§ 282.11 Civil penalties.

The procedures of 15 CFR Part 904 apply to the assessment of civil penalties, except as modified by the requirements of section 8 of the Act.

§ 282.12 Investigation notification.

Upon commencement of an investigation under section 10(b)(1) of the Act, the operator of any vessel concerned shall have 30 days after receipt of the Secretary's notification of the investigation and the operator's rights under section 10(b)(1) to submit comments, information, or evidence bearing on the investigation, and to request in writing that the Secretary provide the operator an opportunity to present the comments, information, or evidence orally to the Secretary or the Secretary's representative.

§ 282.13 Findings leading to removal from fishing area.

(a) Following an investigation conducted under section 10(b) of the Act, the Secretary, with the concurrence of the Secretary of State, and upon the request of the Pacific Island Party concerned, may order a fishing vessel which has not submitted to the jurisdiction of that Pacific Island Party to leave immediately the Licensing Area, all Limited Areas, and all Closed Areas upon making a finding that:

(1) The fishing vessel—

(i) While fishing in the Licensing Area did not have a license under the Treaty to fish in the Licensing Area, and that under paragraph 2 of Article 3 of the Treaty, the fishing is not authorized to be conducted in the Licensing Area without a license;

(ii) Was involved in any incident in which an Authorized Officer, authorized Party Officer, or observer was allegedly assaulted with resultant bodily harm, physically threatened, forcibly resisted, refused boarding or subjected to physical intimidation or physical interference in the performance of duties as authorized by the Act or the Treaty;

(iii) Has not made full payment within sixty days of any amount due as a result of a final judgement or other final determination deriving from a violation in waters within the Treaty Area of a Pacific Island Party; or

(iv) Was not represented by an agent for service of process in accordance with the Treaty; or

(2) There is probable cause to believe that the fishing vessel—

(i) Was used in violation of section 5 (a)(4), (a)(5), (b)(2), or (b)(3) of the Act;

(ii) Used an aircraft in violation of section 5(b)(7); or

(iii) Was involved in an incident in which section 5(a)(7) was violated.

(b) Upon being advised by the Secretary of State that proper notification to Parties has been made under paragraph 7 of Article 5 of the Treaty that a Pacific Island Party is investigating an alleged infringement of the Treaty by a vessel in waters under the jurisdiction of that Pacific Island Party, the Secretary shall order the vessel to leave those waters until the Secretary of State notifies the Secretary that the order is no longer necessary.

(c) The Secretary shall rescind any order issued on the basis of a finding under paragraphs (a)(1) (iii) or (iv) of this section (subsections 11(a)(1) (C) or (D) of the Act) as soon as the Secretary determines that the facts underlying the finding do not apply.

(d) An order issued in accordance with this section is not subject to judicial review.

§ 282.14 Observers.

(a) The operator and each member of the crew of a vessel shall allow and assist any person identified as an observer under the Treaty by the Pacific Island Parties:

(1) To board the vessel for scientific, compliance, monitoring and other functions at the point and time notified by the Pacific Island Parties to the Secretary;

(2) Without interfering unduly with the lawful operation of the vessel, to have full access to and use of facilities and equipment on board the vessel which the observer may determine are necessary to carry out observer duties; have full access to the bridge, fish on board, and areas which may be used to hold, process, weigh and store fish; remove samples; have full access to the vessel's records, including its log and documentation for the purpose of inspection and copying; and gather any other information relating to fisheries in the Licensing Area;

(3) To disembark at the point and time notified by the Pacific Island Parties to the Secretary; and

(4) To carry out observer duties safely.

(b) The operator shall provide the observer, while on board the vessel, at no expense to the Pacific Island Parties, with food, accommodation and medical facilities of reasonable standard as may be acceptable to the Pacific Island Party whose representative is serving as the observer.

§ 282.15 Other inspections.

The operator of any vessel from which any fish taken in the Licensing Area is unloaded shall allow, or arrange for, and assist any authorized inspector, authorized party officer, or authorized officer to have full access to any place where this fish is unloaded, to remove samples, and to gather any other information relating to fisheries in the Licensing Area.

[FR Doc. 89–1840 Filed 1–26–89; 8:45 am]

BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 54, No. 17
Friday, January 27, 1989

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 275

[Amdt. No. 309]

Food Stamp Program: Quality Control Technical Amendments

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend provisions concerning the arbitration of quality control reviews. Current reviews are subject to time limits on State agencies' request for arbitration. However, there are no time limits on most past reviews. This proposed rule would impose time limits on these reviews and thus lead to more stable payment error rates.

DATE: Comments on this proposed rulemaking must be received on or before March 28, 1989 to be assured of consideration.

ADDRESS: Comments should be submitted to Duane S. Maddox, Chief, Quality Control Branch, Progam Accountability Division, Food Stamp Program, Food and Nutrition Service, USDA, Alexandria, Virginia 22302. All written comments will be open to public inspection at the offices of the Food and Nutrition Service (FNS) during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday), at Room 905, 3101 Park Center Drive, Alexandria, Virginia.

FOR FURTHER INFORMATION CONTACT: Mr. Maddox, at the above address, or by telephone at (703) 756–3474.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291

This has been reviewed under Executive Order 12291 and Secretary's Memorandum No. 1512–1. The Department has classified this rule as non-major. The rule's effect on the economy will be less than $100 million. The rule will have no effect on costs or prices. Competition, employment, investment, productivity and innovation will remain unaffected. There will be no effect on the competition of United States-based enterprises with foreign-based enterprises.

Regulatory Flexibility Act

This action has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354, Stat. 1164, September 19, 1980). Anna Kondratas, Administrator of the Food and Nutrition Service, has certified that this rule does not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This action does not contain reporting or recordkeeping requirements subject to approval by the Office of Management and Budget (OMB).

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related Notice(s) to 7 CFR Part 3015, Subpart V (48 FR 29115, June 24, 1983) this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Background

On January 21, 1988, the Department published a final rule which set timeframes for each State agency to request regional or national arbitration (please see 53 FR 1603). A State agency must now request regional arbitration within 28 calendar days of the date it receives the regional office's review findings. A State agency must request national arbitration within 28 calendar days of the date it receives the regional arbitrator's decision. The Department extends these periods if the 28th day falls on a Saturday, Sunday, or Federal or State holiday.

The final rule's deadline for requesting regional arbitration applies only to regional findings which a State agency received on or after February 22, 1988. The deadline for requesting national arbitration applies only to regional arbitrator's decisions which a State agency received on or after February 22, 1988.

Therefore, under the current system, error rates for the earlier periods would continue to be subject to change if a State agency chooses to seek arbitration on one or more cases in the future. With a time limit for requesting arbitration of cases from the earlier periods, the Department and the State agencies would possess stable error rates for those past periods and all issues as to whether errors existed in individual cases could be brought to closure. For this reason, the Department is proposing a time limit for arbitration requests concerning reviews not covered by the final rule.

According to this proposal, if a State agency had received the regional finding before February 22, 1988, the State agency would have to request regional arbitration by the 150th day after publication of the final rule. If a State agency had received the regional arbitrator's decision before February 22, 1988, the State agency would have to request national arbitration by the 150th day after the publication of the final rule.

The 150 day period is based on the standard 30 days for a final rule to become effective and a 120 day period for State agencies to prepare and submit their requests. However, the Department encourages State agencies to begin their examinations of regional findings and arbitration decisions as soon as possible. (§§ 275.3(c)(4)(i)(D) and 275.3(c)(4)(ii)(C)).

Implementation

The Department proposes that implementation of the arbitration timeframes would take place 150 days after publication of a final rule, as discussed above.

List of Subjects in 7 CFR Part 275

Administrative practice and procedure, Food stamps, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Part 275 of Chapter II of Title 7, *Code of Federal Regulations* is proposed to be amended as follows.

1. The authority citation appearing after the table of contents for Part 275 continues to read as follows:

Authority: 7 U.S.C. 2011–2029.

PART 275—PERFORMANCE REPORTING SYSTEM

2. In § 275.3, paragraphs (c)(4)(i)(D), and (c)(4)(ii)(C) are added to read as follows:

§ 275.3 Federal monitoring.

* * * * *

(c) *Validation of State Agency Error Rates.* * * *

(4) *Arbitration.* * * *

(i) *Regional Level.* * * *

(D) The State agency shall have 150 calendar days after publication of this proposed rule's final version to request regional office arbitration of regional office case findings which the State agency received before February 22, 1988.

(ii) *National Level.* * * *

(C) The State agency shall have 150 calendar days after publication of this proposed rule's final version to request national office arbitration of regional arbitration decisions which the State agency received before February 22, 1988.

* * * * *

Date: January 19, 1989.

Anna Kondratas,

Administrator.

[FR Doc. 89-1978 Filed 1-26-89; 8:45 am]

BILLING CODE 3410-30-M

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 5

[Docket No. 89-3]

Rules, Policies, and Procedures for Corporate Activities: Operating Subsidiaries, Changes in Equity Capital, Subordinated Debt, Conversions

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency ("OCC") proposes to amend 12 CFR 5.34 Operating Subsidiaries, to describe the OCC's existing policies on imposing conditions on transactions between a bank and its subsidiaries. The proposed rule also amends 12 CFR 5.24, 5.46 and 5.47 by including timeframes for consummation after the OCC grants preliminary approval. In addition, a new § 5.36 will be added, to require national banks to notify the OCC of plans to make certain equity investments which are authorized by statute. These changes will assist the OCC in fulfilling its responsibility for maintaining the safety and soundness of national banks and the national banking system, and improve OCC efficiency.

DATES: Comments must be received on or before March 28, 1989.

ADDRESSES: Comments should be directed to: Docket No. 89-3, Communications Division, 5th Floor, 490 L'Enfant Plaza East, SW., Washington, DC 20219, Attention: Anne Bryant. Comments will be available for public inspection and photocopying at the same location.

FOR FURTHER INFORMATION CONTACT: Sheila G. Ogilvie, National Bank Examiner/Senior Licensing Policy and Systems Analyst, Bank Organization and Structure, (202) 447-1184, or Christopher Manthey, Senior Attorney, Legal Advisory Services Division, (202) 447-1880, Office of the Comptroller of the Currency, 490 L'Enfant Plaza East, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Background

This proposed rule is part of the OCC's Corporate Activities Review and Evaluation (CARE) program. That program is described in 45 FR 68586, dated October 15, 1980, and involves a comprehensive review of the OCC's rules, policies, procedures and forms governing filings for corporate expansion and structural changes for national banks. The goals of the CARE program are to minimize costs and burdens on applicants, the OCC, and the public; to provide a better understanding of OCC policies; to modify or eliminate rules, policies, procedures and forms which are unnecessary or lead to inefficiencies; and to remove barriers to competition.

Discussion

Operating Subsidiaries

The operating subsidiary regulation (12 CFR 5.34) currently permits a national bank to acquire or establish an operating subsidiary or perform new activities in an operating subsidiary after 30 days from the date it notifies the OCC of its intentions. However, the 30-day period may be extended by the OCC if the bank's letter raises issues that require additional information or analysis. If the time period has been extended, the bank may not perform the new activities in an operating subsidiary until the OCC provides written approval authorizing such activities. The OCC uses the 30-day (or longer) time period to determine if the proposed activities are legally permissible for a national bank and to review the proposal for consistency with safe and sound banking practices. Where warranted, the OCC addresses legal or supervisory concerns by imposing conditions on the performance of the new activities in its written approval.

In the past, the OCC relied on its general authority to ensure the safe and sound operations of national banks, referred to in 12 CFR 5.34(d)(3), as the basis for imposing conditions on operating subsidiary activities. The proposed rule states plainly that the OCC may issue a written approval, subject to conditions, where legal or supervisory concerns are present, which are enforceable as conditions imposed in writing within the meaning of 12 U.S.C. 1818(b).

Time Frames

This proposed rule also amends 12 CFR 5.24, 5.46, and 5.47 by limiting the time between OCC approval and consummation of conversions, changes in equity capital, and issuances of subordinated debt. The proposed rule establishes time limits of six months for conversion transactions and 12 months for the issuance of subordinated debt and changes in equity capital. Approvals will automatically expire for transactions that are not consummated within the time limits, unless the OCC grants an extension.

The new time limits are consistent with OCC policy and practice for other corporate filings. Also, experience indicates that the time limits exceed the time taken by virtually all applicants to consummate those transactions. Therefore, the automatic expiration period will not affect most applicants, but will allow the OCC to purge abandoned filings. Extension of the time limit can be granted in unusual circumstances. OCC efficiency therefore will improve without any significant additional burden on applicants.

Equity Investments

This proposed rule also adds a new § 5.36, which requires notification to the OCC of certain proposed equity investments which are authorized by statute. The proposed rule operates in the same manner as 12 CFR 5.34, including proposed amendments, with regard to operating subsidiaries.

Investments would be approved, disapproved, or approved subject to supervisory conditions. The OCC believes that its duty to ensure the safety and soundness of national banks under 12 U.S.C. 1818(b), as well as its general supervisory authority over national banks under the National Bank Act, 12 U.S.C. 1 *et seq.*, are adequate

legal authority to impose these supervisory requirements.

While national banks are presently permitted by statute to make a number of equity investments, the OCC finds it unnecessary at this time to require notice for every type of investment. Most investments are routine and have little danger of affecting a bank's safety and soundness. Some, such as Edge Act corporations, are adequately supervised by other regulatory agencies. Accordingly, the proposed rule is limited to equity investments in nonbank depository institutions and agricultural credit corporations, as well as any equity investments which may be authorized by statute in the future.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601) it is certified that this notice of proposed rulemaking, if adopted as a final rule, will not have a significant economic impact on a substantial number of small entities.

Executive Order 12291

The OCC has determined that this proposed rule is not classified as a "major rule" and therefore does not require a regulatory impact analysis.

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget under control number 1557–0014 for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection 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 Comptroller of the Currency, with copies to the Comptroller of the Currency, Legislative and Regulatory Analysis, 5th Floor, 490 L'Enfant Plaza East, SW., Washington, DC 20219.

The collections of information in this regulation are in 12 CFR 5.24, 5.34, 5.46, and 5.47, and proposed new § 5.36. This information is required by the OCC to render decisions on the permissibility of proposed activities for operating subsidiaries, the safety and soundness of proposed equity investments, and to purge abandoned filings for changes in equity capital, subordinated debt, and conversions. This information will be used to assist the OCC in fulfilling its responsibility for maintaining the safety and soundness of national banks and the national banking system, and to improve OCC efficiency. The likely respondents are for-profit institutions.

No burden change is expected for §§ 5.24, 5.34, 5.46, or 5.47. Additional burden is imposed by proposed § 5.36, Other Equity Investments. OCC is requesting only the minimum amount of information necessary to review the proposed investment.

For § 5.36, OCC estimates that 10 responses will be received annually and that each response will require approximately four hours to prepare and submit. The burden on respondents should not vary considerably because of differences in bank activity, size, or complexity. Further, the information requested is the same information that prudent bank management and directors will have reviewed in conjunction with their analysis of the investment. The total burden increase attributable to § 5.36 is expected to be approximately 40 burden hours.

If this proposed rule is adopted as a final rule, the total number of responses attributable to OMB Control Number 1557–0014 will be 2,950 and the total burden hours will be 47,613. This reflects 10 additional responses and 40 additional burden hours for 12 CFR 5.36.

List of Subjects in 12 CFR Part 5

National Banks, Banking, Corporate Activities, Operating Subsidiaries, Conversions, Equity Capital, Equity Investments, Subordinated Debt.

Authority and Issuance

For the reasons set out in the preamble, Part 5 of Chapter I of Title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 5—[AMENDED]

1. The authority citation for Part 5—Rules, Policies, and Procedures for Corporate Activities continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*; 12 U.S.C. 93a.

2. In § 5.24, paragraph (c)(4) is revised to read as follows:

§ 5.24 Conversions.

* * * * *

(c) * * *

(4) *Commencement of business as national bank.* When all statutory requirements and other conditions have been met, the Office will issue a charter certificate. The charter will provide that the institution is authorized to commence business as a national bank as of a specified date. Conversions must occur within six months of preliminary approval. An extension of this period is generally not granted; however, in the event of extraordinary circumstances, a request for extension may be submitted to the appropriate district office of Multinational Banking in Washington, DC.

* * * * *

3. In 5.34, paragraph (d)(1)(ii) is revised, text from former (d)(1)(iii) is revised and redesignated as (d)(1)(iv), and new paragraphs (d)(1)(iii) and (d)(4) are added to read as follows:

§ 5.34 Operating subsidiaries.

* * * * *

(d) * * *

(1) * * *

(ii) The bank may acquire or establish an operating subsidiary or perform new activities in an existing operating subsidiary, after 30 days from the date the Office receives the bank's letter, unless otherwise notified by the Office, or in less than 30 days if so notified by the Office. The Office may extend the 30-day period if it determines that the bank's letter raises issues which require additional information or additional time for analysis. If the 30-day period is extended, the bank may acquire or establish an operating subsidiary, or may perform new activities in an existing operating subsidiary, only upon written approval by the Office.

(iii) The Office reviews the bank's proposal to determine if the proposed activities exceed those legally permissible for a national bank's operating subsidiary, and to ensure that the proposal is consistent with prudent banking principles and Office policy. The Office reserves the right to grant written approval subject to conditions when there are legal or supervisory concerns.

(iv) A bank may acquire or establish an operating subsidiary without notifying the Office provided: (A) The activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary; (B) The establishment or acquisition of the prior subsidiary was considered permissible by the Office; (C) The activities in which the new subsidiary will engage continue to be considered legally permissible by the Office; and (D) The activities will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank.

* * * * *

(4) *Conditions imposed in writing.* In permitting a bank to acquire or establish an operating subsidiary or perform new activities in an existing operating subsidiary, the Office may impose one or more legal or supervisory conditions

in connection with its approval. Any such condition shall be enforceable as a condition imposed in writing by the Office in connection with the granting of a request by a bank within the meaning of 12 U.S.C. 1818(b).

4. A new § 5.36 is added to read as follows:

§ 5.36 Other equity investments.

(a) *Authority.* 12 U.S.C. 24(7), 93a.

(b) *Rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 do not apply to national bank notifications of other equity investments.

(c) *Definition.* "Nonbank depository institution" means any institution which qualifies as an "insured institution" within the meaning of section 408(m) of the National Housing Act, 12 U.S.C. 1730a(m).

(d) *General.* National banks are authorized to make equity investments in various types of business organizations by 12 U.S.C. 24 (Seventh) and other statutes.

(e) *Policy and procedure.*—(1) *Notification.* A national bank intending to make an equity investment, pursuant to statutory authorization, in an agricultural credit corporation or nonbank depository institution, or other equity investments which may be authorized by statute after [effective date of final rule], shall submit a letter to the appropriate Deputy Comptroller. The letter must detail the proposed activities of the business in which the bank plans to invest. It must also discuss the financial and managerial resources and future prospects of that business, and must describe the financial capability of the bank to make the proposed investment. The Office may request any additional information it considers necessary to make a decision regarding the permissibility of the proposed investment.

(2) *Review period.* The bank may make the proposed investment after 30 days from the date the Office receives the bank's letter unless notified to the contrary, or in less than 30 days if notified by the Office. The Office will utilize the 30-day period to review the bank's proposed investment. The 30-day period may be extended upon notice to the bank if the bank's notification raises issues that require additional information or time for analysis by the Office. If the 30-day period is extended, the bank may make the proposed investment only upon written notification by the Office.

(3) *Conditions imposed in writing.* The Office may impose legal or supervisory conditions in connection with its review. Any such condition shall be enforceable as a condition imposed in writing by the OCC in connection with the granting of a request by bank within the meaning of 12 U.S.C. 1818(b).

5. In § 5.46, a new paragraph (g)(4) is added to read as follows:

§ 5.46 Changes in equity capital.

* * * * *

(g) * * *

(4) Changes in equity capital must occur within 12 months of preliminary approval. An extension of this period is generally not granted; however, in the event of extraordinary circumstances, a request for extension may be submitted to the appropriate district office or Multinational Banking in Washington, DC.

* * * * *

6. In § 5.47, a new paragraph (g)(3) is added to read as follows:

§ 5.47 Subordinated debt as capital.

* * * * *

(g) * * *

(3) Subordinated debt must be issued within 12 months of preliminary approval. An extension of this period is generally not granted; however, in the event of extraordinary circumstances, a request for extension may be submitted to the appropriate district office or Multinational Banking in Washington, DC.

* * * * *

Date: January 23, 1989.

Robert L. Clarke,

Comptroller of the Currency.

[FR Doc. 89-1964 Filed 1-26-89; 8:45 am]

BILLING CODE 4810-33-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Parts 541, 542, 543, 544, and 545

[No. 89-8]

Extension of Time Period for Board Action on Certain Outstanding Proposals

Date: January 11, 1989.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rules; extension of time period for board action.

SUMMARY: Pursuant to its regulatory review procedures, *see* Board Res. No. 88-269, 53 FR 13156 (April 21, 1988), the Federal Home Loan Bank Board ("Board") hereby gives notice that it is extending the time period for possible Board action on the following outstanding proposed regulations as outlined in **SUPPLEMENTARY INFORMATION.** The Board is taking this action in order to allow adequate time for consideration of a number of complex issues raised by these proposals. It is not soliciting additional comments on these proposals.

DATE: January 11, 1989. Time for Board action on the following proposals is extended until July 10, 1989.

FOR FURTHER INFORMATION CONTACT: Deborah Dakin, Regulatory Counsel, (202) 377-6445, Regulations and Legislation Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552 or the appropriate contact persons listed in the referenced Federal Register documents.

SUPPLEMENTARY INFORMATION: The following are outstanding proposals on which the comment period has been closed for more than six months but which the Board still has under active consideration for possible further action. The Board is hereby extending the time for possible final Board action on each of these proposals to July 10, 1989.

1. Corporate Governance Part I, adopted by the Board on September 13, 1985; 50 FR 38832 (September 25, 1985);

2. Corporate Governance Part II, adopted by the Board on November 22, 1985; 50 FR 52482 (December 24, 1985).

The Board notes that this action does not constitute a representation that the Board will take final action with respect to these proposals, only that it may do so within this extension of time. Moreover, this action carries no implication whatsoever with respect to the Board's view of the merits of the proposals listed here.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89-1924 Filed 1-26-89; 8:45 am]

BILLING CODE 6720-01-M

12 CFR Part 574

[No. 89-32]

Acquisition of Control of Insured Institutions

Date: January 17, 1989.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule; solicitation of comments.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or the "Corporation"), is proposing revisions to its regulations concerning the processing

of applications filed with the Board for approval of the creation of savings and loan holding companies by insured institutions.

DATE: Comments must be received on or before March 28, 1989.

ADDRESS: Send comments to Director, Information Services Section, Office of Secretariat, Federal Home Loan Bank Board, 801 17th Street NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Howard C. Bluver, Attorney, (202) 377–7504; Kevin A. Corcoran, Deputy Director for Corporate Transactions, (202) 377–6962; V. Gerard Comizio, Director, (202) 377–6411, Corporate and Securities Division; or Julie L. Williams, Deputy General Counsel for Securities and Corporate Structure, (202) 377–6549, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: The Board is proposing revisions to its regulations concerning the processing of applications for the acquisition of control of insured institutions. The proposed revisions would provide for automatic approval of applications by insured institutions for approval of routine reorganizations involving the creation of savings and loan holding companies subject to specified requirements. Such applications would be automatically approved 30 calendar days after the filing of the application unless the Board or its delegate has either requested additional information from the applicant in writing, notified the applicant that the application is materially deficient and will not be processed, or denied the application. The revisions also provide for a corresponding streamlined approval for permission to organize an interim federal institution for insurance of accounts, for Federal Home Loan Bank Membership and merger of any interim institution that is used as a component of the reorganization transaction.

In order to qualify for automatic approval under the proposed revisions, an application must involve only the creation of a holding company by an insured institution and no other transaction incident thereto (other than use of an interim institution and merger with such interim), and the applicant company must not also be seeking any waivers, forebearances, or resolution of legal or supervisory issues. In addition, the capitalization of the holding company must not exceed the lesser of the amount that the insured institution in question could pay in dividends, or the amount that the institution could invest in its service corporation. In addition, the board of directors and executive officers of the new holding company must be comprised of persons who are, at the time of the reorganization, executive officers and directors of the institution, although they need not hold the same positions and all executive officers and directors of the institution need not also be executive officers and directors of the holding company.

In a policy statement dated August 12, 1988 (*See* 53 FR 31761 (August 19, 1988)), the Board provided guidance on the extent to which savings and loan holding companies should be required to contribute financial assistance to their subsidiary insured institutions and, in particular, whether a proposed acquiror of an insured institution would be required to execute a regulatory capital maintenance agreement as a condition to receiving approval of a proposed acquisition. For the reasons set forth in the policy statement, a proposed acquiror has the option of executing either (i) a regulatory capital maintenance agreement providing for a specified dollar cap on the amount of the acquiror's maintenance obligation, or (ii) a so-called "prenuptial" agreement, which provides for the transfer to the FSLIC of the right to vote the securities of the institution, remove the board of directors of the institution, cause additional securities of the institution to be issued to the FSLIC, or dispose of any or all of the securities of the institution owned by the acquiror, in the event the institution's capital level declines below a specified level. The Board's Office of Regulatory Activities ("ORA"), in Thrift Bulletin No. 5 dated October 19, 1988, issued guidelines on, among other things, the amount of the dollar cap that will generally be required in a regulatory capital maintenance agreement and, with respect to prenuptial agreements, the minimum capital level that must be maintained by the institution in order to avoid triggering the transfer to FSLIC of the various powers described above. Agreements that exceed the scope of these guidelines are considered to present significant policy issues that warrant consideration by the Board itself. Accordingly, in order to qualify for automatic approval under the proposed revisions, the Board is proposing that the proposed reorganization transaction not raise a significant policy issue as described in the Board's August 12, 1988 policy statement or the ORA guidelines of October 19, 1988. Thus, the proposed holding company in the reorganization would generally be required to submit, prior to consummation of the reorganization, either a "dollar capped" regulatory capital maintenance agreement or a "prenuptial" agreement that, in either case, is consistent with the Board's policy statement and the ORA guidelines.

In addition to the foregoing requirements, the Board also is proposing to require the holding company to file certain certifications and opinions with the insured institution's Supervisory Agent within a specified time before or after the consummation of the acquisition. These certifications and opinions are customarily required to be filed by holding companies completing the prior approval process under current Board regulations. The proposed requirements would be as follows:

(1) On the business day prior to the date of consummation of the acquisition, the chief financial officers of the holding company and the insured institution shall certify to the Supervisory Agent in writing that no material adverse events or material adverse changes have occurred with respect to the financial condition or operations of the holding company or the insured institution since the date of the financial statements submitted with the application;

(2) No later than thirty days from the date of consummation of the acquisition, the holding company shall file with the Supervisory Agent a certification by legal counsel stating the effective date of the acquisition, the exact number of shares of stock of the insured institution acquired by the holding company, and that the acquisition has been consummated in accordance with the provisions of all applicable laws and regulations and the application;

(3) No later than thirty days from the date of consummation of the acquisition, the holding company shall file with the Supervisory Agent an opinion from its independent auditors certifying that the transaction was consummated in accordance with generally accepted accounting principles; and

(4) No later than thirty days from the date of consummation of the acquisition, the holding company shall file with the Supervisory Agent a certification stating that the holding company will not cause the insured institution to deviate materially from the business plan submitted in connection with the application, unless prior written approval from the Supervisory Agent is obtained.

Finally, the proposal would require that the proposed acquisition be consummated within 120 days after the application is automatically approved pursuant to 12 CFR 574.7(a)(1).

The Board believes that the proposed revisions would further expedite and streamline the application process under Part 574 by reducing substantially the processing period for routine holding company reorganization applications.

Commenters are invited to address all aspects of the proposal, including the conditions that would apply to automatically approved applications. Specifically, the Board seeks comment on whether such conditions should be included at all or whether the rules should be expanded, modified, or deleted in part. To the extent that deletion of a requirement is recommended, commenters are requested to address whether any substitute is necessary. Finally, commenters are asked to identify any requirements that should be promulgated in the form of supervisory guidance.

Finally, the Board notes that the proposal provides that in cases where the insured institution has converted from mutual to stock form, the institution's newly formed holding company will become subject to certain post-conversion requirements that are applicable to the institution itself pursuant to various sections of the Board's mutual to stock conversion regulations. This treatment of the holding company simply insures that creation of a holding company will not be used as a route to evade such post-conversion safeguards. These safeguards, which pertain to post-conversion acquisitions of an institution's stock, purchases and sale of conversion stock by the institution's officers and directors, registration of the stock under the Securities Exchange Act of 1934, the existence of market-makers in the institution's stock, and restrictions on certain stock repurchases, have customarily been imposed as conditions of approval of holding company applications where converted institutions reorganize into holding company structure. Treatment of this area in the regulation avoids the need for such a cumbersome conditioning process.

List of Subjects in 12 CFR Part 574

Administrative practice and procedure, Holding companies, Savings and loan associations, Securities.

Accordingly, the Board hereby proposes to amend Part 574, Subchapter D, Charter V, Title 12, *Code of Federal Regulations*, as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 574—ACQUISITION OF CONTROL OF INSURED INSTITUTIONS

1. The authority citation for Part 574 continues to read as follows:

Authority: Sec. 407, 48 Stat. 1260, as amended (12 U.S.C. 1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a).

(2) Amend § 574.7 by adding new paragraphs (a)(1) and (a)(2) to read as follows:

§ 574.7 Determination by the corporation.

(a) *Acquisition by a company.* * * *

(1) Any application filed pursuant to § 574.6(a)(1) by an insured institution for approval of the creation of a savings and loan holding company by such insured institution, and related applications for permission to organize an interim federal institution, for insurance of accounts, for Federal Home Loan Bank membership, and for merger with such interim institution, shall be deemed to be approved 30 calendar days after such applications are properly filed in accordance with the procedures set forth herein, unless, prior to such date—

(i) The Corporation has requested additional information of the applicant in writing;

(ii) Notified the applicant that the application is materially deficient and will not be processed; or

(iii) Denied the application prior to that time; provided that—(A) The holding company will be capitalized in an amount not exceeding the lesser of—

(*1*) One-half of the greater of the insured institution's net income (as defined in 12 CFR 563c.12) for the current fiscal year or the average of the insured institution's net income (as defined in 12 CFR 563c.12) for the current fiscal year and not more than two of the immediately preceding fiscal years, or

(*2*) The amount the insured institution would be permitted to invest in its service corporation subsidiary pursuant to § 545.74(d) (if the institution is a federal association as defined in § 541.8) or pursuant to applicable state law (if the institution is a state-chartered insured institution as defined in § 561.1);

(B) The creation of the savings and loan holding company is the sole transaction contained in the application, and there are no other transactions requiring Corporation approval incident to the creation of the holding company (other than use of an interim institution and merger with such interim to effect the reorganization), and the holding company is not also seeking any waivers, forebearances, or resolution of legal or supervisory issues;

(C) The board of directors and executive officers of the holding company are comprised of persons who, at the time of acquisition, are executive officers and directors of the institution;

(D) The transaction does not raise a significant policy issue as described in the Board's Policy Statement on Regulatory Capital Maintenance Obligations of Acquirors of Insured Institutions, 53 FR 31761 (August 19, 1988), or the Office of Regulatory Activities' Guidelines on Net Worth Maintenance and Prenuptial Agreements, TB 5 (October 19, 1988);

(E) And the holding company shall furnish the following information in accordance with the specified time frames—

(*1*) On the business day prior to the date of consummation of the acquisition, the chief financial officers of the holding company and the insured institution shall certify to the Supervisory Agent in writing that no material adverse events or material adverse changes have occurred with respect to the financial condition or operations of the holding company or the insured institution since the date of the financial statements submitted with the application;

(*2*) No later than thirty days from the date of consummation of the acquisition, the holding company shall file with the Supervisory Agent a certification by legal counsel stating the effective date of the acquisition, the exact number of shares of stock of the insured institution acquired by the holding company, and that the acquisition has been consummated in accordance with the provisions of all applicable laws and regulations and the application;

(*3*) No later than thirty days from the date of consummation of the acquisition, the holding company shall file with the Supervisory Agent an opinion from its independent auditors certifying that the transaction was consummated in accordance with generally accepted accounting principles; and

(*4*) No later than thirty days from the date of consummation of the acquisition, the holding company shall file with the Supervisory Agent a certification stating that the holding company will not cause the insured institution to deviate materially from the business plan submitted in connection with the application, unless prior written approval from the Supervisory Agent is obtained; and

(F) The proposed acquisition shall be consummated within 120 days after the application is automatically approved under this § 574.7(a)(1).

(2) To the extent that an institution reorganizing into holding company form is subject to provisions relating to its mutual to stock conversion imposed by 12 CFR 563b.3 (i), (c)(9), (c)(17), (c)(18), (c)(19) or (g)(1), such provisions shall be applicable to any holding company approved automatically pursuant to § 574.7(a)(1).

* * * * *

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89-1958 Filed 1-26-89; 8:45 am]

BILLING CODE 6720-01-M

12 CFR Part 574

[No. 89-40]

Acquisition of Control of Insured Institutions

Date: January 17, 1989.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule; solicitation of comments.

SUMMARY: The Federal Home Loan Bank Board ("Board") is proposing to adopt a short-form application to be used by insured institutions for approval of routine reorganizations involving the creation of savings and loan holding companies.

DATE: Comments must be received on or before March 28, 1989.

ADDRESS: Send comments to the Director, Information Services Section, Office of Secretariat, Federal Home Loan Bank Board, 801 17th Street, NW., Washington, DC 20006. Comments will be available for public inspection at the above address.

FOR FURTHER INFORMATION CONTACT: Howard C. Bluver, Attorney, (202) 377-7504; Kevin A. Corcoran, Deputy Director for Corporate Transactions, (202) 377-6962; V. Gerard Comizio, Director, Corporate and Securities Division, (202) 377-6411; or Julie L. Williams, Deputy General Counsel for Securities and Corporate Structure, (202) 377-6549, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Federal Home Loan Bank Board, as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or the "Corporation"), is proposing to adopt a new short-form application to be used by insured institutions for approval of routine reorganizations involving the creation of savings and loan holding companies. We note that the Board is also proposing amendments to its regulations that would provide for automatic approval of such applications on an expedited basis provided certain specified conditions are met.[1] The purpose of this proposal, however, is to further streamline the application process by limiting the required contents of routine reorganization applications to information that is necessary to enable the Corporation to make an informed decision on an application consistent with its statutory responsibility.

II. Routine Holding Company Reorganizations

During the past several years, the Board's staff has processed and approved a large number of applications by insured institutions to reorganize into holding company structures. As a result of its experience with simple reorganization applications, the Board is aware that such transactions usually do not present unusual structural issues or raise significant law or policy concerns. The reorganization is almost always accomplished through a reverse triangular merger transaction whereby an interim institution chartered under federal or state law is merged into the insured institution and each share of stock of the insured institution is exchanged for one share of stock of the new holding company.[2] Furthermore, the new holding company engages in no operations prior to consummation of the reorganization and its only significant asset immediately after the transaction is its investment in the insured institution subsidiary. Shareholders of the insured institution generally have the opportunity to vote to approve or disapprove the reorganization and can exercise dissenters' rights of appraisal under applicable law if they do not vote in favor of the reorganization.

Because the reorganization involves the acquisition of control of an insured institution by the new holding company, an application to obtain prior approval from the Corporation must be filed pursuant to the Savings and Loan Holding Company Act of 1967 (the "Holding Company Act").[3] The appropriate application under current Board regulations is Application H-(e)1.[4] This application requires detailed and often voluminous information on, among other things, the proposed transaction, the financial and managerial resources of the Applicant, the current business of the Applicant, and the future prospects of the Applicant. The application also requires the filing of detailed financial statements on both an historical and a pro forma basis and certain exhibits. The Board believes much of the information required in Application H-(e)1 is not necessary to enable the Corporation to make an informed decision on a simple reorganization application consistent with its congressionally mandated responsibility to investigate the qualifications of a potential acquiror and prevent the acquisition of control of an insured institution in circumstances that might result in injury to the insured institution. *See* H.R. Rep. No. 997, 90th Cong., 1st Sess. (1967). Therefore, the Board is proposing to adopt new Application H-(e)1-S to be used solely by insured institutions seeking approval of simple reorganizations involving the creation of savings and loan holding companies.

III. Eligibility for Use of Application H-(e)1-S

In order to be eligible to use Application H-(e)1-S, an insured institution must be proposing a holding company reorganization transaction that qualifies for automatic approval under the Board's proposed amendments to 12 CFR 574.7.[5] These proposed

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[1] *See* the Board's proposal to amend 12 CFR 574.7 by adding new subsections (a)(1) and (2) thereto, together with the explanatory statement accompanying the proposal, which is published elsewhere in today's **Federal Register.**

[2] The shares of the new holding company issued to the former shareholders of the insured institution generally must be registered with the Securities and Exchange Commission ("SEC") under the Securities Act of 1933, as amended. Nevertheless, the SEC staff, in recognition of the fact that a simple reorganization presents relatively minimal risk to shareholders, has adopted a streamlined and expedited registration procedure for such transactions. SEC Staff Accounting Bulletin #50, which originally covered bank holding company formations only but is now applied to savings and loan holding company formations as well, permits a registrant to omit from the applicable registration statement audited financial statements and detailed statistical disclosure as long as certain conditions are satisfied. In addition, Instructions G to SEC Form S-4, which is the form utilized for most holding company formations, provides for the automatic effectivensss of the registration statement on the twentieth day after filing.

[3] The Holding Company Act prohibits any company, directly or indirectly, or acting in concert with one or more other persons, or through one or more subsidiaries, or through one or more transactions, from acquiring control of one or more insured institutions without the prior written approval of the Corporation. 12 U.S.C. 1730a(e)(1)(B) (1982).

[4] 12 CFR 574.6(a)(1).

[5] *See* footnote 1, *supra.*

amendments provide for automatic approval of such applications 30 days after filing, as long as each condition specified in the proposed amendments are satisfied.

IV. Contents of Application H–(e)1–S

The Board's Office of Regulatory Activities, together with the Office of General Counsel, is currently considering the appropriate information to be included in Application H–(e)1–S. The objective of this effort is to streamline the application process by limiting the required contents of routine reorganization applications to information that is necessary to enable the Board to make an informed decision consistent with its statutory responsibility. In this regard, the staff has identified, on a preliminary basis, certain information, documents, and certifications described below that are proposed to be included in Application H–(e)1–S. Commenters are hereby invited to provide the Board with its views on whether the following information, documents, and certifications should be required in Application H–(e)1–S or whether certain individual items should be expanded, modified, or deleted in whole or in part:

1. A copy of the Registration Statement, including exhibits, filed or to be filed with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended ("Securities Act"). If no such Registration Statement has been or will be filed, the Applicant would provide a copy of any materials, including proxy statements, furnished or to be furnished to shareholders in connection with the reorganization, together with a brief description of the facts relied upon for concluding that an exemption from registration is available under the Securities Act.

2. If consummation of the proposed reorganization will result in an amendment to the insured institution's Community Reinvestment Act statement, a copy of the statement as amended.

3. A certification that the proposed reorganization will have no effect on management interlocks compliance under the Depository Institutions Management Interlocks Act, 12 U.S.C. 3201–3207 (1982), the Savings and Loan Holding Company Act, 12 U.S.C. 1730a(i) (1982), or the regulations promulgated thereunder, 12 CFR 563f and 12 CFR 584.9.

4. A certification that the insured institution is eligible to file Application H–(e)1–S because the proposed reorganization transaction satisfies each of the conditions specified in 12 CFR 574.7(a) (1) and (2).

5. The following information and documents, but only in the event that such information and documents are not included in the Registration Statement or other materials furnished pursuant to Item 1 above:

(a) The information required by Item 4 of Application H-(e)1 relating to the details of the proposed transaction;

(b) A statement as to the reasons for proposing the reorganization;

(c) The information required by Item 5 of Application H-(e)1 relating to fees, commissions, and expenses;

(d) The information required by Item 6 of Application H-(e)1 relating to regulatory approval;

(e) A statement of capitalization as of a recently practicable date that shows the insured institution and the holding company on a historical basis, pro forma adjustments, if any, and the holding company on a pro forma basis;

(f) A description of the business intended to be done by the holding company for the twelve month period commencing with the filing of the Application;

(g) A description of the present dividend policy of the insured institution, and a description of proposed dividend policy of the insured institution and the holding company subsequent to the reorganization;

(h) A copy of any contracts or agreements pursuant to which the reorganization is to be accomplished;

(i) A copy of the charter and bylaws of the holding company; and

(j) A copy of any opinions of counsel or revenue rulings received by the insured institution or the holding company in connection with the reorganization.

6. A consolidated business plan using the format contained in Thrift Bulletin No.———— (, 1989).[6]

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following initial regulatory flexibility analysis:

1. *Reasons, objectives, and legal bases underlying the proposed rules.* These elements have been discussed elsewhere in the SUPPLEMENTARY INFORMATION regarding the proposal.

2. *Small entities to which the proposed rules would apply.* The rule would apply to all acquirors of insured institutions.

3. *Impact of the proposed rules on small institutions.* The rule will affect all federal associations and their acquirors equally and will not have an adverse impact on small institutions.

4. *Overlapping or conflicting federal rules.* There are not known federal rules which duplicate, overlap, or conflict with the proposed rule.

5. *Alternatives to the proposed rule.* There are no alternatives that would be less burdensome than the proposal in addressing the concerns expressed in the **SUPPLEMENTARY INFORMATION** set forth above.

List of Subjects in 12 CFR Part 574

Administrative practice and procedure, Holding companies, Savings and loan associations, Securities.

Accordingly, the Board hereby proposes to amend Part 574, Subchapter D, Chapter V, Title 12, *Code of Federal Regulations*, as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 574—ACQUISITION OF CONTROL OF INSURED INSTITUTIONS

1. The authority citation for Part 574 continues to read as follows:

Authority: Sec. 407, 48 Stat. 1260, as amended (12 U.S.C. 1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a).

2. Amend § 574.6 by adding a new paragraph (a)(2) to read as follows; and redesignating paragraphs (a)(2) through (a)(5) as paragraphs (a)(3) through (a)(6), respectively:

§ 574.6 Procedural requirements.

(a) *Form of application or notice.* * * *

(2) H–(e)1–S. Notwithstanding the provisions of paragraph (a)(1) of this section, an application filed under § 574.3(a) that satisfies each of the conditions for automatic approval specified in 12 CFR 574.7(a) (1) and (2), need only include the following information:

(i) A copy of the Registration Statement, including exhibits, filed or to be filed with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended ("Securities Act"). If no such Registration Statement has been or will be filed, a copy of any materials, including proxy statements, furnished or to be furnished to shareholders in connection with the reorganization,

[6] Please note that the Board's Office of Regulatory Activities will be issuing shortly a Thrift Bulletin setting forth the format to be used in preparing a consolidated business plan. The Board is proposing that a business plan consistent with such format be included in the proposed short-form application.

should be provided, together with a brief description of the facts relied upon for concluding that an exemption from registration is available under the Securities Act;

(ii) If consummation of the proposed reorganization will result in an amendment to the insured institution's Community Reinvestment Act statement, a copy of the statement as amended;

(iii) A certification that the proposed reorganization will have no effect on management interlocks compliance under the Depository Institutions Management Interlocks Act, 12 U.S.C. 3201–3207 (1982), the Savings and Loan Holding Company Act, 12 U.S.C. 1730a(i) (1982), or the regulations promulgated thereunder, 12 CFR Part 563f and 12 CFR 584.9;

(iv) A certification that the insured institution is eligible to file Application H–(e)1–S because the proposed reorganization transaction satisfies each of the conditions specified in 12 CFR 574.7(a) (1) and (2);

(v) The following information and documents, but only in the event that such information and documents are not included in the Registration Statement or other materials furnished pursuant to paragraph (a)(2)(i) of this section—

(A) The information required by Item 4 of Application H–(e)1 relating to the details of the proposed transaction;

(B) A statement as to the reasons for proposing the reorganization;

(C) The information required by Item 5 of Application Form H–(e)1 relating to fees, commissions and expenses;

(D) The information required by Item 6 of Application Form H–(e)1 relating to regulatory approval;

(E) A statement of capitalization as of a recently practicable date that shows the insured institution and the holding company on a historical basis, pro forma adjustments, if any, and the holding company on a pro forma basis;

(F) a description of the business intended to be done by the holding company for the twelve month period commencing with the filing to the application;

(G) A description of the present dividend policy of the insured institution, and a description of the proposed dividend policy of the insured institution and the holding company subsequent to the reorganization;

(H) A copy of any contracts or agreements pursuant to which the reorganization is to be accomplished;

(I) A copy of the charter and bylaws of the holding company; and

(J) A copy of any opinions of counsel or revenue rulings received by the insured institution or the holding company in connection with the reorganization.

(vi) A consolidated business plan using the format contained in Thrift Bulletin No. _____ (, 1989).

* * * * *

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89–1963 Filed 1–26–89; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 182 and 184

[Docket No. 85N–0548]

Proposed Affirmation of GRAS Status of High Fructose Corn Syrup; Extension of Comment Period

AGENCY: Food and Drug Administration.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending for 90 days the period for submitting comments on the agency's proposal to affirm that the use of high fructose corn syrup as a direct human food ingredient is generally recognized as safe (GRAS).

DATE: Comments by April 6, 1989.

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

FOR FURTHER INFORMATION CONTACT: John W. Gordon, Center for Food Safety and Applied Nutrition (HFF–334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–426–5487.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 7, 1988 (53 FR 44904), FDA issued a proposed rule that would affirm that the use of high fructose corn syrup as a direct human food ingredient is GRAS. The safety of this ingredient has been evaluated on the basis of six industry petitions and of the agency's comprehensive safety review of corn sugar, corn syrup, invert sugar, and sucrose. FDA gave interested persons until January 6, 1989, to submit comments.

The agency received two requests for a 90-day extension of the comment period. The requestors stated that this additional time is needed (1) to assemble relevant information concerning the GRAS status of other varieties of high fructose corn syrup and (2) to survey association members for comments and information about the proposal.

The agency believes that administrative economy will be served by granting this request, and thus that good cause for extending the comment period has been shown. Interested persons will have until April 6, 1989, to submit comments regarding the GRAS status of the use of high fructose corn syrup as a direct human food ingredient.

Interested persons may, on or before April 6, 1989, submit to the Dockets Management Branch (address above) written comments regarding the agency's proposal to affirm as GRAS the use of high fructose corn syrup as a direct human food ingredient. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 19, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 89–1897 Filed 1–26–89; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[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; Public Hearing on Proposed Regulations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of a public hearing on proposed regulations relating to cash or deferred arrangements described in section 401(k) of the Internal Revenue Code of 1986 and new nondiscrimination rules for employee contributions and matching contributions made to employee plans contained in section 401(m) of the Code. Also included are sections 402(g), 414(g), 414(s), 415, 416 and 4979 of the Internal Revenue Code of 1986.

DATES: The public hearing will be held on Tuesday, March 14, 1989, beginning at 10:00 a.m., and continue, if necessary, at the same time on Wednesday, March 5, 1989. Requests to speak and outlines of oral comments should be delivered or mailed by Tuesday, February 28, 1989.

ADDRESS: The public hearing will be held in the I.R.S. Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Builidng, 1111 Constitution Avenue, NW., Washington, DC. The requests to speak and outlines or oral comments should be submitted to the Commissioner of Internal Revenue, Attention: CC:CORP:T:R (EE–158–86 and EE–160–86), Room 4429, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Angela D. Wilburn of the Regulations Unit, Office of the Assistant Chief Counsel (Corporate), Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, telephone 202–566–3935 (not a toll-free call).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations appearing in the **Federal Register** for Monday, August 8, 1988 (53 FR 29719).

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR Part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit, not later than Tuesday, February 28, 1989, an outline of the orgal comments to be presented at the hearing and the time they wish to devote to each subject.

Each speaker will be limited to 10 minutes for an oral presentation exclusive of the time consumed by questions from the panel for the government and answers to these questions.

Because of controlled access restrictions attendees cannot be admitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the speakers. Copies of the agenda will be available free of charge at the hearing.

By direction of the Commissioner of Internal Revenue.

Dale D. Goode,

Chief, Regulation Unit, Assistant Chief Counsel (Corporate).

[FR Doc. 89–1945 Filed 1–26–89; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

Pennsylvania Permanent Regulatory Program; Public Comment Period and Opportunity for Public Hearing on Proposed Amendment

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE) Interior.

ACTION: Proposed rule.

SUMMARY: OSMRE is announcing receipt of a proposed amendment to the Pennsylvania permanent regulatory program (hereinafter referred to as the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977. The amendment is intended to revise the Pennsylvania program to be consistent with the corresponding Federal regulations pertaining to coal preparation plants.

This notice sets forth the times and locations that the Pennsylvania program and the proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the revised amendment and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received on or before 4:00 p.m. on February 27, 1989, to ensure consideration in the rulemaking process. If requested, a public hearing on the amendment will be held at 9:00 a.m. on February 21, 1989. Requests to present testimony at the hearing must be received on or before 4:00 p.m. on February 13, 1989.

ADDRESSES: Written comments and requests to testify at the hearing should be mailed or hand delivered to Robert J. Biggi, Director, Harrisburg Field Office, at the address listed below. Copies of the Pennsylvania program, the revised proposed amendment, 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 requestor may receive, free of charge, one copy of the proposed revised amendment by contacting OSMRE's Harrisburg Field Office.

Office of Surface Mining Reclamation and Enforcement, Harrisburg Field Office, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone: (717) 782–4036

Office of Surface Mining Reclamation and Enforcement, Administrative Record Office, Room 5131, 1100 "L" Street, NW., Washington, DC 20240, Telephone: (202) 343–5492

Pennsylvania Department of Environmental Resources, Office of Environmental Energy Management, 10th Floor, Fulton Building, 3rd and Locust Streets, P.O. Box 2063, Harrisburg, Pennsylvania 17120, Telephone: (717) 787–4686

A public hearing, if held, will be at the Penn Harris Motor Inn and Convention Center at the Camp Hill Bypass and U.S. Routes 11 and 15, Camp Hill, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: Robert J. Biggi, Director, Harrisburg Field Office, (717) 782–4036.

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Interior conditionally approved the Pennsylvania program on July 31, 1982. Information regarding general background on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Pennsylvania program can be found in the July 30, 1982 **Federal Register** (47 FR 33050–33083). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Discussion of Amendments

By letter dated December 5, 1988 (OSMRE Administrative Record No. PA 720), the Pennsylvania Department of Environmental Resources submitted an amendment to OSMRE for approval. The amendment revises Chapters 86, 88 and 89 of Title 25 *Pennsylvania Code* to cover coal preparation plants not previously subject to the provisions of the Pennsylvania program. Rule changes in these chapters are intended to be no less effective than Federal rule modifications (52 FR 17724, May 11, 1987) on coal preparation plants not previously regulated. The amendment to become effective at time of OSMRE approval.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSMRE is now seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of

30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Pennsylvania program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "**DATES**" or at locations other than the Harrisburg Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under "**FOR FURTHER INFORMATION CONTACT**" by 4:00 p.m. on February 13, 1989. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSMRE officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment, and who wish to do so, will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSMRE representatives to discuss the proposed amendments may request a meeting at the OSMRE office listed under "**ADDRESSES**" by contacting the person listed under "**FOR FURTHER INFORMATION CONTACT.**" All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under "**ADDRESSES.**" A written summary of each meeting will be made part of the Administrative Record.

List of Subjects in 30 CFR Part 938

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Date: January 17, 1989.

Carl C. Close,

Assistant Director, Eastern Field Operations.

[FR Doc. 89-1909 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-05-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 88-597, RM-6442]

Radio Broadcasting Services; Prescott Valley, AZ

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Prescott Valley Broadcasting Co., Inc., licensee of Station KIHX-FM, Channel 292A, Prescott Valley, Arizona, seeking the substitution of Channel 294C2 for Channel 292A and modification of its license accordingly. Reference coordinates utilized for this proposal are 34-27-32 and 112-21-37.

DATES: Comments must be filed on or before March 16, 1989, and reply comments on or before March 31, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Prescott Valley Broadcasting Co., Inc., P.O. Box 26523, Prescott Valley, AZ 86312.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-597, adopted November 30, 1988, and released January 23, 1989. 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1966 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-606, RM-6434]

Radio Broadcasting Services; Eureka, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed on behalf of Eureka Christian Broadcasting, Inc., permittee of Station KECU(FM), Channel 288A, Eureka, California, seeking the substitution of Channel 288C1 for Channel 288A and modification of its permit accordingly. Reference coordinates utilized for this proposal are 40-43-36 and 123-58-18.

DATES: Comments must be filed on or before March 17, 1989, and reply comments on or before April 3, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: James J. Popham, Esq., Hardy, Popham & Wirpel, 700 Camp Street, New Orleans, LA 70130.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-606, adopted November 28, 1988, and released January 24, 1989. 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1967 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 88-605, RM-6392]

Radio Broadcasting Services; Brush, CO

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Randall S. Jacobson, Receiver, licensee of Station KKDD(FM), Channel 296A, Brush, Colorado, seeking the substitution of Channel 296C1 for Channel 296A and modification of its license accordingly. Reference coordinates utilized for this proposal are 40-15-39 and 103-38-15.

DATES: Comments must be filed on or before March 17, 1989, and reply comments on or before April 3, 1989.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition, to filing comments with the FCC, interested parties should serve the petitioner as follows: Randall S. Jacobson, 1516 Mill Street, Brush, Colorado 80723.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-605, adopted November 29, 1988, and released January 24, 1989. 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1968 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 88-596, RM-6430]

Radio Broadcasting Services; Austin-Crothersville, IN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Jacksy Radio Association to allot Channel 287A to Austin or Crothersville, Indiana. Although petitioner requested a hyphenated allotment, the proposal initially lacks sufficient information to justify its request. Channel 287A can be allotted to either community consistent with the minimum spacing requirements of § 73.207(b) of the Commission's Rules. Reference coordinates used for Channel 278A at Austin are 38-44-15 and 85-46-14. Those for Crothersville are 38-47-00 and 85-45-17.

DATES: Comments must be filed on or before March 16, 1989, and reply comments on or before March 31, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners, or their counsel or consultant, as follows: Jacksy Radio Association, Attn: James S. Brennan, 5125 West Tenth St., Indianapolis, IN 46227.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-596, adopted November 30, 1988, and released January 23, 1989. 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-1970 Filed 1-26-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 88-612, RM-6485]

Radio Broadcasting Services; Three Oaks, MI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by John Keeley, proposing the allotment of FM

Channel 248A to Three Oaks, Michigan, as that community's first FM broadcast service. Concurrence of the Canadian government is required for the allotment of FM Channel 248A at Three Oaks at coordinates 41–48–00 and 86–39–00. There is a site restriction 3.6 kilometers west of the community.

DATES: Comments must be filed on or before March 17, 1989, and reply comments on or before April 3, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Doug Vernier, 1600 Picturesque Drive, Cedar Falls, Iowa 50613, (Consultant to the petitioner).

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88–612, adopted November 28, 1988, and released January 24, 1989. 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89–1969 Filed 1–26–89; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Reinitiation of Status Review, Northern Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of reopening of status review.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a reinitiation of the status review for the northern spotted owl, *Strix occidentalis caurina*. Comments, data, and new information on this species are requested.

DATES: Comments and information on the status of the northern spotted owl must be submitted by February 28, 1989.

ADDRESSES: Information, comments, or questions should be submitted to Mr. Marvin Plenert, Regional Director, U.S. Fish and Wildlife Service, 500 NE. Multnomah Street, Suite 1692, Portland, Oregon 97232. The information and comments will be available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service's Region 1 Office of Fish and Wildlife Enhancement at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Barry S. Mulder, Coordinator, Spotted Owl Issues, at the above address (503/231–6150 or FTS 429–6150).

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended, (Act) (16 U.S.C. 1531 et seq.), requires certain findings for any petition to list, delist, or reclassify a species that is accepted for review in accordance with section 4(b)(3) of the Act. In accordance with the Act, the 12-month finding determines whether or not the action requested in a petition is warranted in light of the Service's status review and all other scientific information in its administrative record.

On December 17, 1987, the Service made a 12-month finding on two petitions to list the northern spotted owl under the Act (52 *FR* 48552; December 23, 1987). A finding was made that a proposed listing of the northern spotted owl was not warranted at that time. The Service noted, however, that due to the need for population trend information and other biological data, priority given to this species for further research and monitoring would continue to be high.

On May 5, 1988, the Sierra Club Legal Defense Fund filed suit on behalf of a number of environmental organizations in the U.S. District Court for the Western District of Washington, *Northern Spotted Owl v. Hodel*, No. C88–5732 (W.D. Wash. 1988), challenging the Service's finding on the listing petitions. In an order issued on November 17, 1988, the court concluded that the Service's finding was arbitrary and capricious or contrary to law, and remanded the matter back to the Service for further review. In an order issued on January 12, 1989, the court granted the Service's request to reopen the administrative record for the status review and petition finding for a period not to extend beyond February 28, 1989.

In accordance with the provisions of section 4(b)(1)(A) of the Act, the Service is required to make listing determinations solely on the basis of the best scientific and commercial data available. The Service believes that a considerable amount of new biological information has been collected and made available since December 1987 that should be considered in the review of the prsent status of the northern spotted owl.

The Service would appreciate any additional or new scientific data, comments, and suggestions from the public, other concerned public agencies, the scientific community, industry, or any interested party concerning the biological status of the northern spotted owl, *Strix occidentalis caurina*. The Service is most interested in any information from all sources about the past and present status and trends of both the northern spotted owl and its habitat.

Under the court's order of January 12, 1989, the Service has until May 1, 1989, to complete this additional status review, supplement the status review report, and submit to the court a new analysis and finding on the petition to list the northern spotted owl as endangered or threatened. As authorized by the court, the Service is announcing a public comment period for the purpose of receiving new informatiion and comments on whether the northern spotted owl should be listed as an endangered or threatened species. Information received on or before February 28, 1989, will be considered by the Service in making a new finding on the listing petitions.

Author

This notice was prepared by Mr. Barry S. Mulder, U.S. Fish and Wildlife Service, 500 N.E. Multnomah Street,

Suite 1692, Portland, Oregon 97232 (503/231–6150 or FTS 429–6150).

Authority

The authority for this notice is the Endangered Species Act of 1973, as amended: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411; Pub. L. 100–478, 102 Stat. 2306 (16 U.S.C. 1531 et seq.)

Dated: January 19, 1989.

Marvin L. Plenert,

Regional Director, Region 1, Fish and Wildlife Service.

[FR Doc. 89–2005 Filed 1–26–89; 8:45 am]

BILLING CODE 4310–55–M

Notices

Federal Register
Vol. 54, No. 17
Friday, January 27, 1989

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

Office of the Secretary

Renewal of Agricultural Advisory Committee for Trade

ACTION: Notice.

Notice is hereby given that the Secretary of Agriculture, after consultation with the United States Trade Representative, has renewed the following advisory committees; Agricultural Policy Advisory Committee for Trade, and nine separate Agricultrual Technical Advisory Committees for Trade in: Cotton, Dairy Products, Fruits and Vegetables, Grain and Feed, Livestock and Livestock Products, Oilseeds and Products, Poultry and Egs, Sweeteners, and Tobacco.

The purpose of these committees is to provide advice to the Secretary and the U.S. Trade Representative with respect to the trade policy of the United States pursuant to section 135(c) of the Trade Act of 1974 (Pub. L. 93–618), as amended by the Trade Agreements Act of 1979 (Pub. L. 96–39). Meetings of these committees with be open only to members of the committees in accordance with matters listed in section 552b(c) of the United States Code unless otherwise determined.

The renewal of such committees is in the public interest in connection with the duties of the Department imposed by the Trade Act of 1974, as amended by the Trade Agreements Act of 1979.

Issued at Washington, DC, this 19th day of January 1989.

John J. Franke, Jr.,

Assistant Secretary for Administration.

[FR Doc. 89–1910 Filed 1–26–89; 8:45 am]

BILLING CODE 3410–10–M

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of revision of Privacy Act Systems of Records.

SUMMARY: Notice is hereby given that the United States Department of Agriculture (USDA) is revising one of its Privacy Act (PA) Systems of Records and is deleting two of its PA Systems of Records maintained by the Cooperative State Research Service (CSRS).

EFFECTIVE DATE: This notice will be adopted without further publication in the **Federal Register** on March 28, 1989, unless modified by a subsequent notice to incorporate public comments. Comments must be received by the contact person listed below on or before February 27, 1989.

ADDRESSES: Interested persons may submit written comments to Stasia A.M. Hutchison, PA Coordinator, ARS, USDA, Room 331, Building 005, BARC–West, Beltsville, Maryland 20705; telephone (301) 344–3928, (FTS) 344–3928.

FOR FURTHER INFORMATION CONTACT: Stasia A.M. Hutchison, PA Coordinator, ARS, USDA, Room 331, Building 005, BARC–West, Beltsville, Maryland 20705; telephone (301) 344–3928, (FTS) 344–3928.

SUPPLEMENTARY INFORMATION: Pursuant to the PA, 5 U.S.C. 552a, USDA hereby takes the following action:

I. One system of records maintained by CSRS is being revised for the following reasons:

USDA/CSRS–1, "Current Research Information System." The purposes of this revision to the system of records are to (1) change the designation from USDA/SEA–11 to USDA/CSRS–1; (2) reflect organizational changes; (3) make clarifying stylistic changes; (4) identify changes in record system location and system manager; (5) indicate the authorities for maintaining the system; (6) add four routine uses of the records; (7) indicate that records will be retrieved by the name of the co-investigator; and (8) indicate the project information will be maintained for 2 years following the termination of the project.

II. Two systems of records maintained by CSRS are being deleted as follows:

(1) USDA/SEA–9, "Biographical Information—Office of Information." This system is being deleted because these records are no longer maintained by USDA.

(2) USDA/SEA–10, "Biographical Information on McIntire-Stennis Cooperative Forestry Act Advisory Council Members." This system is being deleted because the records are no longer retrievable by a personal identifier.

A "Report on New System" for each system of records, required by 5 U.S.C. 552a(r), as implemented by OMB Circular A–130, was sent to the President of the Senate, the Speaker of the House of Representatives, and the Office of Management and Budget on January 17, 1989.

Signed at Washington, DC, on January 17, 1989.

Richard E. Lyng,

Secretary.

Privacy Act System USDA/CSRS–1 Report

The purposes of this system of records revision are to change the designation from USDA/SEA–11 to USDA/CSRS–1; reflect organizational changes; make clarifying stylistic changes; and identify changes in the system location, authority for maintenance of the system, routine uses of the records, retrievability, retention and disposal, and system manager.

The authorities for maintaining this system of records are 5 U.S.C. 301; 7 CFR 2.7 and 2.58.

Use of this system, as established, should not result in infringement of any individual's right to privacy.

Access to these records will be limited to USDA employees who maintain the records and have a need for the records in the performance of their duties and subscribers of the Dialog Commercial Database Network.

Use of this system will have no effect upon privacy and other personal or property rights of individuals or on the preservation of the constitutional principles of federalism and separation of powers.

The records are stored in Government office buildings or locked offices and are maintained in file folders and on computer tapes.

The revised system of records will not be exempt from any provisions of the Privacy Act.

USDA/CSRS–1

SYSTEM NAME:

Current Research Information System (CRIS), USDA/CSRS.

SYSTEM LOCATION:

CSRS, National Agricultural Library Building, 5th Floor, 10301 Baltimore Boulevard, Beltsville, Maryland 20705.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Scientists listed on research projects entered into the CRIS.

CATEGORIES OF RECORDS IN THE SYSTEM:

Research projects of USDA agencies and research projects of those State institutions receiving CSRS administered funds in support of research.

AUTHORITIES FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 7 CFR 2.7 and 2.58.

PURPOSES:

This information is made available for the documentation and reporting of research activities conducted by USDA agencies and by State institutions receiving CSRS administered funds for research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Records in this system may be disclosed: (1) To subscribers of the Dialog Commercial Database Network; (2) to contractors for preparation in a form that can be entered into the computer; (3) to the National Technical Information System; (4) to research scientists and Administrators of all Governmental agencies and affiliated institutions in connection with information retrieval requests in special subject areas; (5) to the Department of Justice when relevant and useful for the defense of suits against the United States or its officers or for the institution of suits for the recovery of claims by the USDA; (6) to an appropriate agency, whether Federal, State, or local, charged with the responsibility of investigating or prosecuting a violation of law or rule, regulation, or oder issued pursuant thereto, when information available indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by rule, regulation, or order issued pursuant to such statute; (7) in response to a request for discovery or appearance of a witness, to the extent that what is disclosed is relevant to the subject matter involved in a pending judicial or criminal proceeding or in response to a subpoena issued in a proceeding before a court or adjudicative body, to the extent that the records requested are relevant to the proceedings; and (8) to a congressional office in response to an inquiry from a congressional office made at the request of the individual to whom the record pertains.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on computer tapes at the USDA National Computer Center, Kansas City.

RETRIEVABILITY:

Records can be retrieved by name of project leader or co-investigator.

SAFEGUARDS:

Access to this system is limited to USDA employees and subscribers of the Dialog Commercial Database Network. The computer files and tapes will be kept in a safeguarded environment with access only by authorized personnel.

RETENTION AND DISPOSAL:

Financial and classification records are maintained indefinitely. Project information is maintained for 2 years following termination of the project.

SYSTEM MANAGER(S) AND ADDRESS:

Director, CRIS, National Agricultural Library Building, 5th Floor, 10301 Baltimore Boulevard, Beltsville, Maryland 20705.

NOTIFICATION PROCEDURES:

Any individual may request information regarding this system of records or information as to whether the system contains records pertaining to him from the System Manager.

RECORD ACCESS PROCEDURES:

Any individual may gain access to a record in the system that pertains to him by submitting a written request to the System Manager.

CONTESTING RECORD PROCEDURES:

Any individual may contest a record in the system that pertains to him by submitting pertinent written information to the System Manager.

RECORD SOURCE CATEGORIES:

Information in this system comes from USDA research agencies and State institutions receiving CSRS administered funds for research.

Privacy Act System USDA/SEA–9 Report

The purpose of this notice is to delete this system of records because the records are no longer maintained by USDA.

Privacy Act System USDA/SEA–10 Report

The purpose of this notice is to delete this system of records because the records are not retrievable by a personal identifier.

[FR Doc. 89–1911 Filed 1–26–89; 8:45 am]

BILLING CODE 3410–22–M

Agricultural Stabilization and Conservation Service Feed Grain Donations for the Colville Indian Reservation in Washington

Pursuant to the authority set forth in section 407 of the Agricultural Act of 1949, as amended (7 U.S.C. 1427) and Executive Order 11336, I have determined that:

1. The chronic economic distress of the needy members of the Colville Indian Reservation in Washington has been materially increased and become acute because of severe and prolonged drought, thereby creating a serious shortage of feed and causing increased economic distress. This reservation is designated for Indian use and is utilized by members of the Colville Indian Tribe for grazing purposes.

2. The use of feed grain or products thereof made available by the Commodity Credit Corporation (CCC) for livestock feed for such needy members of the Tribe will not displace or interfere with normal marketing of agricultural commodities.

3. Based on the above determinations, I hereby declare the reservation and grazing lands of the Tribe to be acute distress areas and authorize the donation of feed grain owned by the CCC to livestock owners who are determined by the Bureau of Indian Affairs, United States Department of the Interior, to be needy members of the Tribe utilizing such lands. These donations by the CCC may commence upon January 17, 1989, and shall be made available through May 15, 1989, or such other date as may be stated in a notice issued by the USDA.

Signed at Washington, DC, on January 23, 1989.

Milton Hertz,

Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 89–1977 Filed 1–26–89; 8:45 am]

BILLING CODE 3410–05–M

COMMISSION ON CIVIL RIGHTS

Mississippi 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 (CCR), that a meeting of the Mississippi Advisory Committee to the Commission will convene at 1:00 p.m. and adjourn at 4:00 p.m. on February 16, 1989, at the Holiday Inn (Downtown), 200 E. Amite St., Jackson, MS 39201. The purpose of the meeting is to discuss the status of the Commission and the recent Regional SAC Chairs Conference in which the Mississippi Committee was represented; to hear a report on Civil Rights progress and/or problems; and to plan a project for fiscal year 1989.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Leslie Range, (601/352-0161) or Bobby Doctor, CCR staff at (202/523-5571). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact Mr. Doctor 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, January 17, 1989.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 89-1913 Filed 1-26-89; 8:45 am]

BILLING CODE 6355-01-M

Wyoming 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 the Wyoming Advisory Committee to the Commission will convene at 10:00 a.m. and adjourn at 2:00 p.m., on February 18, 1989 at the Casper Hilton Inn, 800 North Poplar, Casper, Wyoming 82601. The purpose of the meeting is to plan project activities for the new charter period and to discuss civil rights issues affecting the State of Wyoming.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committe Chairperson, Donald Tolin or Philip Montez, Director of the Western Regional Division (213) 894-3437, (TDD 213/894-0508). 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, January 17, 1989.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 89-1914 Filed 1-26-89; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

[Docket No. 81258-8258]

Policies and Procedures for Resolution of Audit-Related Debts

ACTION: Policy statement.

SUMMARY: The Department of Commerce has established internal policies and procedures for handling the resolution and reconsideration of financial assistance audits which have resulted in or may result in the establishment of a debt (account receivable) for financial assistance awards. The procedures were established to protect the integrity of the audit resolution process, to ensure that aggressive actions are taken to collect the Government's claims, to eliminate the administrative burden of continuously reexamining settled issues, to provide appropriate due process safeguards for auditees and debtors and to implement provisions in the Federal Claims Collection Standards and Office of Management and Budget Circular A-50 (Revised), Audit Followup, applicable to the collection of debts.

EFFECTIVE DATE: September 26, 1988.

FOR FURTHER INFORMATION CONTACT: Barbara L. Spithas, Director, Office of Federal Assistance, Office of Finance and Federal Assistance, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230, (202) 377-5817.

SUPPLEMENTARY INFORMATION: The policies and procedures described in this Notice apply to audit-related debts resulting from audits of recipients of grants and cooperative agreements which have included a notice of this policy with their audit report. This policy does not apply to procurement contracts, loans, or loan guarantees.

Each financial assistance recipient (hereafter the "auditee") that is the subject of an audit conducted by or for the Department shall have at least two opportunities to comment upon the findings and recommendations in the audit report and to submit additional documentary evidence to suport the auditee's positions. Unless the Inspector General of the Department determines that it is not in the best interest of the Government to send the draft report to the auditee, the auditee will be given 30 days from the transmittal of the draft audit report in which to sumbit written comments and documentary evidence. The auditee will then be given 30 days from the transmittal of the final audit report in which to submit written comments and documentary evidence. Based on review of the comments, arguments, and evidence available at the expiration of this time period, the Department will make a decision on the actions it will take as a result of the final audit report.

The Department's decisions to disallow costs under the award and to establish a debt (and any other decisions on nonfinancial issues) will be sent to the auditee in an "Audit Resolution Determination" letter. This letter will contain information on the procedures to be followed by the auditee to appeal the Department's decision.

The auditee may appeal an Audit Resolution Determination that it owes money or property to the Department by submissiosn of a written notice of the appeal within 30 days after recept of the determination letter. The auditee must submit an explanation of its dispute with evidence which supports its position (or reference documents already submitted to the Department). The information should be sumbitted with the appeal notice. This appeal procedure is the last opportunity for auditees to submit to the Department arguments and evidence that dispute the validity of the audit-related debt.

The Department will make the decision on appeal of an audit-related debt within 30 days after receipt of the appeal and on the basis of the record existing at the expiration of the time limit for filing an appeal. The Department will issue a decision letter to the auditee. The decision on appeal shall be the final decision of the Department with respect to the amounts and merits of the debt. There are no other administrative appeals available in the Department concerning this matter.

An appeal of the Audit Resolution Determination does not prevent the establishment of the audit-related debt nor does it prevent the accrual of interest on the debt. If the Audit Resolution Determination is overruled or modified on appeal, appropriate corrective action will be taken retroactively. An appeal will stay the offset of funds owned by the auditee against funds due to the auditee.

Authority: 5 U.S.C. app. 3 sec. 4 and 5 U.S.C 301.

Sonya G. Stewart

Director for Finance and Federal Assistance.

[FR Doc. 89–1932 Filed 1–26–89; 8:45 am]

BILLING CODE 3510–FE–M

National Institute of Standards and Technology

[Docket No. 81145–8245]

Proposed Federal Information Processing Standards Publication for Document Application Profile (DAP) for the Office Document Architecture (ODA) and Interchange Format Standard

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Request for comments.

SUMMARY: A Federal Information Processing Standard (FIPS) adopting the Document Application Profile (DAP) for the Office Document Architecture (ODA) and Interchange Format Standard is proposed for Federal agency use. The DAP was developed by the National Institute of Standards and Technology Workshop for Implementors of Open Systems Interconnection and is based on an international voluntary industry standard. This standard will facilitate the interchange of documents among different document systems.

Prior to submission of this proposed standard to the Secretary of Commerce for review and approval as a FIPS, it is essential to assure that consideration is given to the needs and views of manufacturers, the public, and State and local governments. The purpose of this notice is to solicit such views.

This proposed FIPS contains two sections: (1) An announcement section, which provides information concerning the applicability, implementation, and maintenace of the standard; and (2) a specifications section, which deals with the technical requirements of the standard. Only the announcement section of the standard is provided in this notice. Interested parties may obtain a copy of the technical specifications from the Standards Coordinator (ADP), Technology Building, Room B–64, National Institute of Standards and Technology, Gaithersburg, MD 20899, telephone (301) 975–2816.

DATE: Comments on this proposed FIPS must be received on or before April 27, 1989.

ADDRESS: Written comments concerning the adoption of this standard as a FIPS should be sent to: National Institute of Standards and Technology, ATTN: Proposed FIPS for DAP/ODA, Technology Building, Room B–154, Gaithersburg, MD 20899.

Written comments received in response to this notice will be made part of the public record and will be made available for inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Ms. Frances H. Nielsen, National Institute of Standards and Technology, Gaithersburg, MD 20899, telephone (301) 975–3365.

Date: January 23, 1989.

Raymond G. Kammer,

Acting Director.

Federal Information Processing Standards Publications (FIPS PUBS) are issued by the National Institute of Standards and Technology after approval by the Secretary of Commerce pursuant to section 111(d) of the Federal Property and Administrative Services Act of 1949 as amended by the Computer Security Act of 1987, Pub. L. 100–235.

Name of standards. Document Application Profile (DAP) for the Office Document Architecture (ODA) and Interchange Format Standard.

Category of standard. Software Standard, Document Description, Electronic Document Interchange.

Explanation. This Federal Information Processing Standard adopts the National Institute of Standards and Technology (NIST) Implementation Agreement for a Level 3 Document Application Profile (DAP) for the Office Document Architecture (ODA) and Interchange Format Standard. The DAP is a functional subset of the ODA standard and facilitates the interchange of documents among different document systems by specifying the constraints on document structure and content according to the rules of the ODA Standard. Several levels of DAPs are being developed by the standards community; level 3 applies to "desktop publishing" functionality used in document processing systems.

Developed by international standards organizations, the ODA Standard specifies rules for describing the logical and layout structures of documents as well as rules for specifying character, raster, and geometric content of documents, thus providing for the interchange of complex documents. The forms of the interchanged documents may be formatted form (i.e., for presentation such as printing, displaying), processable form (i.e., for further processing such as editing) and formatted processable (i.e., for both presentation and further processing). The ODA Standard was developed primarily by the International Organization for Standardization (ISO) and the Consultative Committee on International Telephone and Telegraph (CCITT). The Implementation Agreement for this DAP was reached by vendors and users of computer networks participating in the NIST Workshop for Implementors of Open Systems Interconnection.

Approving authority. Secretary of Commerce.

Maintenance agency. U.S. Department of Commerce, National Institute of Standards and Technology.

Cross index. a. International Organization for Standardization (ISO) 8613–1988, Information Processing—Text and Office Systems-Office Document Architecture (ODA) and Interchange Format Standard.

b. Stable On-going Implementation Agreements for Open Systems Interconnection Protocols, NIST Workshop for Implementors of Open Systems Interconnection, to be published.

Related documents. Related documents are listed in the Reference Section of the Document Application Profile.

Objectives. The primary objectives of this standard are:

—To promote interchange of documents between systems of different manufacturers,

—To facilitate the use of advanced technology by the Federal Government,

—To stimulate the development of commercial products compatible with the ODA Standard and with the Open Systems Interconnection (OSI) Standards,

—To contribute to the economic and efficient use of document processing system resources, and

—To avoid the proliferation of vendor-unique solutions.

Applicability. The ODA Document Application Profile (DAP) is intended to be used by Federal Government agencies when acquiring document/text processing systems. This FIPS applies to systems ranging from relatively simple wordprocessors to more complex document processors, such as "desktop publishing" systems. Each system acquired by Federal agencies shall include appropriate system-to-DAP and DAP-to-system translators, such that incoming datastreams are interpreted correctly and that outgoing datastreams are generated correctly. Use of the DAP is independent of the communications

used to transfer documents produced by these systems; that is, the DAP may be used within the existing framework of communication protocols.

Specifications. Document Application Profile (affixed).

Implementation. This standard is effective (six months after date of publication of final document in the **Federal Register**). For a period of twelve (12) months after the effective date, agencies are permitted to acquire alternative software which provides equivalent functionality to the Document Application Profile. Agencies are encouraged to use this standard for solicitation proposals for new document processing systems to be acquired after the effective date. This standard is mandatory for use in all solicitation proposals for new document processing products acquired twelve (12) months after the effective date.

Waivers. Under certain exceptional circumstances, the heads of Federal departments and agencies may approve waivers to Federal Information Processing Standards (FIPS). The head of such agency may redelegate such authority only to a senior official designated pursuant to section 3506(b) of Title 44, U.S. Code. Waivers shall be granted only when:

a. Compliance with a standard would adversely affect the accomplishment of the mission of an operator of a Federal computer system, or

b. Cause a major adverse financial impact on the operator which is not offset by Governmentwide savings.

Agency heads may act upon a written waiver request containing the information detailed above. Agency heads may also act without a written waiver request when they determine that conditions for meeting the standard cannot be met. Agency heads may approve waivers only by a written decison which explains the basis on which the agency head made the required finding(s). A copy of each such decision, with procurement sensitive or classified portions clearly identified, shall be sent to: National Institute of Standards and Technology; Attn: FIPS Waiver Decisions, Technology Building, Room B–154; Gaithersburg, MD 20899.

In addition, notice of each waiver granted and each delegation of authority to approve waivers shall be sent promptly to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and shall be published promptly in the **Federal Register**.

When the determination on a waiver applies to the procuremnet of equipment and/or services, a notice of the waiver determination must be published in the *Commerce Business Daily* as a part of the notice of soliciation for offers of an acquisition or, if the waiver determination is made after that notice is published, by amendment to such notice.

A copy of the waiver, any supporting documents, the document approving the waiver and any supporting and accompanying documents, with such deletions as the agency is authorized and decides to make under 5 U.S.C. 552(b), shall be part of the procurement documentation and retained by the agency.

Where to Obtain Copies. Copies of this publication are for sale by the National Technical Information Service, U.S. Department of Commerce, Springfield, VA 22161. When ordering, refer to Federal Information Processing Standards Publication _____ (FIPSPUB _____), and title. Specify microfiche, if desired. Payment may be made by check, money order, or NTIS deposit account.

[FR Doc. 89–1901 Filed 1–26–89; 8:45 am]

BILLING CODE 3510–CN–M

[Docket No. 81138–8238]

Proposed Changes in Requirements for Validation of FIPS Programming Language Processors

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice of proposed changes; request for comments.

SUMMARY: The NIST is considering removing the requirements for validation of language processors for the following high level programming language standards: FIPS PUB 68–2, BASIC; FIPS PUB 109, Pascal; and FIPS PUB 125, MUMPS. Agencies requiring the validation of language processors compilers may specify their own testing for conformance, or adopt other techniques for evaluating conformance.

No changes are planned for current requirements for validation of language processors for the following languages: FIPS PUB 21–2, COBOL; FIPS PUB 69–2, Fortran, and FIPS PUB 119, Ada. The NIST will continue to conduct validation tests for language processors implementing these standards. The NIST also plans to support validation of language processors for the programming language C when a FIPS for that language is issued.

Prior to final action to remove the requirements for validation of language processors for FIPS PUBS 68–2, 109, and 125, it is essential to assure that consideration is given to the needs and views of manufacturers, the public, and State and local governments. The purpose of this notice is to solicit such views.

Interested parties may obtain copies of FIPS PUBS 68–2, 109, and 125 from the National Technical Information Service, U.S. Department of Commerce, Springfield, VA 22161.

DATE: Comments on this proposed change must be received on or before April 27, 1989.

ADDRESS: Written comments concerning this change should be sent to: National Institute of Standards and Technology, ATTN: Validation of FIPS Programming Language Processors, Technology Building, Room B154, Gaithersburg, MD 20899.

Written comments received in response to this notice will be made part of the public record and will be made available for inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Ms. Mabel Vickers, National Institute of Standards and Technology, Gaithersburg, MD 20899, telephone (301) 975–3277.

Authority: 15 U.S.C. 278g–3.

Raymond G. Kammer,

Acting Director.

Date: January 23, 1989.

[FR Doc. 89–1903 Filed 1–26–89; 8:45 am]

BILLING CODE 3510–CN–M

National Fire Codes; Request for Proposals for Revision of Standards

AGENCY: National Institute of Standards and Technology, DOC.

ACTION: Notice of request for proposals.

SUMMARY: The National Fire Protection Association (NFPA) proposes to revise some of its fire safety standards and requests proposals from the public to amend existing NFPA fire safety standards. The purpose of this request is to increase public participation in the system used by NFPA to develop its standards. The publication of this notice of request for proposals by the National Institute of Standards and Technology (NIST) on behalf of NFPA is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the standards referenced in the notice.

DATES: Interested persons may submit proposals on or before the dates listed with the standards.

ADDRESS: Arthur E. Cote, P.E., Secretary, Standards Council, NFPA, Batterymarch Park, Quincy, Massachusetts 02269.

FOR FURTHER INFORMATION CONTACT: Arthur E. Cote, P.E., Secretary, Standards Council, at above address, (617) 770-3000.

SUPPLEMENTARY INFORMATION:

Background

The National Fire Protection Association (NFPA) develops fire safety standards which are known collectively as the National Fire Codes. Federal agencies frequently use these standards as the basis for developing Federal regulations concerning fire safety. Often, the Office of the Federal Register approves the incorporation by reference of these standards under 5 U.S.C. 552(a) and 1 CFR Part 51.

Request for Proposals

Interested persons may submit amendments, supported by written data, views, or arguments to Arthur E. Cote, P.E., Secretary, Standards Council, NFPA, Batterymarch Park, Quincy, Massachusetts 02269. Proposals should be submitted on forms available from the NFPA Standards Administration Office. Each person must include his or her name and address, identify the document and give reasons for the proposal. Proposals received before or by 5:00 P.M. local time on the closing date indicated will be acted on by the Committee. The NFPA will consider any proposal that it receives on or before the date listed with the standard.

At a later date, each NFPA Technical Committee will issue a Technical Committee Report which will include a copy of written proposals that have been received and an account of their disposition by the Committee. Each person who has submitted a written proposal will receive a copy of the report.

Dated: January 23, 1989.

Raymond G. Kammer,

Acting Director.

NFPA No. and Title—Proposal closing date:

NFPA 1–1987, Fire Prevention Code—July 14, 1989.

NFPA 10H–Proposed, Home Portable Fire Extinguishing Equipment—April 7, 1989.

NFPA 12A–1989, Halogenated Fire Extinguishing Agent Systems—September 15, 1989.

NFPA 13–1989, Installation of Sprinkler Systems—November 10, 1989.

NFPA 13D–1989, Sprinkler Systems in One- and Two-Family Dwellings & Mobile Homes—November 10, 1989.

NFPA 31–1987, Oil Burning Equipment—July 20, 1990.

NFPA 35–1987, Manufacture of Organic Coatings—July 15, 1990.

NFPA 36–1988, Solvent Extraction Plants—Open.

NFPA 45–1986, Fire Protection for Laboratories Using Chemicals—January 19, 1990.

NFPA 49–1975, Hazardous Chemicals Data—July 14, 1989.

NFPA 68–1988, Guide for Venting of Deflagrations—January 19, 1990.

NFPA 69–1986, Explosion Prevention Systems—January 19, 1990.

NFPA 79–1987, Industrial Machines—January 19, 1990.

NFPA 85B–1989, Prevention of Furnace Explosions in Natural Gas-Fired Multiple Burner Boiler Furnaces—September 1, 1989.

NFPA 85D–1989, Prevention of Furnace Explosions in Fuel Oil-Fired Multiple Burner Boiler-Furnaces—September 1, 1989.

NFPA 85E–1985, Prevention of Furnace Explosions in Pulverized Coal-Fired Multiple Burner Boiler-Furnaces—September 1, 1989.

NFPA 85F–1988, Installation and Operation of Pulverized Fuel Systems—September 1, 1989.

NFPA 171–1986, Visual Alerting Symbols for General Public Firesafety—July 14, 1989.

NFPA 171–1986, Firesafety Symbols for Architectural and Engineering Drawings—July 14, 1989.

NFPA 174–1986, Firesafety Symbols for Risk Analysis Diagrams—July 14, 1989.

NFPA 178–1986, Symbols for Fire Fighting Operations—July 14, 1989.

NFPA 204M–1985, Guide for Smoke and Heat Venting—July 14, 1989.

NFPA 220–1985, Standard Types of Building Construction—July 14, 1989.

NFPA 232–1986, Protection of Records—July 14, 1989.

NFPA 232AM–1986, Fire Protection for Archives and Records Centers—July 14, 1989.

NFPA 263–1986, Test Methods For Heat Release Rates of Materials—July 14, 1989.

NFPA 295–1985, Wildfire Control—July 14, 1989.

NFPA 296–1986, Air Operations for Forest, Brush and Grass Fires—July 14, 1989.

NFPA 297–1986, Telecommunications Systems—July 14, 1989.

NFPA 321–1987, Classification of Flammable and Combustible Liquids—July 14, 1989.

NFPA 325M–1984, Fire Hazard Properties of Flammable Liquids, Gases, and Volatile Solids—July 14, 1989.

NFPA 327–1987, Cleaning or Safeguarding Small Tanks and Containers—July 15, 1990.

NFPA 328–1987, Control of Flammable and Combustible Liquids and Gases in Manholes and Sewers—July 15, 1990.

NFPA 329–1987, Underground Leakage of Flammable and Combustible Liquids—July 15, 1990.

NFPA 395–1988, Storage of Flammable and Combustible Liquids on Farms and Isolated Construction Projects—Open.

NFPA 403–1988, Aircraft Rescue and Fire Fighting Services at Airports and Heliports—October 6, 1989.

NFPA 424M–1986, Airport/Community Emergency Planning—October 6, 1989.

NFPA 491M–1986, Hazardous Chemical Reactions—July 14, 1989.

NFPA 502–1987, Fire Protection for Limited Access Highways, Tunnels, Bridges, Elevated Railways and Air Right Structures—January 19, 1990.

NFPA 325M–1984, Fire Hazard Properties of Flammable Liquids, Gases, and Volatile Solids—July 14, 1989.

NFPA 327–1987, Cleaning or Safeguarding Small Tanks and Containers—July 15, 1990.

NFPA 328–1987, Control of Flammable and Combustible Liquids and Gases in Manholes and Sewers—July 15, 1990.

NFPA 329–1987, Underground Leakage of Flammable Combusible Liquids—July 15, 1990.

NFPA 395–1988, Storage of Flammable and Combustible Liquids on Farms and Isolated Construction Projects—Open.

NFPA 403–1988, Aircraft Rescue and Fire Fighting Services at Airports and Heliports—October 6, 1989.

NFPA 424M–1986, Airport/Community Emergency Planning—October 6, 1989.

NFPA 491M–1986, Hazardous Chemical Reactions—July 14, 1989.

NFPA 502–1987, Fire Protection for Limited Access Highways, Tunnels, Bridges, Elevated Railways and Air Right Structures—January 19, 1990.

NFPA 703–1985, Fire Retardant Treatments of Building Materials—July 14, 1989.

NFPA 801–1986, Facilities Handling Radioactive Materials—July 14, 1989.

NFPA 1001–1987, Fire Fighter Professional Qualifications—January 19, 1990.

NFPA 1004–1985, Fire Fighter Medical Technicians Professional Qualifications—July 14, 1989.

NFPA 1031–1987, Fire Inspector Professional Qualifications—July 14, 1989.
NFPA 1033–1987, Fire Investigator Professional Qualifications—July 19, 1990.
NFPA 1035–1987, Public Fire Educator Professional Qualifications—July 20, 1990.
NFPA 1126–Proposed, Pyrotechnics in the Performing Arts—April 3, 1989.
NFPA 1461–1986, Criteria for Accreditation of Fire Protection Education Programs—July 14, 1989.
NFPA 1963–1985, Screw Treads and Gaskets for Fire Hose Connections—July 14, 1989.
NFPA 1971–1986, Protective Clothing for Structural Fire Fighting—October 2, 1989.

[FR Doc. 89–1990 Filed 1–26–89; 8:45 am]
BILLING CODE 3510–13–M

[Notice 1]

National Fire Codes: Request for Comments on NFPA Technical Committee Reports

AGENCY: National Institute of Standards and Technology, DOC.

ACTION: Notice of request for comments.

SUMMARY: The National Fire Protection Association (NFPA) revises existing standards and adopts new standards twice a year. At its Fall Meeting in November or its Annual Meeting in May, the NFPA acts on recommendations made by its technical committees.

The purpose of this notice is to request comments on the technical reports which will be presented at NFPA's 1989 Fall Meeting. The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of NFPA is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the standards referenced in the notice.

DATES: The Technical Committee Reports are available for distribution on January 27, 1989. Comments received on or before April 7, 1989 will be considered by the respective NFPA Committees before final action is taken on the proposals.

ADDRESS: The 1989 Fall Technical Committee Reports are available from NFPA, Publications Department, Batterymarch Park, Quincy, Massachusetts 02269. (The single copy price is $5.00 to cover postage and handling.) Comments on the reports should be submitted to Arthur E. Cote, P.E., Secretary, Standards Council, NFPA, Batterymarch Park, Quincy, Massachusetts 02269.

FOR FURTHER INFORMATION CONTACT: Arthur E. Cote, P.E., Secretary, Standards Council, at above address, (617) 770–3000.

SUPPLEMENTARY INFORMATION:

Background

Standards developed by the technical committees of the National Fire Protection Association (NFPA) have been used by various Federal agencies as the basis for Federal regulations concerning fire safety. The NFPA standards are known collectively as the National Fire Codes. Often, the Office of the Federal Register approves the incorporation by reference of these standards under 5 U.S.C. 552(a) and 1 CFR Part 51.

Revisions of existing standards and adoption of new standards are reported by the technical committees at the NFPA's Fall Meeting in November or at the Annual Meeting in May of each year. The NFPA invites public comment on its Technical Committee Reports.

Request for Comments

Interested persons may participate in these revisions by submitting written data, views, or arguments to Arthur E. Cote, P.E., Secretary, Standards Council, NFPA, Batterymarch Park, Quincy, Massachusetts 02269. Commentors may use the forms provided for comments in the Technical Committee Reports. Each person submitting a comment should include his or her name and address, identify the notice, and give reasons for any recommendations. Comments received on or before April 7, 1989 will be considered by the NFPA before final action is taken on the proposals.

Copies of all written comments received and the disposition of those comments by the NFPA committees will be published as the Technical Committee Documentation by September 22, 1989, prior to the Fall Meeting.

A copy of the Technical Committee Documentation will be sent automatically to each commentor. Action on the Technical Committee Reports (adoption or rejection) will be taken at the Fall Meeting, November 13–15, 1989, in Seattle, WA by NFPA members.

Dated: January 23, 1989.

Raymond G. Kammer,

Acting Director.

1989 Fall Meeting Technical Committee Reports

(P = Partial revision; W = Withdrawal; R = Reconfirmation; N = New; C = Complete Revision)

NFPA No.	Title	Action
10	Portable Extinguishers	P
10L	Fire Extinguishers, Portable Enabling Act.	P
14	Standpipe and Hose Systems.	P
17	Dry Chemical Extinguishing Systems.	P
17A	Wet Chemical Extinguishing Systems.	P
32	Drycleaning Plants	R
37	Combustion Engines and Gas Turbines.	P
46	Forest Products, Storage of.	R
50	Oxygen Systems, Bulk, at Consumer Sites.	P
53M	Fire Hazards in Oxygen-Enriched Atmospheres.	R
59A	Liquefied Natural Gas, Storage and Handling.	P
80	Fire Doors and Windows	P
82	Incinerators, Waste and Linen Handling Systems & Equipment.	P
86	Ovens & Furnaces, Design, Locations & Equipment (86A/B Combined).	P
91	Blower and Exhaust Systems, Dust, Stock, Vapor.	P
99	Health Care Facilities	P
98B	Hypobaric Facilities	P
130	Fixed Guideway Transit Systems.	P
385	Flammable and Combustible Liquids, tank Vehicles for.	P
386	Flammable and Combustible Liquids, Portable Shipping Tanks.	R
501C	Recreational Vehicles	P
501D	Recreational Vehicle Parks	P
512	Truck Fire Protection	P
513	Motor Freight Terminals	P
650	Pneumatic Conveying Systems for Handling Combustible Mat.	R
704	Fire Hazards of Materials, Identification System.	P
820	Waste Water Treatment Plants.	N
850	Fossil Fueled Steam Electric Gen Plants.	P
901	Uniform Coding for Fire Protection.	P
902M	Fire Reporting Field Incident Manuel.	P
1405	Fire Servicing Training	N
1991	Vapor Protective Suits for Hazardous Chemical Emergencies.	N
1992	Liquid Splash Protective Suits for Hazardous Chemical Emergencies.	N

[FR Doc. 89–1902 Filed 1–26–89; 8:45 am]
BILLING CODE 3510–13–M

National Oceanic and Atmospheric Administration

Public Meeting on the Proposed Great Bay National Estuarine Research Reserve—Draft Management Plan

AGENCY: Marine and Estuarine Management Division, Office of Ocean and Coastal Resource Management Division, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Public meeting notice.

SUMMARY: Notice is hereby given that the Marine and Estuarine Management Division, of the Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, will hold a public meeting for the purpose of receiving comments on the Draft Management Plan (DMP) prepared on the proposed designation of the Great Bay National Estuarine Research Reserve.

The hearing will be held on Friday, February 17, 1989 at 2:00 p.m. at the Department of Fish and Game, Fish & Game Headquarters Region 3, 37 Concord Road, Durham, New Hampshire.

The views of interested persons and organizations on the adequacy of the DMP are solicited, and may be expressed orally and/or in written statements. Presentations will be scheduled in advance and may be limited to a maximum of five (5) minutes. The time allotment may be extended before the meeting when the number of speakers can be determined. All comments received at the meeting will be considered in the preparation of the Final Management Plan.

The comment period for the DMP will close on Monday, February 27, 1989. All written comments received by this deadline will be considered in the preparation of the Final Management Plan. Copies of the DMP may be obtained from the Marine and Estuarine Management Division, Office of Ocean and Coastal Resource Management, NOAA, 1825 Connecticut Avenue, NW., Suite 714, Washington, DC 20235 (Telephone: 202/673–5122), and the Office of State Planning, 2½ Beacon Street, Concord, New Hampshire 03301 (Telephone 603/271–1752).

Thomas J. Maginnis,

Assistant Administrator for Ocean Services and Coastal Zone Management.

Date: January 19, 1989.

Federal Domestic Assistance Catalog Number 11.420 Coastal Zone Management Estuarine Sanctuaries.

[FR Doc. 89–1921 Filed 1–26–89; 8:45 am]

BILLING CODE 3510-08-M

Marine Mammals Permit Application; Burke Memorial Washington State Museum (P405A)

Notice is hereby given that an Applicant has applied in due form for a Permit to take marine mammals as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216), the Endangered Species Act of 1973 (16 U.S.C. 1531–1544), and the National Marine Fisheries Service regulations governing endangered fish and wildlife permits (50 CFR Parts 217–222).

1. Applicant: Burke Memorial Washington State Museum, University of Washington, Seattle, Washington 98195.

2. Type of Permit: Scientific Research.

3. Name and Number of Marine Mammals: Unspecified number of all species of marine mammals.

4. Type of Take: Specimens will be taken as salvage from dead animals and may be imported for scientific purposes.

5. Location of Activity: Worldwide.

6. Period of Activity: 5 Years.

Concurrent with the publication of this notice in the **Federal Register**, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors.

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, U.S. Department of Commerce, Washington, DC 20235, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries.

All statements and opinions contained in this application are summaries of those of the Applicant and do not necessarily reflect the views of the National Marine Fisheries Service.

Documents submitted in connection with the above application are available for review by interested persons in the following offices:

Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East-West Highway, Rm. 7330, Silver Spring, Maryland; and

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California, 90731–7415.

Director, Nortwest Region, National Marine Fisheries Service, 7600 Sand Point Way, NE., BIN C15700, Seattle, Washington 98115–0070;

Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802;

Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702;

Director, Northeast Region, National Marine Fisheries Service, 14 Elm Street, Federal Building, Gloucester, Massachusetts 01930;

Office of Management Authority, U.S. Fish and Wildlife Service, 1375 K Street, NW., Room 703, Washington, DC 20005.

Nancy Foster,

Director, Office of Protected Resources and Habitat Programs.

Date: October 18, 1988.

Mr. Richard K. Robinson,

Chief, Permit Branch Office of Management Authority.

Date: November 14, 1988.

[FR Doc. 89–1904 Filed 1–26–89; 8:45 am]

BILLING CODE 3510-22-M

Denial of Marine Mammals Permit; Riviera Hotel (P434)

On December 7, 1988, notice was published in the **Federal Register** (53 FR 49341) that an application had been filed by the Riviera Hotel, 2901 S. Las Vegas Blvd., Las Vegas, Nevada 89109, for a permit to import and display three California sea lions (*Zalophus californianus*).

Notice is hereby given that on January 17, 1989, under the authority of the Marine Mammal Protection Act of 1972, as amended, (16 U.S.C. 1361 *et seq.*), and after having considered all pertinent information and facts, the National Marine Fisheries Service denied the above referenced permit application.

Documents submitted in connection with the application are available for inspection in the Office of Protected Resources and Habitat Programs, Room 7324, 1335 East-West Highway, Silver Spring, Maryland 20910. For further

information contact Georgia Cranmore at (301) 427–2289.

Nancy Foster,

Director, Office of Protected Resources and Habitat Programs.

Date: January 23, 1989.

[FR Doc. 89–1905 Filed 1–26–89; 8:45 am]

BILLING CODE 3510–22–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China; Correction

January 23, 1989.

On page 50277 of the **Federal Register** notice published on December 14, 1988, correct footnote 1 to read:

In Categories 338–S/339–S, all tariff numbers except 6109.10.00.10, 6109.10.00.15, 6109.10.00.25, 6109.10.00.30, 6109.10.00.40, 6109.10.00.45, 6109.10.00.60, 6109.10.00.65.

James H. Babb,

Committee for the Implementation of Textile Agreements.

[FR Doc. 89–1930 Filed 1–26–89; 8:45 am]

BILLING CODE 3510–DR–M

Announcement of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in the United Mexican States; Correction

January 23, 1989.

Beginning on page 52461, third column, of the **Federal Register** notice published on December 28, 1988, make the following changes:

Change "223pt.[2]" to "223"

Delete footnote [2]

Footnote 8: delete 6103.42.20.20, add 6103.42.20.25, add 6203.42.20.90, add 6211.32.00.25

Footnote 12: add 4202.92.30.15, add 5601.10.10.00, add 5601.21.00.90

Footnote 17: add 6203.43.20.90, add 6203.49.10.90, add 6211.33.00.17

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89-1931 Filed 1–26–89; 8:45 am]

BILLING CODE 3510–DR–M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List 1989; Addition

AGENCY: Committee for Purchase From the Blind and Other Severely Handicapped.

ACTION: Addition to procurement list.

SUMMARY: This action adds to Procurement List 1989 a commodity to be produced by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: February 27, 1989.

ADDRESS: Committee for Purchase From the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: On November 28, 1988, the Committee for Purchase From the Blind and Other Severely Handicapped published notice (53 FR 47850) of proposed addition to Procurement List 1989, which was published on November 15, 1988 (53 FR 46018).

Comments were received from a law firm representing the current contractor for this service. The commenter indicated that the company had previously received contracts for shelf stocking and custodial services at the Pensacola Naval Air Station Commissary. He related that the Committee had added the commissary shelf stocking service at the base to its Procurement List about two years ago and that the additional loss of the janitorial/custodial contract which represents 75% of the custodial portion of its current business would be a severe economic blow to the company.

The value of the firm's contract for the service proposed for addition represents about 5.9% of its total annual sales. The commissary shelf stocking for the Naval Air Station in Pensacola, Florida, was added to the Committee's Procurement List on October 30, 1986. The cumulative impact on the current contractor of the addition of both services to the Procurement List is about 10.8%. This is not considered to be serious adverse impact. After consideration of the material presented to it concerning the capability of a qualified workshop to provide this service at a fair market price and the impact of the addition on the current or most recent contractor, the Committee has determined that the service listed below is suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The action will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The action will not have a serious economic impact on any contractors for the service listed.

c. The action will result in authorizing small entities to provide the service procured by the Government.

Accordingly, the following service is hereby added to Procurement List 1989:

Janitorial/Custodial
Commissary Store
Naval Air Station
Pensacola, Florida

Beverly L. Milkman,

Executive Director.

[FR Doc. 89–1927 Filed 1–26–89; 8:45 am]

BILLING CODE 6820–33–M

Procurement List 1989; Additions and Deletions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to and deletions from procurement list.

SUMMARY: This action adds to and deletes from Procurement List 1989 commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: February 27, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: On September 16, October 7 and November 28, 1988, the Committee for Purchase From the Blind and Other Severely Handicapped published notices (53 FR 36091, 39497 and 47850) of proposed additions to and deletions from Procurement List 1989, which was published on November 15, 1988 (53 FR 46018).

Additions

No comments were received concerning the proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified workships to produce the commodities and provide

the services at a fair market price and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodities and services listed.

c. The actions will result in authorizing small entities to produce the commodities and provide the services procured by the Government.

Accordingly, the following commodities and services are hereby added to Procurement List 1989:

Commodities

Table, Coffee
7105–00–139–7573
7105–00–139–7601
(Requirements for Zone 1 only)
Table, End
7105–00–139–7598
(Requirements for Zone 1 only)
Table, Lamp
7105–00–139–7600
(Requirements for Zone 1 only)

Services

Grounds Maintenance, Air Route Traffic Control Center, Auburn, Washington
Grounds Maintenance and Sprinkler System Maintenance, Building 6459, Edwards Air Force Base, California
Janitorial/Custodial, Social Security Administration, Operations Building, Third and Fourth Floors, 6401 Security Boulevard, Baltimore, Maryland

Deletions

After consideration of the relevant matter presented, the Committee has determined that the services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

Accordingly, the following services are hereby deleted from Procurement List 1989:

Furniture Rehabilitation at the following locations: Altus Air Force Base, Oklahoma, Lawton, Oklahoma including Fort Sill
Oklahoma City, Oklahoma, plus 25-mile radius, including FAA and Tinker Air Force Base, San Antonio, Texas, plus 40-mile radius, Wichita Falls, Texas, including Sheppard Air Force Base

Beverly L. Milkman,

Executive Director.

[FR Doc. 89–1928 Filed 1–26–89; 8:45 am]

BILLING CODE 6820–33–M

Procurement List 1989; Proposed Additions and Deletions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to and deletions from procurement list.

SUMMARY: The Committee has received proposals to add to and delete from Procurement List 1989 a commodity to be produced and services to be provided by workshops for the blind and other severely handicapped.

Comments Must Be Received on or Before: February 27, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: E.R. Alley, Jr., (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

Additions

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodity and services listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodity and services to Procurement List 1989, which was published November 15, 1988 (53 FR 46018):

Commodity

Cushion, Seat, Vehicular
2540–00–831–6948

Services

Brick Joint Cleaning, Andersonville National Historic Site, Andersonville, Georgia
Janitorial/Custodial, Waterways Experiment Station, Vicksburg, Mississippi
Microfilming and Related Services, Internal Revenue Service, Western Region, Seattle, Washington
Reproduction Service, Headquarters, U.S. Marine Corps, Clarendon Square Office Building, 3033 Wilson Boulevard, Arlington, Virginia

Deletions

It is proposed to delete the following services from Procurement List 1989, which was published November 15, 1988 (53 FR 46018):

Commissary Warehouse Service, Maxwell Air Force Base, Alabama
Commissary Warehouse Service, Scott Air Force Base, Illinois

Beverly L. Milkman,

Executive Director.

[FR Doc. 89–1929 Filed 1–26–89; 8:45 am]

BILLING CODE 6820–33–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Open Meeting

In accordance with section 10(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: 13–14 February 1989.

Time: 0830–1700 hours each day.

Place: Alexandria, Virginia.

Agenda: The 1989 Army Science Board Summer Study of International Cooperation and Data Exchange to Enhance the Army's Technology Base will hold its first meeting at U.S. Army Materiel Command Headquarters, Alexandria. VA. The purpose of this meeting is to validate the planned schedule of this study and to review the current status of the Army/DoD international technology program. The tentative schedule includes regular monthly meetings and data gathering field trips to European and Far Eastern nations. This meeting will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted 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. 89–1892 Filed 1–26–89; 8:45 am]

BILLING CODE 3710–08–M

Army Science Board; Partially Closed Meeting

In accordance with section 10(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: 15–16 February 1989.

Time: 0830–1330 hours, 15 February (Open), 1330–1430 hours, (Closed), 1430–1700 hours, (Open), 0830–1200 hours, 16 February (Open).

Place: The Pentagon, Washington, DC.

Agenda: The Army Science Board Ad Hoc Subgroup on Army's Technology Base Strategy for the 1990's will hold its first meeting. Subjects to be discussed are: The Army Technology Base Master Plan, the current management structure and investment strategy for the Army Tech Base, Advanced Technology Transition Demonstrators (ATTD's) in the Army, results of the Board of Army Science and Technology (BAST) study on Strategic Technologies for the Army, and Technology Base management within the Army Materiel Command (AMC). The open portions of the meeting are open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted 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. 89–1893 Filed 1–26–89; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF ENERGY

Record of Decision on Special Isotope Separation Project, Idaho National Engineering Laboratory

AGENCY: Department of Energy DOE.

ACTION: Record of Decision, Special Isotope Separation Project (SIS).

SUMMARY: The DOE has decided to proceed with the construction and operation of the SIS production facility using the Atomic Vapor Laser Isotope Separation (AVLIS) technology and to select the Idaho National Engineering Laboratory (INEL) as the location for the SIS. The DOE has prepared this Record of Decision (ROD) pursuant to regulations of the Council on Environmental Quality (40 CFR Part 1505) and Implementing Procedures of the Department of Energy (52 F.R. 47662, Dec. 15, 1987).

FOR FURTHER INFORMATION CONTACT: Dr. Ralph G. Lightner, SIS Program Office, DP–7, U.S. Department of Energy, Washington, DC 20545.

Decision

The DOE has decided to proceed with the construction and operation of the SIS production facility using the AVLIS technology and to select the Idaho National Engineering Laboratory (INEL) as the location for the SIS. The INEL is located approximately 45 miles west of the City of Idaho Falls, Idaho. Site preparation activities for the SIS production facility will be initiated as soon as practical; however, significant physical construction of the SIS production plant will not be initiated until successful results of AVLIS plant performance verification testing at the Lawrence Livermore National Laboratory (LLNL) are obtained.

Basis for Decision

In determining to proceed to construct and operate the AVLIS SIS facility, DOE has, in compliance with the National Environmental Policy Act (NEPA) and its implementing regulations, weighed the programmatic need for the SIS facility against its environmental and other costs. DOE has considered: (1) The technology and production alternatives to the SIS Project; (2) the potential environmental consequences of constructing and operating the SIS Project at alternative sites; and (3) No Action, i.e., to not construct the SIS facility. Note that present practice for the production of weapon-grade plutonium would continue irrespective of whether or not the SIS facility is constructed and operated.

During the period between January and March 1986, DOE conducted a process readiness review for the purpose of designating a preferred laser isotope separation technology for the SIS facility. This culminated a several year process in which DOE investigated potential non-reactor based processes to adjust isotopic contents of plutonium. Subsequent to a NEPA review, DOE selected the AVLIS process as the preferred technology because it was the only technology ready to proceed to the definitive plant design phase. Development of AVLIS technology is proceeding at an acceptable pace at LLNL.

Regarding production alternatives, only the SIS production facility can provide the necessary contingency, technological diversity, and flexibility in meeting approved needs for nuclear defense materials. None of the weapon-grade plutonium production alternatives to the SIS Project was considered a reasonable alternative to the Proposed Action, as none would, either separately or in combination, provide the required contingency, technological diversity, and flexibility.

The DOE had previously designated the INEL as the preferred site for the SIS production facility because it would provide diversification of plutonium processing sites and a favorable labor climate. In deciding to proceed with the selection of the INEL for the SIS facility, DOE has considered and evaluated in the FEIS the potential environmental consequences of locating the project at each of three locations: the INEL; the Hanford Site near Richland, Washington; and the Savannah River Plant (SRP) near Aiken, South Carolina. The primary differences in potential environmental consequences associated with locating the SIS Project at the alternative locations are related to factors that include the geographic and demographic area surrounding each location and the origins, destinations, and transport distances for SIS materials and wastes. While quantitative differences in potential exposures and risks do exist, none was found to be clearly superior from an environmental perspective. The FEIS indicates that operation of the plant at any of the three alternative sites will not pose serious threats to the environment or public health and safety, nor give rise to significant adverse socioeconomic consequences.

The No Action alternative does not meet programmatic requirements as it requires a continued exclusive dependence for new nuclear defense materials on production reactors that are more than 35 years old, whose continued operation at high power and availability cannot be assured. While the present practice of recycling and recovery of weapon-grade plutonium form retirements or scrap will continue to be a major source of recycled weapon-grade material, it does not provide a contingent capability for the production of new material, if required.

Background

The DOE, in accordance with the Atomic Energy Act of 1954, as amended, and in subsequent legislation, is responsible for developing and maintaining the capability to produce special nuclear material and other materials required for defense programs of the United States. The nation's stockpile of weapon-grade plutonium physically resides in weapons held by the Department of Defense or in DOE inventories associated with nuclear material and nuclear weapons production, processing, and storage. Annually, the President approves a document entitled the Nuclear Weapons

Stockpile Memorandum (NWSM) which takes into account the inventory of existing special nuclear material and other nuclear materials, including weapon-grade plutonium, and sets forth the future composition of the nuclear weapons stockpile required to defend the United States. The approval of the NWSM by the President and the subsequent authorization and appropriation of funds by Congress constitute the legal authority and mandate for DOE to produce the specified types and quantities of nuclear defense materials and weapons and to maintain the facilities and capabilities to do so.

To fulfill its responsibilities, DOE requires contingency in its production capability, technological diversity, and flexibility. Contingent capability or capacity is essential to ensure that approved needs for defense nuclear materials can be met without being dependent on any single facility. The age of the present DOE facilities requires that a prudent level of contingent production capability be initiated now so that future approved requirements can be met. Technological diversity will help ensure production capability that is not dependent on a single technology which would be susceptible to interruption or foreclosure by generic issues associated with that technology, such as those incurred by DOE's current total reliance on reactors for producing nuclear defense materials. Flexibility in DOE's production of defense nuclear materials is also required to provide an alternative source of weapon-grade plutonium when there are competing demands for tritium and plutonium production from the same production reactors or when approved requirements for weapon-grade plutonium may increase rapidly and extend beyond the capability of the existing sources.

During the last several years, the DOE has investigated potential nonreactor-based processes to adjust the isotopic content of plutonium which does not meet weapon-grade specifications (e.g., fuel-grade plutonium) to provide plutonium meeting weapon-grade specifications. In accordance with the Conference Report for FY 1987 Energy and Water Development Appropriations Acts (Public Law 99–141), DOE reviewed the AVLIS process being developed by LLNL and the Molecular Laser Isotope Separation (MLIS) process under development at the Los Alamos National Laboratory to establish the readiness of these two processes for deployment and to select the more suitable process for a possible production facility. In March 1986, DOE prepared an Environmental Assessment (DOE/EA–0298) to evaluate the differences in potential impacts between the AVLIS and MLIS technologies. DOE's Finding of No Significant Impact issued in April 1986 concluded that although there were quantitative and qualitative differences between the processes, no significantly different environmental impacts existed between the two processes and thus, selection of an SIS process for focusing development, demonstration, and design of a potential production plant was not a major Federal action significantly affecting the environment. Following this review, DOE selected the AVLIS process as the preferred technology for the SIS Project, and in October 1986, published its Notice of Intent to prepare an EIS for siting, constructing and operating a proposed SIS plant based on the AVLIS process technology [51 FR 39765].

As to follow-up to the technical readiness review conducted in early 1986, DOE initiated a decision-making process that included a site evaluation team to identify a preferred site for SIS plant design considerations. The site evaluation team considered such criteria as project cost and schedule; environmental, safety, and health impacts; human resources and workload; and socioeconomic considerations. Based on the findings of the site evaluation team, DOE designated the INEL as the preferred site.

DOE conducted an extended public scoping process (Oct. 1986 to March 2, 1987) and held two public scoping hearings during this scoping period (69 oral commentaries, 44 exhibits, and 99 written submittals were received by DOE). A *Draft Environmental Impact Statement, Special Isotope Separation Project, Idaho National Engineering Laboratory, Idaho Falls, Idaho* (DOE/EIS–0136D) was issued and a Notice of Availability was published in the **Federal Register** on February 19, 1988 [53 FR 5032]. More than 1500 copies of the Draft EIS were distributed to members of Congress, state and Federal agencies, and concerned individuals. DOE provided a 60-day public review period on the Draft EIS, between February 19, 1988, and April 21, 1988, that included six days of public hearings and generated 504 oral commentaries, 803 exhibits and 30 written submittals. DOE then issued and distributed more than 2100 copies of the Final EIS in early December 1988. The EPA Notice of Availability of the Final EIS was published in the **Federal Register** on December 16, 1988 [53 FR 50568]. DOE has considered and responded to the concerns of the public, state and federal officials that were raised throughout these public review periods by making changes or providing additional detail to relevant portions of Vol. 1 of the FEIS and/or making specific responses in Vol. 2, Public Comments and Responses. In addition, DOE has considered all comments received on the Final EIS in the preparation of this Record of Decision. DOE will continue to coordinate with interested members of the public and state and federal officials throughout the implementation of its decision.

Alternatives Considered

As described in the *Final Environmental Impact Statement, Special Isotope Separation Project, Idaho National Engineering Laboratory, Idaho Falls, Idaho* (DOE/EIS–0136), November 1988, DOE's preferred alternative is to construct and operate the SIS facility at the INEL. DOE has considered: (1) The technology and production alternatives to the SIS Project; (2) the potential environmental consequences of constructing and operating the SIS Project at alternative sites; and (3) No Action, i.e., to not construct the SIS facility. Present practice for the production of weapon-grade plutonium would continue irrespective of whether or not the SIS facility is constructed and operated.

In formulating the Proposed Action, DOE considered two major categories of alternatives. These categories of alternatives were technology alternatives to AVLIS and production alternatives for weapon-grade plutonium. The recovery and recycling of existing weapon-grade plutonium from retired weapons and acceleration of scrap recovery, while not true alternatives to production, were also evaluated.

Because of fundamental technical considerations, cost, or the need to carry out extensive research and development programs, only the MLIS process merited further consideration as an alternative to the AVLIS process. As discussed under "Background" in this Record and Decision, subsequent technical evaluations in response to a Congressional request concluded that only the AVLIS process was technically ready to proceed to the definitive plant design phase.

None of the weapon-grade plutonium production alternatives to the SIS Project was considered a reasonable alternative to the Proposed Action, as none would, either separately or in

combination, provide the required contingency, technological diversity, and flexibility. The production alternatives considered in the FEIS included increased blending, use of a new fuel lattice in the reactors at the SRP, restart of the N-Reactor at the Hanford Site, conversion of the Washington Nuclear Project Unit 1, and construction and operation of a New Production Reactor.

The Special Isotope Separation Project would process DOE owned fuel-grade plutonium into weapon-grade plutonium using the AVLIS and supporting chemical processes. The AVLIS process uses precisely tuned visible laser light to selectively ionize, or excite, specific plutonium isotopes into a vapor stream. The ionized plutonium isotopes are then separated from the plutonium isotope of interest. Chemical processes are required to (1) prepare the AVLIS plutonium feed for processing, remove americium-241, and cast plutonium metal into forms that meet AVLIS processing requirements; (2) recover and, if required, purify the AVLIS plutonium products; and (3) recover and process the AVLIS separated byproducts.

Construction and operation of the SIS production facility at any of the three alternative sites would require a Laser Support Facility which would house the laser system, a Plutonium Processing Building, a stand-alone storage vault, and other support facilities. Construction and operation of the SIS Project would be integrated with existing support and waste management facilities at the alternative sites considered. The atmospheric emissions, liquid effluents, and solid radioactive and nonradioactive wastes resulting from operation would be essentially the same at each of the alternative sites. Operation of the SIS Project at any of the alternative sites considered would require the transport of plutonium feed and product material and the transport of TRU waste and, potentially, SIS generated by-product material. The quantities of material to be transported would all be the same except for the transport of plutonium feed material that would vary based on the amount of feed material already located at each of the alternative sites considered. Although there are different distances involved in the transport of materials and different distances with respect to the release point of SIS radiological emissions to the atmosphere relative to offsite populations, neither the total transport risks nor the potential offsite population exposures are significantly different among alternative SIS sites.

The use of land areas for the project would neither impact critical ecological habitats and habitats of endangered and threatened species nor impact known archaeological or historic resources. All atmospheric releases during construction and operation would be well below prescribed environmental standards and wastes generated during construction and operation would be minimized and managed in accordance with applicable environmental requirements. In addition to a spectrum of potential high-consequence accidents which were analyzed, a severe facility accident was considered in the EIS. The severe facility accident, which is considered to be a bounding impact analysis meeting the CEQ criteria stated in 40 CFR 1502.22, has a estimated probability of occurrence of less than $1 \times 10\text{–}6$ per year. Calculated offsite consequences for the severe accident are only a small fraction of the 25 rem criteria used by the U.S. Nuclear Regulatory Commission in the siting of commercial nuclear reactors (10 CFR 100).

The No Action alternative is a continuation of present DOE weapon-grade plutonium practice which includes the production of weapon-grade plutonium through blending of fuel-grade plutonium with newly produced plutonium of higher than weapon-grade plutonium and the continuation of recovery and recycle of existing weapon-grade plutonium. These practices would continue irrespective of whether or not DOE constructs and operates the SIS Project.

Environmentally Preferable Alternative

The No Action alternative is considered the "environmentally preferable alternative." Extensive analysis of the environmental consequences associated with the No Action alternative is presented in other EISs which are referenced in the SIS FEIS, sections 2.4 and 4.4. The environmental consequences associated with the construction and operation of the SIS Project would not occur with the No Action alternative. Consequences of the construction and operation of the SIS Project, although well within all applicable environmental requirements, would include utilization of previously disturbed and undisturbed land areas, habitat and wildlife loss or displacement, and small unavoidable population and occupational exposures to radioactive and nonradioactive materials. Although the No Action Alternative is the environmentally preferable alternative, it does not meet programmatic requirements for technological diversity, contingency, and flexibility in meeting approved needs for nuclear defense materials. For the three siting alternatives for the construction and operation of the SIS facility, the analysis in the FEIS indicated that none was clearly environmentally superior to the others.

Mitigation

DOE has considered all practicable means to avoid or minimize environmental harm from construction and operation of SIS at the INEL. In proceeding with the construction and operation of the SIS production facility, DOE is committed to complying with all applicable state and Federal environmental requirements and to mitigation measures required by DOE policy, law or regulation, as discussed in the EIS. For example, DOE will replace the Freons used in the laser electronic packages with other acceptable dielectric coolants as soon as they are available from commercial manufacturers in order to minimize impacts on stratospheric ozone depletion. Until such substitutes are available, ongoing engineering development to further reduce emissions, such as chillers and condensation systems to reduce Freon evaporation during refurbishments and vapor recovery systems for recycling will be employed.

Definitive design and operation will continue to emphasize waste minimization practices and ensure the segregation of mixed and hazardous wastes. Definitive design and administrative controls will also ensure that only nonradioactive and nonhazardous liquid effluents are discharged to the environment. The INEL will take all necessary measures to ensure that SIS hazardous and mixed wastes are handled and managed in accordance with all applicable requirements of the Resource Conservation and Recovery Act (RCRA) and the Idaho Hazardous Waste Management Act. Best management practices to reduce fugitive dust emissions and erosion (such as utilization of road base material and application of suppressants, routing of surface water runoff to temporary holding basins), and spill prevention measures during construction (including adherence to a Spill Prevention, Control and Countermeasures (SPCC) plan and provision for washdown areas surrounded by berms or channels for

control of inadvertent runoff) will be implemented. Adherence to an SPCC plan and compliance with all applicable requirements of RCRA and the Idaho Hazardous Waste Management Act will also be ensured during operation of the SIS production facility.

Periodic inspections of excavations by a professional paleontologist will also be implemented to determine the significance of any paleontological resources encountered and any need for potential mitigation measures. Disturbed areas not affected by SIS operation would be revegetated. Administrative measures intended to mitigate environmental consequences include independent monitoring agreements funded by DOE between DOE and the State of Idaho and DOE and Idaho State University as a means of verifying DOE's environmental monitoring data; DOE's safety analysis program conducted in accordance with DOE Orders; monitoring programs to demonstrate compliance with radiation protection standards and DOE policies; and emergency preparedness planning, training and coordination with state and local officials to respond to emergencies on or outside the INEL.

Conclusion

The DOE has weighed the programmatic need to proceed with the construction and operation of the SIS facility against its potential environmental consequences and, after consideration of the benefits and impacts of alternatives as analyzed in the Final EIS, comments received on the EIS, and the anticipated benefits and costs associated with the proposed action and its alternatives, has decided to proceed with the construction and operation of the SIS facility at the INEL. To ensure that the environmental consequences of the SIS Project are minimized, DOE has committed to pursue mitigation measures during construction and operation that have been or will be incorporated into project planning, and will continue its interactions with Federal and State of Idaho regulatory agencies to ensure that actions are implemented in accordance with this Record of Decision and in compliance with all applicable regulatory requirements.

Issued at Washington, DC, this 19th day of January, 1989.

Donna Fitzpatrick,

Under Secretary, U.S. Department of Energy.

[FR Doc. 89-1982 Filed 1-26-89; 8:45 am]

BILLING CODE 6450-01-M

Economic Regulatory Administration

[ERA Docket No. 88-68-NG]

Michigan Consolidated Gas Co.; Order Amending Authorization To Import Natural Gas from Canada

AGENCY: Economic Regulatory Administration Department of Energy.

ACTION: Notice of Order Amending Authorization to Import Natural Gas from Canada.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) gives notice that it has issued an order amending a Michigan Consolidated Gas Company (MichCon) authorization to import natural gas from Canada. The order issued in ERA Docket No. 88-68-NG authorizes MichCon to import up to 50,000 Mcf per day and a total of 14,248 MMcf over a three-year period beginning January 23, 1989, for the exchange, on an equivalent Btu basis, of natural gas for ethane.

A copy of this order is available for inspection and copying in the Natural Gas Division Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9478. The docket room in open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, January 19, 1989.

Constance L. Buckley,

Acting Director, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 89-1983 Filed 1-26-89; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. ER89-171-000, et al.]

Gulf States Utilities Co., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. Gulf States Utilities Company

[Docket No. ER89-171-000]

January 13, 1989.

Take notice that on December 19, 1988, Gulf States Utilities Company (GSU) tendered for filing the 1985 rate schedule for transmission service to the City of Lafayette, Louisiana. In its filing of December 19, 1988 GSU states that it had previously filed this rate schedule with the Louisiana Public Service Commission. GSU describes the rate levels contained in the 1985 rate schedule as based upon and identical to the transmission service rates in Docket No. ER82-375-000.

Comment date: January 26, 1989, in accordancce with Standard Paragraph E at the end of this notice.

2. Nantahala Power & Light Company

[Docket No. ER89-138-000]

January 13, 1989.

Take notice that on December 9, 1988, Nantahala Power & Light Company (Nantahala) tendered for filing computations showing the calculation of the cost for the period July 1, 1987 to June 30, 1988 utilizing the billing format resulting from the New Fontana Agreement (NFA), the 1971 Apportionment Agreement as modified by the FERC, and the 1971 Power Purchase Contract with TVA.

Comment date: January 26, 1989, in accordance with Standard Paragraph E at the end of this notice.

3. Iowa Public Service Company

[Docket No. ER89-166-000]

January 17, 1989.

Take notice that Iowa Public Service Company on January 5, 1989, tendered for filing an executed Firm Capacity Sales Agreement dated August 16, 1988, whereby Iowa Public Service Company (IPS) will supply Interstate Power Company (IPW) with firm electric capacity and associated energy, commencing May 1, 1988 and ending on October 31, 1988. IPS requests that the negotiated Agreement be made effective as of May 1, 1988.

Comment date: January 30, 1989, in accordance with Standard Paragraph E at the end of this notice.

4. Tampa Electric Company

[Docket No. ER89-168-000]

January 17, 1989.

Take notice that on January 5, 1989, Tampa Electric Company (Tampa Electric) tendered for filing a Letter of Commitment providing for the sale by Tampa Electric to Seminole Electric Cooperative (Seminole) of 65 megawatts of capacity and energy. Tampa Electric states that the Letter of Commitment is submitted as a supplement to Service Schedule J (negotiated interchange service) under the existing agreement for interchange service between Tampa Electric and Seminole, designated as Tampa Electric Rate Schedule Ferc No. 22.

Tampa Electric proposes an effective date of January 1, 1989 for the commitment of capacity and energy, and therefore requests waiver of the Commission's notice requirements.

Copies of the filing have been served on Seminole and the Florida Public Service Commission.

Comment date: January 30, 1989, in accordance with Standard Paragraph E at the end of this notice.

5. Idaho Power Company

[Docket No. ER89-167-000]

January 17, 1989.

Take notice that on January 4, 1989, Idaho Power Company tendered for filing in compliance with the Commission's Order of October 7, 1978, a summary of sales made under the Company's 1st Revised FERC Electric Tariff, Volume No. 1 (Supersedes Original Volume No. 1) during September and October 1988, along with cost justification for the rate charged. This filing includes the following supplements: Utah Power & Light Company, Supplement No. 79; Sierra Pacific Power Company, Supplement No. 79; Pacific Power & Light Company, Supplement No. 26; Portland General Electric Company, Supplement No. 61; Montana Power Company, Supplement No. 59; Washington Water Power Company, Supplement No. 59; Southern California Edison Company, Supplement No. 44; Pacific Gas & Electric Company, Supplement No. 34; Puget Sound Power & Light Company, Supplement No. 35.

Comment date: January 30, 1989, in accordance with Standard Paragraph E at the end of this notice.

6. New York State Electric & Gas Corporation

[Docket Nos. ER88-508-000, ER88-520-000]

January 18, 1989.

Take notice that on January 6, 1989, New York State Electric & Gas Corporation (NYSEG) tendered for filing supplemental information requested by the Commission, after finding the agreement between NYSEG and GPU Service Corporation (GPU) for the interchange of excess energy (Docket No. ER88-508-000) and the amendment to NYSEG's agreements with Connecticut Light and Power Company, Central Hudson Gas & Electric Corporation, and the New York Power Authority for the sale of short-term energy (Docket No. ER88-520-000) were deficient with respect to the Commission's Regulations.

NYSEG requests that the 60-day filing requirements be waived and that June 1, 1988 be allowed as the effective date of the filing in Docket No. ER88-508-000 and that January 1, 1988 be allowed as the effective date for the filing in Docket No. ER88-520-000.

Comment date: January 30, 1989, in accordance with Standard Paragraph E at the end of this notice.

7. Oxbow Power Corporation

[Docket No. QF89-111-000]

January 19, 1989.

On December 30, 1988, Oxbow Power Corporation (Applicant), of 333 Elm Street, Dedham, MA 02026, submitted for filing an application for certification of a facility as a qualifying cogeneration 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 in North Tonawanda, New York. The facility will consist of an extraction/condensing steam turbine generator and a coal fired boiler. Thermal energy recovered from the facility will be used for industrial processes in the Occidental Chemical Corporation plant adjacent to the facility. The electric power production capacity of the facility will be 55,000 KW. The primary source of energy will be bituminous coal. Construction of the facility is scheduled to begin April 1989.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

8. Bonneville Pacific Corporation

[Docket No. QF85-644-001]

January 19, 1989.

On December 28, 1988, Bonneville Pacific Corporation (Applicant), of 257 East 200 South, Suite #800, Salt Lake City, Utah 84111, submitted for filing an application for recertification of a facility as a qualifying cogeneration 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 in Santa Maria, California. The facility will consist of a combustion turbine generator and a heat recovery steam generator. Thermal energy recovered from the facility will be used in vegetable blanching process and food refrigeration. The net electric power production capacity will be 8500 KW. The primary energy source will be natural gas. Construction of the facility commenced March 1988.

By order issued February 11, 1986, the Commission granted certification of the facility as a cogeneration facility (34 FERC 62319).

The recertification is requested due to a change in the ownership of the facility from Santa Maria Associates to Bonneville Pacific Corporation and an increase in capacity from 7483 KW to 8500 KW.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

9. Southern California Edison Company

[Docket No. ER89-178-000]

January 19, 1989.

Take notice that on January 13, 1989, Southern California Edison (Edison) tendered for filing the Edison-Vernon LADWP Firm Transmission Service Agreement (Agreement) which has been executed by Edison and the City of Vernon, California (Vernon).

Under the Agreement, Edison agrees to make firm transmission service available to Vernon from February 1, 1989 through May 31, 1989, during certain hours, for Vernon's LADWP capacity and associated energy. Edison will be providing firm transmission service for up to 30 megawatts of capacity and associated energy.

Copies of this filing were served upon the Public Utilities Commission of the State of California and the City of Vernon, California.

Comment date: January 27, 1989, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 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,

Secretary.

[FR Doc. 89-1953 Filed 1-26-89; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 6872-004]

City of Ithaca, Surrender of Exemption

January 25, 1989.

Take notice that the City of Ithaca, exemptee for the Sixty Foot Dam Project

No. 6872, has requested that the exemption be terminated. The exemption for Project No. 6872 was issued on August 8, 1986. The project would have been located on the Six Mile Creek, in Tompkins County, New York. No construction has started.

The exemptee filed the request on January 9, 1989, and the exemption for Project No. 6872 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, or holiday as described in 18 CFR 385.2007, in which case the exemption shall remain in effect through the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1959 Filed 1-26-89; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 10398-001]

Skykomish River Hydro, WA; Surrender of Preliminary Permit

January 25, 1989

Take notice that Skykomish River Hydro, permittee for the Goblin Creek Project, located on Goblin Creek in Snohomish County, Washington, has requested that its preliminary permit be terminated. The preliminary permit was issued on October 6, 1987, and would have expired on September 30, 1990. The permittee states that analysis of the project did not indicate feasibility for development.

The permittee filed the request on December 23, 1988, and the preliminary permit for Project No. 10398 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday or holiday as described in CFR 385.2007, in which case the permit shall remain in effect through the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

Lois D. Cashell,

Secretary.

[FR Doc. 89-1960 Filed 1-26-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. MT88-23-001]

Colorado Interstate Gas Co.; Notice of Proposed Changes in FERC Gas Tariff Pursuant to Order No. 497

January 24, 1989.

Take notice that on December 30, 1988, Colorado Interstate Gas Company tendered the following tariff sheets for filing in the captioned docket pursuant to Order No. 497 and section 250.16 of the Commission's Regulations as part of its FERC Gas Tariff, Second Revised Volume No. 1-A:

First Revised Sheet No. 21, Superseding Original Sheet No. 21.

Second Revised Sheet No. 24, Superseding First Revised Sheet No. 24.

Second Revised Sheet No. 25, Superseding First Revised Sheet No. 25.

Second Revised Sheet No. 45, Superseding First Revised Sheet No. 45.

Any person desiring to be heard or to protest the subject 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 18 CFR sections 385.214 and 385.211. All such motions or protests must be filed by January 27, 1989. 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,

Secretary.

[FR Doc. 89-1961 Filed 1-26-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RE81-62-001, et al.]

Duquesne Light Co., et al.; Application for Exemption

January 25, 1989.

In the matter of: Duquesne Light Company, Docket No. RE81-62-001; Metropolitan Edison Company, Docket No. RE81-81-001; Pennsylvania Electric Company, Docket No. RE81-15-001; Pennsylvania Power Company, Docket No. RE81-33-001; Pennsylvania Power & Light Company, Docket No. RE89-1-000; Philadelphia Electric Company, Docket No. RE89-2-000; and West Penn Power Company, Docket No. RE80-16-001.

Take notice that The Pennsylvania Public Utility Commission filed an application on December 29, 1988 on behalf of Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, Pennsylvania Power & Light Company, Philadelphia Electric Company, and West Penn Power Company (Applicants), for exemption from the requirements of Part 290 of the Federal Energy Regulatory Commission's (FERC) regulations. These regulations concern the collection and reporting of cost of service information under section 133 of the Public Utility Regulatory Policies Act (PURPA), Order No. 48 (44 FR 58687, October 11, 1979). Exemption is sought from the requirement to file on or prior to June 30, 1990 and biennially thereafter, information on the costs of providing electric service as specified in Subpart B, C, D, and E of Part 290.

Copies of the applications for exemption are on file with FERC and are available for public inspection. FERC's regulations require that said utility also apply to any state regulatory authority having jurisdiction over it to have the application published in any official state publication in which electric rate change applications are usually noticed, and that the utility publish a summary of the application in newspapers of general circulation in the affected jurisdiction.

Any person desiring to present written views, arguments, or other comments on the applications for exemption should file such information with the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, DC 20426, on or before 45 days following the date this notice is published in the **Federal Register**. Within that 45 day period, such person must also serve a copy of such comments on: Mr. John A. Levin, Assistant Counsel, Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA 17120.

Lois Cashell,

Secretary.

[FR Doc. 89-1962 Filed 1-26-89; 8:45 am]

BILLING CODE 6717-01-M

Office of Hearings and Appeals

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy solicits comments concerning the appropriate procedures to be followed in refunding to adversely affected parties $35,000 obtained as a result of a settlement which the DOE entered into with McClure Oil Company, a reseller-retailer of petroleum products located in Oklahoma. The money is being held in escrow following the settlement of enforcement proceedings brought by the DOE's Economic Regulatory Administration.

DATE AND ADDRESS: Comments must be filed within 30 days of publication of this notice in the Federal Register and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. All comments should conspicuously display a reference to case number KEF–0009.

FOR FURTHER INFORMATION CONTACT: Matthew E. Paul, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–6602.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy, 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision sets forth procedures and standards that the DOE has tentatively formulated to distribute to adversely affected parties $35,000 plus accrued interest obtained by the DOE under the terms of a Consent Order entered into with McClure Oil Company (McClure). The funds were provided to the DOE by McClure to settle all claims and disputes between the firm and the DOE regarding the firm's compliance with the Federal Petroleum Price and Allocation Regulations in its sales of covered products during the period August 20, 1973, through January 27, 1981.

OHA has tentatively determined that a portion of the consent order funds should be distributed to firms and individuals that purchased covered products from McClure during the consent order period. In order to obtain a refund, each claimant will be required to submit a schedule of its monthly purchases of covered products from McClure and to demonstrate that it was injured by McClure's alleged regulatory violations. The specific requirements for proving injury are set forth in the following Proposed Decision and Order. Applications for Refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Residual funds in the McClure escrow account will be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. No. 99–509, Title III.

Any member of the public may submit written comments regarding the proposed refund procedures. Such parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of publication of this notice. All comments received in this proceeding will be available for public inspection between 1:00 and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in Room 1E–234, 1000 Independence Avenue, SW., Washington, DC 20585.

Dated: January 23, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

Proposed Decision and Order of the Department of Energy

Implementation of Special Refund Procedures

January 23, 1989.

Name of Firm: McClure Oil Company
Date of Filing: November 19, 1985
Case Number: KEF–0009

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request the Office of Hearings and Appeals (OHA) to formulate and implement procedures for the distribution of funds obtained by the DOE as a result of the agency's enforcement of the Mandatory Petroleum Price and Allocation Regulations. *See* 10 CFR Part 205, Subpart V. Pursuant to the provisions of Subpart V, on November 19, 1985, the ERA filed a Petition for the Implementation of Special Refund Procedures to distribute funds received from McClure Oil Company (McClure) under the terms of a Stipulation and Agreed Final Judgment (Judgment) dated January 30, 1985. [1] In its Petition, the ERA requests that the OHA establish procedures to make refunds in order to remedy the effects of the alleged regulatory violations that were settled in the McClure Judgment.

I. Background

McClure purchased and resold refined petroleum products during the period of federal price controls. The firm was therefore subject to the Mandatory Petroleum Price and Allocation Regulations set forth at 6 CFR part 150 and 10 CFR Parts 210, 211, and 212. During the period of price controls, the ERA conducted an extensive audit of McClure's operations and, as a result of the audit, alleged that McClure had violated certain of the DOE's price and allocation regulations in its sales of motor gasoline, diesel fuel and propane. Settlement discussions were held, and on January 30, 1985, the ERA and McClure finalized a Judgment (No. 660E00083) that resolved issues pertaining to McClure's refined petroleum product operations during the period November 1, 1973, through March 31, 1974 (the Judgment period). Pursuant to the terms of the Judgment, McClure remitted a total of $35,000.00 (the Judgment fund) [2] to the DOE for distribution through Subpart V. These funds are being held in an interest-bearing escrow account maintained at the Department of the Treasury, pending a determination regarding their proper distribution.

II. Jurisdiction and Authority

The Subpart V regulations set forth general guidelines which may be used by the OHA in formulating and implementing a plan of distribution of funds received as a result of enforcement proceedings. The DOE policy is to use the Subpart V process to distribute such funds. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, *see Office of Enforcement*, 8 DOE ¶ 82,597 (1981).

We have considered the ERA's petition that we implement a Subpart V proceeding with respect to the McClure Judgment fund and have determined that such a proceeding is appropriate. This Proposed Decision and Order sets forth the OHA's tentative plan to distribute these funds. Comments are solicited.

III. Proposed Refund Procedures

We propose to implement a two-stage refund process by which firms and individuals who purchased motor gasoline, diesel fuel and propane from McClure during the Judgment period may submit Applications for Refund in the initial stage. From our experience with Subpart V proceedings, we expect that potential applicants will fall into the following categories of McClure purchasers: (i) End-users, i.e. eltimate consumers; (ii) regulated entities, such as public utilities or cooperatives; and (iii) retailers, resellers, and refiners that resold McClure products.

In order to receive a refund, each claimant will be required to submit a schedule of its monthly purchases of McClure refined petroleum products during the Judgment period. If the product was not purchased directly from McClure, the claimant must provide a

[1] The Judgment resolved all matters in dispute arising from a June 2, 1977, Remedial Order issued to McClure and a subsequent Judgment dated September 11, 1980.

[2] This future consists of the $18,627.13 in overcharges and $16,372.87 in interest which accrued prior to McClure's payment to the DOE. For accounting purposes, the interest remitted by McClure shall be considered as additional principal. Upon completion of payment, the consent order fund equalled $35,000.00.

statement setting forth its reasons for maintaining that the product originated with McClure.

In addition, a refiner, reseller, or retailer claimant, except one that chooses to utilize the injury presumptions set forth below, will be required to make a detailed showing that it was injured by the alleged overcharges. This showing will generally consist of two distinct elements. First, a claimant will be required to show that it maintained "banks" of unrecouped increased product costs (banked costs) in excess of the refund claimed.[3] Second, because a showing of banked costs alone is not sufficient to establish injury, a claimant must provide evidence that market conditions precluded it from increasing its prices to pass through the additional costs associated with the alleged overcharges. *See National Helium Corp./Atlantic Richfield Co.*, 11 DOE ¶ 85,257 (1984), *aff'd sub nom Atlantic Richfield Co.* v. *DOE*, 618 F. Supp. 1199 (D. Del. 1985). Such a showing could consist of a demonstration that the firm suffered a competitive disadvantage as a result of its purchases from McClure. *Id.; see also Sid Richardson Carbon and Gasoline Company and Richardson Products Company/Shupbach and Streitmatter Gas Company*, 14 DOE ¶ 85,186 (1986).

1. Presumptions for Refund Claims

Our experience also indicates that the use of certain presumptions permits claimants to participate in the refund process without incurring inordinate expense, and ensures that refund claims are evaluated in the most efficient manner possible. *See, e.g., Marathon Petroleum Company*, 14 DOE ¶ 85,269 (1986) (*Marathon*). Presumptions in refund cases are specifically authorized by the applicable DOE procedural regulations at 10 CFR 205.282(e). Accordingly, we propose to adopt the presumptions set forth below.

First, we will adopt a presumption that the alleged overcharges were dispersed equally in all of McClure's sales of motor gasoline, diesel fuel and propane during the Judgment period. In accordance with this presumption, refunds are to be made on a pro-rata or volumetric basis. In the absence of better information, a volumetric refund approach is appropriate because the DOE price regulations generally required a regulated firm to account for increased costs on a firm-wide basis in determining its prices.

Under the volumetric approach, a claimant's allocable share of the Judgment fund is equal to the number of gallons purchased times the per gallon refund amount (plus an appropriate share of the interest which has accrued on the McClure Judgment fund).[4] In the present case, the per gallon refund amount is $0.02778. We derived this figure by dividing the Judgment funds by the approximate number of gallons of refined products subject to price and allocation controls sold by McClure during the Judgment period.[5] As in previous cases, we will establish a minimum refund amount of $15.00. The administrative costs of processing claims for amounts less than $15.00 outweigh the benefits of restitution in those instances. *See, e.g., Mobil Oil Corp.*, 13 DOE ¶ 85,339 (1985).[6]

In addition to the volumetric presumption, we also propose to adopt a number of presumptions regarding injury for claimants in each category listed below.

a. End-users

In accordance with prior Subpart V proceedings, we propose to adopt the presumption that an end-user or ultimate consumer of McClure regulated products whose business is unrelated to the petroleum industry was injured by the alleged overcharges settled by the Judgment. *See, e.g., Texas Oil and Gas Corp.*, 12 DOE ¶ 85,069 at 88,209 (1984) (*TOGCO*). Unlike regulated firms in the petroleum industry, members of this group generally were not subject to price controls during the Judgment period, and were not required to keep records which justified selling price increases by reference to cost increases. Consequently, analysis of the impact of the alleged overcharges on the final prices of goods and services produced by members of this group would be beyond the scope of a special refund proceeding. *Id.* We therefore propose that end-users of McClure refined products need only document their purchase volumes from McClure during the Judgment period in order to make the requisite showing that they were injured by the alleged overcharges.

b. Regulated Firms and Cooperatives

We further propose that, in order to receive a full volumetric refund, a claimant whose prices for goods and services are regulated by a governmental agency, e.g., a public utility, or by the terms of a cooperative agreement, need only submit documentation of purchase volumes used by itself or, in the case of a cooperative, sold to its members.[7] A regulated firm or cooperative, however, will also be required to certify that it will: (i) pass through any refund received to its customers or member-customers; (ii) provide us with a full explanation of how it plans to accomplish the restitution; and (iii) certify that it will notify the appropriate regulatory body or membership group of its receipt of the refund. *See Marathon*, 14 DOE at 88,515; *Office of Special Counsel*, 9 DOE ¶ 82,538 at 85,203 (1982). The latter requirement assumes that a regulated firm or cooperative would have passed on any overcharges to its customers or member-customers through automatic rate adjustment mechanisms or the terms of a cooperative agreement. Thus, any refunds received by a regulated firm or cooperative should also be passed through to its customers or customer-members. Because we require these firms to pass refunds through to their customers or customer-members on a dollar-for-dollar basis, we do not require them to make a detailed demonstration of injury.

c. Refiners, Resellers, and Retailers Seeking Refunds of $5,000 or Less

We propose to adopt a small claims presumption under which a refiner, reseller, or retailer seeking a refund of $5,000 or less, exclusive of interest, will not be required to submit evidence of injury.[8] These applicants would only be required to document the volume of McClure covered products they purchased during the Judgment period. *See TOGCO*, at 88,207. As we have

[3] Claimants who have previously relied upon their banked costs in order to be eligible to receive refunds in other special refund proceedings should subtract those refunds from the cumulative banked costs submitted in this proceeding. *See* Husky Oil Co./Metro Oil Products, Inc., 16 DOE ¶ 85,090 at 88,179 (1987).

[4] Because we realize that the impact on an individual claimant may have been greater than the volumetric amount, any purchaser may file a refund application based upon a claim that a specifically alleged overcharge amount should be used in considering its refund application. *See, e.g.*, Standard Oil Co. (Indiana)/Army and Air Force Exchange Service, 12 DOE ¶ 85,015 (1984).

[5] According to an FEA audit of McClure (Case No. FRA-1359), the firm sold a total of 1,259,887 gallons of covered products during the Judgment period. *See* June 28, 1977 Memorandum from James Martin, Area Manager, Oklahoma City, to Don Adair, Director, Compliance Division. Therefore, we divided $35,000 by 1,259,887 gallons to derive a volumetric refund amount of $0.02778 per gallon.

[6] Applicants claiming volumetric refunds must have purchased at least 540 gallons of refined products from McClure during the consent order period to be eligible for a refund.

[7] A cooperative's sales to non-members will be treated in the same manner as sales by other resellers. *See* Marathon, 14 DOE at 88,515.

[8] In order to qualify for a refund under the small claims presumption, a refiner, reseller or retailer must have purchased less than 179,986 gallons of McClure refined petroleum products during the consent order period.

noted in numerous prior proceedings, considerable expense may be involved in gathering the types of data necessary to support a detailed claim of injury. In some cases, that expense might exceed a refund of $5,000 or less. Consequently, without simplified application procedures for small claims, many injured parties would effectively be denied an opportunity to obtain a refund. Furthermore, use of the small claims presumption allows the OHA to process a large number of routine refund claims in an efficient manner.[9]

d. Spot Purchasers

We propose to adopt a rebuttable presumption that a refiner, reseller or retailer that made only spot purchases from McClure did not suffer injury as a result of those purchases. Spot purchasers generally had considerable discretion as to the timing and market in which they made their purchases, and therefore would not have made spot market purchases from a firm at increased prices unless they were able to pass through the full amount of the firm's selling price to their own customers. *See Office of Enforcement*, 8 DOE ¶ 82,597 at 85,396–97 (1981). Accordingly, a spot purchaser claimant must submit specific and detailed evidence to rebut the spot purchaser presumption and to establish the extent to which it was injured as a result of its spot purchasers from McClure.[10]

e. Consignees

A consignee agent is a firm that distributed covered products pursuant to a contractual agreement with a refiner, under which the refiner retained title to the products, specified the price to be paid by the purchaser and paid the consignee a commission based upon the volume of covered products it distributed. 10 C.F.R. § 212.31 (definition of "consignee agent"). As in previous decisions, we propose to adopt the rebuttable presumption that consignees of McClure refined petroleum products were not injured as a result of their arrangement with their refiner/supplier. *See, e.g., Jay Oil Company*, 16 DOE ¶ 85,147 (1987). A consignee, however, may rebut this presumption of non-injury by establishing that "[its] sales volumes, and [its] corresponding commission revenues, declined due to the alleged uncompetitiveness of [the Judgment firm's] practices. *See Gulf Oil Corp./C.F. Canter Oil Co.*, 13 DOE ¶ 85,388 at 88,962 (1986).

2. *Allocation Claims*

We may also receive claims based upon McClure's alleged failure to furnish petroleum products that it was obliged to supply under the DOE allocation regulations. *See* 10 C.F.R. Part 211. Any such applications will be evaluated with reference to the standards set forth in cases such as *Amoco*, 10 DOE at 88,220, and *OKC Corp./Town & Country Markets, Inc.*, 12 DOE ¶ 85,094 (1984). These standards generally require an allocation claimant to demonstrate the existence of a supplier/purchaser relationship with the consent order firm and the likelihood that the Judgment firm failed to furnish petroleum products that it was obliged to supply to the claimant under 10 CFR Part 211. In addition, the claimant should provide evidence that it had contemporaneously notified the DOE or otherwise sought redress from the alleged allocation violation. Finally, the claimant must establish that it was injured and document the extent of the injury.

3. Distribution of Product Funds Remaining After First Stage

We propose that any refined product funds that remain after all first stage claims have been decided be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), Pub. L. 99–509, Title III. *See* Fed. Energy Guidelines ¶ 11,702 et seq. PODRA requires that the Secretary of Energy determine annually the amount of oil overcharge funds that will not be required to refund monies to injured parties in Subpart V proceedings and make those funds available to state governments for use in four energy conservation programs. PODRA, Sections 3003 (c) and (d). These responsibilities have been delegated to the OHA, and any refined product pool funds in the McClure Judgment escrow account that the OHA determines will not be needed to effect direct restitution to injured McClure customers will be distributed in accordance with the provisions of PODRA.

IV. Applications for Refund

Applications for Refund should not be filed at this time. Detailed procedures for filing Applications will be provided in a final Decision and Order. Before disposing of any of the funds received as a result of the McClure Judgment, we intend to publicize the distribution process in order to solicit comments on all aspects of the foregoing Proposed Decision and Order from interested parties. All comments must be filed within 30 days of the publication of this Proposed Decision in the **Federal Register.**

It is Therefore Ordered That:

The refund amount remitted to the Department of Energy by McClure Gas Company pursuant to Consent Order No. 720T00521, finalized on January 6, 1986, will be distributed in accordance with the foregoing Decision.

[FR Doc. 89–1984 Filed 1–26–89; 8:45 am]

BILLING CODE 6450–01–M

[9] Under these proposed procedures, claimants who attempt to make a detailed showing of injury in order to support a refund claim but, instead, provide evidence that leads us to conclude that they passed through all of the alleged overcharges or are eligible for a refund of less than $5,000, will not be entitled to a $5,000 small claims presumption refund. Such claimant, however, will be eligible to receive a refund for the amount of injury that they demonstrate. *See* Union Texas Petroleum Corp./Arrow Enterprises, Inc., 15 DOE ¶ 85,087 (1986); Quaker State Oil Refining Corp./Campbell Oil Co., 15 DOE ¶ 85,089 (1986).

[10] In prior proceedings we have stated that refunds will be approved for spot purchasers who demonstrate that (i) they made the spot purchases for the purpose of ensuring a supply for their base period customers rather than in anticipation of financial advantage as a result of those purchases, and (ii) they were forced by market conditions to resell the product at a loss that was not subsequently recouped. *See* Quaker State Oil Refining Corp./Certified Gasoline Co., 14 DOE ¶ 85,465 (1986).

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–3510–9]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382–5076 or (202) 382–5075.

Availability of Environmental Impact Statements Filed January 16, 1989 Through January 20, 1989 Pursuant to 40 CFR 1506.9.

EIS No. 890011, Draft, COE, KS, Kansas River Commercial Dredging Project, Junction City to Kansas-Missouri State Line, Section 10 Permits, Douglas, Geary, Jefferson, Johnson, Leavenworth, Pottawatomie, Riley, Shawnee, Wabawnsee and Wyandotte Counties, KS, Due: March 17, 1989, Contact: Robert Smith (816) 426–2118.

EIS No. 890012, Final, BLM, AZ, Phoenix Resource Area Management Plan, Implementation, Apache, Navajo, Gila, Maricopa, Pima, Pinal, Santa Cruz and Yavapai Counties, AZ, Due: February 27, 1989, Contact: Don Ducote (602) 863–4464.

EIS No. 890013, DSuppl, FHW, TN, I–40/I–275 (formerly I–75) Interchange Connector Reconstruction to Henley Street and the Western Avenue Viaduct Replacement, Funding and 404 Permit, Knoxville, Knox County,

TN, Due: March 13, 1989, Contact: Dennis C. Cook (615) 736–5394.

EIS No. 890014, Final, UPS, NY, Manhatten General Mail Facility Complex Development, Implementation, New York City, New York County, NY, Due: February 27, 1989, Contact: Charles Vidich (203) 285–7254.

EIS No. 890015, Final, FHW, MD, Calvert Road Closure and Replacement Crossing Construction, Funding and 404 Permit, Prince George's County, MD, Due: February 27, 1989, Contact: Herman Rodrigo (301) 962–4010.

Amended Notices

EIS No. 880373, DSuppl, USN, NC, Mid-Atlantic Electronic Warfare Range (WAEWR) Within Restricted Airspace R–5306A Establishment, Aircraft Noise Analysis, Beaufort, Carteret, Craven, Hyde and Pamlico Counties, NC, Due: February 2, 1989, Contact: Lt. Col. P. J. Lowery (919) 466–2343.

Published FR 11–10–88—Review period extended.

EIS No. 880433, Final, COE, WA, Lummi Bay Navigation Channel Improvements and Marina Construction, Implementation, Lummi Indian Reservation, Whatcom County, WA, Due: February 13, 1989, Contact: Richard Makinen (202) 272–0166.

Published FR 01–06–89—Review period extended.

Dated: January 24, 1989.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 89–1988 Filed 1–26–89; 8:45 am]

BILLING CODE 6560–50–M

[ER–FRL–3511–1]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared January 9, 1989 through January 13, 1989 pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382–5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 22, 1988 (53 FR 13318).

Draft EISs

ERP No.: DS–AFS–L61148–WA, Rating EC2, Okanogan National Forest, Land and Resource Management Plan, Additional Alternative, Implementation, Okanogan, Skagit, Whatcom and Chelan Counties, WA.

Summary: This document evaluates Alternative NC (No Change), which was developed from the Timber Management Plan in effect in 1979. Alternative NC does not incorporate all the provisions of the National Forest Management Act of 1976 and would not include the specific standards and guidelines for water quality protection. As such, EPA could not support the implementation of this alternative.

ERP No.: DS–AFS–L65104–OR, Rating EC2, Ochoco National Forest and Crooked River National Grassland, Land and Resource Management Plan, Additional Alternative and Management Requirements Analysis, Crook, Grant, Jefferson, Harney and Wheeler Counties, OR.

Summary: This document evaluates Alternative NC (No Change), which is essentially a continuation of the Timber Resource Plan developed in 1979. Alternative NC does not incorporate all the provisions of the National Forest Management Act of 1976 and would not include the specific standards and guidelines for water quality protection. As such, EPA could not support the implementation of this alternative.

ERP No.: DS–AFS–L65105–OR, Rating EO2, Siuslaw National Forest Land and Resource Management Plan, Additional Alternative and Management Requirements Analysis, Implementation, Benton, Lincoln, Lane, Coos, Polk, Yamill, Douglas and Tillamook Counties, OR.

Summary: This document evaluates a new Alternative NC (No Change), which was developed from a Timber Resource Plan approved in 1979. Alternative NC does not incorporate all the provisions of the National Forest Management Act of 1976 and would not include the specific standards and guidelines for water quality protection. As such, EPA could not support the implementation of this alternative.

ERP No.: D–COE–K36094–CA, Rating EO2, Dry Creek (Roseville), Northern California Streams Study, Flood Control Plan, Implementation, Sacramento County, CA.

Summary: EPA expressed environmental objections because the selected alternative would permanently eliminate 27.2 acres of mature streamside riparian forest. This document did not fully address alternatives that may be less-damaging to the environment, and inadequately addressed mitigation measures to compensate for the loss of riparian habitats.

ERP No.: DA–COE–L36007–00, Rating LO, McNary Lock and Dam Project, Juvenile Fish Loading and Holding Facility Expansion, Implementation, Umatilla County, OR and Benton County, WA.

Summary: EPA has no objections to the project as described in this document.

ERP No.: D–FHW–E40716–TN, Rating EC2, Kirby Parkway Construction, Split Oak Drive to Stage Road and Sycamore View Road Extension, Mullins Station Road to Kiry Parkway, Funding City of Memphis, Shelby County, TN.

Summary: EPA has concerns on the increased noise levels, wetland loss and decreased water quality. EPA has suggested that additional information on these impacts and/or mitigation is needed in the final EIS.

ERP No.: D–FHW–L40169–WA, Rating EC2, WA–18 Improvements, Auburn-Black Diamond Road to I–90, Funding and 404 Permit, King County, WA.

Summary: EPA is concerned about the effects on water quality, aquatic resources, and wetland resources. The indirect effects from development induced by the project are likely the most significant, however, very little discussion of indirect effects is included in this document. EPA has requested further analysis and disclosure of indirect effects and mitigation.

ERP No.: D–SCS–K36095–CA, Rating EC2, Upper Penitencia Creek Watershed Flood Damage Reduction Plan, Funding, Implementation and 404 Permit, Cities of San Jose and Milpitas, Santa Clara County, CA.

Summary: EPA expressed environmental concerns due to the loss of wetlands and riparian habitats, and requested that the final EIS commit to mitigation, measures to protect water quality, beneficial uses, fisheries, wetlands, and riparian habitats.

Final EISs

ERP No.: F–COE–G81003–TX, Brooke Army Medical Center Replacement Facility Construction, Implementation, Fort Sam Houston, Bexar County, TX.

Summary: EPA has no objections to the proposed action as described.

ERP No.: F–DOE–A84029–00, Superconducting Super Collider Construction and Operation, Site Selection, Arizona, Colorado, Illinois, Michigan, North Carolina, Tennessee and Texas.

Summary: EPA is generally satisfied with this document. EPA recommends DOE work with EPA's Dallas Regional Office and Texas State agencies for site specific activities.

Regulations

ERP No.: R-FCC-A99179-00, 47 CFR Part 1; Request for Declaratory Ruling; Radiofrequency Radiation Compliance (53 FR 40918).

Summary: EPA reiterated earlier comments concerning this proposal, and expressed opposition to alternative criteria proposed by other parties in the rulemaking.

Dated: January 24, 1989.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 89-1989 Filed 1-26-89; 8:45 am]

BILLING CODE 6560-50-M

[OPP-50675A; FRL-3510-4]

Receipt of Application for an Extension/Expansion of an Experimental Use Permit; Genetically Engineered Microbial Pesticide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received an application from Crop Genetics International (CGI) requesting an extension and expansion of their experimental use permit (EUP) for a genetically engineered microbial pesticide that was issued June 14, 1988. This extension/expansion of the current EUP issued under section 5 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(c), would include five additional sites in four additional States and would extend the permit from April 1989 to December 1989. This microbial pesticide is unique in that it actually lives within the treated crop plants. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting public comments on this application.

DATE: Written comments must be received on or before February 27, 1989.

ADDRESSES: Comments in triplicate, should bear number OPP-50675A and be submitted to:

Information Services Section, Program Management and Support Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

In person bring comments to: Rm. 236, CM#2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment(s) concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked, will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment(s) that do not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. Information on the proposed test and all written comments will be available for public inspection in Rm. 236 at the Virginia address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail:

Phil Hutton, Product Manager (PM) 17, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Office location and telephone number: Rm. 207, CM#2, 1921 Jefferson Davis Highway, Arlington, VA. (703-557-2690).

SUPPLEMENTARY INFORMATION: An application for an extension and expansion of their current EUP has been received from Crop Genetics International of 7170 Standard Drive, Hanover, Maryland 21076. This EUP amendment would extend and expand the current EUP EPA File Symbol 58788-EUP-1. The proposed experiment involves the endophytic bacterium *Clavibacter xyli* subspecies *cynodontis* that has been genetically engineered to contain a delta-endotoxin gene obtained from *Bacillus thuringiensis* subspecies *kurstaki*. After inoculation, the endophytic bacterium grows within the corn plants and produces the pesticidal agent which is active against the larval stages of the European Corn Borer.

The purpose of the EUP amendment is to further assess the efficacy of the product in control of the European Corn Borer on corn plants, study the characteristics of the recombinant organism in the environment, and evaluate the effect of the organism on crop yield. CGI proposes to initiate the field tests in the spring of 1989. The proposed field test sites are: Ingleside, Queen Anne's County Maryland (1 site); Beltsville Agricultural Research Center, Prince Georges County, Maryland (1 site); Illiopolis, Sangamon County, Illinois (1 site); Stanton, Goodhue County, Minnesota (1 site), Hastings, Clay County, Nebraska (2 sites); Hooper, Dodge County, Nebraska (1 site). The sites are each approximately 1 to 7 acres in size; all are isolated and secured. Each site will consist of: (1) A central corn plant population arranged in blocks; (2) a plant-free barren zone containing plants to be monitored to detect dissemination of the test agent; (4) a security fence; and (5) a fallow zone surrounding the security fence.

Studies to be performed on all sites will: (1) Determine *Clavibacter xyli* subsp. *cynodontis/Bacillus thuringiensis* subsp. *kurstaki* recombinant levels in inoculated plants; (2) monitor any mechanical and natural spread of the recombinant organism to corn and other plant species; (3) monitor for the recombinant organism in plant residues; (4) monitor for the presence of the recombinant organism in runoff water and soil; and (5) compare yields of colonized and control corn plants. European Corn Borer control will be studied at each of the sites listed above.

As with the original EUP, the ARS-USDA cooperating scientists (at Beltsville) will examine the effects of recombinant colonization on: (1) Crop residue decomposition; (2) vesicular-arbuscular mycorrhizae associations; and (3) gram negative phylloplane bacterial populations.

According to the applicant, test sites will be monitored until the recombinant organism can no longer be detected in plant materials or soil. In the event that there is movement of the recombinant beyond the contained area, biocides will be employed to the extent necessary for control. At the completion of the tests, all plant debris will be decontaminated.

The labeling proposed by CGI that would govern the conduct of the experiment, states: Appliactors should ware protective clothing including goggles, dust mask, and gloves. Surfaces of planting equipment should be treated with 10% household bleach and wiped with paper towels after use. Dispose of unused material, paper towels, and rinse water by autoclaving or place in vessels containing 10% household bleach for disinfection prior to disposal. For use only in accordance with the terms and conditions of the EUP.

Following the review of the CGI application and any comments received in response to this notice, EPA will decide whether to issue or deny the EUP amendment request for extension and expansion of the current EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the Federal Register.

Dated: January 14, 1989.

Anne Lindsay,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 89-1936 Filed 1-26-89; 8:45 am]

BILLING CODE 6560-50-M

[OPP-30000/41C] (FRL-3510-3)

Linuron; Conclusion of the Special Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; Final determination to conclude special review.

SUMMARY: On August 17, 1988, EPA issued a Preliminary Determination to conclude the Special Review for pesticide products containing linuron (53 FR 31262). No comments were received on the Preliminary Determination, and this Notice announces EPA's Final Determination to conclude the Special Review of pesticide products containing linuron.

EFFECTIVE DATE: January 27, 1989.

FOR FURTHER INFORMATION CONTACT: By mail:

Laszlo J. Madaras, Special Review and Reregistration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 1006, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-5778).

SUPPLEMENTARY INFORMATION: Linuron is the common name for 3-(3,4-dichlorophenyl)-1-methoxy-1-methylurea. It is used mainly for pre-emergence and, in some crops or sites, postemergence control of certain troublesome broadleafed weeds and annual grasses on terrestrial food and non-food sites. Linuron is most commonly sold under the trade names Lorox, Linex, Afalon, and Sarclex.

The Special Review was initiated in 1984 based on laboratory data which indicated that linuron induced dose-related tumors in rats and in mice. These data and associated risks are discussed in the Notice of Special Review (September 26, 1984; 49 FR 37843).

Since the initiation of the Special Review, EPA has established Guidelines for Carcinogenic Risk Assessment (September 24, 1986; 51 FR 33992). Using these guidelines and additional data submitted subsequent to the initiation of the Special Review, the Agency determined that the weight of evidence suggested that linuron's carcinogenic potential in humans is weak and it should not be regulated as a carcinogen. The Agency also evaluated the other biological effect of potential concern (hematotoxicity) and concluded that adequate margins of safety existed and no regulatory action was warranted. These determinations resulted in the Agency's decision to conclude the Special Review of linuron without further regulatory action.

The Agency published its proposed decision to conclude the Special Review of linuron in the **Federal Register** of August 17, 1988 (53 31262). No public comments were received in response to this notice. The Agency is therefore concluding the Special Review of linuron effective with the publication of this Notice. In the future, if other data show that exposure to linuron may cause unreasonable adverse effects, the Agency may again review the risks and benefits of linuron use in the Special Review process.

The Agency has established a public docket for the linuron Special Review. This pubic docket will include this Notice; any other Notices pertinent to the linuron Special Review and the Agency's decision regarding the termination of the Special Review of linuron; and a current index of materials in the public docket. The docket is available for public inspection in Rm. 236, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA, between 8 a.m. and 4 p.m., Monday through Friday, except legal holidays.

Dated: January 5, 1989.

John A. Moore,

Acting Deputy Administrator.

[FR Doc. 89-1935 Filed 1-26-89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 372

[OPTS-400023; FRL-3510-6]

Ethylene and Propylene; Toxic Chemical Release Reporting; Community Right-to-Know

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is denying petitions to delist ethylene and propylene from the list of toxic chemicals under section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986. The denial is based on the EPA's conclusion that both ethylene and propylene are high volume volatile organic compounds that contribute to the formation of tropospheric ozone and other hazardous air pollutants such as formaldehyde. As such, ethylene and propylene contribute to the acute and chronic health effects of these pollutants as well as to the ecological damage caused by ozone, and are thereby toxic chemicals for the purposes of section 313 reporting.

FOR FURTHER INFORMATION CONTACT: Robert Israel, Petition Coordinator, Emergency Planning and Community Right-to-Know Information Hotline, Environmental Protection Agency, Mail Stop OS-/120, 401 M St., SW., Washington, DC 20460, Toll free: 800-535-0202, In Washington, DC, and Alaska, 202-479-2449.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Statutory Authority

The response to the petitions is issued under section 313 (d) and (e)(1) of Title III of the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499, "SARA" or "the Act"). Title III of SARA is also referred to as the Emergency Planning and Community Right-to-Know Act of 1986.

B. Background

Section 313 of SARA Title III requires certain facilities using toxic chemicals to report annually their environmental releases of such chemicals. Section 313 establishes an initial list of toxic chemicals that is composed of more than 300 chemicals and chemical categories. Any person may petition EPA to add chemicals to or delete chemicals from the list.

EPA issued a statement of petition policy and guidance in the **Federal Register** of February 4, 1987 (52 FR 3479), to provide guidance regarding the recommended content and format for submitting petitions. EPA must respond to petitions within 180 days either by initiating a rulemaking or by publishing an explanation of why the petition is denied.

II. Description of Petition

On July 13, 1988, EPA received petitions from the Chemical Manufacturers Association (CMA) to delete ethylene and propylene from the section 313 list of toxic chemicals. Since the two chemicals are similar in terms of their chemistry and commercial uses, EPA elected to review the two petitions simultaneously. The petitions were based on CMA's contention that ethylene and propylene are not toxic and do not meet the section 313 criteria for listing.

III. EPA's Toxicity Concerns for Ethylene and Propylene

Both ethylene and propylene belong to the category of chemicals known as "volatile organic compounds" (VOCs) which contribute significantly to air pollution problems. In particular, chemical reactions in the atmosphere of

ethylene and propylene (and other VOCs) contribute to the formation of ozone and to another air pollutants such as formaldehyde which have a direct and unequivocal negative impact on human health and environmental quality.

Ozone is a severe irritant affecting the mucus membranes of the nose and throat, and impairs the normal functioning of the lungs, especially in sensitive individuals such as asthma or allergy sufferers. Exposure also leads to impaired functioning of the immune system in animal tests. Available data suggest that ozone exposure may also lead to serious chronic health effects, including morphological changes to, and impaired functioning of, the lungs.

Ozone also has a severe impact on plant life; agricultural losses alone are estimated at $2 to $3 billion a year due to ozone damage.

In addition to EPA's primary concerns for the impacts of ethylene and propylene as VOCs, EPA's review of the direct health and environmental effects of ethylene and propylene also raised additional concerns. The available data are very limited and often of poor quality, and are not sufficient to draw firm conclusions as to the direct health and environmental effects of ethylene and propylene. However, there is suggestive evidence linking ethylene and propylene exposures to adverse health effects. Exposure to very low concentrations of ethylene led to developmental effects in rats in one study; propylene is of concern due to the possibility that it metabolizes in the body to propylene oxide, a suspected carcinogen. Both chemicals can be directly phytotoxic, although it is not clear if known or anticipated exposures might lead to actual damage.

IV. Explanation of Denial

EPA has determined that ethylene and propylene are VOCs that, due to their high volume of production and releases, contribute significantly enough to air pollution concerns to warrant their continued listing as toxic chemicals under section 313.

Ethylene and propylene are the two highest volume VOCs in production in the United States; annual production capacity is 36 billion pounds and 22 billion pounds, respectively. Estimates of annual emissions from industrial sources range from 36 to 62 million pounds per year of ethylene and 29 to 64 million pounds per year for propylene.

EPA's concerns center around the contribution these emissions make to air pollution problems. Ethylene and propylene emissions contribute to the formation of tropospheric ozone, one of the most intractable and widespread of the nation's environmental problems. The major component of smog, ozone causes serious respiratory problems, and has been implicated in widespread damage to crops and other vegetation. Ethylene and propylene emissions also contribute to the formation of formaldehyde and other hazardous air pollutants which present a serious health threat; formaldehyde emissions are suspected of contributing to cancer risk.

Because ethylene and propylene are very high volume chemicals with substantial emissions, they make a significant contribution to VOC-related air pollution. Hence, continued listing under section 313 is justified. It is not EPA's intention to include all VOC chemicals on the section 313 list; only those whose volume of use or emissions is large enough to raise substantial VOC concerns. Most high-volume VOC chemicals are already subject to reporting under section 313.

In addition to VOC concerns, which are the primary reasons for denying the petitions, EPA's review of the direct toxicity of ethylene and propylene suggested additonal serious developmental and other health effects of potential concern.

EPA has carefully considered the rationale for continued listing of ethylene and propylene under section 313. EPA considers the contribution made by the atmospheric chemical transformations of ethylene and propylene to ozone and other hazardous air pollutants to be of sufficient human health and environmental concern as to justify continuing to list these as "toxic" chemicals for the purposes of section 313 reporting. Specifically, by contributing to ozone pollution through chemical reactions, releases of ethylene and propylene meet the criteria of section 313(d)(2) for both acute and serious chronic health effects, as well as for ecotoxicity effects.

EPA has also concluded that reporting releases of ethylene and propylene under section 313 will provide useful information to the public, EPA and states from the point of view of both ozone and hazardous air pollutant. Specifically, the site-specific type of data collected under section 313 will be valuable for validating and improving current data on VOC emission types, quantities, and sources and will aid in conducting research and in designing regulations, guidelines and standards, in the manner envisioned in section 313(h).

While EPA may utilize other statutory mechanisms to obtain emissions data on individual toxic chemicals, VOCs or otherwise, section 313 reporting is an appropriate mechanism for continuing to collect data on ethylene and propylene as a means of improving the current understanding by EPA, states and the general public, of the quantities of emissions of these chemicals from manufacturing, processing and user sources.

Dated: January 17, 1989.

Susan F. Vogt,

Acting Assistant Administrator, Office of Pesticides and Toxic Substances.

[FR Doc. 89-1937 Filed 1-26-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC, Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-200052-003.

Title: Tampa Port Authority Terminal Lease Agreement.

Parties:

Tampa Port Authority.

Bay Terminal Stevedoring Co., Inc.

Synopsis: The Agreement extends the term of Agreement No. 224-200052, a terminal lease agreement, for an additional eleven month period from January 31, 1989, through December 31, 1989. All other terms and conditions of the original lease remain unchanged.

Agreement No.: 224-011049-003.

Title: Tampa Port Authority Terminal Lease Agreement.

Parties:

Tampa Port Authority.

Seagull Terminal & Stevedoring Co.

Synopsis: The Agreement extends the term of Agreement No. 224-011049, a terminal lease agreement, for an additional eleven month period from January 31, 1989 through December 31, 1989. All other terms and conditions of the original lease remain unchanged.

Agreement No.: 224-200117-001.

Title: Port Authority of New York and New Jersey Terminal Agreement.
Parties:
The Port Authority of New York and New Jersey (Authority).
Atlantic Container Line BV (ACL).
Synopsis: The Agreement provides for ACL's lease of the Authority's container crane No. 282 at the Elizabeth Port Authority Marine Terminal. ACL will pay the Authority an annual rental rate of $252,586.32 for the use of the crane. The Agreement also allows for improvements and modifications to this crane.
Agreement No.: 224–200212.
Title: South Carolina State Ports Authority Terminal Agreement.
Parties:
South Carolina State Ports Authority (Authority).
South Atlantic Cargo Shipping, N.V. (SACS).
Synopsis: The Agreement provides that the Authority will grant SACS a three year license to use seven (7) acres of land at the Authority's North Charleston Terminal (facility) for parking and assembly of containers and other purposes incidental to its shipping operations. SACS agrees to pay the Authority a license fee of $950.00 per acre slot per month, wharfage at $1.25 per slot ton of cargo moving across the Authority's wharves, dockage at the published tariff rate and container crane hire at $500.00 per hour in straight time and $530.00 in overtime. The Authority also grants SACS license to use additional areas at the facility as the parties may agree.
Agreement No.: 224–200054–003.
Title: Tampa Port Authority Terminal Agreement.
Parties:
Tampa Port Authority.
G & C Stevedoring.
Synopsis: The Agreement extends the term of Agreement No. 224–200054, a terminal lease agreement for an additional eleven month period from January 31, 1989, through December 31, 1989. All other terms and conditions of the original lease remain unchanged.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: January 23, 1989.

[FR Doc. 89–1884 Filed 1–26–89; 8:45 am]
BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.
Agreement No.: 213–010786–004.
Title: Costa/Trasatlantica/D'Amico Space Charter and Sailing Agreement.
Parties:
Costa Container Lines.
D'Amico Societa Di Navigazione per Azioni Compania Trasatlantica Espanola S.A.
Synopsis: The proposed modification would change the name of Costa Container Lines S.p.A. to Contship Container Lines, Ltd. It would also add Italia Di Navigazione S.p.A., as a party to the Agreement, and would further change the name of the Agreement from Costa/Trasatlantica/D'Amico Space Charter and Sailing Agreement to Costa/Trasatlantica/D'Amico/Italia Space Charter and Sailing Agreement.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: January 24, 1989.

[FR Doc. 89–1939 Filed 1–26–89; 8:45 am]
BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in section 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.
Agreement No.: 224–200213.
Title: Port of Houston Authority Terminal Agreement.
Parties:
Port of Houston Authority of Harris County, Texas.
Strachan Shipping Company (Strachan).
Filing Party: Algenita Scott Davis, Counsel, Port of Houston Authority, P.O. Box 2562, Houston, TX 77252–2562.
Synopsis: The agreement provides that Strachan will perform or have performed public marine terminal services, including freight handling and cargo loading/unloading, at the Port's Barbours Cut Transit Shed No. 2, Section B(West). The term of the agreement expires December 31, 1990.
Agreement No. 224–010903–002.
Title: Maryland Port Administration Terminal Agreement.
Parties: Maryland Port Administration (MPA) Atlantic Container Line (ACL).
Synopsis: The agreement amends the basic lease agreement to provide that MPA will offer a special credit of $50 per container for containers loaded/unloaded from ACL seagoing vessels and drayed to/from CONRAIL or CSX facilities in Baltimore. This credit applies only to containers moving in either direction by rail between the Port of Baltimore, and Louisville, Kentucky; Chicago, Illinois; or Detroit, Michigan. The credit expires on the termination date of the basic agreement and lease.

By order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: January 24, 1989.

[FR Doc. 89–1940 Filed 1–26–89; 8:45 am]
BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

[Docket No. R–0656]

Private Sector Adjustment Factor

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Request for comment.

SUMMARY: The Board is requesting comment on proposed revisions to the methodology for computing the Private Sector Adjustment Factor ("PSAF"). The PSAF is a recovery of imputed costs that takes into account the taxes that would have been paid and the return on capital that would have been provided had the Federal Reserve's priced services been furnished by a private business firm. The Board is proposing the revisions to reduce the necessity for ad hoc adjustments and to respond to industry

questions regarding the PSAF calculation.

DATES: Comments must be submitted on or before March 13, 1989.

ADDRESSES: Comments, which should refer to Docket No. R–0656, may be mailed to the Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, Attention: Mr. William W. Wiles, Secretary; or may be delivered to Room B–2223 between 8:45 a.m. and 5:00 p.m. All comments received at the above address will be included in the public file and may be inspected at Room B–1122 between 8:45 a.m. and 5:15 p.m.

FOR FURTHER INFORMATION CONTACT: Clyde H. Farnsworth, Director (202/452–2787) or Paul Bettge, Program Leader (202/452–3174), Division of Federal Reserve Bank Operations; for the hearing impaired *only*: Telecommunications Device for the Deaf, Earnestine Hill or Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION:

Background

The Monetary Control Act of 1980 requires that fee schedules for the Federal Reserve's priced services include an allocation of imputed costs for "taxes that would have been paid and the return on capital that would have been provided had the services been furnished by a private business firm." These imputed costs are referred to as the PSAF. The methodology for deriving the PSAF has evolved since 1980 partly as a result of several extensive reviews including two public comment processes, two GAO reviews, and a review by a public accounting firm.

The current PSAF methodology uses the 25 largest privately owned bank holding companies ("BHCs") in a model to compute an average interest rate on short-term debt that is then applied to the value of Federal Reserve short-term priced service assets requiring financing. The BHC model also is used to calculate a three-year average long-term debt rate and a three-year average pretax rate of return on stockholders' equity that are applied to long-term depreciable priced services assets in proportion to the ratio of debt and equity, also computed from the BHC model. The methodology calls for the BHCs with the highest and lowest return on equity in the sample each year to be excluded to prevent distortions. Additional costs are then imputed, including estimates of sales taxes that would be paid on planned purchases and FDIC insurance that would be paid on clearing balances and other deposits held with the Federal Reserve. Finally, the expenses of the Board of Governors directly related to the development of priced services are estimated. All of these costs comprise the PSAF.

Discussion

Since June 1988, the Board has performed a thorough review of the System's method for calculating the PSAF. This review was initiated because the approved methodology, which uses a three-year average that includes the low 1987 average earnings for the 25 largest BHCs, would have produced a 1989 PSAF that was dramatically lower than that approved for 1988 (see Table 1). The Board believes that unusually low, or high, average earnings rates for any one year should not greatly affect estimates of the longer term, or normal, earnings rates for comprable private sector business firms for purposes of establishing prices.[1]

In addition to focusing on variability, the review addressed other areas of the PSAF where questions have been raised in recent years. These areas included the assets reported on the consolidated pro forma priced services balance sheet, the imputed capital structure, and the imputed FDIC assessment. In addition, the Board concluded that the BHC model is still the most appropriate basis for calculating components of the PSAF because BHCs offer services most comparable to those offered by the Federal Reserve Banks and view themselves as competitors of the Federal Reserve.

As a result of the review, the Board is proposing the following revisions to the methodology for calculating the PSAF:

Expanded Sample Size and Extended Sample Period

The Board proposes to expand the sample of bank holding companies used in the PSAF calculation from the 25 to the 50 largest privately-owned bank holding companies in each year [2] and to average the most recent five years of bank holding company data to determine the pretax return on equity, the long-term debt rate, and the ratio of long-term debt and equity used to compute the PSAF. The Board believes that this change will substantially reduce the volatility of the PSAF because each BHC will have a smaller impact on the overall average, and a longer time period smoothes aberrant results of any one year. It is anticipated that use of a larger sample and a longer sample period will decrease the frequency of ad hoc adjustments and eliminate the routine exclusion of the BHCs with the highest and lowest average return on equity each year. The larger sample size also allows for the inclusion of a number of regional correspondent banks and increases the geographical diversity of the group. Data analysis indicates that the impact of expanding the sample size and lengthening the time period does not introduce a systematic bias toward either a higher or lower PSAF over time (see Table 2).

Capital Adequacy

The Board proposes that the Federal Reserve meet the risk-based capital guideline of 8 percent capital to risk-weighted assets as approved by the Board for state member banks and bank holding companies, including in assets a computation of cash items in the process of collection ("CIPC") on a basis comparable to a commercial bank. Under the Board's proposal, however, net CIPC will continue to be included on the consolidated pro forma priced services balance sheet because the purpose of this balance sheet is to show only assets that need to be financed. Net CIPC represents float (the difference between total CIPC and deferred-availability cash items), which needs to be financed through priced services operations.

The Board believes that the current method for imputing equity capital, using the BHC sample data, also continues to be appropriate because sufficient equity capital is derived to finance long-term assets. The Federal Reserve imputes equity for priced services by assuming that long-term assets are financed by long-term debt and equity in the proportion of long-term debt and equity of the BHCs in the model. Using the proposed sample size and sample period, this imputation will result in over 70 percent of depreciable priced services assets being financed by equity. Given, however, the recent Board approval of a risk-based capital standard for state member banks and bank holding companies, the Board believes that the PSAF methodology should ensure that this derived amount of capital is sufficient to meet the risk-based capital guideline imposed on state

[1] As a result, in October 1988, the Board approved an interim PSAF using five-year average data to be applied to the prices of electronic and securities services as of January 1, 1989 (53 FR 44661, November 4, 1988). The 1988 PSAF was used for check services, which were repriced as of September 1, 1988 (53 FR 24148, June 27, 1988) (see Table 1).

[2] The sample size was changed once before, in 1984, following request for public comment (49 FR 11251, March 26, 1984). At that time, the sample was increased from the largest 13 BHCs to the largest 25 BHCs.

member banks and bank holding companies. Using the equity amount imputed in the 1989 PSAF, the Federal Reserve has nearly three times the level of equity needed to meet the risk-based guideline. This is shown in Table 3 and reflects the calculation of CIPC similar to a commercial bank's CIPC.

In the past, some groups have suggested that the Federal Reserve should impute a level of equity on its pro forma priced services balance sheet sufficient to meet the current regulatory capital guideline of 6 percent capital, including equity, to total assets when CIPC is included, on a basis similar to that reported by BHCs. Under the Board's proposed methodology for imputing capital, Federal Reserve priced services equity capital would amount to 4.4 percent of total priced services assets (see Table 3). Because of the high percentage of depreciable assets that will be financed with equity and because of the strong risk-based capital computation noted above, the Board believes that the current methodology for imputing equity capital is appropriate and results in a level of equity capital that is sufficient to support priced services operations.

FDIC Insurance Assessment

The Board proposes to calculate the imputed FDIC insurance assessment on the basis required by the FDIC of a commercial bank. Currently, the Federal Reserve computes an imputed amount of FDIC insurance by applying the FDIC assessment rate to the projected level of clearing balances plus net CIPC. The proposed computation revision would apply the required FDIC assessment rate to projected clearing balances held with the Federal Reserve plus a projection of deferred credits on a basis similar to a commercial bank. Accordingly, the following deferred credits would be excluded: intra-System deferred credits that would otherwise be double-counted on a consolidated Federal Reserve balance sheet; deferred credits associated with nonpriced items, such as deferred credits to government agencies; and deferred credits associated with providing fixed availability or credit prior to receipt and processing of items.[3] The H.4.1 weekly statement of condition of the Reserve Banks reflects only the consolidation of Reserve Bank data. Accordingly, credits or fixed availability posted prior to receipt and processing of items, as well as nonpriced collection items, must be deducted from the H.4.1 data to derive deferred credits comparable to those reported by a commercial bank.

This change in methodology for computing the FDIC insurance and calculation of a consolidated priced CIPC amount, would result in an increase to the PSAF amount to be recovered. In 1989, the FDIC insurance amount would increase from $1.9 million to $4.1 million, an increase of $2.2 million (see Table 4).

By order of the Board of Governors of the Federal Reserve System, January 23, 1989.

William W. Wiles,

Secretary of the Board.

TABLE 1

[In millions of dollars, except as noted]

	PSAF using approved methodology	1989 PSAF		
		Methodology approved by the Board October 1988 [1]	Using approved methodology	Using proposed methodology
Amount	76.2	69.7	61.0	69.8.
Sample size	25 BHCs [2]	25 BHCs [2]	25 BHCs [2]	50 BHCs.
Sample period	3 Years	5 Years	3 Years	5 Years.
Pretax ROE	20.1 percent	16.9 percent	13.4 percent	14.8 percent.
Ratio of equity/equity + LT debt	63.8 percent	61.1 percent	61.1 percent	70.1 percent.
Imputed equity	240.7	245.6	244.5	280.6.
LT debt rate	9.7 percent	9.0 percent	9.0 percent	9.8 percent.
ST Debt rate	7.1 percent	6.6 percent	6.6 percent	6.5 percent.
Weighted average cost of capital	15.4 percent	13.8 percent	11.1 percent	12.6 percent.
Capital to be financed	417.2	445.2	445.2	445.2.
FDIC assessment	1.9	1.9	1.9	4.1.
Sales taxes	8.2	8.0	8.0	8.0.
Board of governors expenses	1.7	1.4	1.4	1.4.
Ratio of equity to risk-weighted assets		21.7 percent	21.6 percent	24.8 percent.

[1] As indicated in the Board's June 27, 1988, Federal Register notice, fees for the check collection service, generating approximately 75 percent of priced services revenue, were established using a PSAF based on the 1988 PSAF.

[2] Excludes BHCs with highest and lowest ROE. Averages are then based on data for the remaining 23 BHCs.

TABLE 2.—COMPARISON OF CHANGES IN SAMPLE SIZE AND PERIOD

	1971–1989	
	After-tax return on equity (percent)	Standard deviation [1] (percent)
25 BHCs; 3 yr average	11.2	2.6
25 BHCs; 5 yr average	11.5	2.0
50 BHCs; 3 yr average	11.2	1.4
50 BHCs; 5 yr average	11.3	1.1

[3] A financial institution provides credit for a cash letter to its customer when the cash letter is received and processed. In contrast, on direct and consolidated shipments, Reserve Banks provide credit to customers based on an advice from the customer that a cash letter has been forwarded for collection; accounting for the credit sometimes predates receipt and processing of the cash letter.

[1] Standard deviation is a commonly used statistical measure of the variability of data around the average value. The lower the standard deviation, the less variability in the data.

TABLE 3.—RISK-BASED CAPITAL COMPUTATION BASED ON AVERAGE 1989 PRO FORMA PRICED SERVICES BALANCE SHEET

[In millions of dollars]

	Assets	Risk Weight	Weighted Assets
Reserves	$283.8	0.0	$0.0
Investments	2,077.9	0.0	0.0
CIPC	3,536.1	0.2	707.2
Receivables	29.6	0.2	5.9
Materials and supplies	7.1	1.0	7.1
Prepaid expenses	6.2	1.0	6.2
Premises	259.9	1.0	259.9
Furniture and equipment	137.9	1.0	137.9
Leases	1.1	1.0	1.1
Leaseholds	4.7	1.0	4.7
Total	$6,344.3		$1,130.0
Imputed equity for 1989	$245.6		
Capital to risk-weighted assets (percent)	21.73		
Capital to total assets (percent)	3.87		
Imputed equity with proposed Revisions to BHC sample	$280.6		
Capital to risk-weighted assets (percent)	24.83		
Capital to total assets (percent)	4.42		

TABLE 4.—COMPUTATION OF FDIC ASSESSMENT, 1989 PSAF DATA

[In millions of dollars]

	Current	Proposed
Clearing balances	$2,361.2	$2,361.2
CIPC [1]	432.8	3,536.1
Total Deposits	2,794.0	5,897.3
Percentage Deduction [2]	465.8	983.1
Remainder	2,328.2	4,914.2
Assessment	1.9	4.1

[1] As noted in the text, the computation of the FDIC insurance assessment currently uses net CIPC. The proposed methodology would use CIPC (representing credits either passed or deferred) stated on a basis similar to commercial banks.

[2] The Percentage Deduction represents 16⅔ percent of Total Deposits, consistent with the FDIC instructions for subtracting one-sixth of demand deposits when computing the FDIC insurance assessment.

[FR Doc. 89-1885 Filed 1-26-89; 8:45 am]

BILLING CODE 6210-01-M

Capitol Bancorp, Ltd. et al.; Applications To Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 17, 1989.

A. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Capitol Bancorp, Ltd.*, Lansing, Michigan; to engage *de novo* through its subsidiary, CNB Bancorp, Inc., Lansing, Michigan, in making, acquiring, and servicing loans or other extensions of credit for the company's account or for the account of others such as would be made for the purpose of mortgage corporation pursuant to § 225.25(b)(1) of the Board's Regulation Y.

B. Federal Reserve Bank of San Francisco (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *Puget Sound Bancorp*, Tacoma, Washington; to engage *de novo* through its subsidiary, Washington Capital Corporation, Seattle, Washington, in providing portfolio investment advice to institutional investors with respect to investments by such investors in real estate projects pursuant to § 225.25(b)(4) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, January 23, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-1950 Filed 1-26-89; 8:45 am]

BILLING CODE 6210-01-M

Fleet/Norstar Financial Group, Inc.; Application To Engage in Financial Guaranty Insurance Activities

Fleet/Norstar Financial Group, Inc., Providence, Rhode Island ("Applicant"), has applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) ("BHC Act") and § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)), to acquire approximately 35 percent of the outstanding shares of Capital Guaranty Corporation, San Francisco, California ("Corporation"), through conversion of its present non-voting investment to a fully-voting investment.

A wholly-owned subsidiary of Corporation, Capital Guaranty Insurance Company, provides financial guaranty insurance to bond issuers, including governmental, hospital, non-profit, educational and corporate issuers of bonds and similar financial obligations, and issues reinsurance contracts on financial guaranty contracts written by others. Corporation also provides post-issuance credit monitoring for obligations covered by financial guaranty contracts written by Capital Guaranty Insurance Company, as well as contracts written by unaffiliated third parties, through Corporation's wholly-owned subsidiary, Capital Guaranty Service Corporation.

Financial guaranty insurance is designed to enhance the marketability of certain debt obligations by reducing the risk of loss to the holders of the obligations through guaranteed payment of the obligation in the event a demand for payment is made under the financial guaranty contract. The Board has not previously approved the activity of financial guaranty insurance under section 4(c)(8) of the BHC Act.

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity "which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." A particular activity may be found to meet the "closely related to banking" test if it is demonstrated that banks have generally provided the proposed activity; that banks generally provide services that are operationally or functionally so similar to the proposed activity so as to equip them particularly well to provide the proposed activity; or that banks generally provide services that are so integrally related to the proposed activity as to require their provision in a specialized form. *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1237 (D.C. Cir. 1975). In addition, the Board may consider any other basis that may demonstrate that the activity has a reasonable or close relationship to banking or managing or controlling banks. Board Statement Regarding Regulation Y, 49 *Federal Register* 806 (1984).

Applicant states that financial guaranty insurance activities are closely related to banking and are a proper incident thereto because (1) the proposed activities constitute an extension of credit, which is a classic banking function, and (2) banks in fact conduct the proposed activities in other forms and provide services that are operationally or functionally similar to the proposed activities so as to equip Applicant with the skills needed to provide the proposed activities through Corporation. Applicant contends that financial guaranty insurance contracts are the functional equivalent of letters of credit, citing *American Insurance Association* v. *Clarke*, 656 F. Supp. 404 (D.D.C. 1987), 854 F.2d 1405 (D.C. Cir. 1988), affirmed in part, vacated in part, No. 87–5128 (D.C. Cir. Jan. 6, 1989) (per curiam), in support of its contention. In addition, Applicant argues that Congress did not intend by Title VI of the Garn-St Germain Act (12 U.S.C. 1843(c)(8)) to restrict the Board's discretion to approve this type of activity because Congress did not treat other functionally equivalent forms of credit enhancement as restricted "insurance." In Applicant's view, the characterization of financial guaranty contracts as "insurance" under the laws of certain states is irrelevant to whether the Board retains discretion to approve this activity.

Applicant also contends that credit monitoring is closely related to banking because banks and other commercial lenders monitor a borrower's credit and financial condition throughout the life of the borrowing in order to reduce the lender's exposure. According to Applicant, credit-monitoring activities are permissible under a bank holding company's express authority to make, acquire or service loans or other extensions of credit for its own account or for the account of others, as well as Board precedent permitting bank holding companies to arrange, and to give advice with respect to, extensions of credit. *See* 12 CFR 225.25(b)(1). Applicant also analogizes credit monitoring to the permissible activities of operating a credit bureau, assisting in loan collections and providing information to third parties for a fee. *See* 12 CFR 225.25(b) (23) and (24); *Mellon Bank Corporation*, 74 Federal Reserve Bulletin 773 (1988); and *Reagan Bancshares, Inc.*, 72 Federal Reserve Bulletin 669 (1986).

In determining whether a particular activity is a proper incident to banking, the Board considers whether the performance of the activity by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices.

Applicant maintains that its proposal would be pro-competitive and would enable it to provide greater convenience and increased services to customers. In addition to expanding the role of Applicant in an existing, though relatively small, market participant, Applicant will be able to broaden the base of experience for Corporation's targeted market of smaller regional issuers that are predominately located in the Western United States. Applicant also argues that the proposal would not result in adverse effects because abusive practices such as "tying" or conflict of interests are very remote possibilities under the proposed activities.

In publishing this proposal for comment, the Board does not take any position on issues raised by the proposal under the BHC Act. Notice of the proposal is published solely in order to seek the views of interested persons on the issues presented by the application and does not represent a determination by the Board that the proposal meets or is likely to meet the standards of the BHC Act.

Any request for a hearing on these questions must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of the reasons why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

The application may be inspected at the offices of the Board of Governors or the Federal Reserve Bank of Boston.

Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than February 27, 1989.

Board of Governors of the Federal Reserve System, January 23, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89–1886 Filed 1–26–89; 8:45 am]

BILLING CODE 6210-01-M

Sleepy Hollow Bancorp, Inc., et al.; Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12

CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a heaing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than February 17, 1989.

A. Federal Reserve Bank of New York (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. *Sleepy Hollow Bancorp, Inc.*, North Tarrytown, New York; to become a bank holding company by acquiring 100 percent of the voting shares of The First National Bank of North Tarrytown, North Tarrytown, New York.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Fostoria Bankshares, Inc.*, Fostoria, Iowa; to become a bank holding company by acquiring at least 80 percent of the voting shares of Farmers Savings Bank, Fostoria, Iowa.

Board of Governors of the Federal Reserve System, January 23, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-1887 Filed 1-26-89;8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those packages submitted to OMB since the last list was published on January 13, 1989.

Social Security Administration

(Call Reports Clearance Officer on 301-965-4149 for copies of package)

1. Government Pension Questionnaire—0960-0160—The information is used to determine if an individual's Social Security benefit will be reduced because of the receipt of a government pension. Respondents: Individuals or households; Number of Respondents: 80,000; Frequency of Response: 1; Average burden per response: 5 minutes; Estimated Annual Burden: 6,667 hours.

2. Student's Statement Regarding Resumption of School Attendance—0960-0143—The information collected by this form issued by the Social Security Administration is used to verify the alleged attendance of a student who is receiving benefits based on school attendance; Respondents: Individuals or households; Number of Respondents: 133,000; Frequency of Response: 1; Average burden per response: 6 minutes; Estimated Annual Burden: 13,300 hours.

3. Letter to Employer Requesting Information About Wages Earned by Beneficiary—0960-0034—This letter is used by the Social Security Administration to collect information from an employer needed to establish the correct wages earned by a beneficiary. Respondents: Business or other for—profit; Number of Respondents: 150,000; Frequency of *Response*: 1; Average burden per response: 5 minutes; Estimated Annual Burden: 12,500 hours.

4. Pre-1957 Military Service—Federal Benefit Questionnaire—0960-0120—The information is used to determine whether an individual with pre-1957 military service can be given wage credits for that period and be entitled to Social Security benefits. Respondents: Individuals or households; Number of Respondents: 56,000; Frequency of Response: 1; Average burden per response: 10 minutes; Estimated Annual Burden: 9,333 hours.

5. Quarterly Statistical Report on Recipients and Payments Under State-administered Assistance Programs for Aged, Blind and Disabled (Individuals and Couples) Recipients—0960-0130—This form is used by the Social Security Administration to provide Statistical data on recipients and assistance payments under the Supplemental Security Income (SSI) State-administered supplementation programs. Respondents: State or local governments; Number of Respondents: 23; Frequency of Response: 4; Average burden per response: 1 hour; Estimated Annual Burden: 92 hours.

6. Medical Cost Data—NEW—The information collected by this form is used by the Social Security Administration to determine if certain State agency budget requests are reasonable. Respondents: State or local governments; Number of Respondents: 54; Frequency of Response: 1; Average Burden Per Response: 1 hour; Estimated Annual Burden: 54 hours.

OMB Desk Officer: Justin Kopca

Health Care Financing Administration

(Call Reports Clearance Officer on 301-966-2088 for copies of package)

1. Statistical Report on Medical Care—0938-0345—The data reported in the HCFA-2082 are the basis of actuarial forecasts for Medicaid services utilization and costs; of analyses and cost savings estimates required for legislative initiatives relating to Medicaid; and for responding to requests for information from HCFA components, the Department, the public, the press, and the Congress. Respondents: State or local governments; Number of Respondents: 51; Frequency of Response: 1; Average Burden Per Response: 356; Estimated Annual Burden: 19,845 hours.

2. Refunding of Federal Share of overpayments made to Medicaid Providers—NEW—Overpayments are occasionally made to Medicaid Providers by State Medicaid agencies. States must refund shares of overpayments of HCFA after a 60-day recovery period. Documentation on out-of-business or bankrupt providers and the aging of overpayments during the recovery period are incremental burdens required by this regulation. Respondents: State or local Governments; Number of Respondents 57; Frequency of Response: 1; Average Burden Per Response: 2,600; Estimated Annual Burden: 148,200 hours.

OMB Desk Officer: Allison Herron

Office of the Secretary

(Call Reports Clearance Officer on 202-245-6511 for copies of package)

Medicare Beneficiary Survey—NEW—This request for information on beneficiary experience with the Medicare program will be used to identify potential inefficiencies which require more detailed review and corrective action. Respondents: Individuals or households; Number of Respondents: 640; Frequency of

Response: 1; Average Burden per Response: 20 minutes; Estimated Annual Burden: 214 hours.

OMB Desk Officer: Shannah Koss-McCallum

As mentioned above, copies of the information collection clearance packages can be obtained by calling the Reports Clearance Officer, one of the following numbers:

PHS: (202) 245–2100
HCFA: (301) 966–2088
SSA: (301) 965–4149
OS: (202) 245–6511
FSA: (202) 252–5605
OHDS: (202) 472–4415

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address:

OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503

Dated: January 24, 1989.

James E. Larson,

Acting Deputy Assistant Secretary for Information Resources Management.

[FR Doc. 89–2029 Filed 1–26–89; 8:45 am]

BILLING CODE 4150–05–M

Food and Drug Administration

Request for Nominations for Representatives of Consumer and Industry Interests on Public Advisory Committees or Panels

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for consumer and industry representatives to serve on certain public advisory committees or panels in the Center for Devices and Radiological Health. Nominations will be accepted for current vacancies and for those that will or may occur during the next 18 months.

FDA has a special interest in ensuring that women, minority groups, the physically handicapped, and small businesses are adequately represented on advisory committees and, therefore, extends particular encouragement to nominations for appropriately qualified female, minority, and physically-handicapped candidates, and nominations from small businesses that manufacture medical devices subject to the regulations.

DATE: Nominations should be received by March 28, 1989, for vacancies listed in this notice.

ADDRESSES: All nominations and curricula vitae for consumer representatives shall be submitted in writing to Naomi Kulakow (address below).

All nominations and curricula vitae, which includes a nominee's office address and telephone number, for industry representatives shall be submitted in writing to Kay Levin (address below).

FOR FURTHER INFORMATION CONTACT: For Consumer Interests: Naomi Kulakow, Office of Consumer Affairs (HFE–40), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–5006.

For Industry Interests: Kay Levin, Center for Devices and Radiological Health (HFZ–20), Food and Drug Administration, 12720 Twinbrook Parkway, Rockville, MD 20857, 301–443–4016.

SUPPLEMENTARY INFORMATION: FDA is requesting nominations for members representing consumer and industry interests for the following vacancies listed below:

Committee or panel	Approximate date representative is needed	
	Consumer	Industry
1. Anesthesiology and Respiratory Therapy Devices Panel	No vacancy	Nov. 30, 1989.
2. Clinical Chemistry and Clinical Toxicology Devices Panel	Feb. 28, 1990	No vacancy.
3. Dental Products Panel	No vacancy	Oct. 31, 1989.
4. Device Good Manufacturing Practice Advisory Committee	May 31, 1990	May 31, 1990.
5. General and Plastic Surgery Devices Panel	No vacancy	Aug. 31, 1989.
6. General Hospital and Personal Use Devices Panel	do	Dec. 31, 1989.
7. Microbiology Devices Panel	Feb. 28, 1990	No vacancy.
8. Orthopedic and Rehabilitation Devices Panel	No vacancy	Aug. 31, 1989.
9. Radiologic Devices Panel	do	Jan. 31, 1990.
10. Technical Electronic Product Radiation Safety Standards Committee	Dec. 31, 1989	Dec. 31, 1989.

Functions

Medical Devices Panels

The functions of the medical devices panels are to (1) review and evaluate available data concerning the safety and effectiveness of devices currently in use, (2) advise the Commissioner of Food and Drugs (the Commissioner) regarding recommended classification of these devices into one of three regulatory categories, (3) recommend the assignment of a priority for the application of regulatory requirements for devices classified in the standards or premarket approval category, (4) advise on any possible risks to health associated with the use of devices, (5) advise on formulation of product development protocols and review premarket approval applications for those devices classified in the premarket approval category, (6) review classification of devices to recommend changes in classification as appropriate, (7) recommend exemption to certain devices from the application of portions of the act, (8) advise on the necessity to ban a device, and (9) respond to requests from the agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices.

The Dental Products Panel will function at times as a nonprescription drug advisory panel. As such, the panel reviews and evaluates available data concerning the safety and effectiveness of active ingredients, and combinations thereof, of various currently marketed nonprescription drug products for human use, the adequancy of their labeling, and advises the Commissioner on the promulgation of monographs establishing conditions under which these drugs are generally recognized as safe and effective and not misbranded. The panel also evaluates and recommends whether various prescription drug products should be changed to over-the-counter status. The panel also evaluates data and makes recommendations concerning the approval of new drug products for human use.

Device Good Manufacturing Practice Advisory Committee

The function of the Device Good Manufacturing Practice Advisory

Committee is to review regulations for promulgation regarding good manufacturing practices governing the methods used in, and the facilities and controls used for, the manufacture, packing, storage, and installation of devices, and make recommendations regarding the feasibility and reasonableness of those proposed regulations. The committee also reviews and makes recommendations on proposed guidelines (e.g., Guideline on General Principles of Process Validation) developed to assist the medical device industry in meeting the good manufacturing practice requirements, and provides advice with regard to any petition submitted by a manufacturer for an exemption or variance from good manufacturing practice regulations.

Technical Electronic Product Radiation Safety Standards Committee

The function of the Technical Electronic Product Radiation Safety Standards Committee is to provide advice and consultation on the technical feasibility, reasonableness, and practicability of performance standards for electronic products to control the emission of radiation from such products. The committee may recommend electronic product radiation safety standards for consideration.

Consumer and Industry Representation

Medical Devices Panels

Section 513 of the Medical Device Amendments of 1976 (21 U.S.C. 360c) provides that each medical devices panel include as members one nonvoting representative of consumer interests and one nonvoting representative of interests of the device manufacturing industry.

Device Good Manufacturing Practice Advisory Committee

Section 520 of the Medical Device Amendments of 1976 (21 U.S.C. 360j) provides that the Device Good Manufacturing Practice Advisory Committee include as members two voting representatives of the general public and two voting representatives of interests of the device manufacturing industry.

Technical Electronic Product Radiation Safety Standards Committee

Section 358(f) of the Radiation Control for Health and Safety Act of 1968 (42 U.S.C. 263f(f)) provides that the Technical Electronic Product Radiation Safety Standards Committee include five members from the affected industries and five members from the general public, of which at least one shall be a representative of organized labor.

Nomination Procedures

Consumer Representatives

Any interested person may nominate one or more qualified persons as a member of a particular advisory committee or panel to represent consumer interests as identified in this notice. Self-nominations are also accepted. To be eligible for selection, the applicant's experience and/or education will be evaluated against Federal civil service criteria for the position to which the person will be appointed.

Nominations shall include a complete curriculum vitae of each nominee and shall state that the nominee is aware of the nomination, is willing to serve as a member, and appears to have no conflict of interest that woud preclude membership. FDA will ask the potential candidates to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest. The nomination should state whether the nominee is interested only in a particular advisory committee or panel or in any advisory committee or panel. The term of office is between 3 and 4 years, depending on the appointment date.

Industry Representatives for Medical Devices Panels

Any organization in the medical device manufacturing industry wishing to participate in the selection of an appropriate member of a particular devices panel may nominate one or more qualified persons to represent industry interests. Persons who nominate themselves as industrial representatives for the devices panels will not participate in the selection process. It is, therefore, recommended that all nominations be made by someone with an organization or firm who is willing to participate in the selection process.

Nominations shall include a complete curriculum vitae of each nominee. The nomination should state whether the nominee is interested only in a particular advisory committee or panel or in any advisory committee or panel. The term of office is between 3 and 4 years, depending on the appointment date.

Device Good Manufacturing Practice Advisory Committee and Technical Electronic Product Radiation Safety Standards Committee

Any interested person may nominate one or more qualified persons to represent industry interest on these committees as identified in this notice. Self-nominations are also accepted. Nominations shall include a complete curriculum vitae of each nominee. The term of office is between 3 and 4 years, depending on the appointment date.

Selection Procedures

Consumer Representatives

Selection of members representing consumer interests is conducted through procedures which include use of a consortium of consumer organizations which has the responsibility for screening, interviewing, and recommending candidates for the agency's or department's selection. Candidates should possess appropriate qualifications to understand and contribute to the committee's work.

Industry Representatives for Medical Devices Panels

Regarding nominations for members representing the interests of the device manufacturing industry on the medical devices panels, a letter will be sent to each organization that has made a nomination, and to those organizations indicating an interest in participating in the selection process, together with a complete list of all such organizations and the nominees. This letter will state that it is the responsibility of each organization to consult with the others in selecting a single member representing industry interests for that particular committee within 60 days after receipt of the letter. If no individual is selected within 60 days, the agency will select the nonvoting member representing industry interests.

Device Good Manufacturing Practice Advisory Committee and Technical Electronic Product Radiation Safety Standards Committee

Regarding nominations for persons to represent industry interests on these committees, they shall be forwarded to the office of the Secretary of Health and Human Services for final selection.

This notice is issued under the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770–776 (5 U.S.C. App. I)) and 21 CFR Part 14, relating to advisory committees.

Dated: January 19, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-1898 Filed 1-26-89; 8:45 am]

BILLING CODE 4160-01-M

Food and Drug Administration

Request for Nominations for Voting Members on Public Advisory Committees or Panels

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on certain public advisory committees or panels in the Center for Devices and Radiological Health. Nominations will be accepted for current vacancies and those that will or may occur during the next 18 months.

FDA has a special interest in ensuring that women, minority groups, and the physically handicapped are adequately represented on advisory committees and, therefore, extends particular encouragement to nominations for appropriately qualified female, minority, and physically-handicapped candidates.

DATES: Because scheduled vacancies occur on various dates throughout each year, no cutoff date is established for the receipt of nominations. However, when possible, nominations should be received at least 6 months before the date of scheduled vacancies for each year, as indicated in this notice.

ADDRESSES: All nominations and curricula vitae for the medical devices panels shall be sent to Gordon C. Johnson, Center for Devices and Radiological Health (HFZ-70), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910.

All nominations and curricula vitae for the Device Good Manufacturing Practice Advisory Committee shall be sent to Sharon Kalokerinos, Center for Devices and Radiological Health (HFZ-332), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910.

All nominations and curricula vitae for the Technical Electronic Product Radiation Safety Standards Committee shall be sent to Arlene Underdonk, Center for Devices and Radiological Health (HFZ-83), Food and Drug Administration, 12720 Twinbrook Parkway, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Kay Levin, Center for Devices and Radiological Health (HFZ-20), Food and Drug Administration, 12720 Twinbrook Parkway, Rockville, MD 20857, 301-443-4016.

SUPPLEMENTARY INFORMATION: FDA is requesting nominations of voting members for vacancies listed below. If specific expertise is not indicated, individuals should have expertise relevant to the field of activity of the committee or panel.

1. *Anesthesiology and Respiratory Therapy Devices Panel:* Three vacancies occurring immediately, three vacancies occurring November 30, 1989; clinicians/researchers with demonstrated experience in the treatment of respiratory disorders with an emphasis on neonatal/pediatric problems and some work experience with new (experimental) therapies including high frequency ventilation and/or extracorporeal membrane oxygenation.

2. *Clinical Chemisty and Clinical Toxicology Devices Panel:* One vacancy occurring February 28, 1990; doctor of medicine or philosophy experienced with clinical chemistry, clinical toxicology, therapeutic drug monitoring, or genetic disease diagnostic devices.

3. *Dental Products Panel:* Three vacancies occurring immediately; individuals with expertise in dental devices, materials, or oral microbiology.

4. *Device Good Manufacturing Practice Advisory Committee:* One vacancy occurring May 31, 1990; one health professional employed in the human health care area. Areas of committee interest include quality assurance in manufacturing of medical devices to include application of the good manufacturing practice regulation to the production of computerized devices and in vitro diagnostics and problems associated with the use of medical devices.

5. *Ear, Nose, and Throat Devices Panel:* One vacancy occurring immediately, four vacancies occurring October 31, 1989; audiologists or otolaryngologists with experience in pediatrics.

6. *Gastroenterology-Urology Devices Panel:* One vacancy occurring immediately, two vacancies occurring December 31, 1989; interventional radiologist; urologist; nephrologist; lithotripsy specialist; clinician/biomedical engineer with experience in membrane transport and hemodialysis or other extracorporeal therapy.

7. *General and Plastic Surgery Devices Panel:* One vacancy occurring August 31, 1989; pathologist or general surgeon with a strong academic and clinical research orientation.

8. *General Hospital and Personal Use Devices Panel:* Two vacancies occurring immediately, two vacancies occurring December 31, 1989; clinical/biomedical engineer; surgical oncologist with experience in the use of various drug infusion regimes; general surgeon; internist; diabetologist; immunologist; or general practitioner.

9. *Hematology and Pathology Devices Panel:* One vacancy occurring February 28, 1989, four vacancies occurring February 28, 1990; individuals involved in the practice of medicine or clinical laboratory science familiar with clinical hematology and biotechnology.

10. *Immunology Devices Panel:* Two vacancies occurring February 28, 1989, one vacancy occurring February 28, 1990; immunologists with experience in allergies; medical oncologists with experience in tumor diagnosis and treatment.

11. *Microbiology Devices Panel:* Three vacancies occurring August 28, 1989, two vacancies occurring February 28, 1990; disease clinicians; individuals with expertise in antimicrobial susceptibility testing devices, and/or virology testing devices, and/or biotechnology.

12. *Neurological Devices Panel:* One vacancy occurring immediately; biomedical engineer.

13. *Obstetrics-Gynecology Devices Panel:* One vacancy occurring immediately, one vacancy occurring January 31, 1989; individuals with expertise in obstetrics and/or gynecology.

14. *Ophthalmic Devices Panel:* One vacancy occurring immediately, two vacancies occurring October 31, 1989; ophthalmologists and optometrists.

15. *Orthopedic and Rehabilitation Devices Panel:* One vacancy occurring immediately, four vacancies occurring August 31, 1989; orthopedic surgeons with expertise in joint structure and function, prosthetic ligament devices, or joint biomechanics and implants, or biomaterials engineers.

16. *Radiologic Devices Panel:* Three vacancies occurring immediately, one vacancy occurring January 31, 1989; radiologist; radiation oncologist; oncologist who is expert in hyperthermia; and hyperthermia specialist.

17. *Technical Electronic Product Radiation Safety Standards Committee:* Two vacancies occurring December 31, 1989; two members from a government agency, including State or Federal government (however, see paragraph below regarding qualifications).

Functions

Medical Devices Panels

The functions of the medical devices panels are to (1) review and evaluate available data concerning the safety and effectiveness of medical devices currently in use, (2) advise the Commissioner of Food and Drugs regarding recommended classification of these devices into one of three regulatory categories, (3) recommend the assignment of a priority for the application of regulatory requirements for devices classified in the standards or premarket approval category, (4) advise on any possible risks to health associated with the use of devices, (5) advise on formulation of product development protocols and review premarket approval applications for those devices classified in the premarket approval category, (6) review classification of devices to recommend changes in classification as appropriate, (7) recommend exemption to certain devices from the application of portions of the act, (8) advise on the necessity to ban a device, and (9) respond to requests from the agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices.

The Dental Products Panel will function at times as a nonprescription drug advisory panel. As such, the panel reviews and evaluates available data concerning the safety and effectiveness of active ingredients, and combinations thereof, of various currently marketed nonprescription drug products for human use, the adequacy of their labeling, and advises the Commissioner of Food and Drugs on the promulgation of monographs establishing conditions under which these drugs are generally recognized as safe and effective and not misbranded. The panel also evaluates and recommends whether various prescription drug products should be change to over-the-counter status. The panel also evaluates data and makes recommendations concerning the approval of new drug products for human use.

Device Good Manufacturing Practice Advisory Committee

The function of the Device Good Manufacturing Practice Advisory Committee is to review regulations for promulgation regarding good manufacturing practices governing the methods used in, and the facilities and controls used for, the manufacture, packing, storage, and installation of devices, and make recommendations regarding the feasibility and reasonableness of those proposed regulations. The committee also reviews and makes recommendations on proposed guidelines (e.g., Guideline on General Principles of Process Validation) developd to assist the medical device industry in meeting the good manufacturing practice requirements, and provides advice with regard to any petition submitted by a manufacturer for an exemption or variance from good manufacturing practice regulations.

Technical Electronic Product Radiation Safety Standards Committee

The function of the Technical Electronic Product Radiation Safety Standards Committee is to provide advice and consultation on the technical feasibility, reasonableness, and practicability of performance standards for electronic products to control the emission of radiation from such products. The committee may recommend electronic product radiation safety standards for consideration.

Qualifications

Medical Devices Panels

Persons nominated for membership on the medical devices panels shall have adequately diversified experience appropriate to the work of the panel in such fields as clinical and administrative medicine, engineering, biological and physical sciences, statistics, and other related professions. The nature of specialized training and experience necessary to qualify the nominee as an expert suitable for appointment may include experience in medical practice, teaching, and/or research relevant to the field of activity of the panel. The particular needs at this time for each panel are shown above. The term of office is between 3 and 4 years, depending on the appointment date.

Device Good Manufacturing Practice Advisory Committee

Persons nominated for membership on the Device Good Manufacturing Practice Advisory Committee should have expertise in any one or more of the following areas: quality assurance concerning manufacturing of medical devices and/or sterilization of medical devices during the manufacturing process. In addition, nominees should have experience with the use and application of medical devices. The particular needs for this committee are shown above. The term of office is between 3 or 4 years, depending on the appointment date.

Technical Electronic Product Radiation Safety Standards Committee

Persons nominated for the Technical Electronic Product Radiation Safety Standards Committee must be technically qualified by training and experience in one or more fields of science or engineering applicable to electronic product radiation safety. The particular needs for this committee are shown above. The term of office is between 3 and 4 years, depending on the appointment date.

Nomination Procedures

Any interested persons may nominate one or more qualified persons for membership on one or more of the advisory committees or panels. Self-nominations are also accepted. Nominations shall include a complete curriculum vitae of each nominee, current business address and telephone number, and shall state that the nominee is aware of the nomination, is willing to serve as a member, and appears to have no conflict of interest that would preclude membership. FDA will ask the potential candidates. to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflict of interest.

This notice is issued under the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770–776 (5 U.S.C. App. I)) and 21 CFR Part 14, relating to advisory committees.

Dated: January 19, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 89–1899 Filed 1–26–89; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 88F–0403]

Takeda Chemical Industries, Ltd., Filing of Food Additive Petition

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a petition has been filed on behalf of Takeda Chemical Industries, Ltd., proposing that the food additive regulations be amended to provide for

the safe use of 3-isocyanatomethyl-3,5,5-trimethylcyclohexylisocyanate trimer as a new cross-linking agent, and to change the use levels of components of the polyurethane-polyeter resin-epoxy adhesives used in the production of high temperature laminates intended for use in contact with food.

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: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5), 72 Stat. 1786 (21 U.S.C. 348(b)(5))), notice is given that a petition (FAP 9B4116) has been filed on behalf of Takeda Chemical Industries, Ltd., c/o 1730 Rhode Island Avenue NW., Washington, DC 20036, proposing that § 177.1390 *Laminate structures for use at temperatures of 250 °F and above* (21 CFR 177.1390) be amended as follows: (1) in paragraph (c)(2)(vi)(*a*)(*3*), to increase the epoxy resin content from 5 percent to a maximum of 30 percent; (2) in paragraph (c)(2)(vi) (*a*)(*4*), to remove the 3 percent limit on the optional trimethoxysilane coupling agent; and (3) in paragraph (c)(2)(vi)(*b*), to provide for the optional use of 3-isocyanatomethyl-3,5,5-trimethylcyclohexylisocyanate trimer (CAS Reg. No. 53895-32-2) as an optional urethane cross-linking agent.

Additionally, FDA notes that the CAS Reg. No. (4098-71-9) for 3-isocyanatomethyl-3,5,5-trimethylcyclohexylisocyanate, which appeared in a final regulation published in the **Federal Register** of October 5, 1988 (53 FR 39083 at 39084), amending 21 CFR 177.1390, is incorrect. FDA will correct the CAS Reg. No. to read 62628-59-5 in a subsequent **Federal Register** document.

The potential environmental impact of this action is being reviewed. If the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: January 10, 1989.

Richard Ronk,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 89-1900 Filed 1-26-89; 8:45 am]

BILLING CODE 4160-01-M

Public Health Service

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Public Health Service (PHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those packages submitted to OMB since the last list was published on January 13, 1989.

(Call Reports Clearance Officer on 202-245-2100 for copies of package.)

1. NCHS Laboratory-Based Questionnaire Research—0920-0222—Questionnaires for one NCHS survey (National Health Interview Survey) and for three other questionnaire research projects will be developed using laboratory methods which combine the techniques of cognitive psychology and survey research to reduce measurement errors. Respondents: Individuals or households; Number of Respondents: 300; Number of Responses Per Respondent: 1; Average Burden Per Response: 1 hour; Estimated Annual Burden: 300 hours.

2. Study of Families with Multigenerational History of Alcoholism—NEW—NIAAA requires information on noninherited and genetic risk factors that determine alcoholism. To more closely examine these factors, NIAAA will study alcoholics with specific clinical characteristics and their relatives. Respondents: Individuals or households; Number of Respondents: 83; Number of Responses Per Respondent: 1; Average Burden Per Response: 13 hours; Estimated Annual Burden: 1,079 hours.

3. Cosmetic Raw Material Composition—0910-0031—Information provides FDA personnel, dermatologists, consumers and other concerned individuals with detailed information on the trade name raw materials used in cosmetic products. Respondents: Businesses or other for profit and small businesses or organizations; Number of Respondents: 40; Number of Responses Per Respondent: 10; Average Burden Per Response: 0.5 hours; Estimated Annual Burden: 200 hours.

4. Characteristics of Youth at Differential Risk for Substance Abuse; Comparisons Across Subjects Groups—NEW—The etiological factors associated with substance abuse are not well understood due to the insufficient collection of data on persons at high risk for substance abuse. This study will assess behavioral and developmental patterns of children at risk for substance abuse in order to identify these factors which contribute to substance abuse behavior in children. Respondents: Individuals or households; Number of Respondents: 960; Number of Responses Per Respondent: 1; Average Burden Per Response: 2.73 hours; Estimated Annual Burden: 2,624 hours.

5. Cosmetic Product Experience Reports—21 CFR Part 730—0910-0047—Experience data, when correlated with cosmetic product ingredient data, gives FDA scientists valuable insight into potentially unsafe cosmetic ingredients thereby improving FDA's ability to accomplish its mission of protecting consumers from injuries resulting from harmful ingredients in cosmetics. Respondents: Businesses or other for profit and small businesses or organizations; Number of Respondents: 125; Number of Responses Per Respondent: 1; Average Burden Per Response: 4.2 hours; Estimated Annual Burden: 525 hours.

6. The Scholarship Program for First-Year Students of Exceptional Financial Need (EFN)—0915-0028—The reporting and recordkeeping requirements ensure that funds are allocated to participating health professions schools according to statutory and regulatory requirements. The information supplied will help determine the number and types of scholarships each school will receive.

	No. of respondents	No. of hrs. per response	No. of responses per respondent
Application by School	300-325	.25	1
Maintenance of Student Ranking Criteria	300-325	.03	1
Maintenance of Students Records	300-325	.05	1
Total Annual Burden	104 Hours		

7. Teacher Questionnaire and Parental Consent Forms for the Study of the Long-Term Health Outcomes of Very Low Birthweight Infants—NEW—The U.S. has experienced a dramatic increase in the survival of low birthweight infants. These infants are known to be at risk for less than optimal neurodevelopmental outcomes. This study investigates the development of low birthweight children to identify the care and services which they will need. The teacher questionnaire will gather critically needed data on the utilization

of special education services by VLBW infants at school age, their language learning and achievement problems. Respondents: Non-profit institutions; State or local governments; Number of Respondents: 2,100; Number of Responses Per Respondent: 1; Average Burden Per Response: .17 hours; Estimated Annual Burden: 360 hours.

OMB Desk Officer: Shannah Koss-McCallum.

Written comments and recommendations for the proposed information collections should be sent directly to the OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Date: January 19, 1989.

Steven A. Grossman,

Deputy Assistant Secretary for Health (Planning and Evaluation).

[FR Doc. 89-1829 Filed 1-26-89; 8:45 am]

BILLING CODE 4160-17-M

Advisory Council; Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), announcement is made of the following National Advisory Council scheduled to meet during the month of February 1989:

Name: National Advisory Council on Health Care Technology Assessment

Date and Time: February 17, 1989—9:00 a.m. to 4:00 p.m.

Place: Washington Court Hotel, Ball Room, 525 New Jersey Avenue, Northwest, Washington, DC.

Closed February 17, 3:30 p.m. to 4:00 p.m.

Open for remainder of the meeting.

Purpose: The Council is charged to provide advice to the Secretary and to the Director of the National Center for Health Services Research and Health Care Technology Assessment (NCHSR) with respect to the performance of health care technology assessment functions prescribed by Section 305 of the Public Health Service Act, as amended.

Agenda: The agenda will include the election of a chairman for the Council. There will also be a discussion of potential future Council activities. In addition, there will be a discussion of the Medicare Coverage recommendations. In closed session from 3:30 p.m. to 4:00 p.m., the Council will review technology assessment grant applications submitted to the NCHSR.

Anyone wishing to obtain a Roster of Members, Minutes of Meetings, or other relevant information should contact Mrs. Diana Dodd, National Center for Health Services Research and Health Care Technology Assessment, Room 18A20, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Telephone (301) 443-3091.

Agenda items are subject to change as priorities dictate.

Dated: January 12, 1989.

Norman W. Weissman,

Acting Director, National Center for Health Services Research and Health Care Technology Assessment.

[FR Doc. 89-1965 Filed 1-26-89; 8:45 am]

BILLING CODE 4160-17-M

National Research Service Awards for Research In Primary Medical care; Delegation of Authority

Notice is hereby given that in furtherance of the delegation of authority to the Assistant Secretary for Health on July 20, 1979 (44 FR 46318), by the Secretary of Health, Education, and Welfare (predecessor of the Secretary of Health and Human Services), with Assistant Secretary for Health has delegated to the Administrator, Health Resources and Services Administration, with authority to redelegate, the authority under Title IV, section 487(d)(3), of the Pulbic Health Service Act (42 U.S.C 288(d) as amended, pertaining to National Research Service Awards for research in primary medical care, extending the one-half of one percent for payments under National Research Service Awards made for National Center for Health Services Research and Health Care Technology Assessment under Section 304(a)(3). This delegation also excluded the authority to promulgate regulations, submit reports to the President of the Congress, approve organizational changes at the division level and above, establish national advisory councils and boards, and select members of national advisory councils and boards.

Redelegation

Provision was made for all delegations and redelegations within the Public Health Service to contiue in effect provided they are consistent with this delegation.

Effective Date

This delegation was effective on January 17, 1989.

Dated: January 17, 1989.

Robert E. Windom,

Assistant Secretary for Health.

[FR Doc. 89-1895 Filed 1-26-89; 8:45 am]

BILLING CODE 4160-15-M

Office of the Assistant Secretary for Health; Section 319 of the Public Health Service Act; Delegation of Authority

Notice is hereby given that in furtherance of the delegation of authority to the Assistant Secretary for Health on January 14, 1981 (46 FR 10016) by the Secretary of Health and Human Services, the Assistant Secretary for Health has delegated all of the authorities under section 319 of the Public Health Service Act, as amended, pertaining to the functions assigned to the Health Resources and Services Administration for Public Health Emergencies to the Administrator, Health Resources and Services Administration, with authority to redelegate. The delegation excluded the authorities to issue regulations, to submit reports to the President and the Congress or a congressional committee, to establish advisory committees or councils, or to appoint members to advisory committees or councils.

Redelegation

Provision was made for all delegations and redelegations under Title III of the Public Health Service Act to continue in effect.

Effective Date

This delegation became effective on January 13, 1989.

Date: January 13, 1989.

Robert E. Windom,

Assistant Secretary for Health.

[FR Doc. 89-1896 Filed 1-26-89; 8:45 am]

BILLING CODE 4160-15-M

Statement of Organization, Functions, and Delegations of Authority

Part H of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services, Public Health Service (PHS), Chapter HG, Indian Health Service (IHS), (52 FR 47053-67, December 11, 1987) is amended to reflect establishment of substructure components within IHS, PHS.

Indian Health Service

Under *Chapter HG, Section HG.10, Organization and Functions,* delete the *Section HG.10, Organization and Functions* and insert the following *Section HG.10, Organization* and components:

Section HG.10, Organization. IHS is directed by a Director who is responsible to the Assistant Secretary

for Health. IHS consists of the following major components:

Office of the Director (HGA);
Office of Administration and Management (HGA2);
Office of Planning, Evaluation and Legislation (HGA3);
Office of Tribal Activities (HGA4);
Office of Health Programs (HGA5);
Office of Environmental Health and Engineering (HGA6);
Office of Health Program Research and Development (HGA7);
Office of Information Resources Management (HGA8), and
IHS Area Offices (HGF).

After *HG.10. Organization,* insert the title *Section HG.20. Functions.*

After the title and statement for *Office of the Director (HGA),* insert the following:

Communications Staff (HGA–2) The Staff: (1) Serves in an advisory capacity for general policy and program direction on the communications and public affairs focus for the IHS and coordinates communications activities with other health agencies; (2) provides support in policy and program direction and establishes and implements procedures for development, review and dissemination of communication materials; (3) conducts and coordinates communications and public affairs activities for the IHS within PHS and DHHS and with other public and private sector organizations; (4) develops and implements policies to establish and maintain productive media relations; (5) plans and directs programs designed to facilitate dissemination of health program/services information to and from IHS Headquarters, IHS Bureaus, IHS Service Units and Tribal components; and (6) coordinates implementation of the Freedom of Information Act for IHS.

Policy Review and Coordination Staff (HGA–3) The Staff: (1) Coordinates the review of policy issues, initiatives, and the resolution of differences within the Indian Health Service (IHS) related to them; (2) performs special assignments for the Director, some of which require responses by or coordination with other IHS or PHS offices; (3) analyzes and studies the background of problems, generates and evaluates options, and develops and implements new procedures and working policies to correct deficiencies; and (4) plans, organizes, and directs the Executive Secretariat of the IHS with primary responsibility for management of written communications to and from the Director.

Equal Employment Opportunity and Civil Rights Staff (HGA–4) The Staff: (1) Administers the IHS equal opportunity, civil rights and affirmative action programs in accordance with established DHHS and PHS policies; (2) monitors the personnel systems for General Schedule, PHS Commissioned Corps and Wage Schedule personnel and responds to complaints of employment discrimination; (3) develops and directs implementation of the provisions under the Civil Rights Act of 1964 (P.L. 88–352), and the Age Discrimination Act of 1975 (P.L. 94–135, 89 Stat. 728) as they apply to recipients of IHS funds; (4) in conjunction with the Division of Contracts and Grants Policy, promotes the awarding of contracts under section 8(a) of the Small Business Act; (5) participates in the formulation of IHS goals, policies, priorities and strategies as they affect professional health organizations and institutions of higher education; (6) serves as liaison to assess and ensure equitable application of IHS programs to its minority constituencies; and (7) develops EEO education and training programs for IHS managers, supervisors, counselors and employees.

After the title and statement for the *Office of Administration and Management (HGA2)* insert the titles and statements for the following:

Program Integrity and Ethics Staff (HGA2–2) The Staff: (1) Directs the investigation and resolution of allegations of impropriety, mismanagement of resources, abuse of authority, violations of Standards of Conduct or other forms of wrongdoing or mismanagement; (2) provides leadership and developing plans, provides guidance, and evaluates the agency personnel and physical security programs; (3) develops and evaluates the agency's Automated Information Systems (AIS) Security Program under the Computer Security Act of 1987 (P.L. 100–235); (4) develops policies and procedures to maintain integrity of contractor information; (5) provides focus for agencywide top management investigative capability including "hotline" cases; (6) develops policies and procedures and implements reviews concerning conflicts of interest matters, employee associations with regulated industries, employee financial interests and outside activities of employees; (7) decides nature of conflict, counsels, and trains employees on the avoidance of conflicts of interests; (8) advises IHS Agency management concerning corrective and remedial actions to be taken on investigatory findings and recommendations; (9) proposes, develops and implements standards, guidelines, procedures and systems for ensuring the integrity of Agency employees and programs; and, (10) maintains case files, extensive reference materials (e.g., laws, regulations and policy statements), and other data pertaining to integrity matters.

Division of Management Policy (HGA21) (1) Provides analysis and direction for management policies and procedures; (2) serves as principal advisor on IHS organization and management policy and provides guidance for establishment or modification of organizational structures, functions and delegations of authority; (3) conducts and coordinates the internal control reviews, management initiatives, issuances, reports and agreements management programs; (4) provides consultation and assistance in the development of directives and agreements; (5) serves as focus for liaison with PHS and DHHS for management policy; and (6) coordinates all reports for the Inspector General and the GAO, and other Federal internal audits for the agency.

Division of Administrative Services (HGA22) (1) Plans, develops and coordinates office services, records, supply, personal property and other administrative services to support the IHS Headquarters and field programs, and (2) provides guidance and assistance to IHS Headquarters and field in the development, planning and implementation of administrative functions and support services.

Division of Resources Management (HGA23) (1) Develops and prepares the budget for OMB submission and the President's budget for the Indian Health Service and Facilities Appropriation; (2) participates with DHHS and PHS officials in budget briefings for OMB and Congress; (3) distributes, coordinates and monitors resource allocations; and (4) in collaboration with the Office of Health Programs (OHP) and the tribes develops and implements budget, fiscal and accounting procedures and conducts review and analyses to ensure compliance in budget activities.

Division of Personnel Management (HGA24) (1) Provides personnel management advice and assistance on matters affecting the Indian Health Service as a whole or on matters arising from the field requiring headquarters action; (2) develops personnel management policies, programs, and reports; (3) within the headquarters servicing area, provides the full range of personnel management and personnel administration services including manpower planning and utilization, staffing, recruitment, compensation and classification, training, career

development and upward mobility, labor and employee relations; (4) provides advice, consultation, and assistance to IHS management and tribal officials on personnel policy issues associated with the implementation of Pub. L. 93–638; (5) coordinates Commissioned Officer orders, billets, efficiency reports and promotions; (6) provides liaison for Commissioned Corps activities IHS-wide with Division of Commissioned Personnel, OASH; (7) develops and/or provides training and career development programs, and manages nominations for executive level training programs IHS-wide; (8) assures implementation of the Indian Preference policy in all personnel practices; and (9) represents IHS in personnel management matters within and outside the Department of Health and Human Services.

Division of Contracts and Grants Policy (HGA25) (1) Develops and issues policies and procedures pertaining to contract and grant programs throughout the IHS; (2) reviews and evaluates the effectiveness of established policies and procedures and recommends improvements; (3) conducts compliance reviews of IHS Area Office contract and grants offices, developing findings and recommendations for corrective action where appropriate; (4) reviews and provides comments on proposed legislation, regulations, directives and issuances; (5) reviews and makes recommendations on proposed contract documents such as Justification for Other than Full and Open Competition, waivers, appeals, deviations and determinations and findings which are required to be approved by the Director or Associate Directors of IHS, OASH and OS; (6) performs pre-award review and approval of contracts in excess of stated limits to be awarded by the IHS area offices, Office of Engineering Services on behalf of IHS, and IHS headquarters; (7) plans and develops special statistical studies, analyses and reports concerning all facets of IHS grant and contract activities, including responding to Congress, governmental and public information inquiries; (8) establishes and operates the IHS contract and grant information systems; (9) provides training, advice and technical consultation of IHS Area Offices on interpretation and application of contract and grant policies; (10) manages and coordinates the IHS Small and Disadvantaged business programs; (11) manages and promotes the achievement of applicable civil rights policies and objectives for IHS financial assistance; and (12) serves as IHS contact point for protest to the General Accounting Office or the General Services Administration Board of Contract Appeals.

Division of Acquisition and Grant Operations (HGA29) (1) Furnishes contracts and grants services for programmatic requirements to the Indian Health Service (IHS) headquarters components; (2) coordinate activities to ensure proper development of headquarters contract requirements and assistance programs; (3) implements acquisition and assistance policies and procedures, formulated by the Division of Contracts and Grants Policy, and develops necessary acquisition and assistance policies and procedures not otherwise established for IHS-wide use for grants and contracts under its cognizance; (4) executes grant and contract awards; (5) administers grants and contracts; (6) serves as liaison with the Division of Acquisition Management, OASH, for administrative acquisitions processed for IHS by that office; (7) provides cost advisory and audit resolution services to IHS Area Offices; and (8) coordinates responses to OIG and GAO reports and monitors implementation of OIG and GAO recommended procurement corrective actions.

After the title and statement for the *Office of Planning, Evaluation and Legislation (HGA3)*, add the titles and statements for the following:

Division of Program Evaluation and Policy Analysis (HGA32) (1) Serves as principal advisor on program evaluation and policy analysis; (2) provides liaison in communications between the agency, PHS and the Department on all matters involving evaluation and analysis of program performance; (3) establishes and maintains liaison with other Federal and non-Federal health organizations on matters of program evaluation and policy analysis; (4) provides technical assistance to support statistical, economical, operations research and other scientific analyses of policy questions; (5) directs all activities that compare costs of agency programs with their benefits/effectiveness; (6) identifies program performance data for use in the management and direction of IHS programs; (7) provides technical analysis trends and forecasts for national health services delivery systems for program management and decisionmaking; (8) monitors ongoing information systems for evaluation and analytical data for IHS programs; (9) analyzes impact of IHS programs to develop appropriate responses to need, demand, access, illness and disease; and (10) plans, conducts and directs health service research for IHS (other than biomedical, clinical and behavioral).

Division of Legislation and Regulations (HGA33) (1) Determines need for and develops plans for changes in legislation and regulations; (2) identifies legislative proposals in the Congress that impact IHS programs and activities and develops an agency position response for PHS and DHHS officials; (3) informs management and program officials of legislative and regulatory activities of other Federal agencies; (4) coordinates legislative and regulations activities with PHS and DHHS agencies that impact on the delivery of health services to Indians; (5) serves as liaison with the Office of the General Counsel for matters of litigation, regulations and legislation, and coordinates legal issues with the Office of the General Counsel, IHS, PHS, DHHS components, and other Federal agencies; (6) assures development and implementation of appeals process within the agency; and (7) assures proper clearance and processes of **Federal Register** documents.

Division of Program Statistics (HGA34) (1) Plans, develops, directs, coordinates and monitors statistical reporting systems and data bases for measuring health status and appraising program activities; (2) analyzes, maintains and publishes statistical data for demographics and morbidity of American Indian and Alaska Native populations; (3) develops methodologies to identify health status improvements and deficiencies and to forecast health services requirements; (4) provides statistical advice and information to IHS and PHS entities for policy formulation, budget preparation and justification, program planning and evaluation, health status assessment, health systems description, resource requirements and allocation, health research, etc.; (5) consults and advises other Federal and non-Federal organizations regarding statistical data, methodology and techniques related to American Indian and Alaska Native demographic and morbidity data; and (6) administers implementation of the Privacy Act and the Paperwork Reduction Act within IHS.

Division of Health Services Planning and Operations Research (HGA35) (1) Directs IHS program planning and operations research programs; (2) develops and oversees implementation of planning methodologies, techniques and procedures for the IHS Area Offices, service units and Tribes; (3) develops the strategy for Area-wide health services plan and oversees implementation of the plan; (4) develops

policies and procedures for operational plans and other requirements related to DHHS and PHS priorities; (5) directs all activities related to design, development, implementation and evaluation of resource requirements and allocation methodologies models; (6) establishes and maintains liaison with other Federal and non-Federal health organizations within the area of resource allocation, health services planning and operations research; (7) formulates and guides analytical studies for operations research that examine factors affecting management decisions for the mode of health services delivery; (8) collaborates with other headquarters offices to develop and coordinate material to support budget presentations to PHS, DHHS, the OMB and the Congress; (9) directs and carries out IHS activities for the health services priority system; (10) provides technical assistance on design and optimum use of operations research technology, its expected contribution and limitation in key operational and managerial issues; (11) provides technical assistance to IHS and PHS components for health services planning, resource allocation and operations research initiatives; and (12) coordinates the updating of various PHS and departmental reports and documents related to health services delivery.

After the title and statement for the *Office of Tribal Activities ((HGA4)*, add the titles and statements for the following:

Division of Tribal Information Services (HGA42) (1) Provides timely information to tribal and IHS officials on subjects that include tribal health programs, American Indian and Alaska Native health issues, and resources available to Native Americans; (2) maintains accurate information on American Indian and Alaska Native tribes and communities, tribal health programs, and sources of information available to tribes; (3) develops and maintains supportive relationships with tribal governments, intertribal governing bodies, national American Indian and Alaska Native interest groups, and other groups and individuals active in American Indian and Alaska Native issues; (4) formulates and revises policies, administrative procedures, and guidelines supporting tribal information activities and oversees their implementation; (5) arranges meetings for tribal delegations at IHS Headquarters, analyzes the issues to be discussed, and follows-up each meeting, including tracking progress in honoring commitments made by IHS representatives; and (6) monitors and coordinates the timely development of IHS Headquarters correspondence to tribal officials and organizations regarding issues of concern to them.

Division of Community Services (HGA43) (1) Participates with tribes and tribal organizations in the formulation and implementation of policies which support American Indian and Alaska Native community development; (2) strengthens tribal capabilities to manage community health programs and administers funds for developing and expanding tribal health programs; (3) assists American Indian and Alaska Native communities to identify their health needs and to design health programs; (4) develops mechanisms for tribal leaders to share their expertise in health program management and self-determination activities; (5) provides technical assistance to American Indian and Alaska Native communities in developing their capability to influence health care delivery in their communities; (6) provides technical assistance to American Indian and Alaska Native communities in developing and mobilizing local service capabilities and other resources available for tribal health programs; and (7) supports development of tribal information systems which improve health care service delivery.

Division of Self-Determination Services (HGA44) (1) Implements legislation and authorities to support American Indian and Alaska Native self-determination; (2) formulates and revises policies, administrative procedures, and guidelines supporting American Indian and Alaska Native self-determination activities and oversees their implementation; (3) develops mechanisms for and oversees consultation with tribes and tribal organizations in the development of American Indian and Alaska Native health policies; (4) provides guidance and technical assistance to interpret American Indian and Alaska Native self-determination policies, administrative procedures and guidelines, and promotes their understanding by Federal and tribal officials; (5) assists the Associate Director, Office of Tribal Activities, and other IHS and tribal officials in resolving issues and solving problems regarding American Indian and Alaska Native self-determination; (6) evaluates Areas' compliance with IHS self-determination policies, administrative procedures and guidance; and (7) develops network with and provides guidance and support to Area Contract Proposal Liaison Officers.

After the title and statement for the *Office of Health Programs (HGA5)*, add the titles and statements for the following:

Division of Clinical and Preventive Services (HGA52) (1) Provides direction for health delivery activities; (2) coordinates logistics associated with the conduct of program reviews of IHS organizations; (3) advises on assessment findings for potential implication for IHS policy, plan, programs and operations; (4) develops quality of care evaluation criteria, standards of care, and guidance for the maintenance of the quality assurance program of IHS; (5) conducts monitoring activities to assess the quality of care provided by IHS; and (6) collaborates with budget and planning offices to develop material to support budget presentations to PHS, DHHS, the OMB and the Congress.

Division of Health Care Administration and Contract Health Services (HGA53) (1) Develops, coordinates and evaluates program standards, guides, plans and requirements for health care administration; (2) develops, coordinates and evaluates material, preventive and hospital services provided through contractual arrangements; (3) establishes and evaluates the implementation of standards and guidelines for quality assurance of direct hospital and health services and contract health services; (4) coordinates hospital care administration recruitment, assignment and career development; (5) establishes national standards of performance for contract health services and assesses performance against these standards; (6) develops allocations of contract health services funds; (7) coordinates appeals and reconsideration of denials of services to IHS beneficiaries; (8) plans and develops methods for identifying and obtaining health resources available through public and private sources and coordinates use of these resources; (9) serves as principal liaison with the Health Care Financing Administration (HCFA) for Medicare and Medicaid activities and establishes liaison and coordinates Medicaid activitie with States; (10) serves as principal liaison with Joint Commission on Accreditation of Hospitals (JCAH) and American Hospital Association for hospital accreditation and other activities applicable to IHS health care administration; (11) develops policy, plans, coordinates and directs third-party activities of IHS facilities, and coordinates and develops policy and plans for implementation of the Indian Health Care Improvement Act; and (12)

coordinates development of the budget for health care administration and contract health services activities.

Division of Health Professions Recruitment and Training (HGA54) (1) Develops the IHS program to recruit, select, assign and retain health care professionals in accordance with policies and guidance provided by the Division of Personnel Management; (2) assesses IHS professional staffing needs; (3) provides research and analysis functions for Chief Medical Officers, Clinical Directors and senior clinicians; (4) manages continuing medical and scholarship education programs; and (5) coordinates activities and provides support for IHS clinical programs.

Division of Nursing (HGA55) (1) Plans, develops, coordinates, and evaluates nursing administration; (2) plans, develops, coordinates and evaluates clinical nursing practice; (3) plans, develops, coordinates, manages and evaluates nursing education; (4) establishes standards for nursing service; (5) provides professional guidance; (6) coordinates professional staff, including nursing recruitment, scholarship recipients, assignment and development to meet Service Unit, Area, and Tribal needs in accordance with policies and guidance provided by the Division of Personnel Management; (7) provides guidance in planning, developing and maintaining management information systems; and (8) prepares budgetary data, analysis and program evaluations.

After the title and statement for the *Office of Environmental Health and Engineering (HGA6)*, add the titles and statements for the following:

Division of Facilities Planning and Construction (HGA62) (1) Administers nationwide facilities engineering and construction programs for IHS health care facilities and personnel quarters in consultation with the Office of Engineering Service in the PHS Regions; (2) develops and coordinates program requirements for short- and long-range plans, designs and evaluations of health care facilities and personnel quarters; (3) develops, coordinates and evaluates technical standards, guides, plans and requirements for health care facilities construction requirements within IHS and PHS; (4) develops and coordinates IHS health care facility construction programs; (5) provides technical assistance and monitors IHS Area and tribal health care facilities planning and construction programs; (6) coordinates IHS activities related to intra- and interagency requirements for shared or cooperative health care facilities projects undertaken in cooperation with other Federal, State and regional planning organizations; (7) provides consultation to professional standards organizations; (8) provides technical assistance and consultation to tribal governments and Alaska Native corporations on the progress of health care factility planning, design and construction projects; and (9) develops material to support budget presentations to PHS, DHHS, and the OMB and the Congress.

Division of Facilities Management (HGA63) (1) Administers nationwide IHS facilities management programs, including facilities engineering, clinical engineering and real property management; (2) serves as principal advisor in providing engineering leadership, guidance and coordination of IHS facilities management activities; (3) develops and coordinates program requirements to implement facilities management programs that meet established IHS objectives, accreditation standards and Medicare/Medicaid requirements; (4) develops, coordinates and evaluates technical standards, guides, plans and requirements for operation maintenance, repair, alteration and improvement of IHS health care and supporting facilities; (5) plans, develops, coordinates and evaluates the IHS clinical engineering and biomedical equipment management activities; (6) provides technical engineering assistance and implements evaluation of Area and tribal facilities management programs; (7) plans, directs, and coordinates the acquisition, management and disposal of IHS-owned or leased real property and administers the Federal Buildings Fund for all General Services Administration (GSA) assigned space; and (8) represents IHS in facilities management matters with other Federal agencies and non-Federal organizations.

Division of Environmental Health (HGA64) (1) Administers a comprehensive environmental health program designed to maintain/improve the health of, and prevent disease among, the Native American people; (2) provides engineering and sanitation expertise, overall program leadership, guidance, and coordination, and serves as the principal IHS advisor on environmental health issues; (3) administers the Indian Sanitation Facilities Act (Public Law 86–121) and activities necessary to ensure IHS compliance with environmental protection and historic preservation legislation, as well as activities in community injury control, institutional environmental health and employee safety, emergency preparedness, technical assistance for operation and maintenance, and related program areas; (4) assess environmental and sanitation facilities conditions in Native American homes and communities, identifies and priorities needs, develops long/short-range plans and action programs in consultation with other IHS staff and tribal representatives, identifies resource requirements, prepares and justifies environmental health and sanitation facilities construction program budget requests, devises/implements environmental health and sanitation facilities construction resource allocation methodologies, and directs resource distribution; (5) develops, coordinates, and evaluates technical standards and prepares technical handbooks; (6) provides engineering and sanitation technical support to, and performs periodic evaluations of, IHS Area and tribal environmental health program activities; (7) coordinates environmental health staff utilization, training, and career development; (8) represents IHS on environmental health and sanitation facilities construction issues with other Federal, State, and local agencies, Native American tribes/organizations, professional organizations, and interested groups.

After the title and statement for the *Office of Health Program Research and Development (OHPRD) (HGA7)*, add the titles and statements for the following:

Division of Administrative Support (HGA72) Provides local administrative services for national research and development and local area service delivery, including finance, contracting and procurement, property and supply, personnel, facilities management and transportation.

Division of Health Services Systems (HGA73) (1) Develops methods to improve health services delivery; (2) provides specialized services for operations and systems analysis, evaluation methods and designs, planning methodology development and consultation and technical assistance for IHS and tribal programs, and (3) provides assistance for alternative policy and operations concept impact analysis and assessment.

Division of Human Resources Systems (HGA74) (1) Provides management systems analysis, consultation, technical assistance, education and training program and methodology development to IHS, tribal and Indian urban organizations, and (2) provides technical assistance, training and management developmental activities for all human resources systems development.

Division of Medical Systems Research (HGA75) (1) Develops long-range medical services delivery research requirements for IHS; (2) conducts research to improve delivery of medical services to American Indians and Alaska Native populations; (3) and provides medical systems design, development and technical assistance.

Division of Health Information Systems Research and Development (HGA76) (1) Provides research and development of automated information systems for IHS-wide use in Patient Care and Program Management, within the IHS Information Systems Policy and priority framework; (2) serves as a demonstration and testing site for IHS and other data systems developed elsewhere than OHPRD; (3) provides Patient Care and Program data processing technical assistance to IHS and tribal components; (4) provides support to the transition of systems from development to operations status through certification testing and initial installations and provides initial supporting specifications and systems documentation and manuals; (5) evaluates the use of new patient care technologies and data processing products for potential IHS system applications, within the context of advanced health services delivery systems research, design and development activities of the OHPRD; (6) maintains technical liaison with the Veterans Administration (VA), Department of Defense and other state-of-the-art research and development activities involved in automated patient care support activities, and executes the IHS–VA interagency agreement; (7) coordinates ADP planning and procurement for OHPRD and contributes to IHS-wide ADP planning; and (8) provides to OHPRD components data processing services including computer operation, medical coding, data entry, information retrieval and analysis, office automation and telecommunications management.

Division of Health Services Delivery (HGA77) (1) Manages the direct and indirect health service delivery activities of the Office of Health Program Research and Development, Tucson, Arizona, including the Sells Service Unit, the Pasqua Yaqui HMO contract, environmental health and sanitation facilities construction program and the Tucson Urban Project; (2) assures comprehensive quality health services through direct, contract and tribal contract health services; (3) implements pilot projects, and critiques and conducts trials of health information systems, health services delivery methods and health services delivery protocols; and (4) provides demonstration sites for observation and training in health care delivery and health information systems.

After the title and statement for the *Office of Information Resources Management (OIRM) (HGA8)* insert the following:

Division of Data Processing Services (HGA82). (1) Provides staff assistance and advice to the Associate Director, OIRM; (2) provides interactive access to mainframe computer for retrieval, analysis, and manipulation of large data sets; (3) provides consultation, systems analysis, and design for new centralized information systems or modifications to existing systems; (4) provides programming services to implement centralized information systems; (5) sets standards for centralized hardware, software, and telecommunications equipment required for the transfer of data from/to distributed equipment and the IHS mainframe; (6) evaluates and reports on equipment and software for the processing of centralized information; (7) certifies functionality of software and controls the release of centralized system software; (8) provides systems management to maintain coordination and operation of centralized data systems; (9) provides/coordinates user training and technical assistance for centralized resources; (10) maintains software and documentation library and distributes manuals and literature concerning support for centralized products; and (11) provides for the maintenance of an AIS ADP security program for the IHS mainframe.

Division of Resource and Patient Management Systems (HGA83). (1) Provides staff advice and assistance to the Associate Director, OIRM; (2) develops IHS standards for hardware, software, data, telecommunications software and user documentation for distributed systems; (3) ensures that all RPMS applications meet design and programming standards; (4) provides requirements analyses, feasibility studies, and cost analyses, systems analysis, design and programming services for RPMS applications; (5) develops and maintains cost data, staffing data and implementation schedules for all IHS-wide RPMS distributed projects; (6) provide data communications software and protocols for IHS-wide distributed information systems; (7) designs, develops and operates the data communications network; (8) provides for the maintenance of an AIS ADP security program for distributed systems; (9) coordinates systems activities with Information Systems Advisory Committee, Professional Specialty Groups, Information Systems Coordinators and Tribal organizations; (10) serves as project manager for the design of all IHS-wide distributed application systems; (11) reviews RPMS project documentation for IHS-wide distributed data systems; reviews and evaluates technological development for applicability to RPMS requirements; (12) provides technical assistance and consultation on all aspects of the RPMS to Tribal contractors and to IHS Areas, IHS Service Units, facilities and disciplines; (13) develops and maintains RPMS information systems resources inventory; and (14) provides data dictionary, data base and name space creation, administration and management for IHS-wide distributed information systems.

After the titles for the *IHS Area Offices (HGF),* delete the statement in its entirety and substitute the following:

IHS Area Office (HGF). An Area Office is a bureau-level organization under the direction of a Director who reports to the Director, IHS. The Area Office carriers out the mission of the IHS in providing a system of health care unique to the Area population, and the Area Office Director supervises clinical directors who administer programs of direct care to the population. Although specific functions of an Area Office vary, every Area Office includes functions organized to support major categories of administrative management and clinical activities involved in:

Administration and Management—financial management, administrative and office services, contract/grant administration, procurement, personnel management, facilities management, management information systems; contract health care services, and equal employment opportunity;

Program Planning, Analysis and Evaluation Programs—program planning, statistical analysis, legislative initiatives, research and evaluation, health records, management information systems, and patient registration/third party collection;

Tribal Activity Programs—provisions of Public Law 93–638 Indian Self-Determination and Educational Assistance Act, health service delivery, community health representative services, urban health, alcoholism and substance abuse, and health education;

Health Programs—primary care, clinical activities, mental health, nursing services, dental services, health promotion and disease prevention, professional recruitment and community

services; the Joint Commission on Accreditation of Hospitals;

Environmental Health/Sanitation Facilities Construction Programs—environmental health and engineering/sanitation facilities construction programs for IHS Area Office;

Information Resources Management Programs—Automated data processing (ADP), ADP planning and operations, management information systems, office automation systems, voice and data telecommunications management.

After the title and statements for the IHS Area Offices, delete *Section HG.20, Order of Succession,* and *Section HB.30, Delegations of Authority,* and insert the following:

Section HG.30. Order of Succession. During the absence or disability of the Director, IHS, or in the event of a vacancy in that office, the first official listed below who is available shall act as Director, except that during a planned period of absence, the IHS Director may specify a different order of succession. The order of succession will be: (1) Deputy Director; (2) Director for Headquarters Operations; (3) Associate Director, Office of Health Programs; and (4) Associate Director, Office of Administration and Management.

Section HG.40. Delegations of Authority. All delegations and redelegations of authority made to IHS officials which were in effect immediately prior to this reoganization, and which are consistent with the reorganization effective January 4, 1988 shall continue in effect pending further redelegation.

Date: January 18, 1989.

Robert E. Windom, M.D.,

Assistant Secretary for Health.

[FR Doc. 89-1971 Filed 1-26-89; 8:45 am]

BILLING CODE 4160-16-M

Social Security Administration

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Social Security Administration publishes a list of information collection packages that have been submitted to the Office of Management and Budget (OMB) for clearance in compliance with Pub. L. 96-511, The Paperwork Reduction Act. The following clearance packages have been submitted to OMB since the last list was published in the **Federal Register** on January 13, 1989.

(Call Reports Clearance Officer on (301) 965-4149 for copies of package)

1. Representative Payee Report—0960-0068—The information is used to determine whether a representative payee has properly used a beneficiary's funds. The form SSA-623 is used to collect the information. The respondents are current representative payees.

Number of Respondents: 3,780,000
Frequency of Response: 1
Average Burden Per Response: 10.25 minutes
Estimated Annual Burden: 645,750 hours

2. Statement of Household Expenses and Contributions—0960-0456—The information collected on the form SSA-8011 is needed to determine the existence and amount of in-kind support and maintenance received by an applicant for or recipient of Supplemental Security Income (SSI) payments, and is used to determine the individual's eligibility and payment amount under this program. The respondents are members of an SSI applicant's or recipient's household.

Number of Respondents: 538,400
Frequency of Response: 1
Average Burden Per Response: 15 minutes
Estimated Annual Burden: 134,600 hours

3. Agency/Employer Questionnaire—(New Collection)—The information collected on the form SSA-4163 will be used to apply the pension offset to certain individuals receiving a State/Federal government pension and also receiving or applying for Social Security benefits. The respondents are State/Federal Agencies paying pensions to certain former employees.

Number of Respondents: 1,000
Frequency of Response: 1
Average Burden Per Response: 3 minutes
Estimated Annual Burden: 50 hours

4. Real Property Current Market Value Estimate—(New)—The information collected on the form SSA-2794 will be used by the Social Security Administration to determine the value of property owned by an applicant for, or recipient of, supplemental security income payments (or a person whose resources are deemed to such an individual). The respondents will be persons who are experienced in estimating the current market value of real property.

Number of Respondents: 10,125
Frequency of Response: 1
Average Burden Per Response: 20 minutes
Estimated Annual Burden: 3,375 hours

OMB Desk Officer: Justin Kopca.

Written comments and recommendations regarding these information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Date: January 23, 1989.

Robert D. Marder,

Director, Office of Publications and Logistics Management.

[FR Doc. 89-1942 Filed 1-26-89; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Canon City District Grazing Advisory Board Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 463), that a meeting of the Canon City District Grazing Advisory Board will be held at 10 a.m., Friday, March 3, 1989, at the District Office of the Bureau of Land Management, 3170 East Main Street, Canon City, Colorado. The purpose of this meeting will be:

1. Prioritization of Range Improvement projects.

2. Initiate, conduct and settle business pertaining to the expenditure of Range Betterment Funds.

3. Update Board on status of ongoing resource management planning efforts in the Canon City District.

SUPPLEMENTARY INFORMATION: This meeting will be open to the public. Any member of the public may file with the Board a written statement concerning matters to be discussed. Minutes of the meeting will be made available for public inspection 30 days after the meeting.

FOR FURTHER INFORMATION CONTACT: Donnie R. Sparks, District Manager, Bureau of Land Management, 3170 East Main Street, Canon City, Colorado 81212 or telephone at (719) 275-0631.

Stuart L. Freer,

Associate District Manager.

[FR Doc. 89-1889 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-JB-M

[CO-070-09-4320-10-2410]

Grand Junction District Grazing Advisory Board Meeting

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice of meeting of Grand Junction District Advisory Board.

SUMMARY: Notice is hereby given that a meeting of the Grand Junction District Grazing Advisory Board will be held on Thursday, March 16, 1989. The meeting will convene in the third floor conference room at the Bureau of Land Management Office, 764 Horizon Drive, Grand Junction, Colorado at 9 a.m.

SUPPLEMENTARY INFORMATION: The agenda for the meeting will include: (1) Introductions; (2) Minutes of the previous meeting; (3) Glenwood Springs Resource Area Rangeland Program Summary Update and associated grazing decisions; (4) Colorado Cattlemen/Colorado Woolgrowers upcoming field review of Glenwood Springs Resource Area RMP—five years of implementation; (5) Proposed Rangeland Monitoring Standards for Colorado; (6) Proposed process if drought continues through 1989; (7) Status of current project work; (8) Range Betterment Fund project proposals; (9) Advisory Board project proposals; (10) Public presentations; and (11) Arrangements for the next meeting.

The meeting is open to the public. Interested persons may make oral statements to the Board between 3 and 3:30 p.m., or file written statements for the Board's consideration. Anyone wishing to make an oral statement must notify the District Manager, Bureau of Land Management, 764 Horizon Drive, Grand Junction, Colorado 81506 by March 14, 1989. Depending on the number of persons wishing to make oral statements, a per person time limit may be established by the District Manager.

Minutes of the Board Meeting will be maintained in the District Office and be available for public inspection and reproduction (during regular business hours) after thirty (30) days following the meeting.

Further information on the meeting may be obtained at the above address, or by calling (303) 243-6552.

Bruce Conrad,

District Manager, Grand Junction District.

[FR Doc. 89-1890 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-JB-M

[Alaska AA-48648-U]

Proposed Reinstatement of a Terminated Oil and Gas Lease

In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97-451), a petition for reinstatement of oil and gas lease AA-48648-U has been received covering the following lands:

Copper River Meridian, Alaska

T. 11 N., R. 10 W.,
Sec. 24, SW¼NE¼.
(40 acres)

The proposed reinstatement of the lease would be under the same terms and conditions of the original lease, except the rental will be increased to $5 per acre per year, and royalty increased to 16⅔ percent. The $500 administrative fee and the cost of publishing this Notice have been paid. The required rentals and royalties accruing from AA-48648-U, the date of termination, have been paid.

Having met all the requirements for reinstatement of lease AA-48648-U as set out in section 31 (d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective July 1, 1988, subject to the terms and conditions cited above.

Dated: January 17, 1989.

Kay Kletka,

Chief, Branch of Mineral Adjudication.

[FR Doc. 89-1759 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-JA-M

[Alaska AA-48673-W]

Proposed Reinstatement of a Terminated Oil and Gas Lease

In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97-451), a petition for reinstatement of oil and gas lease AA-48673-W has been received covering the following lands:

Copper River Meridian, Alaska

T. 12 N., R. 10 W.,
Sec. 23, SW¼SE¼.
(40 acres)

The proposed reinstatement of the lease would be under the same terms and conditions of the original lease, except the rental will be increased to $5 per acre per year, and royalty increased to 16⅔ percent. The $500 administrative fee and the cost of publishing this Notice have been paid. The required rentals and royalties accruing from July 1, 1988, the date of termination, have been paid.

Having met all the requirements for reinstatement of lease AA-48673-W as set out in section 31 (d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective July 1, 1988, subject to the terms and conditions cited above.

Kay Kletka,

Chief, Branch of Mineral Adjudiction.

Dated: January 17, 1989.

[FR Doc. 89-1760 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-JA-M

[MTM72921; MT-020-09-4212-12]

Realty Action—Exchange; Montana

AGENCY: Bureau of Land Management, Miles City District Office, Interior.

ACTION: Notice of Realty Action MTM-72921. Exchange of public and state lands in Wheatland, Golden Valley, Musselshell, Stillwater and Carbon Counties, Montana.

SUMMARY: The following described lands have been determined to be suitable for disposal by exchange under Section 206 of the Federal Land Policy and Management Act of 1976, 32 U.S.C. 1716.

Principal Meridian, Montana

T. 9 N., R. 12 E.,
Section 20, NW¼SE¼;
Section 28, S½NW¼;
Section 32, SE¼NE¼, NE¼SE¼.
T. 6 N., R. 15 E.,
Section 2, Lots 11 & 12.
T. 9 N., R. 15 E.,
Section 6, SE¼NE¼.
T. 8 N., R. 19 E.,
Section 6, Lots 4 & 5, SW¼NE¼, SE¼NW¼.
T. 11 N., R. 19 E.,
Section 35, E½E½.
T. 4 N., R. 22 E.,
Section 6, SE¼NE¼.
T. 10 N., R. 29 E.,
Section 12, N½NW¼.
Aggregating 754.34 acres of public land.

In exchange for those lands, the United States will acquire the following described lands from the Montana Department of State Lands.

Principal Meridian, Montana

T. 8 S., R. 28 E.,
Section 16, All.
T. 9 S., R. 27 E.,
Section 36, N½, E½SW¼, SE¼.
T. 9 S., R. 28 E.,
Section 16, All.
Aggregating 1840 acres of State lands.

DATES: For a period of 45 days from the date of this notice, interested parties may submit comments to the Bureau of Land Management at the address shown below. Any adverse comments will be evaluated by the BLM, Montana State

Director who may sustain, vacate or modify this realty action. In the absence of any objections this realty action will become the final determination of the Department of the Interior.

FOR FURTHER INFORMATION CONTACT: Information related to the exchange, including the environmental assessment and land report is available for review at the Miles City District, Billings Resource Area Office, 810 E. Main, Billings, Montana 59105.

SUPPLEMENTARY INFORMATION: The publication of this notice segregates the public lands described above from settlement, sale, location, and entry under the public land laws, including the mining laws, but not from exchange pursuant to Section 206 of the Federal Land Policy and Management Act of 1976 for a period of 2 years from the date of first publication. The exchange will be made subject to:

1. A reservation to the United States of a right-of-way for ditches or canals in accordance with 43 U.S.C. 945.
2. The reservation to the United States of all minerals in the Federal lands being transferred.
3. All valid existing rights (e.g. rights-of-way, easements and leases of record).
4. Fair Market Value based on accepted appraisal methods.
5. The 2-year notifications to grazing lessees were received August 1, 1988, in accordance with 43 CFR 4110.4–2(b).

This exchange is consistent with Bureau of Land Management policies and the Billings RMP/EIS and has been discussed with state and local officials. The estimated intended time of the exchange is April 1989. The public interest will be served by completion of this exchange because it will enable the Bureau of Land Management to acquire lands with high public values, and will increase management efficiency of public lands in the area.

Date: January 13, 1989.

Mat Millenbach,

District Manager.

[FR Doc. 89–1973 Filed 1–26–89; 8:45 am]

BILLING CODE 4310–DN–M

[NV–930–09–4212–14; N–47519]

Realty Action; Elko County, NV

AGENCY: Bureau of Land Mangement, Interior.

ACTION: Notice of realty action, proposed direct sale of public lands.

SUMMARY: The following described public lands administered by the Bureau of Land Management have been proposed for disposal by direct sale to the City of Carlin under section 203 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701, 1713):

Mount Diablo Meridian, Nevada

T. 33 N., R. 52 E.,
Sec. 22, SW¼NE¼, N½NW¼, SE¼NW¼, E½NE¼SW¼NW¼, S½S½SW¼NW¼, SE¼NW¼, S½.
Containing 497.50 acres.

The increase in gold mining has created a need for additional land to accommodate the City of Carlin's growing commercial and residential demand. The sale of the identified lands to the City of Carlin is in the public interest and is in conformance with the Bureau's Elko Resource Management Plan as well as state and local planning.

The above described lands will be subject to an appraisal and would not be sold to the City of Carlin for less than the appraised fair market value. The mineral estate having no known mineral value would also be conveyed to the City for this sale. The lands will not be sold to the City of Carlin until the environmental assessment/land report has been completed and a subsequent Notice of Realty Action has been published in the **Federal Register**.

The described lands would be conveyed to the City of Carlin subject to the continued grazing use of 48 AUMs held by Lee and Betty Taylor and Melvin Jones Ranches. The rights of Lee and Betty Taylor to graze domestic livestock on the lands according to the terms and conditions of grazing authorization number 01587 for 32 AUMs shall cease on February 28, 1992. The rights of Melvin Jones Ranches to graze domestic livestock on the lands according to the terms and conditions of grazing authorization number 01545 for 16 AUMs shall cease on February 28, 1996. The City of Carlin is entitled to receive annual grazing fees from the identified parties not to exceed that which would be authorized under Federal grazing fees published annually in the **Federal Register**.

Publication of this notice in the **Federal Register** will segregate the subject lands from all appropriations under the public land laws, the mining laws, but not the mineral leasing laws. The segregation will terminate 270 days from the date of publication of this notice in the **Federal Register** upon publication of a Termination of Segregation.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, Elko District Office, Bureau of Land Management, 3900 E. Idaho Street, Elko, Nevada 89801.

Date: January 19, 1989.

Rodney Harris,

District Manager.

[FR Doc. 89–1974 Filed 1–26–89; 8:45 am]

BILLING CODE 4310–HC–M

[NM–010–4212–13/GP9–0106; NM NM 39284]

Issuance of Exchange Conveyance Document; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States issued an exchange conveyance document to Louis Menyhert on September 8, 1988, for the surface estate in the following described land in Santa Fe County, New Mexico, pursuant to section 206 of the Act of October 21, 1976 (43 U.S.C. 1716):

New Mexico Principal Meridian

T. 17 N., R. 8 E.,
Sec. 24, E½NE¼, NE¼SE¼, and S½S½.
Containing 280.00 acres.

In exchange for the land described above, Louis Menyhert, et al., reconveyed to the United States the surface estate in the following described land in Taos County, New Mexico:

New Mexico Principal Meridian

T. 29 N., R. 9 E.,
Sec. 11, N½NE¼;
Sec. 12, N½, N½N½NW¼SE¼, NE¼SE¼, N½SE¼SE¼, SE¼SE¼SE¼;
Sec. 13, NE¼NE¼NE¼, S½NE¼NE¼, SE¼NE¼, SW¼NW¼, S½ (except for S½SE¼SW¼);
Sec. 24, all (except for N½NE¼NW¼, W½SE¼NE¼NW¼, E½SW¼NE¼NW¼);
Sec. 25, all.
T. 29 N., R. 10 E.,
Sec. 18, S½;
Sec. 19, all.
T. 31 N., R. 9 E.,
Sec. 10, SW¼NW¼, NW¼SW¼, SE¼SW¼, N½SE¼;
Sec. 24, all (except for 10 acres as surveyed).
T. 31 N., R. 10 E.,
Sec. 21, N½;
Sec. 22, N½ (except for 10 acres as surveyed)
Sec. 23, E½W½, E½.
T. 27 N., R. 11 E.,
Sec. 1, lots 1, 2, 3, 4, S½N½, SW¼, W½SE¼, NE¼SE¼, N½N½SE¼SE¼.
T. 30 N., R. 11 E.,
Sec. 19, lot 2, SE¼NW¼, SE¼;
Sec. 30, lots 1, 2, 3, 4, E½, E½W½.
T. 31 N., R. 11 E.,
Sec. 17, SW¼, NW¼SE¼, S½SE¼.
Containing 6,837.523 acres.

The purpose of the exchange was to enable BLM to acquire private land north and west of Taos which have high

values for wildlife habitat, livestock grazing, and public recreation. Portions of the acquired land have been identified as critical winter elk habitat and buffer zone for the Rio Grande Wild and Scenic River. The public interest was served through completion of this exchange.

The values of Federal public land and the non-Federal land in the exchange were appraised at $700,000.00 and $699,960.00, respectfully. An equalization payment of $40.00 was paid to the United States.

Larry L. Woodard,

State Director.

Dated: January 12, 1989.

[FR Doc. 89-1701 Filed 1-25-89; 8:45 am]

BILLING CODE 4310-FB-M

[ID-942-09-4730-12]

Filing of Plats of Survey; Idaho

The plats of survey of the following described lands were officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 10:00 a.m., January 20, 1989.

The plat representing the retracement of the boundary between Idaho and Washington from Mile Post 59 to Mile Post 61, the dependent resurvey of a portion of the subdivisional lines, and the subdivision of certain sections, T. 46 N., R. 6 W., Boise Meridian, Idaho, Group No. 589, was accepted January 5, 1989.

This survey was executed to meet certain administrative needs of the Bureau of Indian Affairs.

The plat representing the dependent resurvey of a portion of the west boundary and subdivisional lines and the subdivision of certain sections, T. 9 S., R. 25 E., Boise Meridian, Idaho, Group No. 669, was accepted January 13, 1989.

The plat representing the dependent resurvey of a portion of the subdivisional lines and a portion of the meanders of the right bank of the Snake River, and the subdivision of section 11, T. 4 S., R. 2 E., Boise Meridian, Idaho, Group 723, was accepted January 18, 1989.

The plat representing the dependent resurvey of a portion of the subdivisional lines, the subdivision of section 4, and the survey of Parcels A and C of lot 20 in section 4, T. 15 S., R. 30 E., Boise Meridian, Idaho, Group No. 770, was accepted January 11, 1989.

These surveys were executed to meet certain administrative needs of this Bureau.

All inquiries about this land should be sent to the Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

Gary T. Oviatt,

Acting Chief Cadastral Surveyor for Idaho.

January 20, 1989.

[FR Doc. 89-1917 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-GG-M

[NV-930-09-4212-22]

Filing of Plats of Survey; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the latest filing of Plats of Survey in Nevada.

EFFECTIVE DATES: Filings were effective at 10:00 a.m. on December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Lacel Bland, Chief, Branch of Cadastral Survey, Bureau of Land Management (BLM), Nevada State Office, 850 Harvard Way, P.O. Box 12000, Reno, Nevada 89520, 702-784-5484.

SUPPLEMENTARY INFORMATION: The Plats of Survey of lands described below were officially filed at the Nevada State Office, Reno, Nevada on December 30, 1988.

Mount Diablo Meridian, Nevada

T. 45 N., R. 25 E.—Dependent Resurvey
T. 32 N., R. 44 E.—Supplemental Plat
T. 38 N., R. 62 E.—Supplemental Plat
T. 33 N., R. 70 E.—Supplemental Plat

All the plats were accepted on December 19, 1988. The dependent resurvey was executed to meet certain administrative needs of the Fish and Wildlife Service and the supplemental plats were executed to meet certain administrative needs of the BLM.

All of the above-listed plats are now the basic record for describing the lands for all authorized purposes. The plats will be placed in the open files in the BLM Nevada State Office and will be available to the public as a matter of information. Copies of the plats and related field notes may be furnished to the public upon payment of the appropriate fee.

Edward F. Spang,

State Director, Nevada.

[FR Doc. 89-1975 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-HC-M

[ID-920-09-4332-09]

Public Review Period for USGS/USBM "Mineral Survey Reports"; Wilderness Study Areas; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Idaho, Bureau of Land Management (BLM), is requesting the public to review combined U.S. Geological Survey (USGS) and U.S. Bureau of Mines (USBM) "Mineral Survey Reports" which have been completed for preliminarily suitable Wilderness Study Areas (WSAs). If the public identifies significant differences in interpretation of the data presented in the reports or submits significant new minerals data for consideration, the Bureau of Land Management will request USGS/USBM evaluate these comments in relation to their final Mineral Survey Report. The BLM will consider the USGS/USBM evaluations as well as the Mineral Survey Report in developing final wilderness suitability recommendations. Copies of the WSA reports can be reviewed in BLM offices in Boise, Burley, Idaho Falls, Salmon, Shoshone, and Coeur d'Alene.

DATE: New information will be accepted on the reports enumerated in this notice until April 7, 1989.

ADDRESS: Send information on reports to: Deputy State Director for Minerals, BLM Idaho State Office, 3380 Americana Terrace, Boise, ID 83706.

FOR FURTHER INFORMATION CONTACT: Bob DeTar or Bill LaVelle, BLM Idaho State Office, Division of Mineral Resources, 3380 Americana Terrace, Boise, Idaho 83706, (208) 334-1189.

SUPPLEMENTARY INFORMATION: Section 603 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2785, directed the Secretary of the Interior to inventory lands having wilderness characteristics as described in the Wilderness Act of September 3, 1964, and from time to time report to the President his recommendations as to the suitability or non-suitability of each area for preservation as wilderness. The USGS and USBM are charged with conducting mineral surveys for areas that have been preliminarily recommended suitable for inclusion into the wilderness system, to determine the mineral values, if any, that may be present in such areas.

To ensure that all available minerals data are considered by the Bureau of Land Management prior to making its final wilderness suitability recommendations to the Secretary of the

Interior, the State Director, Idaho is providing this public review and comment period. Usually there is a one to two year lag time between actual field work and final printing of a mineral survey report. New information may have been collected by the public during this lag time or the public may have a new interpretation of the data presented in the mineral survey reports. Any new data or new interpretations of data in the reports will be screened for its significance and validity by the Bureau of Land Management. Significant new minerals data or new interpretations of the minerals data will be forwarded to the U.S. Geological Survey and U.S. Bureau of Mines for further consideration. Evaluation received by the Bureau of Land Management from the U.S. Geological Survey and U.S. Bureau of Mines will be considered by the State Director in the final wilderness suitability recommendations.

Information requested from the public via this invitation are not limited to any specific energy or mineral resource. Information can be in the form of a letter and should be as specific as possible and include:

1. The name and number of the subject Wilderness Study Area and Mineral Survey Report.

2. Mineral(s) of interest.

3. A map or land description by legal subdivision of the public land surveys or protracted surveys showing the specific parcel(s) of concern within the subject Wilderness Study Area.

4. Information and documents that depict the new data or reinterpretation of data.

5. The name, address, and phone number of the person who may be contacted by technical personnel of the Bureau of Land Management, U.S. Geological Survey or U.S. Bureau of Mines assigned to review the information.

Geologic maps, cross sections, drill hole records and sample analyses, etc., should be included. Published literature and reports may be cited. Each comment should be limited to a specific Wilderness Study Area. All information submitted and marked confidential will be treated as proprietary data and will not be released to the Public without consent.

The following is a list of available Mineral Survey Reports by Wilderness Study Area (WSA) on which new information will be accepted.

WSA No.	Name	Report No.
ID-016-053	S. Fork Owyhee River.	Bulletin 1719-F.
ID-017-011	Jarbidge River.	Bulletin 1720-B.
ID-019-002	King Hill Creek.	Bulletin 1721-B.
ID-035-077	Henry's Lake.	Bulletin 1718-D.
ID-037-077	Worm Creek	Open File Rpt 88-353.
ID-043-003	Eighteen Mile.	Bulletin 1718-B.
ID-045-012	Burnt Creek	Bulletin 1718-C.
ID-046-013	Boulder Creek.	MF-1466-C.
ID-054-008A/B	Gooding City of Rocks.	Bulletin 1721-A.
ID-057-008	Sand Butte	Bulletin 1721-C.
ID-057-010	Raven's Eye.	Bulletin 1721-C.
ID-111-017	Bruneau River.	Bulletin 1720-B.
ID-111-036A	Sheep Creek West.	Bulletin 1720-B.
ID-111-044	Upper Deep Creek.	Bulletin 1719-G.

Reports available for review in BLM offices will not be available for sale or removal from the office. Copies of the listed reports may be purchased from: U.S. Geological Survey, Books and Open File Reports, Box 25425, Federal Center, Denver, CO 80225.

Bill R. LaVelle,

Deputy State Director for Mineral Resources.

January 18, 1989.

[FR Doc. 89-1918 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-66-M

[AZ-920-09-4214-10; A-9608]

Cancellation of Withdrawal Application; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Soil Conservation Service (SCS) U.S. Department of Agriculture has cancelled withdrawal application A-9608. The application effects 3,033.68 acres of public land in Maricopa County. This notice terminates the segregation imposed by this application and opens the land to the operation of the public land laws including the mining and mineral leasing laws.

EFFECTIVE DATE: February 13, 1989.

FOR FURTHER INFORMATION CONTACT: John Mezes, BLM Arizona State Office, P.O. Box 16563, Phoenix, Arizona 85014, (602) 241-5531.

SUPPLEMENTARY INFORMATION: The SCS, USDA, filed withdrawal application A-9608 on June 21, 1976, in support of the Harquahala Watershed Project. They stated the need would be temporary and the application would be cancelled upon issuance of a right-of-way to the Flood Control District. A right-of-way has been granted and a withdrawal is no longer required. The SCS has requested that withdrawal application A-9608 be cancelled.

Withdrawal application A-9608 is hereby cancelled in its entirety and the segregation imposed on the following described land is hereby terminated:

Gila and Salt River Meridian

T. 1 N., R. 8 W.,
Sec. 3, N½NW¼;
Sec. 4, E½;
Sec. 17, E½;
Sec. 20, All.
T. 2 N., R. 8 W.,
Sec. 6, E½SE¼;
Sec. 7, S½;
Sec. 17, N½;
Sec. 34, All.
T. 2 N., R. 9 W.,
Sec. 8, N½.

The area described aggregates 3,033.68 acres in Maricopa County.

John T. Mezes,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 89-1919 Filed 1-26-89; 8:45 am]

BILLING CODE 4310-32-M

National Park Service

Management Policies

AGENCY: National Park Service, Interior.

ACTION: Notice of availability of final management policies.

SUMMARY: The National Park Service has reviewed and revised its policies for management of areas of the national park system. The revision was done in light of current directions from Congress and the administration as well as comments received from the general public.

EFFECTIVE DATE: Copies will be available on or after January 30, 1989.

FOR FURTHER INFORMATION CONTACT: Carol F. Aten, Chief, Office of Policy, National Park Service, P.O. Box 37127, MIB-MS1226, Washington, DC 20013-7127.

Copies of the *Management Policies* and a summary of comments received and responses will be mailed to all commentors. For all others interested, copies of the *Management Policies* may be obtained by writing:

Office of Policy, National Park Service, P.O. Box 37127, MIB–MS1226, Washington, DC 20013–7127
Alaska Regional Office, National Park Service, 2525 Gambell Street, Room 107, Anchorage, AK 99503
Mid-Atlantic Regional Office, National Park Service, 143 South Third Street, Philadelphia, PA 19106
Midwest Regional Office, National Park Service, 1709 Jackson Street, Omaha, NE 68102
National Capital Parks, National Park Service, 1100 Ohio Drive, SW., Washington, DC 20242
North Atlantic Regional Office, National Park Service, 15 State Street, Boston, MA 02109–3572
Pacific Northwest Regional Office, National Park Service, 83 South King Street, Suite 212, Seattle, WA 98104
Rocky Mountain Regional Office, National Park Service, 12795 West Alameda Parkway, P.O. Box 25287, Lakewood, CO 80225
Southeast Regional Office, National Park Service, 75 Spring Street, SW, Atlanta, GA 30303
Southwest Regional Office, National Park Service, P.O. Box 728, Santa Fe, New Mexico 87504–0728
Western Regional Office, National Park Service, 450 Golden Gate Ave., Box 36063, San Francisco, CA 94102.

Copies of a summary of comments received and responses may be obtained from the Chief, Office of Policy, National Park Service, P.O. Box 37127, MIB–MS1226, Washington, DC 20013–7127.

SUPPLEMENTARY INFORMATION: The National Park Service has completed a comprehensive revision of policies on management of the national park system. The final product reflects response to the approximately 200 commentors who took advantage of the public review period to share their concerns. The new document represents an update of the 1978 Management Policies and includes the addition of a new chapter on Interpretation and Education; new policies throughout the document addressing Native American relationships; a revised section on new area criteria; expanded sections on research relating to both cultural and natural resources; new sections on land protection plans, museum objects an library materials, ethnographic resources, paleontologic resource management, cave management, submerged cultural resources, historic property leases and other topics. The chapter on concessions management and the sections on accessibility for disabled persons incorporates policy changes previously promulgated as Special Directives.

This document will be the primary vehicle for articulating guidance to National Park Service personnel concerning preservation and use of park system areas.

William Penn Mott,

Director

January 30, 1989.

[FR Doc. 89–1911 Filed 1–26–89; 8:45 am]

BILLING CODE 4300–70–M

INTERSTATE COMMERCE COMMISSION

Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

A. 1. Parent Corporation: Anheuser-Busch Companies, Inc., One Busch Place, St. Louis, Missouri 63118.

2. Wholly-Owned Subsidiaries and State of Incorporation:

(1) Anheuser-Busch Inc., Missouri
(2) August A. Busch & Co., Incorporated, Texas
(3) August A. Busch & Co. of Massachusetts, Inc., Massachusetts
(4) August A. Busch & Co. of Florida, Inc., Florida
(5) Busch Properties, Inc., Delaware
(6) Consolidated Farms, Inc., Delaware
(7) Metal Container Corporation, Delaware
(8) Kingsmill Realty, Inc., Virginia
(9) Busch International Sales Corporation, Delaware
(10) St. Louis Refrigerator Car Company, Common Law, Massachusetts Business Trust (Unincorported)
(11) Manufacturers Railway Co., Missouri
(12) Manufacturers Cartage Co., Missouri
(13) MRS Redevelopment Corporation, Missouri
(14) MRS Transport Company, Texas
(15) Williamsburg Transport, Inc., Virginia
(16) Fairfield Transport, Inc., California
(17) Busch Entertainment Corporation, Delaware
(18) Container Recovery Corporation, Ohio
(19) Metal Label Corporation, Tennessee
(20) Busch Creative Services Corporation, Delaware
(21) SP Parks, Inc., Delaware
(22) Golden Eagle Distributing Company, Delaware
(23) Busch Agricultural Resources, Inc., Delaware
(24) Anheuser-Busch International, Inc., Delaware
(25) Anheuser-Busch Europe, Inc., Delaware
(26) Civic Center Corporation, Missouri
(27) Stadium Plaza Redevelopment Corporation, Missouri
(28) Broadway Redevelopment Corporation, Missouri
(29) Suffolk-Busch Development Corporation, Massachusetts
(30) Eagle Snacks, Inc., Delaware
(31) Anheuser-Busch Beverage Group, Inc., Delaware
(32) Nutri-Turf, Inc., Delaware
(33) Anheuser-Busch Asia, Inc., Delaware
(34) Campbell Taggart, Inc., Delaware
(35) A–B Sports, Inc., Delaware
(36) Anheuser-Busch Metal Corporation, Delaware
(37) Anheuser-Busch Investment Capital Corporation, Delaware
(38) BACI, Inc., Delaware
(39) BACI Holdings, Inc., Delaware
(40) InnoVen IV Corporation, Delaware
(41) Innervisions Productions, Inc., Missouri
(42) Busch Mechanical Services, Delaware
(43) Busch Media Group, Inc., Delaware
(44) Metal Container Corporation of California, California
(45) Busch Biotech, Inc., Delaware
(46) Pacific International Rice Mills, Inc., Delaware
(47) Adolphus, Inc., Florida
(48) Optimus, Inc., Delaware
(49) Busch Import/Export Company, Inc., Delaware
(50) BACI of Tennessee, Inc., Tennessee
(51) Anheuser-Busch World Trade Ltd., Delaware
(52) Litchfield Development Corporation, Delaware
(53) Horizon Beverage Company, California
(54) Garrard Holding Co., Delaware
(55) Garrard Leasing Company, Kentucky
(56) Busch Investment Corporation, Delaware
(57) Anheuser-Busch Entertainment Limited, Delaware
(58) A–B Contract Services Co., Delaware
(59) Rainbo Baking Company of Albuquerque, Delaware
(60) Colonial Baking Company of Atlanta, Delaware
(61) Colonial Baking Company of Augusta, Delaware
(62) Rainbo Bread Company of Aurora, Delaware
(63) Colonial Baking Company of Cedar Rapids, Delaware
(64) Colonial Baking Company of Chattanooga, Delaware
(65) Colonial Baking Company of Columbus, Delaware

(66) Rainbo Baking Company of Corpus Christi, Delaware
(67) Manor Baking Company of Dallas, Delaware
(68) Rainbo Bread Company, Delaware
(69) Colonial Baking Company of Des Moines, Delaware
(70) Rainbo Baking Company of El Paso, Delaware
(71) Evansville Colonial Baking Company, Delaware
(72) Rainbo Bakeries of San Joaquin Valley, Inc., Delaware
(73) Colonial Baking Company of Gulfport, Delaware
(74) Rainbo Baking Company of Harlingen, Delaware
(75) Rainbo Baking Company of Houston, Delaware
(76) Colonial Baking Company of Huntsville, Delaware
(77) Bets Baking Company, Delaware
(78) Colonial Baking Company of Indianapolis, Inc., Delaware
(79) Rainbo Baking Company of Johnson City, Delaware
(80) Manor Baking Company, Delaware
(81) Rainbo Baking Company of Lexington, Delaware
(82) Rainbo Baking Company of Louisville, Delaware
(83) Rainbo Baking Company of Lubbock, Delaware
(84) Colonial Baking Company of Memphis, Delaware
(85) Colonial Baking Company of Alabama, Delaware
(86) Colonial Baking Company of Muncie, Inc., Delaware
(87) Colonial Baking Company of Nashville, Delaware
(88) Rainbo Baking Company of Oklahoma City, Delaware
(89) Rainbo Baking Company of Phoenix, Delaware
(90) Rainbo Bakers, Inc., Delaware
(91) Rainbo Bread Company of Roanoke, Delaware
(92) Rockford Colonial Baking Company, Delaware
(93) Rainbo Baking Company of Scramento Valley, Delaware
(94) Rainbo Bread Company of St. Joseph, Delaware
(95) Colonial Baking Company of St. Louis, Delaware
(96) Rainbo Baking Company of San Antonio, Delaware
(97) Colonial Baking Company of Sprinfield, Delaware
(98) Kilpatricks Bakeries, Inc., Delaware
(99) Rainbo Baking Company of Tucson, Delaware
(100) Rainbo Baking Company of Tulsa, Delaware
(101) Rainbo Baking Company of Wichita, Delaware
(102) Eagle Crest Foods, Inc., Delaware
(103) Merico, Inc., Texas
(104) Arizona Baking Company of the Southwest, Delaware
(105) Bel-Art Advertising, Inc., Texas
(106) C-Trans, Inc., Texas
(107) Colonial Baking Company of Madison County, Delaware
(108) EG Bread, Inc., Delaware
(109) Hardin's Bakeries, Corporation, Mississippi
(110) Old American Pottery Company, Texas
(111) Rainbo Baking Company of Beaumont, Delaware
(112) Rainbo Baking Company of Waco, Delaware
(113) Roswell Baking Company, Delaware
(114) Rainbo Baking Company of Cincinnati, Delaware

B. Parent corporation, address of principal office and state of incorporation: International Multifoods Corporation, Multifoods Tower, 33 South Sixth Street, P.O. Box 2942, Minneapolis, MN 55402 (a Delaware Corporation).

2. Wholly owned subsidiaries which will participate in the operations, addresses of their respective principal offices and states of incorporation:

i. The Boston Sea Party of Bloomington, Inc., 7801 Xerxes Avenue South, Minneapolis, MN 55431 (a Delaware Corporation).

ii. The Boston Sea Party Restaurants, Inc., Multifoods Tower, 33 South Sixth Street, P.O. Box 2942, Minneapolis, MN 55402 (a Delaware Corporation).

iii. Centre Brands, Inc., 5225 Canyon Crest Drive, Building 400, Riverside, CA 92507 (a California Corporation).

iv. Fred's Frozen Foods, Inc., 2395 East Conner Street, R.R. 5, P.O. Box 44, Nobelsville, IN 46060 (an Indiana Corporation).

v. MINETCO—Minnesota International Export Trading Company, Inc., Multifoods Tower, 33 South Sixth Street, P.O. Box 2942, Minneapolis, MN 55402 (a Minnesota Corporation).

vi. Mister Donut of America, Inc., Multifoods Tower, 33 South Sixth Street, P.O. Box 2942, Minneapolis, MN 55402 (a Delaware Corporation).

vii. Multifoods Bakery Distributors, Inc., Multifoods Tower, 33 South Sixth Street, P.O. Box 2942, Minneapolis, MN 55402 (a Delaware Corporation).

viii. Multifoods Transportation, Inc., Multifoods Tower, 33 South Sixth Street P.O. Box 2942, Minneapolis, MN 55402 (a Delaware Corporation).

ix. Prepared Foods, Inc., Multifoods Tower, 33 South Sixth Street, P.O. Box 2942, Minneapolis, MN 55402 (a Delaware Corporation).

x. Prepared Foods, Inc., 5701 McNutt Road, P.O. Box 12910, El Paso, TX 79913 (a Texas Corporation).

xi. Pueringer Distributing, Inc., Rosewood Industrial Park, Box 187, Rice, MN 55367 (a Delaware Corporation).

xii. Rotanelli Foods, Inc., 2 Birch Street, New Rochelle, NY 10801 (a Delaware Corporation).

xiii. VSA, Inc., 11111–F East 53rd Avenue, Denver, CO 80239 (a Colorado Corporation).

xiv. Vendors Supply of America Corporation, Multifoods Tower, 33 South Sixth Street, P.O. Box 2942 Minneapolis, MN 55402 (a Delaware Corporation).

Noreta R. McGee,

Secretary.

[FR Doc. 89–1926 Filed 1–26–89; 8:45 am]

BILLING CODE 7035–01–M

[Ex Parte No. 431 (Sub No. 1)]

Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for All Regulatory Costing Purposes

AGENCY: Interstate Commerce Commission.

ACTION: Notice of proposed policy.

SUMMARY: In accordance with recommendations of the Railroad Accounting Principles Board, the Commission proposes to adopt the Uniform Railroad Costing System (URCS) as its General Purpose Costing System (GPCS). The use of URCS would be required in all statutory instances necessitating the use of a GPCS. Further, the Commission proposes to require the use of URCS costs for all other regulatory purposes in the Interstate Commerce Act.

DATES: Notices of intent to participate will be due February 16, 1989. Comments will be due March 20, 1989. Reply comments will be due 25 days thereafter.

ADDRESSES: An original and 15 copies of comments should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT:

Leslie J. Selzer, (202) 275–7627;

or

William T. Bono, (202) 275–7354. TDD for hearing impaired: (202) 275–1721.

SUPPLEMENTAL INFORMATION:

Additional information is contained in the Commission's decision. To obtain a copy of the full decision, write to the Office of the Secretary, Room 2215, Interstate Commerce Commission Building, Washington, DC 20423, or telephone (202) 275–7428. The decision may be picked up from Dynamic Concepts, Inc., in Room 2229, at

Commission headquarters, (202) 289–4357/4359. Assistance for the hearing impaired is available through TDD Services, (202) 275–1721.

This action will not significantly affect either the quality of the human environment or energy conservation. This proceeding will not have a significant impact on a substantial number of small entities.

Decided: January 23, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Commissioner Phillips commented with a separate expression.

Noreta R. McGee,

Secretary.

[FR Doc. 89–1925 Filed 1–26–89; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Lodging of Consent Order Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent order in *United States v. City of Belvidere, et al.*, Civil Action No. 89–C20015 has been lodged with the United States District Court for the Northern District of Illinois on January 19, 1989. The proposed consent order concerns cleanup of a hazardous waste site known as the Belvidere Municipal No. 1 Landfill Site, which is located in Boone County, Illinois. The proposed consent order requires defendants to perform a cleanup at the Site, and pay certain United States Environmental Protection Agency costs.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed consent order. 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. City of Belvidere, et al.*, D.J. Ref. 90–11–3–248.

The proposed consent ordermay be examined at the office of the United States Attorney and the Region V Office of the Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604. Copies of the consent order 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, Washington, DC 20530. A copy of the proposed consent order 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 $16.40 (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. 89–1920 Filed 1–26–89; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3504, Washington, DC 20210.

Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I:

Connecticut:

CT89–1 (Jan. 6, 1989) ..... p. 63.

New Jersey:
NJ89-2 (Jan. 6, 1989) ..... pp. 619-620, pp. 630-631.
New York:
NY89-4 (Jan. 6, 1989) ..... p. 713.
NY89-5 (Jan. 6, 1989) ..... p. 720.
Pennsylvania:
PA89-4 (Jan. 6, 1989) ..... p. 870.

Volume II:

New Mexico:
NM89-1 (Jan. 6, 1989) ..... p. 749.

Volume III:

Alaska:
AK89-1 (Jan. 6, 1989) ..... pp. 2-3.
Utah:
UT89-3 (Jan. 6, 1989) ..... pp. 354-359.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 23rd day of January 1989.

Robert V. Setera,

Acting Director, Division of Wage Determinations.

[FR Doc. 89-1743 Filed 1-26-89; 8:45 am]

BILLING CODE 4510-27-M

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Federal Policy for the Protection of Human Subjects

AGENCY: Office of Science and Technology Policy, Executive Office of the President.

ACTION: Notice of Federal policy for protection of human subject; extension of comment period.

SUMMARY: On November 10, 1988, the Office of Science and Technology Policy, Executive Office of the President issued a Notice of Federal Policy for Protection of Human Subjects. The purpose of this new Notice is to extend the pertinent comment period to February 8, 1989. The Office of Science and Technology Policy intends to accept as the Final Model Federal Policy for the Protection of Human Subjects the common rule to be promulgated after consideration of public comment on the Notice of Proposed Rulemaking set forth in the November 10, 1988, issue of the **Federal Register** (at 53 FR 45600-45682). The proposed common rule was developed by the Interagency Human Subjects Coordinating Committee of the Federal Coordinating Council for Science, Engineering and Technology in response to public comment on the Notice of Proposed Model Policy for Department and Agency implementation published in the **Federal Register** on June 3, 1986 (51 FR 20204).

Note that the Central Intelligence Agency is required by Executive Order 12333 to conform to the guidelines issued by the Department of Health and Human Services (HHS).

DATES: To assure consideration, comments must now be received at the address listed below by the close of business on February 8, 1989.

ADDRESS: Please send comments or requests for additional information to: Dr. Joan P. Porter, Office for Protection from Research Risks, National Institutes of Health, Building 31, Room 4B09, Bethesda, MD 20892. Comments directed toward adoption of the common Federal Policy by a particular Department or Agency should clearly identify that Department or Agency. Comments should refer to specific sections in the proposed regulations. Comments received will be available for public inspection at the National Institutes of Health, Building 31, Room 4B09, Bethesda, Maryland, from 9:00 a.m. to 4:00 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Joan P. Porter, (301) 496-7005.

William R. Graham,

Director, Office of Science and Technology Policy, Executive Office of the President.

[FR Doc. 89-1882 Filed 1-26-89; 8:45 am]

BILLING CODE 4140-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Termination of Section 301 Investigation; Korea's Restrictions on Access to its Wine Market

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of decision to terminate an investigation initiated under section 302 of the Trade Act of 1974, as amended, in response to a petition for action under section 301.

EFFECTIVE DATE: January 18, 1989.

SUMMARY: On June 11, 1988, the U.S. Trade Representative initiated an investigation of the Korean government's policies and practices affecting efforts to obtain fair and equitable access to the Korean wine market. On January 18, 1989, the United States and the Republic of Korea reached agreement on providing foreign manufacturers of wine and wine products non-discriminatory and equitable access to the Korean market for such products. In light of this agreement, the investigation related to possible action under section 301 of the Trade Act of 1974, as amended, has been terminated.

FOR FURTHER INFORMATION CONTACT: Gordana S. Earp, Director of Korean Affairs, U.S. Trade Representative, (202) 395-6813, or Catherine Field, Associate General Counsel, (202) 395-3432, Office of the U.S. Trade Representative, 600 17th Street, NW., Washington, DC.

SUPPLEMENTARY INFORMATION: On April 27, 1988, the wine Institute and Association of American Vintners filed a petition under section 302(a) of the Trade Act of 1974, as amended ("Trade Act"), alleging that the Government of the Republic of Korea engaged in acts, policies and practices that are unreasonable or discriminate against imports and burden or restict U.S. commerce. The import barriers complained of include, among others: (1) The combination of a 100 percent tariff applied to table wine and a quota on imports, creating a price escalation through the distribution system that prevents imported wine from being price competitive with domestically produced wine and other alcoholic beverages; (2) an absolute ban on imports of sparkling wine, wine coolers, brandy and dessert wines, and non-grape wines such as ciders; (3) labeling and packaging requirements, certification procedures, licensing and distribution restrictions and business capitalization requirements that impede access to the Korean market.

Negotiations with the Government of the Republic of Korea resulted in a trade agreement, signed on January 18, 1989, which provides foreign wine manufacturers non-discriminatory and equitable access to the Korean market for wine and wine products. The agreement provides for reduction of customs tariffs to 35 percent effective July 1, 1989, and to 30 percent effective January 1, 1990. Further annual reductions will be made during the period from 1991 through 1993. In 1989, the quota on table wine and wine products including wine coolers has been doubled and the Korean market for these products will be totally liberalized effective January 1, 1990. Restrictions on imports of brandy and sparkling wines will be eliminated effective January 1, 1991. Labeling and testing requirements have been clarified. In addition, the agreement significantly liberalizes the importation and distribution system for imported wine and wine products.

Since the matters raised in this investigation have been resolved satisfactorily, the Trade Representative has terminated the investigation.

A. Jane Bradley,

Chairman, Section 301 Committee.

[FR Doc. 89-1906 Filed 1-26-89; 8:45 am]

BILLING CODE 3190-01-M

Trade Policy Staff Committee; Public Comments on U.S. Negotiations With the Government of Bolivia in the Context of the Accession of Bolivia to the General Agreement on Tariffs and Trade (GATT)

SUMMARY: Notice is hereby given that the Trade Policy Staff Committee (TPSC) is requesting written public comments on Bolivia's announced intention to accede to the GATT and on the bilateral negotiations that will accompany Bolivian accession. Comments received will be considered by the Executive Branch in developing the U.S. position and objectives for GATT examination of Bolivian accession and for the bilateral negotiations concerning the terms of its accession to the General Agreement.

1. Written Comments

The Chairwoman of the Trade Policy Staff Committee invites written public comments on the issues that will be addressed in the course of examination by the Contracting Parties to the GATT of the request by Bolivia for accession and during bilateral negotiations in the context of Bolivian accession to the GATT addressing the terms of its accession, including tariff concessions. The Committee is particularly interested in views on the impact of U.S. trade of Bolivian accession to the GATT, on specific bilateral issues covered by the provisions of the General Agreement that should be addressed in the accession negotiations, on items of specific interest to U.S. exporters to Bolivia and on the experiences of U.S. firms in trading with Bolivia.

All comments will be considered by the Executive Branch in developing the U.S. position and objectives for GATT examination of Bolivian accession and for bilateral negotiations concerning both the substantive terms of Bolivian accession and the establishment of a GATT schedule of tariff concessions.

Persons wishing to submit written comments should provide a statement, in twenty copies, by noon, Friday, February 10, 1989, to Carolyn Frank, TPSC Secretary, Office of the U.S. Trade Representative, Room 523, 600 17th Street NW., Washington, DC 20506.

2. Background

On October 7, 1989, the GATT Contracting Parties received Bolivia's request to accede to the General Agreement pursuant to Article XXXIII. A Working Party to examine this request, composed of interested GATT members was established. The Working Party will consider the application of Bolivia for full accession, examine its foreign trade regime, and submit to the GATT Council recommendations that may include a draft Protocol of Accession.

The Protocol of Accession that Bolivia negotiates with the Contracting Parties will set forth the agreed terms of Bolivia's GATT membership, including the relationship of its foreign trade regime to the Articles of the General Agreement. Aspects of a country's foreign trade regime that are normally examined in such negotiations include: licensing requirements, quantitative trade restrictions, subsidy practices, nontariff charges and taxes, customs valuation and classification procedures, and state trading practices and monopolies. In addition, as part of the accession process, Bolivia will also conduct bilateral negotiations with interested GATT members to formulate a schedule of tariff concessions that will become part of its Protocol of Accession. These concessions will consist of Bolivia's agreement to bind the tariffs applied to certain imports, restricting its ability to increase the tariff rate applied to those items without offering appropriate compensatory tariff concessions on other items.

The advantages to Bolivia of GATT membership are several. As a GATT member, Bolivia will enjoy a multilateral guarantee of unconditional most favored nation treatment from all other GATT contracting parties that is more comprehensive than that available through bilateral agreements. The bindings on tariffs maintained in the tariff schedules of other GATT contracting parties will be extended to Bolivian imports as obligations under the GATT, and Bolivia will enjoy the injury test on duty free trade involved in U.S. countervailing duty investigations. Bolivia will also have recourse to GATT procedures to protect itself from unfair or unreasonable trade actions by its trading partners. Through the dispute settlement provisions in the General Agreement, member countries are able to utilize a multilateral forum, largely independent of the political pressures influencing bilateral relationships, to resolve disputes. As an applicant for GATT contracting party status, Bolivia will also have the opportunity to participate in all apsects of the Uruguay Round of Multilateral Negotiations.

In return for these benefits, Bolivia will be expected to conduct its trade policies in accordance with the rules set out in the General Agreement and to establish its own schedule of tariff concessions.

3. Additional Information

Any questions with regard to the proposed accession of Bolivia to the GATT should be directed either to Cecilia Leahy Klein, Director for GATT Affairs (telephone: 202-395-3063), or Betsy Stillman, Director, Andean, African, and Least Developed Country Affairs (telephone: 202-395-5190), Office of the U.S. Trade Representative, 600 17th Street NW., Washington, DC 20506.

Sandra J. Kristoff,

Chairwoman, Trade Policy Staff Committee.

[FR Doc. 89-1976 Filed 1-26-89; 8:45 am]

BILLING CODE 3190-01-M

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

Northwest Conservation and Electric Power Plan 1988 Supplement

AGENCY: Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

ACTION: Notice of extended consultation period.

SUMMARY: On December 7, 1988, the Council published a notice of hearings and deadline for written comment (53 FR 49369) on the 1988 Supplement,

which, if adopted, will amend the 1986 Power Plan. The Council has determined, however, that there may be a need to schedule further consultations to clarify some of the underlying data that pertains to the Draft Supplement. Therefore, this document is to give you notice that the Council and its staff may initiate consultations to clarify written comments received during the public comment period on the 1988 Supplement until such time as the Council takes final action by adopting this amendment.

FOR FURTHER INFORMATION: Contact Bess Wong at 851 S.W. Sixth Avenue, Suite 1100, Portland, Oregon, 97204, or at (503) 222–5161, toll free 1–800–222–3355 in Idaho, Montana, and Washington or 1–800–452–2324 in Oregon.

Edward Sheets,

Executive Director.

[FR Doc. 89–1891 Filed 1–26–89; 8:45 am]

BILLING CODE 0000–00–M

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Incorporated

January 23, 1989.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder, for unlisted trading privileges in the following securities:

Blackstone Target Term Trust, Inc.
Common Stock, $0.01 Par Value (File No. 7–4172)
Texas Air Corporation
6¾ Cum. Conv. Junior Pfd. Stock (File No. 7–4173)
Texas Air Corporation
6.50% Depositary Preferred Stock (File No. 7–4174)
Texas Air Corporation
12% Depositary Preferred Stock (File No. 7–4175)
Borden Chemicals & Plastics, L.P.
Depositary Units (File No. 7–4176)
EMC Corporation
Common Stock, $0.01 Par Value (File No. 7–4177)
Nuveen Premium Income Municipal Fund, Inc.
Common Stock, $0.01 Par Value (File No. 7–4178)
Sotheby's Holdings Inc.
Class A Common Stock, $0.01 Par Value (File No. 7–4179)
Southern Union Company
Common Stock, $1 Par Value (File No. 7–4180)
Sovran Financial Corporation
Common Stock, $5 Par Value (File No. 7–4181)
Anthem Electronics, Inc.
Common Stock, No Par Value (File No. 7–4182)
Timberland Company
Common Stock, $0.01 Par Value (File No. 7–4183)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before February 13, 1989, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–1972 Filed 1–26–89; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

ACTION: Notice of reporting requirements submitted for review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATE: Comments should be submitted within 30 days of this publication in the **Federal Register**. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (S.F. 83), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer. Submit comments to the Agency Clearance Officer and the OMB Reviewer.

FOR FURTHER INFORMATION CONTACT:

Agency Clearance Officer: William Cline, Small Business Administration, 1441 L Street NW., Room 200, Washington, DC 20416, Telephone: (202) 653–8538

OMB Reviewer: Gary Waxman, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Telephone: (202) 395–7340

Title: Certified Development Company Survey.

Form Number: SBA Form 1640.

Frequency: One time.

Description of Respondents: All development companies currently certified by SBA.

Annual Responses: 460.

Annual Burden Hours: 460.

Elizabeth Zaic,

Deputy Director, Office of Administrative Services.

Certified Development Company (CDC) Funding Source Survey

CDC Name: _____
CDC Certification No.: _____
Contact Name: _____
Phone No.: _____
Number of CDC employees (or full time equivalents:) ____
Address (correction only):
_____
_____
_____

Public Law 100–590 requires SBA to prepare a report on the sources of funding used by CDCs. In order to collect the required information, this survey is split into 3 parts, each with its own specific instructions. Please read all instructions carefully as there are differences. All questions relate only to the legal entity that was certified by SBA. It does not relate to affiliates.

PART I. FUNDS USED TO DEFRAY OPERATING EXPENSES

Instructions: This portion of the survey focuses on the source(s) of funds a CDC has budgeted or projected to defray the administrative expenses of the CDC (i.e. not funds used for lending). The numbers provided should be for the *current* fiscal year.

CDC's current operating budget year (e.g. January 1, 1989–December 31, 1989): ____

The first column lists common sources with spaces provided to specify various components. It is necessary to segregate amounts from the same source if they have different restrictions. Use an attachment if additional space is needed.

The second column should be completed with the dollar amount received from the source (round to the nearest $1000). If no funds were received from a given source, indicate by "–0–", "none", or "N/A".

The third column, "%", requires calculation of the percentage of the total operating budget represented by each line item.

The fourth column, "Expiration date", should be filled out when funds are provided pursuant to a contract, memo of understanding, etc. Provide the month and year of expiration of the contract.

The fifth column requires a narrative description of any and all restrictions placed on funds by the provider of those funds. Use attachments if required. If any of the sources require that income related to their funds be returned to them, include that under "Restrictions".

CDC Survey: Part I

Sources	Amount	Percent	Expiration date	Restrictions
Federal Government				
I.A. Small Business Administration				
1. Title V (502/503/504 Fees)	$			xxxxxxxxxx
2. 7(a) (Packaging Fees)				xxxxxxxxxx
3. Other				xxxxxxxxxx
I.B. Housing and Urban Development				
1. CDBG				
New funds				
Repayment Receipts				
2. UDAG				
New funds				
Repayment Receipts				
3. Other (list)				
I.C. Economic Development Administration				
New funds				
Repayment Receipts				
I.D. Farmers Home Administration				
I.E. Other Federal Agencies (list)				
I.F. State Government (list)				
I.G. Local Government (e.g. COGs, etc.)				
I.H. Charitable/Non-profit organizations (list)				
I.J. Chamber of Commerce				
For-profit organizations (list)				
I.K. Other (list)				
Total		100		

Part II. Funds Used To Provide Financing

Instructions:

This portion of the survey focuses on the funds or financing a CDC receives or arranges that were used for direct assistance to borrowers or other recipients. The numbers provided should be as of the end of the *most recently completed* fiscal year.

Inclusive dates of fiscal year used to complete this Part. (e.g. January 1, 1989-December 31, 1989):

The first column lists common sources with spaces provided to specify various components. It is necessary to segregate amounts from the same source if they have different restrictions. Use an attachment if additional spacer is required.

The second column should contain the dollar amount received from the sources (round to the nearest $1000). If no funds were received from a given source indicate by "–0–", "none", or "N/A".

The third column, "%", requires calculation of the percentage of the year's total revenue represented by each line item.

The fourth column, "Expiration date", should be filled out when funds are provided pursuant to a contract, memo of understanding, etc. Provide the month and year of expiration of the contract.

The fifth column requires a narrative description of any and all restrictions placed on funds by the provider of those funds. Use attachments if required. If any of the sources require that income related to their funds be returned to them, include that under "Restrictions".

Sources	Amount	Percent	Expiration date	Restrictiions
Federal Government				
I.A. Small Business Administration				
1. Title V (502/503/504 Fees)	$			xxxxxxxxxx
2. 7(a) (Packaging Fees)				xxxxxxxxxx
3. Other				xxxxxxxxxx
I.B Housing and Urban Development				
1. CDBG				
New funds				
Repayment Receipts				
2. UDAG				
New funds				
Repayment Receipts				
3. Other (list)				
I.C. Economic Development Administration				
New funds				
Repayment Receipts				
I.D. Farmers Home Administration				
I.E. Other Federal Agencies (list)				
I.F. State Government (list)				
I.G. Local Government (e.g. COGs, etc.) (list)				
I.H. Charitable/Non-profit organizations (list)				
I.J. Chamber of Commerce				
For-profit organizations (list)				
I.K. Other (list)				
Total		100		

III. Assistance Provided

Instructions: Provide information on all financings completed during the most recently ended fiscal year (identified in Part II above) and estimate your activity for the current fiscal year. If your projected activity for the current year is significantly greater or less than your actual activity for last year, please identify the line item at the end of this section and indicate the reason. Use an additional sheet if necessary.

Type	Last Fiscal Year		Current Year Estimate	
	Number	Amount	Number	Amount
III.A. Small Business Administration				
1. 502/504 approvals		$		$

Type	Last Fiscal Year		Current Year Estimate	
	Number	Amount	Number	Amount
2. 7(a) approvals				
III.B. Economic Development Administration Revolving Loan Fund				
III.C. Other Revolving Loan Funds (List)				
III.D. Grants (List)				
III.E. Equity injections (List)				
III.F. Other (List)				
Total				

[FR Doc. 89-1944 Filed 1-26-89; 8:45 am]
BILLING CODE 8025-01-M

Region IX Advisory Council meeting

The U.S. Small Business Administration Region IX Advisory Council, located in the geographical area of San Francisco, will hold a public meeting at 10:00 a.m. on Friday, February 3, 1989, 211 Main Street—5th Floor—Conference Room 543, San Francisco, California, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Office of District Director, U.S. Small Business Administration, 211 Main Street—4th Floor, San Francisco, California 94105, 415/974-0642.

Jeanette M. Pauli,

Acting Director, Office of Advisory Councils.

January 23, 1989.

[FR Doc. 89-1894 Filed 1-26-89; 8:45 am]
BILLING CODE 8025-01-M

DEPARTMENT OF THE TREASURY

Office of the Secretary

[Department Circular—Public Debt Series—No. 2-89]

Treasury Notes of January 31, 1991, Series V-1991

Washington, January 19, 1989.

1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of Chapter 31 of Title 31, United States Code, invites tenders for approximately $9,250,000,000 of United States securities, designated Treasury Notes of January 31, 1991, Series V-1991 (CUSIP No. 912827 XC 1), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes may be issued to Government accounts and Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

2. Description of Securities

2.1. The Notes will be dated January 31, 1989, and will accrue interest from that date, payable on a semiannual basis on July 31, 1989, and each subsequent 6 months on January 31 and July 31 through the date that the principal becomes payable. They will mature January 31, 1991, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in denominations of $5,000, $10,000, $100,000, and $1,000,000, and in multiples of those amounts. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR Part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the TREASURY DIRECT Book-Entry Securities System in 51 FR 18260, *et seq.* (May 16, 1986), apply to the Notes offered in this circular.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches

and at the Bureau of the Public Debt, Washington, DC 20239–1500, prior to 1:00 p.m., Eastern Standard time, Wednesday, January 25, 1989. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, January 24, 1989, and received no later than Tuesday, January 31, 1989.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is $5,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than $1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; Federal Reserve Banks; and Government accounts. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in Section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tender are accepted, an interest rate will be established, at a ⅛ of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.500. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders receive from Government accounts and Federal Reserve Bank will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

4. Reservations.

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public debt, whenever the tender was submitted. Settlement of Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in Section 3.5. must be made or completed on or before Tuesday, January 31, 1989. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Friday, January 27, 1989. In addition, Treasury Tax and Loan Note Option Depositaries may make payment for the Notes allotted for their own accounts and for accounts of customers by credit to their Treasury Tax and Loan Note Accounts on or before Tuesday, January 31, 1989. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in TREASURY DIRECT are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in TREASURY DIRECT must be completed to show all the information required thereon, or the TREASURY DIRECT account number previously obtained.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may, at any time, supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public

announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 89-2004 Filed 1-26-89; 8:45 am]

BILLING CODE 4810-40-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 17
Friday, January 27, 1989

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).

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 53 FR 52575.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 11:30 a.m., January 27, 1989.

CHANGE IN THE MEETING: The closed Commission meeting scheduled to discuss Enforcement Matters has been cancelled.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, Secretary of the Commission.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 89-2044 Filed 1-25-89; 1:27 p.m]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNUNCEMENT: 53 FR 52575.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., January 31, 1989.

CHANGE IN THE MEETING: The Commission has cancelled the open meeting previously scheduled to discuss applications for designations as contract markets for:

Japanese Yen Euro-Rate Differential Futures/ Chicago Mercantile Exchange
Deutsche Mark Euro-Rate Differential Futures/Chicago Mercantile Exchange
Pound Sterling Euro-Rate Differential Futures/Chicago Mercantile Exchange

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, Secretary of the Commission.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 89-2045 Filed 1-25-89; 1:27 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Thursday, February 2, 1989.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED: Proposed amendments of the Chicago Mercantile Exchange relating to the implementation of the Globex Trading System.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 89-2046 Filed 1-25-89; 1:27 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Friday, February 3, 1989.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 89-2047 Filed 1-25-89; 1:25 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Friday, February 10, 1989.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 89-2048 Filed 1-25-89; 1:28 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Friday, February 17, 1989.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 89-2049 Filed 1-25-89; 1:28 pm]
BILLNG CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Friday, February 24, 1989.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 89-2050 Filed 1-25-89; 1:28 pm]
BILLNG CODE 6351-01-M

NATIONAL COUNCIL ON THE HANDICAPPED

Quarterly Meeting

AGENCY: National Council on Disability.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Council on Disability. This notice also describes the functions of the Council. Notice of this meeting is required under section 522(b)(10) of the "Government in Sunshine Act" (Pub. L. 94-409).

DATES:

Feb. 6, 1989, 9:00 a.m. to 4:30 p.m.
Feb. 7, 1989, 9:00 a.m. to 4:30 p.m.
Feb. 8, 1989, 8:30 a.m. to 4:30 p.m.
Feb. 9, 1989, 9:00 a.m. to 12:00 noon

LOCATION: Cathedral Hill Hotel, San Francisco, California.

FOR FURTHER INFORMATION CONTACT: National Council on Disability, 800 Independence Avenue, SW., Suite 814, Washington, DC 20591, (202) 267-3846, TDD: (202) 267-3232.

The National Council on Disability is an independent Federal agency comprised of 15 members appointed by the President of the United States and confirmed by the Senate. Established by the 95th Congress in Title VI of the Rehabilitation Act of 1973 (as amended by Pub. L. No. 95-602 in 1978), the Council was initially an advisory board within the Department of Education. In 1984, however, the Council was transformed into an independent agency by the Rehabilitation Act Amendments of 1984 (Pub. L. No. 98-221).

The Council is charged with reviewing all laws, programs, and policies of the Federal Government affecting disabled individuals and making such

recommendations as it deems necessary to the President, the Congress, the Secretary of the Department of Education, the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research (NIDRR).

The meeting of the Council shall be open to the Public. The proposed agenda includes:

Report from the Chairperson and Executive Committee
Presentation on the Institute of Medicine Study on Prevention of Disability by Dr. Andrew Pope, Project Director
Update on the Family Conference—Dr. George Elias, Program Chairman
Status Report on the Living Arrangements for Severely Disabled Children and Youth Study—by Dr. Thomas Backer
Committee Meetings
Personal Assistance
Education Committee
Employment Committee
Prevention Committee
Technology Committee
NIDRR Committee
Communications Committee
Family Conference Committee
Forum On The Americans With Disabilities Act consponsored by the California Foundation for Independent Living Centers
Roundtable Discussion on Americans With Disabilities Act
Long Term Care Forum—consponsored by the ILRC San Francisco and the Mayor's Council on Disabilities.
Strategy Session on The Americans With Disabilities Act
Discussion of Unfinished and New Business

Records shall be kept of all Council proceedings and shall be available after the meeting for public inspection at the National Council on Disability.

Signed at Washington, DC on January 19, 1989.

Paul G. Hearne,

Executive Director.

[FR Doc. 89-2010 Filed 1-25-89; 10:46 am]

BILLING CODE 6820-BS-M

NUCLEAR REGULATORY COMMISSION

DATE: Friday, February 10, 1989.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Friday, February 10

2:00 p.m.

Oral Argument on Sanction Issue in Shoreham Proceedings (Public Meeting)

Note.—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING): (301) 492-0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 492-1661.

William M. Hill, Jr.,

Office of the Secretary.

January 25, 1989.

[FR Doc. 89-2083 Filed 1-25-89; 3:54 pm]

BILLING CODE 7590-01-M

PAROLE COMMISSION

(Department of Justice)

DATE AND TIME: Tuesday, February 7, 1989, 2:00 a.m., eastern standard time.

PLACE: 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

STATUS: Open—Meeting.

MATTERS TO BE CONSIDERED: The following matters have been placed on the agenda for the open Parole Commission meeting:

1. Adoption of minutes of previous Commission meeting.
2. Reports from the Chairman, Vice Chairman, Commissioners, Legal, Case Operations, and Administrative Section.
3. Consideration of establishment of National Home Detention/Community Sanction Program. (Discussion Only)
4. Consideration of adding cocaine addiction to Item F of salient factor score. (Discussion Only)
5. Consideration of amendments to the Commission manual as a result of the Anti Drug Abuse Act of 1988.
6. Proposal to modify the language regarding Special Curfew Parole Program in the Commission manual.
7. Consideration of regional handling of correspondence from members of Congress and other high officials.
8. Proposal to advise parolees of swift and certain sanctions for use of illegal drugs.
9. Consideration of whether bows and arrows in the possession of parolees are "dangerous weapons" as defined in 28 CFR 2.40(a)(11).
10. Consideration of the adoption of a policy that the Commission would not rely upon imminized, self-incriminating testimony in parole release or revocation decisions.
11. Proposal for modification of 28 CFR 2.44(b) to reflect that the Commission may place a warrant as a detainer against a parolee in pre-trial custody.
12. Consideration of the adoption of proposed rule changing "arson" to "fire" in 28 CFR 2.20, Chapter 3, section 301.
13. Discussion of American Correction Association Accreditation.

AGENCY CONTACT: Linda Wines Marble, Director, Case Operations and Program Development, United States Parole Commission (301) 492-5952.

Date: January 25, 1989.

Michael A. Stover,

General Counsel, U.S. Parole Commission.

[FR Doc. 89-2043 Filed 1-25-89; 8:45 am]

BILLING CODE 4410-01-M

POSTAL SERVICE

Board of Governors; Meeting

The Board of Governors of the United States Postal Service, pursuant to its Bylaws (39 CFR 7.5) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice that it intends to hold a meeting at 8:30 a.m. on Tuesday, February 7, 1989, in Conference Room 102-B at the U.S. Postal Service Miami Field Division, 2200 Northwest 72nd Avenue, Miami, Florida 33152-9998. The meeting is open to the public. The Board expects to discuss the matters stated in the agenda which is set forth below. Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

There will also be a session of the Board on Monday, February 6, 1989, but it will consist entirely of briefings and is not open to the public.

Agenda

Tuesday Session

February 7, 8:30 a.m. (Open)

1. Minutes of the Previous Meeting, January 9-10, 1989.
2. Remarks of the Postmaster General.
3. Officer Compensation. (Anthony M. Frank, Postmaster General)
4. Consideration of Board Resolution Establishing Special Committee on Personnel Practices. (Robert Setrakian, Chairman, Board of Governors)
5. Appointment of Committee Members. (Mr. Setrakian)
6. Consideration of Postal Rate Commission Opinion and Recommended Decision in Docket No. C87-2 (Complaint of American Newspaper Publishers Association). (Louis A. Cox, General Counsel)
7. Quarterly Report on National Service Performance. (Ann McK. Robinson, Consumer Advocate)
8. Quarterly Report on Financial Performance. (Comer S. Coppie, Senior Assistant Postmaster General, Finance Group)
9. Report on Affirmative Action Programs in the Miami Division. (Woodrow Conner, Miami Field Division General Manager/Postmaster)
10. Tentative Agenda for March 6-7, 1989, meeting in Washington, DC.

David F. Harris,

Secretary.

[FR Doc. 89-1981 Filed 1-24-89; 5:06 pm]

BILLING CODE 7710-12-M

Corrections

Federal Register
Vol. 54, No. 17
Friday, January 27, 1989

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 AGRICULTURE

Federal Grain Inspection Service

7 CFR Part 800

Shiplot Inspection Plan (Cu-Sum)

Correction

In proposed rule document 89-1194 beginning on page 3050 in the issue of Monday, January 23, 1989, make the following corrections:

1. On page 3055, in the 3rd column, under **Optional Component Sample Inspections**, in the 15th line, after "them" insert "as a".

2. On page 3056, in the third column, under **Summary**, in the fifth line, "prohability that interior" should read "probability that inferior".

§ 800.86 [Corrected]

3. On page 3060, in § 800.86(c)(2), in table 15, after the heading "Heat-damaged (percent)" insert "[1]"; and after the heading "Total (percent)" insert "[1]".

4. On page 3061, in § 800.86(c)(2), in table 19, directly above the headings "Heat-damaged (percent)" and "Total (percent)" insert a heading which reads "Damaged Sunflower Seed".

5. On the same page, in § 800.86(c)(2), in table 21, directly above the headings "Heat-damaged (percent)" and "Total [1] (percent)" insert a heading which reads "Damaged kernels".

6. On the same page, in § 800.86(c)(2), in the same table, directly above the headings "Material other than wheat or rye (percent)" and "Total [2] (percent)" insert a heading which reads "Foreign material".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP 5E3160/P467; FRL-3477-5]

Pesticide Tolerances for Dimethyl Tetrachloroterephthalate

Correction

In proposed rule document 88-26428 beginning on page 46098 in the issue of Wednesday, November 16, 1988, make the following correction:

§ 180.185 [Corrected]

On page 46099, in the second column, in § 180.185(a), in the table, under "Commodities", "(code)" should read "(cole)".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP 7E3555/P445; FRL-3500-9]

Pesticide Tolerance for Thiophanate-Methyl

Correction

In proposed rule document 88-30084 beginning on page 53018 in the issue of Friday, December 30, 1988, make the following corrections:

1. On page 53018, in the first column, in the heading, the docket line should read as set forth above.

2. On the same page, in the third column, in the paragraph designated "3", in the eighth line, after the word "equivalent", "t" should read "to".

3. On page 53019, in the 1st column, in the 2nd complete paragraph, in the 18th line, "rates" should read "rats"; and in the 21st line, "of" should read "or".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 712 and 716

[OPTS-84029; FRL-3476-3]

Preliminary Assessment Information and Health and Safety Data Reporting; Addition of Chemicals

Correction

In rule document 88-26305 beginning on page 46279 in the issue of Wednesday, November 16, 1988, make the following correction:

On page 46279, in the third column, in the last line, "disphosphate" should read "diphosphate".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 799

[OPTS-42092A; FRL-3503-7]

Testing Consent Order on Alkyl Phthalates

Correction

In rule document 89-299 beginning on page 618 in the issue of Monday, January 9, 1989, make the following corrections:

1. On page 620, in the first column, under **V. Export Notification**, in the third line, after "DnBP," insert "DHP,".

2. On the same page, in the 3rd column, in reference (10), in the 11th line, "pp. 100-191" should read "pp. 180-191".

BILLING CODE 1505-01-D

federal register

Friday
January 27, 1989

Part II

Environmental Protection Agency

40 CFR Part 35

Cooperative Agreements and Superfund State Contracts for Superfund Response Actions; Interim Final Rule With Request for Comments

ENVIRONMENTAL PROTECTION AGENCY

Office of Administration

40 CFR Part 35

[FRL-3428-8]

Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule with request for comments.

SUMMARY: This rule establishes the administrative requirements for CERCLA-funded cooperative agreements, and Superfund State Contracts. The rule establishes these requirements for States, political subdivisions thereof, and Federally-recognized Indian tribes. This regulation sets forth the pre-award, post-award, and after-the-grant requirements which are conditions for receiving a Superfund cooperative agreement or Superfund State Contract. This regulation is needed to implement CERCLA cost recovery requirements and ensure that recipients carefully track and document all costs.

DATES: *Effective Date:* This rule becomes effective January 27, 1989.

Compliance Date: This rule is effective for all CERCLA-funded cooperative agreements and Superfund State Contracts awarded after January 27, 1989. This rule also applies to amendments to existing agreements where the scope of work starts after the effective date of this rule.

Comments: Written comments must be submitted on or before April 27, 1989.

ADDRESSES: Written comments must be submitted to: Superfund Docket Clerk, Office of Emergency and Remedial Response (WH-548D), Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Comments on today's Interim Final Rule must identify the regulatory docket as follows: "Docket 104CA." Docket: Copies of materials relevant to this rulemaking are contained in the Superfund docket located in the Lower Garage (Room LG-100) at the U.S. Environmental Protection Agency, 401 M Street SW., Washington DC 20460. The docket is available for inspection by appointment only between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday, excluding Federal holidays. The docket phone number is (202) 382-3046. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Richard A. Johnson, Office of Administration, PM-216F, U.S. Environmental Protection Agency, 499 South Capitol Street SW., Washington, DC 20460 at (202) 382-5296.

SUPPLEMENTARY INFORMATION: The contents of this preamble are as follows:

I. Background

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was enacted in 1980 and launched the nation's first centralized and substantial commitment to clean up hazardous waste sites. CERCLA, or Superfund, provided Federal authority and resources to respond directly to releases (or threatened releases) of hazardous substances that could endanger human health or the environment. The law also authorized enforcement action and cost recovery from those responsible for a release. The Superfund Amendments and Reauthorization Act (SARA) was enacted on October 17, 1986 and continued the program initiated by CERCLA by reauthorizing CERCLA for an additional five years. SARA strengthened and expanded the cleanup program and increased the size of the Hazardous Substance Superfund by $8.5 billion.

One of the vehicles EPA uses to conduct Superfund cleanup responses is a cooperative agreement, through which EPA authorizes recipients to perform the lead role for cleanup activities. Superfund cooperative agreements are unique among EPA cooperative agreements; the major difference is the cost recovery requirement. To expedite the process of recovering costs from parties responsible for a release, the Superfund program mandates site-specific tracking of costs incurred under cooperative agreements and maintenance of site-specific files to document such costs.

The Office of Management and Budget (OMB) recently revised OMB Circular A-102 by establishing a government-wide "common rule" which prescribes administrative requirements for Federal assistance awards to States, political subdivisions thereof, and Federally-recognized Indian Tribes. EPA is implementing the common rule through 40 CFR Part 31. However, as provided in 40 CFR 31.5, Part 31 does not supersede administrative provisions required by statute.

Consistent with this Part 31 exception, EPA is promulgating this interim final rule as 40 CFR Part 35, Subpart O to implement the cost recovery program under section 107 of CERCLA, as amended. Section 107 of CERCLA makes any person responsible for a release or threatened release of hazardous substances liable for all costs of removal or remedial action. EPA implements this statutory provision through its cost recovery program. To ensure an effective cost recovery program, Subpart O establishes specific uniform requirements which supplement those in Part 31 for Superfund cooperative agreements and Superfund State contracts (SSC's) in three ways.

The first way in which this subpart supplements Part 31 is that it provides requirements specific to CERCLA, as amended, which were not addressed in Part 31. For example, the regulation adds requirements for States to follow for non- State-lead responses. Second, this subpart includes requirements which, although addressed in Part 31, do not meet the minimum standards necessary to meet the goal of cost recovery. These minimum requirements have been included in this subpart in a modified form. For example, although Part 31 does address procurement procedures, recipients must follow the procurement requirements in § 35.6550 through § 35.6610 of this subpart when procuring products or services under Superfund cooperative agreements. Finally, this subpart references those existing 40 CFR Part 31 requirements which are applicable for recipients of CERCLA funds. For example, recipients must follow the allowable cost requirements contained in 40 CFR 31.22, which are referenced in § 35.6250(a)(2) of this subpart.

Those sections of Part 31 that Subpart O references which are applicable for CERCLA funded cooperative agreements and/or Superfund State Contracts are listed below:

31.3 Definitions.
31.6 Additions and exceptions: selected sections.
31.13 Principal statutory provisions applicable to EPA assistance awards.
31.20 Standards for financial management systems: source documentation and awarding agency review.
31.21 Payment: Basic standard, reimbursement, effect of program income, refunds, audit recoveries on payment, withholding payments, and cash depositories.
31.22 Allowable costs.
31.23 Period of availability of funds.
31.24 Matching or cost sharing: qualifications and exceptions, and valuation of donated services.
31.25 Program income.
31.26 Non-Federal audit.

31.30 Changes.
31.31 Real property.
31.34 Copyrights.
31.35 Subawards to debarred and suspended parties.
31.36 Procurement: Selected sections from procurement standards, contracting with MBE's/WBE's and small businesses, bonding requirements, and payment to consultants.
31.40 Monitoring by grantees.
31.41 Financial reporting.
31.42 Starting dates for records retention period and requirements for records access.
31.43 Enforcement.
31.44 Termination for convenience.
31.45 Quality assurance.
31.50 Closeout.
31.51 Labor disallowances and adjustments.
31.52 Collection of amounts due.
31.70 Disputes.

The requirements in this subpart do not apply to Technical Assistance Grants or CERCLA research and development grants, including Superfund Innovative Technology Evaluation (SITE) Demonstration cooperative agreements.

II. Description of Major Issues

A. The National Oil and Hazardous Substances Pollution Contingency Plan (NCP)

Although CERCLA, as amended, is the legislative initiative that provides for the cleanup of hazardous waste, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) describes the guidelines and procedures for implementing CERCLA. The NCP is currently being revised to include the statutory requirements established by SARA. Subpart O references specific sections of CERCLA, as amended, in prescribing requirements. Upon final promulgation of the revised NCP, any terms defined in both this regulation and the NCP will be superseded by the definition found in the NCP.

B. Records Retention

Length of Retention

40 CFR Part 31 establishes a three-year records retention requirement for the recipients of assistance agreements (40 CFR 31.42). In addition, Part 31 specifies that if any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the three-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. Subpart O requires that recipients retain all records for ten years after the date of completion of all response actions at the site, or until any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been completed and all issues resolved, whichever is later. This requirement ensures that response action information remains available for a sufficient period to support government cost recovery cases. The ten-year requirement supersedes all Superfund guidance documents which specify a three-year retention period, including *State Superfund Financial Management and Recordkeeping Guidance*, dated January 1988. Subpart O also requires the recipient to obtain written approval from its EPA award official before disposing of any CERCLA records.

Method of Retention

Recipients may substitute microform copies for original supporting documentation for removal actions and remedial investigations, feasibility studies, designs, and any additional related activities (including financial and cost accounting records) undertaken pursuant to CERCLA. The microform copying must be performed in accordance with the technical regulations concerning micrographics of Federal Government records (36 CFR 1230 et seq.) and EPA records management procedures (EPA Order 2160). If the recipient decides to use microform copies, then the recipient must also perform microform copying of original documents periodically in the regular course of business, and may dispose of these records only upon EPA approval. Subpart O requires the recipient to obtain written approval from EPA before disposing of the original records which were used to make the microform copy. Records retention requirements specified in this subpart are applicable to mircoform.

C. Purchase of Property

Although Subpart O provides the recipient with an option for obtaining equipment with CERCLA funds, it is not EPA's intent to use the Hazardous Substance Superfund to finance large purchases of equipment indiscriminantly. Therefore, the recipient must meet stringent requirements before EPA will allow the purchase of equipment with CERCLA funds. EPA encourages the recipient to use its own funds to purchase equipment, and charge the cooperative agreement for its use. Although EPA must approve this usage rate, the recipient does not then have to comply with the other property standards or disposition requirements of this regulation, if the recipient buys the equipment with its own funds.

D. Superfund State Contracts (SSC's)

There are two types of Superfund State Contracts (SSC's). The first is a two-party SSC between EPA and the State which is required pursuant to CERCLA section 104 to obtain the State's CERCLA 104 assurances before a Federal-lead remedial action can begin. The second type of SSC is a three-party SSC between EPA, the State, and a political subdivision thereof, which is required before a political subdivision receives a cooperative agreement for remedial response at a site. In this instance, a three-party SSC is required before a political subdivision takes the lead for any phase of remedial response to ensure adequate State involvement during remedial response pursuant to section 121(f)(1) of CERCLA. Prior to a political subdivision taking the lead for remedial action, the three-party SSC must be amended to include the State's CERCLA 104 assurances, if not already provided in the SSC.

E. Non Site-Specific Cost Accounting

The recipient of CERCLA funds is required to account for costs on a site-specific basis by phase of activity. The recipient is not required to track expenses by site for pre-remedial or Core Program cooperative agreement activities. However, for pre-remedial activities (i.e. Preliminary Assessments and Site Inspections), the recipient is required to track expenses by a single Superfund account number designated specifically for the pre-remedial activity. In addition, the recipient is required to track site-specific technical hours spent for the pre-remedial activity. For Core Program activities, the recipient is required to track expenses by a single Superfund account number designated specifically for Core Program activities.

F. Credit for NPL sites

This regulation addresses requirements for obtaining credit in § 35.6270(c), which describes the requirements for expenditures incurred before a site is listed on the NPL and for those incurred after a site is listed on the NPL. Section 104(c)(5)(A) of CERCLA, as amended, grants credit for amounts expended by a State for remedial action at a NPL site pursuant to a contract or cooperative agreement. In addition, section 104(c)(5)(B) allows credit for expenses for remedial action at a site incurred before the site is listed on the NPL if the site is subsequently listed on the NPL, and the expenses are determined to be creditable.

G. Federally-recognized Indian Tribes

CERCLA requires EPA to afford to Federally-recognized Indian Tribes substantially the same treatment as it would to States. However, in order to clarify the Supefund administrative requirements, the term "State" in this regulation does not mean "Federally-recognized Indian Tribe." Where a requirement applies only to a State, the term "State" is used, and where a requirement applies only to a Federally-recognized Indian Tribe, the term "Federally-recognized Indian Tribe" is used.

A Federally-recognized Indian Tribe may be the lead or support agency for a response and, under the terms of the statute, need not provide the section 104(c)(3) assurances with regard to remedial actions.

H. Financial Status Report

Although the Financial Status Report form (SF–269) does not request information by site and activity, the recipient must continue to provide financial information by site and activity in order to support cost recovery.

I. Support Agency Cooperative Agreements

Under the Superfund program, States and Federally-recognized Indian Tribes may receive funding to perform site-specific activities to support a Federal-lead response. Since the State or Federally-recognized Indian Tribe performs these activities as the support agency, the cooperative agreement which funds this assistance is termed a support agency cooperative agreement. This regulation codifies the requirements for recipients of support agency cooperative agreements in § 35.6900 through 35.6920 of this subpart. An example of support agency activities that may be funded under a cooperative agreement is the review and comment on technical data and reports relating to implementation of the remedy.

J. Non-Time-Critical Removals

Because there must be sufficient time to complete a cooperative agreement before a State or Federally-recognized Indian Tribe may take the lead, generally only non-time-critical removal actions will be eligible for cooperative agreements. Non-time-critical removals are those where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of more than six months available before on-site activities must begin.

K. Twenty-Year Waste Capacity

The regulation includes the assurance regarding availability of hazardous waste treatment and disposal facilities as required by CERCLA section 104(c)(9). EPA intends to issue guidance on this assurance in the near future.

III. Supporting Information

List of Subjects in 40 CFR Part 35

Accounting, Administrative practice and procedures, Financial administration, Grant programs (Cooperative agreements and Superfund State Contracts), Government procurement requirements, Property requirements, Reporting and recordkeeping requirements, Superfund.

IV. Impact Analyses

A. Federalism

As explained in E.O.12612, Federalism, States possess unique constitutional authority, resources, and competence. Under Federalism, States should be given the maximum administrative discretion possible with respect to national programs they administer. However, due to statutory cost recovery requirements and the need to carefully track all costs, Superfund recipients must comply with administrative requirements sufficient to meet the cost recovery provisions of CERCLA. Therefore, States must follow the additional requirements in this rule, which are absolutely crucial for effective cost recovery from parties responsible for release. Nonetheless, States will be able to follow their own procedures, such as for procurement, if they certify that their requirements meet the intent of our regulation.

B. Executive Order 12291

Executive Order No. 12291 requires that regulations be classified as "major" or "non-major" for purposes of review by the Office of Management and Budget (OMB). According to Executive Order No. 12291, "major" rules are regulations that are likely to result in:

(1) An annual adverse (cost) effect on the economy of $100 million or more; or

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government, or geographical regions; or

(3) Significant adverse effects on the competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule does not affect the amount of funds provided in the Superfund program, but rather modifies and updates administrative and procedural requirements. We do not believe that the rule will have an annual economic impact of $100 million or more, will increase costs or prices, or will adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. For this reason, we have determined that this is not a major rule within the meaning of the Order, and therefore no formal Regulatory Impact Analysis is necessary. This interim final rule was submitted to the Office of Management and Budget for its review as required by Executive Order No. 12291.

C. Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires that, for each rule with "significant economic impact on a substantial number of small entities," an analysis be prepared describing the rule's impact on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities. We certify that this rule will not have a significant economic impact on a substantial number of small entities because the requirements in this regulation apply only to States, political subdivisions thereof, and Indian Tribes for administering Superfund response actions.

D. Paperwork Reduction Act

Sections 35.6055 (a) (1) through (a) (3) and (b) (1) through (b) (2); 35.6105 (a) (1) through (a) (5) and (b); 35.6250 (a) (1) and (b); 35.6300 (a) (3); 35.6315 (c); 35.6320 (a); 35.6340(a) (3); 35.6550 (b) (1) through (b) (3); 35.6585 (a) and (b); 35.6650; 35.6655; 35.6660; 35.6665; 35.6670; 35.6700; 35.6705; 35.6710; 35.6805; 35.6810; 35.6815 (d); 35.6860; and 35.6865 of this rule contain collection-of-information requirements. The information collection requirements in this interim final rule have been approved by the Office of Management and Budget (OMB) under the "Paperwork Reduction Act," 44 U.S.C. 3501 et seq. And assigned OMB control numbers 2010–0020. An Information Collection Request document has been prepared by EPA (ICR No. 1487) and a copy may be obtained from David Ogden, Information Policy Branch; EPA; 401 M St., SW. (PM–223); Washington, DC 20460 or by calling (202) 475–9498.

Public reporting burden for this collection of information is estimated to average 81 hours per response, including time for reviewing instructions, searching existing data sources,

gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch, EPA, PM-223, 401 M St., SW., Washington, DC 20460 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this interim final rule.

Dated: January 9, 1989.

Lee M. Thomas,

Administrator.

Accordingly, the Administrator amends Chapter I, Part 35 of Title 40 of the Code of Federal Regulations as follows:

PART 35—STATE AND LOCAL ASSISTANCE

1. The authority citation for Part 35, appearing at the end of the table of contents, is removed.

2. A new Subpart O is added to read as follows:

Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

Authority: 42 U.S.C. 9601 et seq.

General

§ 35.6000 Authority.

This regulation is issued under section 104 CERCLA, 42 U.S.C. 9601 et seq.

§ 35.6005 Purpose and scope.

(a) This regulation codifies recipient requirements for administering CERCLA-funded cooperative agreements. This regulation also codifies requirements for administering Superfund State Contracts (SSC's) for non-State-lead remedial responses.

(b) The requirements in this regulation do not apply to Technical Assistance Grants (TAG's) or to CERCLA research and development grants, including the Superfund Innovative Technology Evaluation (SITE) Demonstration Program.

(c) 40 CFR Part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," establishes consistency and uniformity among Federal agencies in the administration of grants and cooperative agreements to State, local, and Federally recognized Indian tribal governments. For CERCLA-funded cooperative agreements, this subpart supplements the requirements contained in Part 31 for States, political subdivisions thereof, and Federally recognized Indian Tribes. This regulation references those sections of Part 31 that are applicable to CERCLA-funded cooperative agreements.

§ 35.6010 Eligibility.

This regulation applies to States, political subdivisions thereof, and Federally recognized Indian Tribes. Although section 126 of CERCLA provides that the governing body of a Federally recognized Indian Tribe shall be afforded substantially the same treatment as a State, in this subpart Federally recognized Indian Tribes are not included in the definition of State in order to clarify those requirements with which Federally recognized Indian Tribes must comply and those with which they need not comply.

§ 35.6015 Definitions.

(a) As used in this subpart, the following words and terms shall have the meanings set forth below:

(1) *Activity.* A set of tasks that together comprise a segment of the sequence of events undertaken in determining, planning, and conducting a response to a release or potential release of a hazardous substance. These include: pre-remedial (i.e. Preliminary Assessments and Site Inspections), remedial investigation/feasibility studies, remedial design, remedial action, removal, enforcement, and Core Program activities.

(2) *Allowable costs.* Those project costs that are: eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles; and approved by EPA in the cooperative agreement and/or Superfund State Contract.

(3) *Architectural or engineering (A/E) services.* Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the recipient is located.

(4) *Award official.* The EPA official with the authority to execute cooperative agreements and Superfund State Contracts (SSC's) and take other actions authorized by EPA Orders.

(5) *Budget period.* The length of time EPA specifies in an cooperative agreement during which the recipient may expend or obligate Federal funds.

(6) *CERCLA.* The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986.

(7) *Change order.* A written order issued by a recipient, or its designated agent, to its contractor authorizing an addition to, deletion from , or revision of, a contract, usually initiated at the contractor's request.

(8) *Claim.* A demand or written assertion by a contractor seeking, as a matter of right, changes in contract duration, costs, or other provisions, which originally have been rejected by the recipient.

(9) *Closeout.* The final EPA or recipient actions taken to assure satisfactory completion of project work and to fulfill administrative requirements, including financial settlement, submission of acceptable required final reports, and resolution of any outstanding issues under the cooperative agreement and/or Superfund State Contract.

(10) *Community Relations Plan (CRP).* A management and planning tool outlining the specific community relations activities to be undertaken during the course of a response. It is designed to provide for two-way communication between the affected community and the agencies responsible for conducting a response action, and to assure public input into the decision-making process related to the affected communities.

(11) *Construction.* Erection, building, alteration, repair, remodeling, improvement, or extension of buildings, structures or other property.

(12) *Contract.* A written agreement between an EPA recipient and another party (other than another public agency) or between the recipient's contractor and the contractor's first tier subcontractor.

(13) *Contractor.* Any party to whom a recipient awards a contract.

(14) *Cooperative agreement.* A legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

(15) *Core Program Cooperative Agreement.* A cooperative agreement that provides funds to a State or Federally-recognized Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to develop and maintain a State's ability to participate in the CERCLA response program.

(16) *Cost analysis.* The review and evaluation of each element of contract cost to determine reasonableness, allocability, and allowability.

(17) *Cost share.* The portion of allowable project costs that a recipient contributes toward completing its project (i.e.,. non-Federal share, matching share).

(18) *Equipment.* Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(19) *Excess property.* Any property under the control of a Federal agency that is not required for immediate or foreseeable needs and thus is a candidate for disposal.

(20) *Fair market value.* The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Fair market value is the price in cash, or its equivalent, for which the property would have been sold on the open market.

(21) *Health and safety plan.* A plan that specifies the procedures that are sufficient to protect on-site personnel and surrounding communities from the physical, chemical, and/or biological hazards of the site. The health and safety plan outlines: (i) Site hazards; (ii) work areas and site control procedures; (iii) air surveillance procedures; (iv) levels of protection; (v) decontamination and site emergency plans; (vi) arrangements for weather-related problems; and (vii) responsibilities for implementing the health and safety plan.

(22) *In-kind contribution.* The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements in a cooperative agreement only. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.

(23) *Indian Tribe.* As defined by section 101(36) of CERCLA, any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native Village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States

to Indians because of their status as Indians.

(24) *Lead agency.* The Federal agency, State agency, political subdivision, or Federally recognized Indian Tribe that has primary responsibility for planning and implementing a response action under CERCLA.

(25) *Minority Business Enterprise (MBE).* A business which is: (i) Certified as socially and economically disadvantaged by the Small Business Administration, (ii) certified as a minority business enterprise by a State or Federal agency, or (iii) an independent business concern which is at least 51 percent owned and controlled by minority group member(s). A minority group member is an individual who is a citizen of the United States and one of the following:

(A) Black American;

(B) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America);

(C) Native American (American Indian, Eskimo, Aleut, native Hawaiian), or

(D) Asian-Pacific American (with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent).

(26) *National Priorities List (NPL).* EPA's list of the most serious uncontrolled or abandoned hazardous waste sites identified for possible long-term remedial action under Superfund. A site must be on NPL to receive money from the Trust Fund for remedial action. The list is based primarily on the score a site receives from the Hazard Ranking System.

(27) *Operation and maintenance (O&M).* Activities required to maintain the effectiveness of response actions. O&M is the sole responsibility of the State.

(28) *Personal property.* Property other than real property. It includes both supplies and equipment.

(29) *Political subdivision.* The unit of government that the State determines to have met the State's legislative definition of a political subdivision.

(30) *Potentially Responsible Party (PRP).* Any individual(s), or company(ies) identified as potentially liable under CERCLA for cleanup or payment for costs of cleanup of Hazardous Substance sites. PRPs may include individual(s) or company(ies) identified as having owned, operated, or in some other matter contributed wastes to Hazardous Substance sites.

(31) *Price analysis.* The process of evaluating a prospective price without regard to the contractor's separate cost elements and proposed profit. Price analysis determines the reasonableness of the proposed contract price based on adequate price competition, previous experience with similar work, established catalog or market price, law, or regulation.

(32) *Profit.* The net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on applicable Federal cost principles, it may vary from many firms' definition of profit, and may correspond to those firms' definition of "fee.")

(33) *Project.* The activities or tasks EPA identifies in the cooperative agreement and/or Superfund State Contract.

(34) *Project officer.* The EPA official designated in the cooperative agreement as EPA's program contact with the recipient. Project officers are responsible for monitoring the project.

(35) *Project period.* The length of time EPA specifies in the cooperative agreement and/or Superfund State Contract for completion of all project work. It may be composed of more than one budget period.

(36) *Quality Assurance Project Plan.* A written document, associated with site sampling activities, which presents in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance and quality control activities designed to achieve the data quality objectives of a specific project(s) or continuing operation(s). The quality assurance project plan will be prepared by the responsible program office, regional office, laboratory, contractor, recipient of a cooperative agreement, or other organization. For an enforcement action, EPA must approve a Potentially Responsible Party's quality assurance project plan.

(37) *Real property.* Land, including land improvements, structures, and appurtenances thereto, excluding movable machinery and equipment.

(38) *Recipient.* Any State, political subdivision thereof, or Federally recognized Indian Tribe which has been awarded and has accepted an EPA cooperative agreement.

(39) *Services.* A recipient's in-kind or a contractor's labor, time, or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawing, specifications). This term does not include employment agreements or collective bargaining agreements. This term includes dismantling and demolition of buildings, ground improvements, and other real property structures, and the removal of such structures or portions of them, unless further work which will result in construction, alteration, or repair is contemplated at that location.

(40) *Small business.* A business as defined in section 3 of the Small Business Act, as amended (15 U.S.C. 632).

(41) *State.* The several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of Northern Marianas, and any territory or possession over which the United States has jurisdiction.

(42) *Statement of Work (SOW).* The portion of the cooperative agreement application and/or Superfund State Contract that describes the purpose and scope of activities and tasks to be carried out as a part of the proposed project.

(43) *Subcontractor.* Any first tier party that has a contract with the recipient's prime contractor.

(44) *Superfund State Contract (SSC).* A joint, legally binding agreement between EPA and another party to obtain the necessary assurances before a Federal-lead remedial action can begin at a site. In the case of a political subdivision-lead remedial response, a three-party SSC between EPA, the State, and political subdivision thereof, is required before a political subdivision takes the lead for any phase of remedial response to ensure State involvement pursuant to section 121(f)(1) of CERCLA, as amended. The SSC must be amended to provide the State's CERCLA 104 assurances before a political subdivision can take the lead for remedial action.

(45) *Supplies.* All tangible personal property other than equipment as defined in this subpart.

(46) *Support agency.* The State Agency or Federally recognized Indian Tribe that furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance as required by the lead agency during a response.

(47) *Task.* An element of a Superfund response activity.

(48) *Title.* The valid claim to property which denotes ownership and the rights of ownership, including the rights of possession, control, and disposal of property.

(49) *Unit acquisition cost.* The net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges,

such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(50) *Value engineering.* A systematic and creative analysis of each contract term or task to ensure that its essential function is provided at the overall lowest cost.

(51) *Women's Business Enterprise (WBE).* A business which is certified as a Women's Business Enterprise by a State or Federal agency, or which meets the following definition. A women's business enterprise is an independent business concern which is at least 51 percent owned by a woman or women who also control and operate it. Determination of whether a business is at least 51 percent owned by a woman or women shall be made without regard to community property laws.

(b) Those words not defined in this section shall have the meanings set forth in 40 CFR 31.3.

§ 35.6020 Principal statutory provisions.

The recipient must comply with the Federal laws described in 40 CFR 31.13, and with other applicable statutory provisions.

§ 35.6025 Deviation from this subpart.

On a case-by-case basis, EPA will consider requests for exceptions to the non-statutory provisions of this regulation. Refer to the requirements regarding additions and exceptions described in 40 CFR 31.6 (b), (c), and (d).

Pre-Remedial Response Cooperative Agreements

§ 35.6050 Eligibility for pre-remedial cooperative agreements.

States and Federally recognized Indian Tribes may apply for pre-remedial response cooperative agreements.

§ 35.6055 State-lead pre-remedial cooperative agreements.

(a) *Pre-remedial application requirements.* To receive a pre-remedial cooperative agreement, the applicant must submit the following items to EPA:

(1) *Application form.* An "Application for Federal Assistance" (SF–424) for non-construction programs. Applications for additional funding need include only the revised pages. The application must include the following:

(i) *Budget sheets* (SF–424(c));

(ii) *A Statement of Work (SOW)* which must include a detailed description, by task, of activities to be conducted, the projected costs associated with each task, the number of products to be completed, and a quarterly schedule indicating when these products will be submitted to EPA; and

(iii) *Proposed project and budget periods.*

(2) *Evidence of compliance with intergovernmental review requirements.* The applicant must comply with 40 CFR Part 29, "Intergovernmental Review of the EPA Programs and Activities" and the "Notice of Supplemental Procedures for Establishing Start Dates of Comment Period for Activities Subject to Executive Order 12372" (48 FR 54692).

(3) *A list of sites* at which the applicant proposes to undertake pre-remedial tasks. If the recipient proposes to revise the list, the recipient may not incur costs on a new site until the project officer has approved the site.

(b) *Pre-remedial cooperative agreement requirements.* The recipient must comply with all special conditions in the cooperative agreement, and with the following requirements:

(1) *Health and safety plan.* (i) Before beginning field work, the recipient must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. This plan need not be submitted to EPA, but must be made available to EPA upon request.

(ii) The recipient's health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is a Federally recognized Indian Tribe which is exempt from OSHA requirements.

(2) *Quality assurance.* (i) The recipient must comply with the quality assurance requirements described in 40 CFR 31.45.

(ii) The recipient must have an EPA-approved non-site-specific quality assurance plan in place before beginning field work. The recipient must submit the plan to EPA in adequate time (generally 45 days) in order for approval to be granted before beginning field work.

(iii) The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

§ 35.6060 Federally recognized Indian Tribe-lead pre-remedial cooperative agreements.

The Federally recognized Indian Tribe must comply with all of the requirements described in § 35.6055 of this subpart except for the intergovernmental review requirements described in § 35.6055(a)(2).

Remedial Response Cooperative Agreements

§ 35.6100 Eligibility for remedial cooperative agreements.

States, Federally recognized Indian Tribes, and political subdivisions may apply for remedial response cooperative agreements.

§ 35.6105 State-lead remedial cooperative agreements.

(a) *Remedial application requirements.* To receive a remedial cooperative agreement, the applicant must submit the following items to EPA:

(1) *Application form,* as described in § 35.6055(a)(1) of this subpart, accompanied by the following:

(i) *Budget sheets* displaying costs by site and activity;

(ii) *A site-specific Statement of Work (SOW),* including estimated costs per task; and

(iii) *Proposed project and budget periods.*

(2) *Evidence of compliance with intergovernmental review requirements,* as described in § 35.6055(a)(2) of this subpart.

(3) *A site-specific Community Relations Plan* or an assurance that field work will not begin until one is in place. The Regional community relations coordinator must approve the Community Relations Plan before the recipient begins field work. The recipient must comply with the community relations requirements described in EPA policy and guidance, and in the National Contingency Plan (NCP).

(4) *A site-specific health and safety plan,* or an assurance that the applicant will have an EPA-accepted final plan before starting field work. Unless specifically waived by the award official, the applicant must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. The site-specific health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is a Federally recognized Indian Tribe exempt from OSHA requirements.

(5) *Quality assurance*—(i) *General.* If the project involves environmentally related measurements or data generation, the recipient must comply with the requirements regarding quality assurance described in 40 CFR 31.45.

(ii) *Quality assurance plan.* The applicant must have a separate quality assurance project plan/sampling plan

for each site to be covered by the cooperative agreement. The applicant must submit the quality assurance project plan and sampling plan, which incorporates results of any site investigation performed at that site, to EPA with its cooperative agreement application. However, at the option of the EPA award official with program concurrence, the applicant may submit with its application a schedule for developing the detailed site-specific quality assurance plan. The recipient must submit the detailed site-specific plan to EPA in adequate time (generally 45 days) in order for approval to be granted before beginning field work. The recipient may not begin field work until the EPA approves the quality assurance plan.

(iii) *Split sampling.* The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

(b) *Remedial action cooperative agreement requirements: assurances.* The State must comply with all special conditions in the cooperative agreement. In addition, before beginning remedial action, the State must provide EPA with written assurances as specified below.

(1) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance of implemented remedial actions for the expected life of each such action.

(2) *Cost sharing.* The State must provide assurances for cost sharing as follows:

(i) *Privately-operated.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(ii) *Publicly-operated.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(3) *Off-site storage, treatment, or disposal.* If offsite storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with Subtitle C of the Solid Waste Disposal Act and is acceptable to EPA.

(4) *Property title and interest acquisition.* If appropriate, the State must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. See § 35.6400 of this subpart for additional information on property title and interest requirements.

§ 35.6110 Federally recognized Indian Tribe-lead remedial cooperative agreements.

(a) *Application requirements.* The Federally-recognized Indian Tribe must comply with all of the requirements described in § 35.6105(a) of this subpart, except for the intergovernmental review requirements described in § 35.6055(a)(2).

(b) *Cooperative agreement requirements.* (1) The Federally recognized Indian Tribe must comply with all special conditions in the cooperative agreement.

(2) If appropriate, the Federally-recognized Indian Tribe must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. See § 35.6400 of this subpart regarding information on property title and interest requirements.

§ 35.6115 Political subdivision-lead remedial cooperative agreements.

(a) *General.* If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume lead responsibility for a site. The State and political subdivision must enter into a three-party Superfund State Contract (SSC) with EPA before a political subdivision can be awarded a cooperative agreement.

(b) *Three-party Superfund State Contract requirements.* The three-party SSC must specify the responsibilities of the signatories. By signing the SSC, the EPA, the State, and the political subdivision agree to:

(1) Ensure that the SSC specifies the substantial and meaningful involvement of the State as required by section 121 (f)(1) of CERCLA, as amended.

(2) Ensure that the three-party SSC includes the State's CERCLA 104 assurances at the time of remedial action, if the political subdivision is designated the lead for remedial action.

(3) Follow the appropriate administrative requirements regarding SSC's described in § 35.6805, 35.6815, and 35.6820 of this subpart.

(c) *Political subdivision cooperative agreement requirements.*—(1) *Application requirements.* To receive a remedial cooperative agreement, the political subdivision must prepare an application which includes the documentation described in § 35.6105(a)(1) through (a)(5).

(2) *Cooperative agreement requirements.* The political subdivision must comply with all special conditions in the cooperative agreement.

§ 35.6120 Twenty-year waste capacity.

After October 17, 1989, EPA will not enter into a cooperative agreement for a remedial action without an adequate assurance as required by section 104(c)(9) that there are hazardous waste treatment or disposal facilities that comply with Subtitle C of the Solid Waste Disposal Act that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated for 20 years after the date of the cooperative agreement.

Enforcement Cooperative Agreements

§ 35.6150 Eligibility for enforcement cooperative agreements.

States may apply for enforcement cooperative agreements.

§ 35.6155 State-lead enforcement cooperative agreements.

The State must comply with the requirements described in § 35.6105(a)(1) through (5) of this subpart. Assurances and provisions which apply to enforcement activities must be contained in the cooperative agreement. The CERCLA assurances described in § 35.6105(b) are not applicable for enforcement actions.

Removal Response Cooperative Agreements

§ 35.6200 Eligibility for removal cooperative agreements.

States and Federally recognized Indian Tribes may apply for non-time-critical removal cooperative agreements.

§ 35.6205 Removal cooperative agreements.

(a) The State must comply with the requirements described in § 35.6105(a)(1) through (5) of this subpart. Federally recognized Indian Tribes must comply with the requirements described in § 35.6105 (a)(1), and (a)(3) through (a)(5) of this subpart.

(b) The State is not required to share in the cost of a CERCLA-funded removal action, unless the removal is conducted at a site that was publicly operated by a State or political subdivision at the time of disposal of hazardous substances and a CERCLA-funded remedial action is ultimately undertaken at the site. In this situation, the State must share at least 50 percent in the cost of all removal, remedial planning, and remedial action costs at the time of the remedial action

as described in § 35.6105(b)(2)(ii) of this subpart.

(c) Federally recognized Indian Tribes are never required to share in the cost of a CERCLA-funded removal action.

Financial Administration Requirements Under a Cooperative Agreement

§ 35.6250 Standards for financial management systems.

(a) *Accounting system standards.*—(1) *General.* The recipient's and its contractor's systems must track expenses by site and activity, according to object class. The systems must also provide control, accountability, and an assurance that funds, property, and other assets are used only for their authorized purposes. The recipient must allow an EPA review of the adequacy of the financial management system as described in 40 CFR 31.20(c).

(2) *Allowable costs.* The recipient's and its contractor's systems must comply with the appropriate allowable cost principles described in 40 CFR 31.22.

(3) *Pre-remedial.* The systems need not track expenses by site. However, all pre-remedial costs must be documented under a single Superfund account number designated specifically for the pre-remedial activity.

(4) *Accounting system control procedures.* Except as provided for in paragraph (a)(3) of this section, accounting system control procedures must ensure that accounting information is:

(i) Accurate, charging only costs attributable to the site and activity; and

(ii) Complete, recording and charging to individual sites and activities all costs attributable to the recipient's CERCLA effort.

(5) *Financial reporting.* The recipient's accounting system must use actual costs as the basis for all reports of direct site charges. The recipient must comply with the requirements for financial reporting contained in § 35.6670 of this subpart.

(b) *Recordkeeping system standards.* (1) The recipient must maintain a recordkeeping system that consists of complete site-specific files containing documentation of costs incurred.

(2) The recipient must provide this site-specific documentation to the EPA Regional Office upon request and within specified time frames (generally within 30 days of request).

(3) In addition, the recipient and the recipient's contractors must comply with the requirements regarding records described in §§ 35.6700, 35.6705, and 35.6710 of this subpart. The recipient must comply with the requirements regarding source documentation described in 40 CFR 31.20(b)(6).

(4) For the pre-remedial activity, the recordkeeping system must comply with the requirements described in paragraph (a)(3) of this section.

§ 35.6255 Period for availability of funds.

The recipient must comply with the requirements regarding the availability of funds described in 40 CFR 31.23.

§ 35.6260 Cost sharing.

The recipient may not use costs incurred at one site to meet the cost sharing obligation at another site. However, the recipient may apply excess credits from one site to the required cost-share at another site. See § 35.6270(c)(3) of this subpart for the requirements regarding the use of excess credits. The recipient must comply with the requirements regarding cost sharing described in 40 CFR 31.24.

§ 35.6265 Payments.

(a) *General.* In addition to the following requirements, the recipient must comply with the requirements regarding payment described in 40 CFR 31.21 (f) through (h).

(1) *Assignment of payment.* The recipient cannot assign the right to receive payments under the recipient's cooperative agreement. EPA will make payments only to the payee identified in the cooperative agreement.

(2) *Interest.* If the recipient earns interest on an advance of EPA funds, the recipient must return the interest unless the recipient is a State or State agency as defined under section 203 of the Intergovernmental Cooperation Act of 1968, or a tribal organization as defined under section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93–638).

(b) *Payment Method*—(1) *Letter of credit.* In order to receive payment by the letter of credit method, the recipient must comply with the requirements regarding letter of credit described in 40 CFR 31.20(b)(7) and 31.21(b). The recipient must attribute costs to specific sites and activities for drawdown purposes except for the pre-remedial activity.

(2) *Reimbursement.* If the recipient is unable to meet letter of credit requirements, EPA will pay the recipient by reimbursement. The recipient must comply with the requirements regarding reimbursement described in 40 CFR 31.21(d).

§ 35.6270 Recipient payment of response costs.

The recipient may pay for its share of response costs using cash, services, credits or any combination of these, as follows:

(a) *Cash.* The recipient may pay for its share of response costs in the form of cash.

(b) *Services.* The recipient may provide equipment and services to satisfy its cost share requirements under cooperative agreements. The recipient must comply with the requirements regarding in-kind and donated services described in 40 CFR 31.24 (b) and (c).

(c) *Credit*—(1) *General credit requirements.* Credits are limited to State expenses that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-Federal funds for remedial action. Credits are established on a site-specific basis. Only a State may claim credit.

(i) The State may claim credit for response activity expenditures or obligations incurred by the State or political subdivision between January 1, 1978 and December 11, 1980.

(ii) The State may claim credit for remedial action expenditures incurred by the State after October 17, 1986.

(iii) The State may not claim credit for removal actions taken after December 11, 1980.

(2) *Credit submission requirements*—(i) *Expenditures incurred before a site is listed on the NPL.* Although EPA may require additional documentation, the State must submit the following before EPA will approve the use of the credit:

(A) Specific amounts claimed for credit, by site (estimated amounts are unacceptable), based on supporting cost documentation;

(B) Units of government (State agency, county, local) that incurred the costs, by site;

(C) Description of the specific function performed by each unit of government at each site;

(D) Certification (signed by the State's fiscal manager or the financial director for each unit of government) that credit costs have not been previously reimbursed by the Federal government or any other party, and have not been used for matching purposes under any other Federal program or grant; and

(E) Documentation, if requested by EPA, to ensure the actions undertaken at the site are cost eligible and consistent with CERCLA, as amended, and the NCP requirements. This requirement does not apply for costs incurred before December 11, 1980.

(ii) *Expenditures incurred after a site is listed on the NPL.* A State may receive credit for remedial action expenditures after October 17, 1986, only if the State entered into a cooperative agreement before incurring costs at the site.

(3) *Use of credit.* The State must first apply credit at the site at which it was earned. With the approval of EPA, the State may use excess credit earned at one site for its cost share at another site. EPA will not reimburse excess credit.

(4) *Credit verification.* Credits are subject to verification by audit and technical review of actions performed at sites.

(d) *Advance match.* (1) A cooperative agreement entered into after October 17, 1986 cannot authorize a State to contribute funds during remedial planning and then apply those contributions to the remedial action cost share (advance match).

(2) A State may seek reimbursement for costs incurred under cooperative agreements which authorize advance match.

(3) Reimbursements are subject to the availability of appropriated funds.

(4) If the State does not seek reimbursement, EPA will apply the advance match to off-set the State's required cost share for remedial action at the site. The State may not use advance match for credit at any other site nor may the State receive reimbursement until the conclusion of CERCLA-funded remedial response activities.

(5) Claims for advance match are subject to verification by audit.

§ 35.6275 Program income.

The recipient must comply with the requirements regarding program income described in 40 CFR 31.25.

Personal Property Requirements Under a Cooperative Agreement

§ 35.6300 General personal property acquisition and use requirements.

(a) *General.* (1) Property may be acquired only when authorized in the cooperative agreement.

(2) The recipient must acquire the property during the approved project period.

(3) The recipient must:

(i) Charge property costs by site and activity;

(ii) Document the use of the property; and

(iii) Solicit and follow EPA's instructions on the disposal of any property purchased with CERCLA funds as specified in §§ 35.6340 and 35.6345 of this subpart.

(b) *Exception.* The recipient is not required to charge property costs by site under a pre-remedial or Core Program Cooperative Agreement.

§ 35.6305 Obtaining supplies.

To obtain supplies, the recipient must agree to comply with the requirements in §§ 35.6300, 35.6315(b), and 35.6325 through 35.6335 of this subpart.

§ 35.6310 Obtaining equipment.

To obtain equipment, the recipient must agree to comply with the requirements in § 35.6300 and §§ 35.6315 through 35.6350 of this subpart.

§ 35.6315 Alternative methods for obtaining property.

(a) *Purchase with recipient funds.* The recipient may purchase equipment with the recipient's own funds and may charge EPA a fee for using equipment on a CERCLA-funded project. The fee must be based on a usage rate, subject to the usage rate requirements in § 35.6320 of this subpart.

(b) *Borrow Federally owned property.* The recipient may borrow Federally owned property, with the exception of motor vehicles, for use on CERCLA-funded projects. The loan of the Federally owned property may only extend through the project period. At the end of the project period, or when the Federally owned property is no longer needed for the project, the recipient must return the property to the Federal Government.

(c) *Lease, use contractor services, or purchase with CERCLA funds.* To acquire equipment through lease, use of contractor services, or purchase with CERCLA funds, the recipient must conduct and document a cost comparison analysis to determine which of these methods of obtaining equipment is the most cost effective. In order to obtain the equipment, the recipient must submit documentation of the cost comparison analysis to EPA for approval. The recipient must obtain the equipment through the most cost effective method, subject to the requirements listed below:

(1) *Lease or rent equipment.* If it is the most cost effective method of acquisition, the recipient may lease or rent equipment, subject only to the requirements in § 35.6300 of this subpart.

(2) *Use contractor services.* (i) If it is the most cost effective method of acquisition, the recipient may hire the services of a contractor.

(ii) The recipient must obtain award official approval before authorizing the contractor to purchase equipment with CERCLA funds. (See § 35.6325 of this subpart regarding the title and vested interest of equipment purchased with CERCLA funds.) This does not apply for recipients who have used the sealed bids method of procurement.

(iii) The recipient must require the contractor to allocate the cost of the contractor services by site and activity.

(3) *Purchase equipment with CERCLA funds.* If equipment purchase is the most cost-effective method of obtaining the equipment, the recipient may purchase the equipment with CERCLA funds. To purchase equipment with CERCLA funds, the recipient must comply with the following requirements:

(i) The recipient must include in the cooperative agreement application a list of all items of equipment to be purchased with CERCLA funds, with the price of each item.

(ii) If the equipment is to be used on more than one site, the recipient must allocate the cost of the equipment by site and activity by applying a usage rate subject to the usage rate requirements in § 35.6320 of this subpart.

(iii) The recipient may not use CERCLA funds to purchase a transportable or mobile treatment system.

§ 35.6320 Usage rate.

(a) *Usage rate approval.* To charge EPA a fee for use of equipment purchased with recipient funds or to allocate the cost of equipment by site and activity, the recipient or the recipient's contractor must apply a usage rate. The recipient must submit documentation of the usage rate computation to EPA. EPA must approve the usage rate.

(b) *Usage rate application.* The recipient or the recipient's contractor must record the use of the equipment by site and activity and must apply the usage rate to calculate equipment charges by site and activity. For Core Program and pre-remedial activities, the recipient is not required to apply a usage rate.

§ 35.6325 Title and EPA interest in CERCLA-funded property.

(a) *EPA's interest in CERCLA-funded property.* EPA has an interest (the percentage of EPA's participation in the total award) in both equipment and supplies purchased with CERCLA funds.

(b) *Title in CERCLA-funded property.* Title in both equipment and supplies purchased with CERCLA funds vests in the recipient.

(1) *Right to transfer title.* EPA retains the right to transfer title of all property purchased with CERCLA funds to the Federal Government or a third party within 120 calendar days after project completion or at the time of disposal.

(2) *Equipment used as all or part of the remedy.* The following requirements apply to equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA will relinquish its interest in the title to fixed

in-place equipment after certifying that the remedy is functional and operational.

(ii) *Equipment that is an integral part of services to individuals.* EPA will relinquish its interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, when EPA certifies that the remedy is functional and operational.

§ 35.6330 Title to Federally owned property.

Title to all Federally owned property vests in the Federal Government.

§ 35.6335 Property management standards.

The recipient and the recipient's contractor must comply with the following property management standards for property purchased with CERCLA funds. The recipient may use its own property management system if it meets the following standards.

(a) *Control.* The recipient must maintain:

(1) *Property records* for CERCLA-funded property which include the contents specified in § 35.6700(c) of this subpart.

(2) *A control system* which ensures adequate safeguards for prevention of loss, damage, or theft of the property. The recipient must make provisions for the thorough investigation and documentation of any loss, damage, or theft;

(3) *Procedures* to ensure maintenance of the property in good condition and periodic calibration of the instruments used for precision measurements;

(4) *Sales procedures* to ensure the highest possible return, if the recipient is authorized to sell the property;

(5) *Provisions for financial control and accounting* in the financial management system of all equipment; and

(6) *Identification* of all Federally owned property.

(b) *Inventory and reporting for CERCLA-funded equipment*—(1) *Physical inventory.* The recipient must conduct a physical inventory at least once every two years for all equipment except that which is part of the in-place remedy. The recipient must reconcile physical inventory results with the equipment records.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports set forth in § 35.6660 of this subpart.

(c) *Inventory and reporting for Federally owned property*—(1) *Physical inventory.* The recipient must conduct a physical inventory:

(i) Annually;

(ii) When the property is no longer needed; and

(iii) Within 90 days from the end of the project period.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports in § 35.6660 of this subpart.

§ 35.6340 Disposal of CERCLA-funded property.

(a) *Equipment.* For equipment which is no longer needed, or at the end of the project period, whichever is earlier, the recipient must:

(1) Analyze two alternatives: the cost of leaving the equipment in place, and the cost of removing the equipment and disposing of it in another manner.

(2) Document the analysis of the two alternatives in the inventory report. See § 35.6660 of this subpart regarding requirements for the inventory report.

(i) If it is most cost-effective to remove the equipment and dispose of it in another manner:

(A) If the equipment has a residual fair market value of $5,000 or more, the recipient must request disposition instructions from EPA in the inventory report. See § 35.6345 of this subpart for equipment disposal options.

(B) If the equipment has a residual fair market value of less than $5,000, the recipient may retain the equipment for the recipient's use on another CERCLA site. If, however, there is any remaining residual value at the time of final disposition, the recipient must reimburse the Hazardous Substance Superfund for EPA's vested interest in the current fair market value of the equipment at the time of disposition.

(ii) If it is most cost-effective to leave the equipment in place, recommend in the inventory report that the equipment be left in place.

(3) Submit the inventory report to EPA, even if EPA has stopped supporting the project.

(b) *Supplies.* (1) If supplies have an aggregate fair market value of $5,000 or more at the end of the project period, the recipient must take one of the following actions at the direction of EPA:

(i) Use the supplies on another CERCLA site and reimburse the original site for the fair market value of the supplies;

(ii) If both the recipient and EPA concur, keep the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies; or

(iii) Sell the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies, less any reasonable selling expenses.

(2) If the supplies remaining at the end of the project period have an aggregate fair market value of less than $5,000, the recipient may keep the supplies to use on another CERCLA site. If the recipient cannot use the supplies on another CERCLA site, then the recipient may keep or sell the supplies without reimbursing the Hazardous Substance Superfund.

§ 35.6345 Equipment disposal options.

The following disposal options are available:

(a) Use the equipment on another CERCLA site and reimburse the original site for the fair market value of the equipment;

(b) If both the recipient and EPA concur, keep the equipment and reimburse the Hazardous Substance Superfund, for EPA's interest in the current fair market value of the equipment;

(c) Sell the equipment and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the equipment, less any reasonable selling expenses; or

(d) Return the equipment to EPA and, if applicable, EPA will reimburse the recipient for the recipient's proportionate share in the current fair market value of the equipment.

§ 35.6350 Disposal of Federally owned property.

When Federally owned property is no longer needed, or at the end of the project, the recipient must inform EPA that the property is available for return to the Federal Government. EPA will send disposition instructions to the recipient.

Real Property Requirements Under a Cooperative Agreement

§ 35.6400 Acquisition and transfer of interest.

(a) An interest in real property may be acquired only with prior approval of EPA.

(1) If a State or Federally recognized Indian Tribe acquires real property in order to conduct the response, the recipient with jurisdiction over the real property must agree to acquire and hold the necessary real property interest.

(2) If it is necessary for the Federal Government to acquire the interest in real property to permit conduct of the response, the State or Federally recognized Indian Tribe must agree to accept transfer of the acquired interest on or before the completion of the

response action. States and Federally recognized Indian Tribes must follow the requirements in § 35.6105(b)(5) and 35.6110(b)(2) of this subpart. Political subdivisions must follow the requirements in § 35.6815(c) of this subpart.

(b) The State or Federally recognized Indian Tribe must comply with applicable Federal regulations for real property acquisition under assistance agreements contained in part 4 of this chapter.

§ 35.6405 Use.

The recipient must comply with the requirements regarding real property described in 40 CFR 31.31.

Copyright Requirements Under a Cooperative Agreement

§ 35.6450 General requirements.

The recipient must comply with the requirements regarding copyrights described in 40 CFR 31.34. The recipient must comply with the requirements regarding contract copyright provisions described in § 35.6595(b)(3) of this subpart.

Use of Recipient Employees ("Force Account") Under a Cooperative Agreement

§ 35.6500 General requirements.

(a) Force Account work is the use of the recipient's own employees or equipment for construction, construction-related activities (including architecture and engineering services), or repair or improvement to a facility. When using Force Account work, the recipient must demonstrate that the employees can complete the work as competently as, and more economically than, contractors, or that an emergency necessitates the use of the Force Account.

(b) Where the value of Force Account services exceeds $25,000, the recipient must receive written authorization for use from the award official.

Procurement Requirements Under a Cooperative Agreement

§ 35.6550 Procurement system standards.

(a) *Recipient standards*—(1) *Procurement system evaluation.*

(i) An applicant or recipient must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700–48) and submit the form to EPA with its application.

(ii) The certification will be valid for two years or for the length of the project period specified in the cooperative agreement, whichever is greater, unless the recipient substantially revises its procurement system or the award official determines that the recipient is not following the intent of the requirements in this part (see paragraph (a)(4) of this section regarding EPA right to review). If the recipient substantially revises its procurement system, the recipient must re-evaluate its system and submit a revised EPA Form 5700–48.

(2) *Certified procurement system.* Even if the applicant or recipient has certified that its procurement system meets the intent of the requirements of this subpart, the EPA award official retains the authority as stated in:

(i) Section 35.6565(d)(1)(iii), "Noncompetitive proposals," regarding award official authorization of noncompetitive proposals;

(ii) Section 35.6565(b), "Sealed bids (formal advertising)," regarding award official approval for the use of a procurement method other than sealed bidding for a construction award;

(iii) 40 CFR 31.36(b)(12), "Protests," regarding EPA review of protests; and

(iv) 40 CFR 31.36(g)(2)(ii), "Awarding Agency Review," regarding the review of proposed awards over $25,000 which are to be awarded to other than the apparent low bidder under a sealed bid procurement.

(3) *Noncertified procurement system.* If the applicant or recipient has not certified that its procurement system meets the intent of the requirements of this subpart, then the recipient must follow the requirements of this subpart and allow EPA preaward review of proposed procurement actions that will use EPA funds. In addition, the recipient with a noncertified procurement system must comply with the following requirements:

(i) The recipient's contractors and subcontractors must submit their cost or price data on EPA Form 5700–41, "Cost or Price Summary Format for Subagreements Under U.S. EPA Grants," or in another format which provides information similar to that required by EPA Form 5700–41. This specific requirement is an addition to the requirements regarding cost and price analysis described in § 35.6585 of this subpart.

(ii) When soliciting bids or proposals, the recipient must allow at least 30 days between public notice of the project and the deadline for receipt of bids or proposals. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over a reasonable area.

(4) *EPA review.* EPA reserves the right to review any recipient's procurement system or procurement action under a cooperative agreement.

(5) *Code of conduct.* The recipient must comply with the requirements of 40 CFR 31.36(b)(3), which describes standards of conduct for employees, officers, and agents of the recipient.

(6) *Completion of contractual and administrative issues.* The recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgement and good administrative practice of all contractual and administrative issues arising out of procurements under the cooperative agreement. EPA will not substitute its judgement for that of the recipient unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, tribal, or Federal authority having proper jurisdiction.

(7) *Selection procedures.* The recipient must have written selection procedures for procurement transactions.

(i) EPA may not participate in a recipient's selection panel except to provide technical assistance. EPA staff providing such technical assistance:

(A) Shall constitute a minority of the selection panel (limited to making recommendations on qualified offers and acceptable proposals based on published evaluation criteria) for the contractor selection process; and

(B) Are not permitted to participate in the negotiation and award of contracts.

(ii) When selecting a contractor, recipients:

(A) May not use EPA contractors to provide any support related to procuring a State contractor.

(B) May use the Corps of Engineers for review of State bidding documents, requests for proposals and bids and proposals received.

(8) *Award.* The recipient may award a contract only to a responsible contractor, as described in 40 CFR 31.36(b)(8), and must ensure that each contractor performs in accordance with all the provisions of the contract (see also § 35.6560 of this subpart regarding debarred and suspended contracts).

(9) *Protest procedures.* The recipient must comply with the requirements described in 40 CFR 31.36(b)(12) regarding protest procedures.

(10) *Reporting.* The recipient must comply with the requirements for procurement reporting contained in § 35.6665 of this subpart.

(11) *Intergovernmental agreements.* To foster greater economy and efficiency, recipients are encouraged to enter into State and local

intergovernmental agreements for procurement or use of common goods and services.

(12) *Value engineering.* The recipient is encouraged to include value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

(b) *Contractor standards*—(1) *Disclosure requirements regarding Potentially Responsible Party relationships.* The recipient must require each prospective contractor to provide with its bid or proposal:

(i) Information on its financial and business relationship with all PRP's at the site, and with their parent companies, subsidiaries, affiliates, subcontractors, and current clients or attorneys and agents (this disclosure requirement encompasses past and anticipated financial and business relationships, including services related to any proposed or pending litigation, with such parties);

(ii) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

(iii) A statement that it shall disclose immediately any such information discovered after submission of its bid or proposal or after award. The recipient shall evaluate such information and if a member of the contract team has a conflict of interest which prevents the team from serving the best interests of the recipient, the prospective contractor may be declared nonresponsible and the contract awarded to the next eligible bidder or offeror.

(2) *Conflict of interest*—(i) *Conflict of interest notification.* The contractor shall notify the recipient of any actual, apparent, or potential conflict of interest regarding any individual working on a contract assignment or having access to information regarding the contract. This notification shall include both organizational conflicts of interest and personal conflicts of interest. If a personal conflict of interest exists, the individual who is affected shall be disqualified from taking part in any way in the performance of the assigned work that created the conflict of interest situation.

(ii) *Contract provisions.* The recipient must incorporate the following provisions of their equivalents into all contracts:

(A) *Contractor data.* The contractor shall not provide data generated or otherwise obtained in the performance of contractor responsibilities under a contract to any party other than the recipient, EPA, or its authorized agents.

(B) *Employment.* The contractor shall not accept employment from any party other than the recipient or Federal agencies for work directly related to the site(s) covered under the contract for three years after the contract has terminated, or until any cost recovery action related to the site(s) is completed, whichever is longer. The recipient agency may exempt the contractor from this requirement through a written release. This release must include EPA concurrence.

(C) *Activity and cost documentation.* For six years after the contract has terminated, or until any cost recovery action related to the site(s) is completed, whichever is longer, the contractor shall provide witnesses and documentation of activities performed and costs incurred under the contract upon request to the recipient, EPA, or its authorized agents. The contractor shall be entitled to reasonable compensation for any such activities performed.

(3) *Certification of independent price determination.* The recipient must require that each contractor include in its bid or proposal a certification of independent price determination. This document certifies that no collusion, as defined by Federal and State antitrust laws, occurred during bid preparation.

§ 35.6555 Competition.

The recipient must conduct all procurement transactions in a manner providing maximum full and open competition.

(a) *Restrictions on competition.* Inappropriate restrictions on competition include the following:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding requirements;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive awards to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a "brand name" product, instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) *Geographic and Federally recognized Indian Tribe preferences*—(1) *Geographic.* When conducting a procurement, the recipient must prohibit the use of statutorily or admininstratively imposed in-State or local geographical preferences in evaluating bids or proposals. However, nothing in this section preempts State licensing laws. In addition, when contracting for architectural and engineering (A/E) services, the recipient may use geographic location as a selection criterion, provided that when geographic location is used, its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(2) *Federally recognized Indian Tribe.* If the project benefits Indians, the recipient must comply with the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93–638).

(c) *Written specifications.* The recipient's written specifications must include a clear and accurate description of the technical requirements and the qualitative nature of the material, product or service to be procured.

(1) This description must not contain features which unduly restrict competition, unless the features are necessary to:

(i) Test or demonstrate a specific thing;

(ii) Provide for necessary interchangeability of parts and equipment; or

(iii) Promote innovative technologies.

(2) The recipient must avoid the use of detailed product specifications if at all possible.

(d) *Public notice.* When soliciting bids or proposals, the recipient must give adequate (generally 30 days before receipt of bids or proposals) public notice of the proposed project. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over reasonable area. Recipients with a non-certfified procurement system must follow the public notice requirements described in § 35.6550(a)(3)(ii) of this subpart.

(e) *Prequalified lists.* Recipients may use prequalified lists of persons, firms, or products to acquire goods and services. The list must be current and include enough qualified sources to ensure maximum open and free competiton. Recipients must not preclude potential bidders from qualifying during the solicitation period.

§ 35.6560 Master list of debarred, suspended, and voluntarily excluded persons.

While evaluating bids or proposals, the recipient and its contractor must consult the most current "List of Parties Excluded from Federal Procurement or Nonprocurement Programs" to ensure that the firms submitting proposals are not prohibited from participation in

assistance programs. The recipient and its contractor must comply with the requirements regarding subawards to debarred and suspended parties described in 40 CFR 31.35.

§ 35.6565 Procurement methods.

The recipient must comply with the requirements for payment to consultants described in 40 CFR 31.36(j). In addition, the recipient must comply with the following requirements:

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, the recipient must obtain and document price or rate quotations from an adequate number of qualified sources.

(b) *Sealed bids (formal advertising).* (For a construction award, the recipient must obtain the award official's approval to use a procurement method other than the sealed bid method.) Bids are publicly solicited and a fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.

(1) In order for the recipient to use the sealed bid method, the following conditions must be met:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If the recipient uses the sealed bid method, the recipient must comply with the following requirements:

(i) Publicly advertise the invitation for bids and solicit bids from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(ii) The invitation for bids, which must include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) Publicly open all bids at the time and place prescribed in the invitation for bids;

(iv) Award the fixed-price contract in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, the recipient shall consider factors such as discounts, transportation cost, and life cycle costs in determining which bid is lowest. The recipient may only use payment discounts to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) If there is a sound documented reason, the recipient may reject any or all bids.

(c) *Competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If the recipient uses the competitive proposal method, the following requirements apply:

(1) Recipients must publicize requests for proposals and all evaluation factors and must identify their relative importance. The recipient must honor any response to publicized requests for proposals to the maximum extent practical;

(2) Recipients must solicit proposals from an adequate number of qualified sources;

(3) Recipients must have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Recipients must award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) Recipients may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitor's qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. This method, where price is not used as a selection factor, may only be used in the procurement of A/E professional services. The recipient may not use this method to purchase other types of services even though A/E firms are a potential source to perform the proposed effort.

(d) *Noncompetitive proposals.* (1) The recipient may procure by noncompetitive proposals only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals, and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (a declaration of an emergency under State law does not necessarily constitute an emergency under the EPA Superfund program's criteria);

(iii) The award official authorized noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined to be inadequate.

(2) When using noncompetitive procurement, the recipient must conduct a cost analysis in accordance with the requirements described in § 35.6585 of this subpart.

§ 35.6570 Use of the same engineer during subsequent phases of the project.

(a) If the public notice clearly stated the possibility that the firm or individual selected could be awarded a contract for follow-on services and initial procurement complied with the procurement request of this subpart, the recipient of a CERCLA remedial response cooperative agreement may use the engineer procured to conduct any or all of the remedial investigation (RI), the feasibility study (FS), or design to perform follow-on engineering activities under the remedial response without going through the public notice and evaluation procedures.

(b) The recipient may also use the same engineer during subsequent phases of the project in the following cases:

(1) Where the recipient conducted the RI, FS, or design activities without EPA assistance but is using EPA funds for follow-on activities, the recipient may use the engineer for subsequent work provided the recipient certifies:

(i) That it complied with the procurement requirements in § 35.6565 of this subpart when it selected the engineer and the code of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any EPA-funded contract between the engineer and the recipient meets all of the other provisions as described in the procurement requirements in this subpart.

(2) Where EPA conducted the RI, FS, or design activities but the recipient will assume the responsibility for subsequent phases of remedial response under a cooperative agreement, the recipient may use, with the award official's approval, EPA's engineer contractor without further public notice or evaluation provided the recipient follows the rest of the procurement requirements of this subpart to award the contract.

§ 35.6575 Restrictions on types of contracts.

(a) *Prohibited contracts.* The recipient's procurement system must not allow cost-plus-percentage-of-cost (e.g.,

a multiplier which includes profit) or percentage-of-construction-cost types of contracts.

(b) *Removal.* Under a removal cooperative agreement, the recipient must award a fixed price contract (lump sum, unit price, or a combination of the two) when procuring contractor support, regardless of the procurement method selected, unless the recipient obtains the award official's prior written approval.

(c) *Time and material contracts.* The recipient may use time and material contracts only if no other type of contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.

§ 35.6580 Contracting with minority and women's business enterprises (MBE/WBE), small businesses, and labor surplus area firms.

(a) *Procedures.* The recipient must comply with the six steps described in 40 CFR 31.36(e)(2) to ensure that MBE's, WBE's and small businesses are used whenever possible as sources of supplies, construction, and services.

(b) *Labor surplus firms.* EPA encourages recipients to procure supplies and services from labor surplus area firms.

(c) *"Fair share" objectives.* It is EPA's policy that recipients award a fair share of contracts to small, minority and women's businesses. The policy requires that fair share objectives for minority and woman-owned business enterprises be negotiated with the States and/or recipients, but does not require fair share objectives be established for small businesses.

(1) Each recipient must establish an annual "fair share" objective for MBE and WBE use. A recipient is not required to attain a particular statistical level of participation by race, ethnicity, or gender of the contractor's owners or managers.

(2) If the recipient is awarded more than one cooperative agreement during the year, the recipient may negotiate an annual fair share for all cooperative agreements for that year. It is not necessary to have a fair share for each cooperative agreement. When a cooperative agreement is awarded to a recipient with which a "fair share" agreement has not been negotiated, the recipient must not award any contracts under the cooperative agreement until the recipient has negotiated a fair share objective with EPA.

§ 35.6585 Cost and price analysis.

(a) *General.* The recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification.

(1) *Cost analysis.* The recipient must conduct and document a cost analysis for all negotiated contracts over $25,000 and for all change orders regardless of price. A cost analysis is not required when adequate price competition exists and the recipient can establish price reasonableness. The recipient must base its determination of price reasonableness on a catalog or market price of a commercial product sold in substantial quantities to the general public, or on prices set by law or regulation.

(2) *Price analysis.* In all instances other than those described in (a)(1) of this section, the recipient must perform a price analysis to determine the reasonableness of the proposed contract price.

(b) *Profit analysis.* For each contract in which there is no price competition and in all cases in which cost analysis is performed, the recipient must negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

§ 35.6590 Bonding and insurance.

(a) *General.* The recipient must meet the requirements regarding bonding described in 40 CFR 31.36(h). The recipient must clearly and accurately state in the contract documents the bonds and insurance requirements, including the amounts of security coverage that a bidder or offeror must provide.

(b) *Indemnification.* When adequate pollution liability insurance is not available to the contractor, EPA may indemnify response contractors for liability related to damage from releases arising out of the contractor's negligent performance. The recipient must comply with the requirements regarding indemnification described in section 119 of CERCLA, as amended.

(c) *Accidents and catastrophic loss.* The contractor must provide insurance against accidents and catastrophic loss to manage any risk inherent in completing the project.

§ 35.6595 Contract provisions.

(a) *General.* Each contract must be a sound and complete agreement, and include the following provisions:

(1) Nature, scope, and extent of work to be performed;

(2) Time frame for performance;

(3) Total cost of the contract; and

(4) Payment provisions.

(b) *Other contract provisions.* Recipients' contracts must include the following provisions:

(1) *Energy efficiency.* A contract must comply with mandatory standards and policies on energy efficiency contained in the State's energy conservation plan which is issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163).

(2) *Violating facilities.* Contracts in excess of $100,000 must contain a provision which requires contractor compliance with all applicable standards, orders or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and EPA regulations (40 CFR Part 15) which prohibit the use of facilities included on the EPA List of Violating Facilities under nonexempt Federal contracts, grants or loans.

(3) *Patents, inventions, and copyrights.* All contracts must include notice of EPA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed while conducting work under a contract. This notice shall also include EPA requirements and regulations pertaining to copyrights and rights to data contained in 40 CFR 31.34.

(4) *Labor standards.* (i) The recipient must include a copy of EPA Form 5720–4 ("Labor Standards Provisions for Federally Assisted Construction Contracts") in each contract for construction (as defined by the Secretary of Labor). The form contains the Davis-Bacon Act requirements (40 U.S.C. 276a–276a–7), the Copeland Regulations (29 CFR Part 3), the Contract Work Hours and Safety Standards Act Overtime Compensation (940 U.S.C. 327–333), and the nondiscrimination provisions in Executive Order 11246, as amended.

(ii) If the contract is solely for dismantling or demolition of buildings, ground improvements, and other real property structures, and the removal of such structures or portions of them, the Davis-Bacon Act does not apply unless further work will result in construction at that location, even though by separate contract.

(5) *Conflict of interest.* The recipient must include provisions pertaining to

conflict of interest as described in § 35.6550(b)(2)(ii) of this subpart.

(c) *Model clauses.* The recipient must comply with the requirements regarding model contract clauses described in 40 CFR 33.1030.

§ 35.6600 Contractor claims.

(a) *General.* The recipient must conduct an administrative and technical review of each claim before EPA will consider funding these costs.

(b) *Claims settlement.* The recipient may incur costs (including legal, technical and administrative) to assess the merits of or to negotiate the settlement of a claim by or against the recipient under a contract, provided:

(1) The claim arises from work within the scope of the cooperative agreement;

(2) A formal cooperative agreement amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the recipient; and

(4) The award official determines that there is a significant Federal interest in the issues involved in the claim.

(c) *Claims defense.* The recipient may incur costs (including legal, technical and administrative) to defend against a contractor claim for increased costs under a contract or to prosecute a claim to enforce a contract provided:

(1) The claim arises from work within the scope of the cooperative agreement;

(2) A formal cooperative agreement amendment is executed specifically covering the costs before they are incurred;

(3) Settlement of the claim cannot occur without arbitration or litigation;

(4) The claim does not result from the recipient's mismanagement;

(5) The award official determines that there is a significant Federal interest in the issues involved in the claim; and

(6) In the case of defending against a contractor claim, the claim does not result from the recipient's responsibility for the improper action of others.

§ 35.6605 Privity of contract.

Neither EPA nor the United States shall be a party to any contract nor to any solicitation or request for proposals.

§ 35.6610 Contracts awarded by a contractor.

A contractor must comply with the following provisions in the award of contracts (i.e., subcontracts). (This section does not apply to a supplier's procurement of materials to produce equipment, materials and catalog, off-the-shelf, or manufactured items.)

(a) The requirements regarding debarred, suspended, and voluntarily excluded persons in § 35.6560 of this subpart.

(b) The limitations on contract award in § 35.6550(a)(8) of this subpart.

(c) The requirements regarding minority and women's business enterprises, and small business in § 35.6580 of this subpart.

(d) The requirements regarding specifications in § 35.6555 (a)(6) and (c) of this subpart.

(e) The Federal cost principles in 40 CFR 31.22.

(f) The prohibited types of contracts in § 35.6575(a) of this subpart.

(g) The cost, price analysis, and profit analysis requirements in § 35.6585 of this subpart.

(h) The applicable provisions in § 35.6595 (b) and (c) of this subpart.

(i) The applicable provisions in § 35.6555(b)(2).

Reports Required Under a Cooperative Agreement

§ 35.6650 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly. EPA may not require submission of progress reports more often than quarterly.

(b) *Content for pre-remedial, remedial, enforcement, and removal progress reports.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, delays or other problems, if any, and a description of the corrective measures that are planned. For pre-remedial cooperative agreements, the report must include a list of the site-specific products completed and the number of technical hours spent to complete each product.

(2) A comparison of the percentage of the project completed to the project schedule, and an explanation of significant discrepancies.

(3) A comparison of the estimated funds spent to date to planned expenditures and an explanation of significant discrepancies. For pre-remedial cooperative agreements, the report should compare aggregated expenditures. For remedial, enforcement, and removal reports, the comparison must be on a per task basis.

(4) An estimate of the time and funds needed to complete the work required in the cooperative agreement, a comparison of that estimate to the time and funds remaining, and a justification for any increase.

§ 35.6655 Notification of significant developments.

Events may occur between the scheduled performance reporting dates which have significant impact upon the cooperative agreement-supported activity. In such cases, the recipient must inform the EPA project officer as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

§ 35.6660 Property inventory reports.

(a) *CERCLA-funded property*—(1) *Content.* The report must contain the following information:

(i) Classification and value of remaining supplies;

(ii) Description of all equipment purchased with CERCLA funds, including its current condition;

(iii) Verification of the current use and continued need for the equipment by site and activity;

(iv) Notification of any property which has been stolen or vandalized; and

(v) A request for disposition instructions for any equipment no longer needed on the project.

(2) *Reporting frequency.* The recipient must submit an inventory report to EPA at the following times:

(i) Within 90 days after completing any response activity at a site; and

(ii) When the equipment is no longer needed for any response activity at a site.

(b) *Federally owned property*—(1) *Content.* The recipient must include the following information for each Federally-owned item in the inventory report:

(i) Description;

(ii) Decal number;

(iii) Current condition; and

(iv) Request for disposition instructions.

(2) *Reporting frequency.* The recipient must submit an inventory report to the appropriate EPA property accountable officer at the following times:

(i) Annually, due to EPA on the anniversary date of the award;

(ii) When the property is no longer needed; and

(iii) Within 90 days after the end of the project period.

§ 35.6665 Procurement reports.

(a) *Report for the Department of Labor (DOL)*—(1) *Content.* The recipient must notify the DOL Regional Office of Compliance, in writing, of each construction contract which has or is expected to have an aggregate value of over $10,000 within a 12-month period. The report must include the following:

(i) Construction contractor's name, address, telephone number, and employee identification number;

(ii) Award amount;

(iii) Estimated start and completion dates; and

(iv) Project number, name, and site location.

(2) *Reporting frequency.* The recipient must notify the DOL Office of Compliance within 10 calendar days after the award of each such construction contract. The recipient must submit a copy of the report to the EPA project officer.

(b) *Name of contractor.*—(1) *Content.* For construction contracts over $25,000, the recipient must submit the name of the contractor to the project officer.

(2) *Reporting frequency.* The recipient must submit the name of the contractor to the project officer within 10 calendar days after the award of each such construction contract.

(c) *Minority and women's business enterprises (MBE/WBE)*—(1) *Content.* The recipient must report on its use of MBE and WBE firms by submitting a completed Minority and Women's Business Utilization Report (SF–334) to the award official.

(2) *Reporting frequency.* The recipient must submit the MBE/WBE Utilization Report within 30 days after the end of each Federal fiscal quarter, regardless of whether the recipient awards a contract to an MBE or WBE during that quarter. Reporting commences with the recipient's award of its first contract and continues until they and their contractors have awarded their last contract for the activities or tasks identified in the cooperative agreement.

§ 35.6670 Financial Reports.

(a) *General.* The recipient must comply with the requirements regarding financial reporting described in 40 CFR 31.41.

(b) *Financial Status Report.*—(1) *Content.* (i) The Financial Status Report (SF–269) must include site and activity-specific financial information.

(ii) A final Financial Status Report (FSR) must have no unliquidated obligations. If any obligations remain unliquidated, the FSR is considered an interim report and the recipient must submit a final FSR to EPA after liquidating all obligations.

(2) *Reporting frequency.* The recipient must file a Financial Status Report as follows:

(i) Annually (unless the cooperative agreement requires quarterly or semi-annual reports in accordance with 40 CFR 31.41(b)(3)), due 90 days after the cooperative agreement anniversary date if annual reports are required; due 30 days after the reporting period if quarterly or semiannual reports are required;

(ii) Within 90 calendar days after completing each CERCLA-funded response activity at a site (submit the FSR only for each completed activity); and

(iii) Within 90 calendar days after termination or closeout of the cooperative agreement.

Records Requirements Under a Cooperative Agreement

§ 35.6700 Project records.

The recipient is responsible for maintaining project files as described below.

(a) *General.* The recipient must maintain project records by site and activity.

(b) *Financial records.* The recipient must maintain records which support the following items:

(1) Amount of funds received and expended; and

(2) Direct and indirect project cost.

(c) *Property records.* The recipient must maintain records which support the following items:

(1) Description of the property;

(2) Manufacturer's serial number, model number, or other identification number;

(3) Source of the property, including the assistance identification number;

(4) Information regarding whether the title is vested in the recipient or EPA;

(5) Unit acquisition date and cost;

(6) Percentage of EPA's interest;

(7) Location, use and condition (by site and by activity) and the date this information was recorded; and

(8) Ultimate disposition data, including the sales price or the method used to determine the price, or the method used to determine the value of EPA's interest for which the recipient compensates EPA in accordance with § 35.6340, 35.6345, and 35.6350 of this subpart.

(d) *Procurement records*—(1) *General.* The recipient must maintain records which support the following items, and must make them available to the public:

(i) The reasons for rejecting any or all bids; and

(ii) The justification for a procurement made on a noncompetitively negotiated basis.

(2) *Procurements in excess of $25,000.* The recipient's records and files for procurements in excess of $25,000 must include the following information, in addition to the information required in paragraph (d)(1) of this section:

(i) The basis for contractor selection;

(ii) A written justification for selecting the procurement method;

(iii) A written justification for use of any specification which does not provide for maximum free and open competition;

(iv) A written justification for the choice of contract type; and

(v) The basis for award cost or price, including a copy of the cost or price analysis made in accordance with § 35.6585 of this subpart and documentation of negotiations.

(e) *Other records.* The recipient must maintain records which support the following items:

(1) Time and attendance records and supporting documentation;

(2) Documentation of compliance with statutes and regulations that apply to the project; and

(3) The number of site-specific technical hours spent to complete each pre-remedial product.

§ 35.6705 Records retention.

(a) *Applicability.* This requirement applies to all financial and programmatic records, supporting documents, statistical records, and other records which are required to be maintained by the terms of this subpart, program regulations, or the cooperative agreement, or are otherwise reasonably considered as pertinent to program regulations or the cooperative agreement.

(b) *Length of retention period.* The recipient and the recipient's contractor must retain all records for ten years following submission of the final Financial Status Report for the site, and must obtain written approval from the EPA award official before destroying any records. If any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been started before the expiration of the ten-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular ten-year period, whichever is later.

(c) *Substitution of microform.* Microform copies may be substituted for the original records. The recipient must have written EPA approval before destroying original records. The

microform copying must be performed in accordance with the technical regulations concerning micrographics of Federal Government records (36 CFR 1230 et seq.) and EPA records management procedures (EPA Order 2160 [1]).

(d) *Starting date of retention period.* The recipient and the recipient's contractor must comply with the requirements regarding the starting dates for records retention described in 40 CFR 31.42(c) (1) and (2).

§ 35.6710 Records access.

(a) *Recipient requirements.* The recipient must comply with the requirements regarding records access described in 40 CFR 31.42(e).

(b) *Availability of records.* The recipient must, with the exception of certain policy, deliberative, and enforcement documents which may be held confidential, ensure that all files are available to the public.

(c) *Contractor requirements.* The recipient's contractor must comply with the requirements regarding records access described in 40 CFR 31.36(i)(10).

Other Administrative Requirements for Cooperative Agreements

§ 35.6750 Modifications.

The recipient must comply with the requirements regarding changes to the cooperative agreement described in 40 CFR 31.30.

§ 35.6755 Monitoring program performance.

The recipient must comply with the requirements regarding program performance monitoring described in 40 CFR 31.40 (a) and (e).

§ 35.6760 Enforcement and termination for convenience.

The recipient must comply with the requirements regarding enforcement of the terms of an award and termination for convenience described in 40 CFR 31.43 and 31.44.

§ 35.6765 Non-Federal audit.

The recipient must comply with the requirements regarding non-Federal audits described in 40 CFR 31.26.

§ 35.6770 Disputes.

The recipient must comply with the requirements regarding dispute resolution procedures described in 40 CFR 31.70.

[1] Statement of available.

§ 35.6775 Exclusion of third-party benefits.

The cooperative agreement benefits only the signatories to the cooperative agreement.

§ 35.6780 Closeout.

(a) Closeout of a cooperative agreement can take place in the following situations:

(1) After the completion of all work for a response activity;

(2) After all activities under a cooperative agreement have been completed; or

(3) Upon termination of the cooperative agreement.

(b) The recipient must comply with the closeout requirements described in 40 CFR 31.50 and 31.51.

§ 35.6785 Collection of amounts due.

The recipient must comply with the requirements described in 40 CFR 31.52 regarding collection of amounts due.

§ 35.6790 High risk recipients.

If EPA determines that a recipient is not responsible, EPA may impose restrictions on the award as described in 40 CFR 31.12.

Requirements for Administering a Superfund State Contract (SSC)

§ 35.6800 General.

An SSC is required when either EPA or a political subdivision is the lead agency for a CERCLA response.

(a) *EPA-lead SSC.* (1) An SSC with a State or Federally recognized Indian Tribe is required before EPA initiates remedial action during an EPA-lead remedial response.

(2) The State or Federally recognized Indian Tribe must comply with the requirements decribed in §§ 35.6805, 35.6810, and 35.6815 of this subpart.

(b) *Three-party SSC (political subdivision-lead).* (1) An SSC is required before a political subdivision takes the lead for a remedial response.

(2) Both the State and the political subdivision must comply with the requirements described in §§ 35.6805, 35.6815, and 35.6820 of this subpart. In addition, the State must comply with the requirements described in § 35.6810 of this subpart.

§ 35.6805 Contents of an SSC.

The SSC must include the following provisions:

(a) *Purpose of contract,* which describes the activities to be conducted and the benefits to be derived by the signatories;

(b) *Negation of agency relationship* between the signatories, which states that no signatories of the SSC can represent or act on the behalf of any other signatory in any matter associated with the SSC;

(c) *Amendability of the SSC,* which states that any change in the SSC must be agreed to, in writing, by the signatories, except as provided elsewhere in the SSC;

(d) *Litigation,* which describes EPA's right to bring an action against any party for liability under sections 106 and 107 of CERCLA, as amended;

(e) *Sanctions for failure to comply with SSC terms;* which states that if the signatories fail to comply with the terms of the SSC, EPA may proceed under the provisions of section 104(d)(2) of CERCLA and may seek in the appropriate court of competent jurisdiction to enforce the SSC;

(f) *The CERCLA assurances,* as appropriate, as described in § 35.6810 of this subpart;

(g) *Cost share provisions,* which include an estimate of the total project costs and the basis for arriving at this figure, and the payment terms as negotiated by the signatories;

(h) *Site access.* The State is expected, to the extent of its legal authority, to secure access to the site and adjacent properties, as well as all rights-of-way and easements necessary to complete the response actions undertaken pursuant to the SSC;

(i) *Exclusion of third-party benefits,* which states that the SSC is intended to benefit only the signatories of the SSC, and extends no benefit or right to any third party not a signatory to the SSC; and

(j) *Any other provision* deemed necessary by all parties to facilitate the response activities covered by the SSC.

§ 35.6810 Assurances.

The SSC must include the following:

(a) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance of implemented remedial actions for the action's expected life. In addition, even if the political subdivision is designated as being responsible for O&M, the State must guarantee that it will assume any or all O&M activities in the event of default by the political subdivision.

(b) *Cost sharing.* The State must provide assurances for cost sharing as provided in paragraphs (b)(1) and (2) of this section. In addition, even if the political subdivision is providing the actual cost share, the State must guarantee payment of the cost share in the event of default by the political subdivision.

(1) *Privately operated.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(2) *Publicly operated.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(c) *Off-site storage, treatment, or disposal.* If offsite storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with Subtitle C of the Solid Waste Disposal Act and is acceptable to EPA. The political subdivision may not provide this assurance.

(d) *Twenty-year waste capacity.* After October 17, 1989, EPA will not enter into an SSC for a remedial action without an adequate assurance as required by Section 104(c)(9) that there are hazardous waste treatment or disposal facilities that comply with Subtitle C of the Solid Waste Disposal Act that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated for 20 years after the date of the SSC.

(e) *Property title and interest acquisition.* If appropriate, the State or Federally-recognized Indian Tribe must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. The State must provide this assurance even if it intends to transfer this title to the political subdivision. See § 35.6400 of this subpart for additional information on property title and interest requirements.

§ 35.6815 Administrative requirements.

In addition to the requirements specified in § 35.6805, the State and/or political subdivision must comply with the following:

(a) *State review.* The State must review and comment on the response actions pursuant to the SSC.

(b) *Financial administration.* The State and/or political subdivision must comply with the following requirements regarding financial administration:

(1) *Payment.* The State may pay for its share of the costs of the response activities in cash or credit. If the political subdivision provides all or part of the cost share, the political subdivision may pay for those costs in cash or in-kind services. The State may not pay for its cost share using in-kind services, unless the State has entered into a support agency cooperative agreement with EPA. The use of the support agency cooperative agreement as a vehicle for providing cost share must be documented in the SSC. The payment must be provided during the course of the project. See § 35.6915 of this subpart for requirements concerning cost sharing under a support agency cooperative agreement.

(2) *Collection of amounts due.* The State and/or political subdivision must comply with the requirements described in 40 CFR 31.52(a) regarding collection of amounts due.

(3) *Failure to comply with negotiated payment terms.* Failure to comply with negotiated payment terms may be construed as default by the State on its required assurances, even if the political subdivision is responsible for providing all or part of the cost share (see § 35.6805(e) of this subpart).

(c) *Property.* If the State or Federally-recognized Indian Tribe is required to accept title, the following requirements concerning property must be met:

(1) *Equipment used as all or part of the remedy.* The following requirements apply to title and vested interest in equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA will relinquish its vested interest in the title to fixed in-place equipment after certifying that the remedy is functional and operational.

(ii) *Equipment that is an integral part of services to individuals.* EPA will relinquish its vested interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, when EPA certifies that the remedy is functional and operational.

(2) *Real property.* If it is necessary for the Federal Government to acquire the interest in real property to permit conduct of the response, the State or Federally recognized Indian Tribe must agree to accept transfer of the acquired interest on or before the completion of the response action even if the State intends to transfer title to the political subdivision. See the requirements in § 35.6810(e) of this subpart regarding the assurance for property title and interest acquisition.

(d) *Reports.* The State and/or political subdivision or Federally recognized Indian Tribe must comply with the following requirements regarding reports:

(1) *EPA-lead.* The nature and frequency of reports between EPA and the State or Federally recognized Indian Tribe will be specified in the SSC.

(2) *Political subdivision-lead.* The political subdivision must submit to the State a copy of the quarterly progress report which the political subdivision is required to submit to EPA in accordance with the requirements of its cooperative agreement. (See § 35.6650 for requirements regarding quarterly progress reports.)

(e) *Records.* The State and political subdivision or Federally recognized Indian Tribe must maintain records on a site-specific basis. The State and political subdivision must comply with the requirements regarding record retention described in § 35.6705 and the requirements regarding record access described in § 35.6710.

§ 35.6820 Conclusion of the SSC.

(a) The SSC remains in effect until either one of the following occurs:

(1) *SSC conclusion.* In order to conclude the SSC, the signatories must:

(i) Satisfactorily complete the response activities at the site;

(ii) Produce a final accounting of all project costs, including change orders and outstanding contractor claims; and

(iii) Submit all State cost share payments to EPA (see § 35.6810(b) regarding cost share assurances).

(2) *Termination of the SSC.* The State and political subdivision or Federally recognized Indian Tribe must comply with the requirements regarding enforcement of the terms of an award and termination for convenience described in 40 CFR 31.43 and 31.44.

(b) For remedial action, the SSC remains in effect until the final reconciliation of response costs ensures that both EPA and the State have satisfied the cost share requirement contained in section 104 of CERCLA, as amended. Overpayments in an SSC may not be used to meet the cost-sharing obligation at another site. Reimbursements for any overpayment made after reconciliation will be made to the payee identified in the SSC.

Requirements for Core Program Cooperative Agreements

§ 35.6850 Eligibility for Core Program Cooperative Agreements.

States and Federally recognized Indian Tribes may apply for Core Program cooperative agreements in order to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to develop and maintain a State's or Federally recognized Indian

Tribe's ability to participate in the CERCLA response program.

§ 35.6855 General.

The recipient of a Core Program cooperative agreement must comply with the requirements regarding financial administration (§§ 35.6250 through 35.6275 of this subpart), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6655 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a cooperative agreement (§§ 35.6750 through 35.6780), described in this subpart. Recipients may not incur site-specific costs. Where these sections entail site-specific requirements, the recipient is not required to comply on a site-specific basis.

§ 35.6860 Application requirements.

To receive a Core Program cooperative agreement, the applicant must submit an application form ("Application for Federal Assistance," SF–424, for non-construction programs) to EPA. Applications for additional funding need include only the revised pages. The application must include the following:

(a) *A project workplan*—(b) *Intergovernmental review comments*, in accordance with §35.6055(a)(2) of this subpart (Federally recognized Indian Tribes need not comply with this requirement); and

(c) *Project and budget periods.* The budget period is one year, and may be extended incrementally, up to 12 months at a time, based on EPA approval of an amended workplan and budget. The project period will be determined in the cooperative agreement.

§ 35.6865 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly on the activities delineated in the work plan. EPA may not require submission of progress reports more often than quarterly.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, a description of problems, if any, and the corrective measures that are planned;

(2) A comparison of the estimate of funds spent to date to planned expenditures; and

(3) An estimate of the funds needed to complete the work required in the cooperative agreement, and a justification for any increase.

§ 35.6870 Cost sharing.

The recipient of a Core Program cooperative agreement must provide at least five percent of the direct and indirect costs of all activities covered by the Core Program cooperative agreement. The recipient must provide its cost share with non-Federal funds not used for matching purposes under any other cooperative agreement. The recipient may provide its share using in-kind contributions. The recipient may not use CERCLA State credits to offset any part of the recipient's required match for Core Program cooperative agreements. See § 35.6270 (c) and (d) regarding credit and advance match, respectively.

§ 35.6875 Payment to recipient.

The State or Federally-recognized Indian Tribe is not required to attribute costs to specific sites and activities for drawdown purposes for Core Program cooperative agreement costs.

Requirements for Support Agency Activities Under Cooperative Agreements

§ 35.6900 Eligibility for support agency cooperative agreements.

States and Federally-recognized Indian Tribes may apply for support agency cooperative agreements to ensure their meaningful and substantial involvement when EPA or a political subdivision has the lead for response activities, as specified in section 121(f)(1) of CERCLA.

§ 35.6905 Allowable activities.

Support agency activities are those activities conducted by a State or Federally-recognized Indian Tribe to ensure the State's or Federally-recognized Indian Tribe to ensure the State's or Federally-recognized Indian Tribe's meaningful and substantial involvement when it is the support agency at a Federal-lead site. The activities described in section 121(f)(1) of CERCLA, as amended, are eligible for funding under a support agency cooperative agreement.

§ 35.6910 Support agency cooperative agreement requirements.

(a) *Application requirements.* The applicant must comply with the requirements described in § 35.6105(a) (1), (2), (3), and (5) of this subpart.

(b) *Cooperative agreement requirements.* The recipient must comply with the requirements regarding financial administration 35.6250 through 35.6275 of this subpart), property 35.6300 through 35.6450), procurement 35.6550 through 35.6610), reporting 35.6655 through 35.6670), records 35.6700 through 35.6710), and other administrative requirements under a cooperative agreement 35.6750 through 35.6780) described in this subpart.

§ 35.6915 Cost sharing.

The requirements for cost sharing under a support agency cooperative agreement are the same as the cost sharing requirements of § 35.6105(b)(2) and § 35.6110(a) of this subpart. The State may use in-kind services as part of its cost share, as long as it is documented in the SSC (see § 35.6815(b) for SSC payment requirements).

§ 35.6920 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly. EPA may not require submission of progress reports more often than quarterly.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, a discription of problems, if any, and the corrective measures that are planned;

(2) A comparison of the estimate of funds spent to date to planned expenditures; and

(3) An estimate of the funds needed to complete the work required in the cooperative agreement, and a justification for any increase.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 216

Regulations Governing the Taking of Marine Mammals Incidental to Commercial Fishing Operations; Advance Notice of Proposed Rulemaking and Proposed List of Fisheries

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 81140-9020]

Regulations Governing the Taking of Marine Mammals Incidental to Commercial Fishing Operations

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Advance notice of proposed rulemaking and proposed list of fisheries associated with exemption procedures.

SUMMARY: NOAA Fisheries intends to amend regulations governing the taking of marine mammals incidental to commercial fishing operations. These modifications, when promulgated, will implement the recent amendments to the Marine Mammal Protection Act of 1972 which require a program to be established through which commercial fishermen may be exempted from prohibitions against the incidental take of marine mammals in the course of commercial fishing activities. As required by the amendments, a proposed list of fisheries, categorized according to frequency of incidental take of marine mammals, is included in this notice. Comments are invited on the proposed list of exempted fisheries and on the general provisions of this exemption system.

DATES: The Final List of Fisheries and a rulemaking for implementing the interim exemption program for commercial fisheries will be published on or about March 23, 1989. Comments received before February 27, 1989 will be considered in developing subsequent rules and the Final List of Fisheries covered under the exemption system provided in section 114 of the MMPA.

ADDRESS: Send comments to or request a copy of the Marine Mammal Commission's letter from Dr. Nancy Foster, Director, Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Herbert W. Kaufman, (Office of Protected Resources), 301–427–2319.

SUPPLEMENTARY INFORMATION:

Background

Before enactment of the amendments (Pub. L. 100–711)) to the Marine Mammal Protection Act (MMPA) on November 23, 1988, the MMPA prohibited the take of marine mammals incidental to commercial fishing unless authorized by a general incidental take permit or a small take exemption. Before a general permit could be issued, NOAA Fisheries was required to determine that the population stock from which a marine mammal was to be taken was within its optimum sustainable population (OSP) and that the marine mammal stock would not be disadvantaged by the incidental take. If these determinations could not be made because of the level of take that would occur or because a marine mammal stock could not be determined to be within its OSP, no permit could be issued for that particular marine mammal stock.

On January 26, 1988, NOAA Fisheries announced in the **Federal Register** (53 FR 2069), its intention to prepare an Environmental Impact Statement (EIS) on the proposed reissuance of domestic general permits (other than the general permit for incidental take of porpoise in the eastern tropical Pacific) that authorized commercial fishermen, primarily in west coast waters, to take marine mammals incidental to commercial fishing operations. These general permits were scheduled to expire on December 31, 1988. In addition, two small take exemptions issued under section 101(a)(4) of the MMPA in 1984 were scheduled to expire on that date. Public scoping meetings were held in Washington, DC (March 22, 1988) and San Francisco, CA (April 8, 1988). In preparing the draft EIS, NOAA Fisheries determined that there is insufficient information to determine whether most of the marine mammal stocks that interact with commercial fishing are within their OSP. This suggested that NOAA Fisheries would not be able to issue permits to authorize the incidental take of certain marine mammal stocks.

On February 16, 1988, the U.S. Court of Appeals for the District of Columbia Circuit in *Kokechik Fishermen's Ass'n v. the Secretary of Commerce*, 839 F.2d. 795 (D.C. Cir. 1988), issued a decision which further jeopardized NOAA Fisheries' ability to issue any general incidental take permits or small take exemptions. The court upheld a District Court decision setting aside the marine mannal incidental take permit issued in 1987 to the Japanese salmon driftnet fishery (52 FR 19874). The majority concluded, as did the lower court, that NOAA Fisheries is not authorized by the MMPA to issue a permit allowing the incidental take of a marine mammal species that is within its OSP—in this instance Dall's porpoise—if the permitted activity will also involve the occasional taking of other species of marine mammals for which no permit can be issued. As a result of the *Kokechik* decision and the fact that there is insufficient information to determine whether most marine mammal stocks are within OSP levels, NOAA Fisheries determined that some existing general permits or small take exemptions could not be reissued and that some new authorizations could not be issued for foreign or domestic fishing operations within the U.S. Exclusive Economic Zone.

On November 23, 1988, the President signed Pub. L. 100–711, reauthorizing and amending the MMPA. These amendments (section 114) replace existing provisions for granting incidental take authority to commercial fishermen with an interim exemption system valid until October 1, 1993. The primary objective of this new system is to provide a means to obtain reliable and accurate information about interactions between commercial fishermen and marine mammals while allowing commercial fishing operations to continue despite NOAA Fisheries' inability to make necessary OSP findings. The information collected would be used to develop a long-term program to manage incidental takings of marine mammals associated with commercial fisheries. As a preliminary step to establishing the exemption system, the amendments require the Secretary of Commerce (Secreatary) to publish a list of fisheries along with the number of vessels or persons involved in each such fishery that have the following:

(I) A frequent incidental taking of marine mammals;

(II) An occasional incidental taking of marine mammals; or

(III) A remote likelihood of, or no known incidental taking of marine mammals.

The Secretary is required to publish a notice in the **Federal Register** and provide an opportunity for comments on this proposed list of fisheries within 60 days of the enactment of the MMPA amendments and to publish a final list within 120 days of the date of enactment. Changes to the list will be announced to the public through notice in the **Federal Register**; public comment will be solicited.

In order to engage lawfully in fisheries in categories I and II, owners of vessels must register with the Secretary to obtain an exemption to take marine mammals incidentally, must display or possess physical evidence of the exemption, and must submit periodic reports to NOAA Fisheries. In addition, vessels engaged in category I fisheries must take on board a natural resources observer if requested by the Secretary.

Fishing in a category I or II fishery without an exemption is a violation of the MMPA and owners and masters of comercial fishing vessels are subject to penalties under this provision of the law. Owners of vessels in category III fisheries are not required to register with the Secretary to obtain an exemption but they must report all lethal incidental takings.

As long as the owner of a vessel complies with exemption requirements, he and his master and crew are exempt from penalties under the MMPA for incidental takings of marine mammals (other than the taking of California sea otters and the intentional lethal taking of Steller sea lions, cetaceans, or marine mammals from depleted stocks) in a fishery to which the exemption applies. The exemption system will be available only to U.S. vessels or foreign vessels that have valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act. Exemptions provided by section 114 are not available to vessels fishing in the yellowfin tuna purse seine fishery in the eastern tropical Pacific.

The Secretary is required to establish verification programs to substantiate the data submitted by fishermen. Verification will include education efforts regarding information to be reported, interviews with fishermen and other activities that will enable the Secretary to determine the reliability, the nature, type and extent of the incidental taking that occurs in a fishery.

Observers will be placed on board vessels participating in a category I fishery to monitor between 20 and 35 percent of the fishing operations by vessels in the fishery. The Secretary may exempt vessels from observer coverage for certain reasons, such as protecting the health and safety of the observer or ensuring the safe operation of the vessel. Observers will be prohibited from bringing a civil action under any law of the United States for injury, illness, disability or death incurred during service as an observer against the vessel or vessel owner unless caused by the willful misconduct of the vessel owner. This provision does not apply if the observer performs duties in service to the vessel.

The Secretary shall establish alternative observation programs to obtain statistically reliable information on category I fisheries for which the required level of observer coverage cannot be met or for any other fishery about which reliable information is not otherwise available. The alternative observation programs can include, but are not limited to, direct observation of fishing activities from vessels, airplanes, or points on shore.

If the Secretary finds that incidental takings are having an immediate and significant adverse effect on a marine mammal population or that more than 1,350 Steller sea lions or 50 northern fur seals will be lethally taken in one year, then he can issue emergency regulations to prevent, to the maximum extent practicable, further take. The Secretary must consult with the appropriate regional Fishery Management Council or State before taking such action. If the Secretary finds that incidental takings are not having an immediate and significant adverse impact but will likely have a significant adverse impact over a period of time longer than one year, then he must request a Fishery Management Council or State to take actions that will mitigate the adverse impact. The Secretary also has general authority to impose conditions and restrictions on exemptions that he issues.

The Secretary is also required to specify how catch data and other information will be reported and to establish an information management system to process and analyze data received from the verification programs and other sources. To protect the confidentiality of fishermen, the system will provide for public access to aggregated data only.

Finally the amendments in this section require the Secretary, in consultation with the Marine Mammal Commission, the States, the fishing industry, the general public, the regional Fishery Management Councils, and other Federal agencies, to recommend to Congress by January 1, 1992, a proposed system to govern the incidental taking of marine mammals after this section expires.

Consultation With the Marine Mammal Commission

As required by the amendments, NOAA Fisheries has consulted with the Marine Mammal Commission on the development of the lists of fisheries. The Commission was provided a copy of the proposed lists of fisheries and rationale as part of this consultation. Written comments and 3 reports discussing marine mammal/fisheries interactions were provided to NOAA Fisheries by the Commission. The Commission's letter has been made a part of the record and is available upon request (see address). The reports, "Workshop On Marine Mammal-Fisheries Interactions In The Northeastern Pacific" [NTIS PB80-17544]; "Workshop On Marine Mammal-Fisheries Interactions" [NTIS PB82-189507]; and "Workshop On Measures To Address Marine Mammal/Fisheries Interactions In California" [NTIS PB86-219060], are available from the U.S. Department of Commerce, National Technical Information Service, Springfield, VA 22161.

The Commission recommended that several changes be made to the proposed list of fisheries. NOAA Fisheries has decided not to make most of these changes at this time, but will consider these changes during the comment period. Therefore, public comment is specifically requested on the following quotations from the Commission's letter on the categorization of various fisheries:

> For the most part, the Commission has no information with which to disagree with the placement of fisheries into the three frequency categories proposed by the Service. However, there are a few instances in which we suggest modifications to the list. Most notably, we believe that the salmon gillnet fisheries * * * and the California gillnet fisheries for white sea bass and other species * * * proposed for listing in category II should be moved to category I. In making this suggestion, we note that these fisheries are very similar to other gillnet fisheries proposed for inclusion in category I and, as they occur in areas in which marine mammals are known to occur, are reasonably likely to take marine mammals with a similar frequency.
>
> * * * drawing analogies between fisheries can be helpful in classifying those fisheries for which few incidental take data are available. The Commission believes that the Service can and should use such analogies more than it apparently has in formulating the list. In particular, fisheries with potentially substantial incidental take rates have been placed in cateogry II because there currently is insufficient documentary evidence from observation of that fishery to support a category I listing. We therefore recommend the addition of a third criteria for listing under category I as follows: "by analogy with a fishery listed in category I, it is likely that a 'frequent' take of marine mammals occurs."
>
> * * * Recognizing that the incidental take of marine mammals within a fishery may be considerably higher in some locations or may be higher for certain segments of a fishing season, the Commission is concerned about categorizing fisheries based solely on fishery wide averages. The system for determining what constitutes a fishery or for classifying those fisheries must have enough flexibility to take into account such local or seasonal variations. For instance, if vessels have a high probability of taking marine mammals for one month of a six month season, the fishery should be listed as a category I fishery for at least part of the year. Similarly, local concentrations of incidental takes should be reflected either in how fisheries are listed or how they are classified.
>
> A further problem arises in the discussion of what constitutes "frequent," "occasional," and "remote likelihood" for purposes of categorizing fisheries. These definitions all

are expressed in terms of the likelihood of an observer on a representative vessel witnessing the incidental take of a marine mammal during an "observer stint." What constitutes an observer stint, however, is unclear. The Commission believes that the Service should adopt definitions based upon a more precise standard. We therefore recommend that these terms be defined in terms of the likelihood of an individual vessel taking a marine mammal per fishing season or per year.

NOAA Fisheries will continue consulting with the Commission on the list of fisheries and other matters pertaining to the exemption process.

Schedule of Events

NOAA Fisheries provides the following tentative schedule to implement the exemption provisions of section 114:

March 23—(1) Day 120. Publication in **Federal Register** of final list of fisheries in assigned categories; (2) Publication **Federal Register** of an appropriate notice to implement section 114 of the MMPA and provide an opportunity for public comment; (3) Filing documents for NEPA findings in this proceeding;

March 27–April 14—(1) Public meetings with interested parties;

July 21—(1) Day 240. Exemption system implemented, enforcement begins; fishermen in categories I and II need exemptions to legally fish after this date.

Rationale for Categorization of Commercial Fisheries

At the time of publication of this notice, NOAA Fisheries had categorized 163 fisheries in which 128,688 vessels or persons participate in the Pacific, Atlantic (Atl) and Gulf of Mexico (GMX). This information is summarized in the following list, explained in the rationale, and itemized in Tables 1–6.

Category	Number of fisheries		Number of vessels or persons	
	Pacific	Atl/ GMX	Pacific	Atl/ GMX
I	11	3	3,046	155
II	25	3	20,518	1,040
III	76	45	24,040	80,089
Total	112	51	47,604	81,284

Tables 1 through 6 contain proposed lists of fisheries to be published for public comment as required by section 114(b)(1)(A) of the recently passed amended MMPA. Tables 1, 2 and 3 describe west coast fisheries, while Tables 4, 5 and 6 describe the east coast fisheries, including the Gulf of Mexico. The proposed lists identify and categorize fisheries according to their levels of frequency of incidental taking of marine mammals. Timely comments received on the proposed lists and categories will be considered in compiling the final list to be published by March 23, 1989.

Before completing these proposed lists, the agency held two public meetings, one in Seattle, WA, on December 16 and one in Washington, DC on December 19, at which the public was invited to comment on how the list should be developed. NOAA Fisheries also mailed a draft proposed list of fisheries to States, Regional Fishery Management Councils, environmental groups, fishing industry representatives and other interested parties. Comments received from these groups and during the public meetings were considered to the extent time allowed.

In compiling the proposed lists of fisheries, the agency was faced with two major tasks. First, it was necessary to identify all fisheries that would be eligible for the exemption provided by section 114. To ensure a sensible application of the provisions of the amendments, NOAA Fisheries identified commercial fisheries according to gear type, species of fish caught, geographic distribution or some combination of these. In many instances, fisheries were identified according to groupings used by State agencies for management purposes. The list is meant to include all fisheries operating in U.S. waters or under U.S. jurisdiction with the exception of Japanese salmon gillnet fisheries and the eastern tropical Pacific yellowfin tuna purse seine fishery which were explicitly excluded from the exemption provided in section 114.

The second major task was deciding in which of the three categories each fishery should be placed based on the frequency of incidental takings. The amendments establish three categories according to whether there is frequent incidental taking (category I), occasional incidental taking (category II) or a remote likelihood or no known incidental taking (category III). The Committee Reports (Senate Report 100–592 and House of Representatives 100–970) accompanying the amendments recognize that for the first year section 114 is in effect, the Secretary may not have adequate data necessary to determine accurately the placement of all fisheries into categories. Accordingly, these reports recommend six fisheries to be included in category I and two fisheries to be included in category III. NOAA Fisheries has included these fisheries in the recommended categories for the proposed list.

To categorize all other fisheries, it was necessary to interpret and define "frequent," "occasional," and "remote likelihood." NOAA Fisheries decided to define these terms based more on qualitative standards than quantitative ones due to the lack of reliable data documenting many commercial fishery interactions with marine mammals. NOAA Fisheries considered the Committee Reports and comments from those involved in the development of the amendments, including Congressional staff. As a result, NOAA Fisheries concluded that "frequent," "occasional" and "remote likelihood" were intended by Congress to be evaluated on the average frequency with which marine mammals are taken incidentally in a fishery. This interpretation would place observers on board vessels in fisheries where the likelihood of observing interactions with marine mammals would be maximized.

NOAA Fisheries therefore interprets Congressional intent to be that categorization of fisheries should not be based on the status of stocks of marine mammal species or the likelihood of a significant adverse impact on a species. Other actions, such as mitigating measures, voluntary placement of observers and alternative observation programs, are available under the amendments to address situations where incidental take may not be frequent but commercial fishing may be adversely affecting a marine mammal population or where there are critical research needs.

Using this interpretation, "frequent" is defined to mean that it is highly likely that more than one incidental taking will be noted during a standard observation period by an observer on a randomly selected vessel. "Occasional" is defined to mean that there is some likelihood that an incidental taking will be noted during a standard observation period by an observer on a randomly selected vessel, but that there is little likelihood that more than one incidental taking will be noted during the standard observation period. And, "remote likelihood" is defined to mean that it is highly unlikely that any incidental takings will be noted during a standard observation period by an observer on a randomly selected vessel.

For purposes of categorizing fisheries, NOAA Fisheries considered incidental taking to mean accidental entanglement and serious injury or death, as suggested by Committee Reports, and intentional takings to protect gear, catch or person. Intentional takings are included because the amendments expressly require vessels in category I and II fisheries to

report such takings and because these takings are the primary type of taking in several fisheries.

These definitions were applied to categorize fisheries according to the following guidelines. If sufficient documented information was available to estimate the frequency of incidental takings of marine mammals, such information was used in categorizing that fishery. If there was not sufficient documented information to estimate the frequency of incidental takings, the agency looked to other factors that would indicate the likelihood of incidental takings such as gear types, fishing techniques, species fished, areas fished and duration of a fishing season. If these factors indicated a likelihood of at least occasional incidental takings, but the frequency could not be estimated because of insufficient documented information, the fishery was placed in category II.

If available information or other factors indicated that the likelihood of incidental takings in a fishery would be so rare or exceptional as to be remote or non-existent, that fishery was placed in category III.

The definitions and criteria used in identifying and categorizing fisheries will be incorporated into the notice to be published by March 23, 1989.

The final list will be developed after considering comments received on this proposed list. The final list will be subject to revision at least on an annual basis during the five-year exemption period after notice and opportunity for public comment. NOAA Fisheries anticipates that as information becomes available, there will be a number of revisions made to the list.

The following sections discuss the specific criteria for placing fisheries in one of three categories designated by Congress.

Category I Fisheries—Tables 1 and 4

Tables 1 and 4 comprise the list of commercial fisheries conducted in U.S. waters that were considered to have frequent incidental takings of marine mammals. Fisheries were included in this list based on the following criteria:

(1) Committee Reports recommended that the fishery be placed in category I; or,

(2) There is sufficient documented information indicating a "frequent" incidental taking of marine mammals in the fishery.

Category I Fisheries Indicated by Committee Report

The Committee Report of the House of Representatives identified the Prince William Sound/Copper River set and drift gillnet fisheries, Unimak Pass and False Pass (Alaska Peninsula) salmon drift gillnet fisheries, Columbia River salmon drift gillnet fisheries, the Washington and Oregon thresher shark drift gillnet fishery, and the Bering Sea and Gulf of Alaska groundfish trawl fisheries as Category I fisheries. The Senate Committee Report affirmed the House of Representatives' list and added the Unimak Pass and False Pass purse seine salmon fishery. Not all of these fisheries would qualify as Category I fisheries under the second criterion above because there is not sufficient documented information to estimate accurately the frequency of incidental takings in all cases. However, NOAA Fisheries considers Congressional intent to be adequate justification for placing them in Category I in the proposed list for purposes of soliciting comments. Moreover, most of these fisheries were identified and jointly suggested to Congress by representatives of the environmental community and the fishing industry as category I fisheries. At the end of the first year, observer data should either verify or refute the placing of these fisheries in category I. These fisheries are briefly discussed below in terms of available information concerning incidental takings. After considering all available information, timely comments received, and any other pertinent factors, NOAA Fisheries may decide to recategorize some of these fisheries in the final list.

Matkin and Fay (1980) reported that approximately 1,000 marine mammals were entangled or killed in the Copper River Delta/Prince William Sound salmon drift gillnet fishery during the 1978 season. The approximate composition of the kill was 516 harbor seals, 333 northern sea lions, 10 Dall's porpoise, 44 harbor porpoise and 66 sea otters. Unpublished data collected by Wynne indicate that the levels of interaction probably were of the same order of magnitude in 1988.

There is not sufficient information available to estimate reliably the frequency of incidental takings in the Prince William Sound set gillnet fishery for salmon and the Alaska Peninsula (Unimak Pass and False Pass) drift gillnet fishery. However, northern sea lions, harbor seals and sea otters reside in the area and they are known to interact with similar gear in the Prince William Sound/Copper River drift gillnet fishery. Therefore there is a high potential for the taking of northern sea lions, sea otters and harbor seals in these fisheries.

The results of monitoring programs for the salmon gillnet fisheries in the Columbia River and adjacent waters were reported by Beach et al. (1985). Estimated harbor seal mortality in Grays Harbor, Willipa Bay and the Columbia River was 335 animals in 1980. In 1981, total mortality was projected for the Columbia River at 335 harbor seals. California sea lion mortality in the fishery ranged from 4 to 45 animals over the same period. In addition commercial fishermen frequently harass mammals away from their nets. Some of these animals entangle in the nets and drown, and others are killed after attempts to harass them away from fishing operations fail.

Committee Reports identified the Washington and Oregon drift gillnet fishery for thresher shark as a Category I fishery. NOAA Fisheries believes that these reports identified only part of this fishery. The California driftnet thresher shark fishery represents the southern end of this fishery and should be combined with the Washington/Oregon portion. Therefore, NOAA Fisheries has added the California extension of this fishery to Category I. The thresher shark is a highly migratory species that occurs along the entire west coast. The majority of the thresher shark fleet originates in California where they fish for swordfish as well as shark. The Washington and Oregon fishery is conducted largely by California fishermen who have followed the sharks north in the summer months. The drift gillnet fishery for thresher shark is a relatively young fishery that started around the Channel Islands in southern California in 1977. Miller et al. (1983) estimated that the fishery off of southern California killed between 600 and 1200 California sea lions between September 1980 and September 1981. In 1983, the State of California promulgated regulations to reduce the incidental mortality of California sea lions. As a result of the new regulations, and the 1983–84 El Nino event, the fishery moved offshore and extended to the north and billfish became an important target species. Since this shift, there have been too few observers placed to produce statistically reliable estimates of incidental marine mammal mortality. Diamond et al. (1987) reported that the redistribution of the fishing effort contributed to a reduction in the rate of California sea lion mortality but had moved the fishery into areas where it interacts with more species of marine mammals. Between Diamond et al. (1987) and preliminary unpublished data from the 1988 Washington and Oregon observer program, 15 different species of marine mammals have been observed taken in this fishery. Given the potential

for this fishery to take large numbers of marine mammals and the diversity of marine mammal species known to have been taken in the fishery, NOAA Fisheries proposes that the entire west coast drift net fishery for thresher shark and swordfish be placed in Category I.

The Bering Sea/Gulf of Alaska groundfish trawl fishery interacts with 14 different species of marine mammals. Loughlin et al. (1983), Loughlin and Nelson (1986), and unpublished observer reports prepared annually by the NOAA Fisheries National Marine Mammal Laboratory, indicate that most of these were taken in the foreign and joint venture fisheries. Loughlin and Nelson (1986) estimated that 958 to 1,436 northern sea lions were killed in the Shelikof Strait fishery in 1982. However, mortalities decreased substantially in following years and the fishery has become largely domestic in nature. Unpublished data from Craig (Alaska Department of Fish and Game) indicate a low level of interaction between the domestic trawl fleet and marine mammals; only 4 northern sea lions were caught during 1,176 trawl hauls observed during the 1978 through 1988 seasons.

Observer data in the North Pacific groundfish trawl fishery indicate that the degree of interaction with marine mammals varies widely according to the time of year, location of the fishery, species of fish sought and the type of trawl gear used. NOAA Fisheries is interested in defining these segments as precisely as possible. This will enable NOAA Fisheries to more accurately identify those segments with frequent interactions and to develop appropriate mitigation measures, if necessary.

Melteff and Rosenberg (1984) indicated "frequent encounters" occur between the South Unimak (Unimak Pass and False Pass) salmon purse seine fishery and marine mammals. During 1987, however, the fishery lasted only 110 hours and reports submitted by Certificate of Inclusion holders and the State observer program indicated that entangling, seriously injuring, or killing a marine mammal in this fishery is highly unlikely.

Additional Category I Fisheries

NOAA Fisheries propose to include the following west coast fisheries to Category I: the Prince William Sound and Southern Bering Sea sablefish longline fisheries; the Washington marine set gillnet fishery for salmon in areas 4, 4A, and 4B; and the California halibut and angel shark set gillnet fishery. Two east coast fisheries are proposed to be included in Category I: the foreign mackerel trawl fishery and the Gulf of Marine gillnet fishery. These fisheries are being placed in Category I because "frequent" incidental taking of marine mammals has been documented.

Interactions between sablefish longline fisheries and killer whales in Prince William Sound have resulted in losses of fish reported to be as high as 25 percent of the catch. Similar sablefish/killer whale interactions are known to occur in the Southern Bering Sea south of 57 degrees North latitude and east of 170 degrees West longitude as well. To deter this depredation of catch, fishermen intentionally harass the whales and if harassment fails, some fishermen have attempted to kill the whales that depredate their catch. Such attempted killings are in violation of the MMPA. Dahlheim (1988) and unpublished studies by Matkin presume a mortality (based on the absence of known individuals) in Prince William Sound of three killer whales in 1985, three in 1986, one each in 1987 and 1988. Also, some mortalities are believed to have occurred in the Southern Bering Sea sablefish longline fishery. The available evidence indicates frequent intentional takings of killer whales in this fishery.

NOAA Fisheries proposes to include the Washington marine set gillnet fishery for salmon in Washington's Fisheries Management and Reporting Areas 4, 4A, and 4B in Category I. Available information, based on reports and observations, indicates there is a frequent incidental taking of marine mammals in this fishery.

The California Department of Fish and Game has been monitoring set net fisheries in near shore waters since 1983. From 1983 through 1985, the estimated mortality of California sea lions was between 2,207 and 3,427 annually and the estimated mortality of harbor seals increased from 834 to 1,886 animals per year (Hanan, et al. 1988). The California halibut and angel shark fisheries account for most of this mortality. These fisheries also take common dolphins, harbor porpoise, sea otters (which would not be authorized under the exemption system) and a small number of gray whales. Based on the high total number of documented takings and the number of vessels in these fisheries, there is sufficient indication that these fisheries have frequent incidental takings of marine mammals.

In East coast fisheries, the foreign mackerel trawl fishery listed in Table 4 is included as a category I fishery based on 100 percent observer coverage from 1984–88. During this period a total of 286 animals were killed at an observed rate of kill per day of 0.1 (or one every 10 days). The average observer trip was two weeks. This information documents a frequent incidental taking in this fishery.

The Gulf of Maine gillnet fishery listed in Table 4 is also being placed in category I based on reports and observations documented in Gilbert and Wynne (1987). This study documented that in one segment of the fishery at least 100 marine mammals were incidentally taken by 11–22 vessels over a fishing season. This information indicates a frequent incidental taking of marine mammals in this fishery.

Category II Fisheries—Tables 2 and 5

Tables 2 and 5 comprise the list of fisheries that have an "occasional incidental take of marine mammals." No Category II fisheries were identified in Congressional Reports on the amendments. These fisheries were included in this category based on the following criteria:

(1) There is information indicating an "occasional" incidental taking of marine mammals in the fishery; or

(2) In the absence of information indicating the frequency of incidental taking of marine mammals, there is a likelihood of at least an "occasional" incidental taking in the fishery based on factors such as gear type, fishing techniques, species fished, areas fished, or duration of fishing season.

A brief discussion of these fisheries follows.

Given the known incidence of marine mammals in the area, and that the salmon gillnet fisheries listed in Table 2 use gear similar to the gear observed by Matkin and Fay (1980) in the Copper River Delta and by Beach et al. (1985) in the Columbia River, there is some likelihood of an occasional incidental take of marine mammals. In addition there are reports indicating that incidental takes of marine mammals are more than a rare or exceptional event in most salmon gillnet fisheries. However, there is insufficient information to estimate reliably the frequency of the takes. Examples of reports in various salmon gillnet fisheries are discussed below.

The NOAA Fisheries Alaska Region documented six humpback whale entanglements, resulting in at least one mortality in the southeast Alaska drift gillnet fishery for salmon in 1987. This appears to be an anomalous year and may not be a reliable estimate of the frequency of incidental takes.

NOAA Fisheries Alaska Region has received reports that fishermen in the Yakatat set gillnet fishery for salmon occasionally shoot northern sea lions

(the amendments do not provide an exemption for such takings) and harbor seals to prevent loss of catch or damage of gear. This fishery also took a gray whale in 1988.

Twelve beluga whales were reported taken in 1983 in the Bristol Bay set and drift gillnet fisheries for salmon (Frost et al. 1984). But since few other published reports of interactions with salmon gillnet fisheries in Alaska, Washington, or Oregon are available, this information does not constitute sufficient justification to place this fishery in Category I.

Certificate of Inclusion holders have reported incidental marine mammal takes in the Puget Sound and Straits of Juan de Fuca salmon gillnet fishery but these reports are not sufficient to estimate reliably the actual frequency of incidental takings.

The gillnet fisheries for California white sea bass, yellowtail, and soupfin shark were placed in Category II because the gear is similar to the gear used in other fisheries with frequent incidental takings and there is known incidence of marine mammals in the areas fished. These fisheries use mesh sizes large enough to capture California sea lions and harbor seals. Hanan et al. (1988) estimated the total mortality of California sea lions and harbor seals in these fisheries to be small compared to the take in the halibut and angel shark fisheries. The white croaker and bonito/flying fish gillnets use smaller mesh but takes of marine mammals are reported and there is some likelihood of occasional incidental takings.

The salmon troll fisheries are included in Category II based on fishermen reports and the likelihood of at least an occasional intentional take to protect gear or catch. The entanglement of marine mammals is a rare event, but the loss of hooked fish to seals and sea lions occurs on at least an occasional basis. Fishermen use various methods, including firearms, to deter marine mammals from stealing hooked fish. When this type of deterrence has failed, fishermen have been known to shoot at and sometimes kill animals that continue to depredate their catch. Based on interviews with fishermen, Miller et al. (1983) reported that approximately 300 California sea lions were killed in the California salmon troll fishery in 1980. This information, however, is insufficient to conclude the frequency of incidental takings.

NOAA Fisheries proposes placing Alaskan salmon beach and purse seine fisheries (other than those in Unimak Pass) in Category II. Given the type of fishery and area fished there is a likelihood of at least occasional intentional takings in order to protect gear or catch.

The Hawaiian trolling rod-and-reel fishery is included in Category II based on the likelihood of frequent interactions with dolphins. The interactions reported are usually dolphins removing bait.

The California round haul fisheries are proposed for listing in Category II based on information from Miller et al. (1983) documenting at least an occasional mortality of several species of cetaceans.

The Alaska longline groundfish fishery has a likelihood of intentional takings to protect gear or catch similar to the Prince William Sound and southeastern Bering Sea longline fishery for sablefish. Also, based on gear type, fishermen reports, and other factors there is some likelihood of at least occasional entanglement of marine mammals. However, there is insufficient information to estimate the frequency of incidental takings.

The remainder of the west coast fisheries listed in Category II (the Metlakatla fishtrap fishery in Alaska, the handline and jig fisheries in Hawaii, the squid dip net fishery, and the aquaculture salmon fisheries) are included because available information from fishermen reports, studies (e.g. Miller et al. 1983 and Kuljis 1987), and other factors mentioned in criterion two indicate that marine mammals are at least occasionally intentionally taken by fishermen to protect gear and their catch from damage by marine mammals. Information is too sparse to document the frequency of incidental takings.

Certain east coast fisheries are also being proposed for Category II. The Southern New England, Mid-Atlantic offshore squid and Atlantic Ocean mackerel fisheries listed in Table 5, are placed in Category II because there is some information indicating that there is at least an occasional incidental taking of a variety of marine mammals. This is based on observer reports in joint venture operations. There were 33 reported takes of marine mammals from 1985–88 with a high of 20 in 1986. Consequently, these reports combined with the likelihood of at least occasional incidental takings based on the type of fishery and gear involved, justify inclusion of this fishery in Category II.

The Atlantic Ocean and Gulf of Mexico pelagic longline fisheries listed in Table 5 are proposed as Category II fisheries. Information collected by observers on the Japanese fleet of longliners operating in Northeast waters documented at least occasional incidental takings of marine mammals. Since this fleet is similar in most respects to other pelagic longliners, there is a likelihood of at least occasional incidental takings.

Category III Fisheries—Tables 3 and 6

Tables 3 and 6 comprise the list of fisheries that have been determined to have "a remote likelihood of or no known incidental taking of a marine mammal." These fisheries were included in Category II based on the following criteria:

(1) Committee Reports recommended that the fishery be placed in Category III;

(2) There is information indicating no more than a remote likelihood of an incidental taking of a marine mammal in one fishery; or

(3) In the absence of information indicating the frequency of incidental taking or where there is no known taking of marine mammals, other factors such as gear type, fishing techniques, species fished, areas fished, or duration of fishing season suggest no more than a remote likelihood of an incidental take;

In making this determination, the agency relied on the Senate Committee Report which stated that "fisheries such as the shrimp trawl fishery and menhaden purse seine fishery in the Atlantic Ocean and the Gulf of Mexico, where hundreds of thousands of sets or tows may result in a small total mortality of animals annually, would be placed in [Category III]" (Senate Committee Report, page 17).

There is no information available suggesting that the northern Bering Sea gillnet fisheries incidentally take marine mammals. Based on factors described in criterion 3 above, there is only a remote likelihood of a taking incidental to these fisheries.

The likelihood of incidental take of marine mammals in the other category III gillnet fisheries is remote because the seasons are extremely short (e.g. herring fisheries), the mesh size is too small to entangle (e.g. shad, smelt, and herring), or they are conducted in areas where mammals generally are not present (e.g. mullet).

Troll fisheries for species other than salmon rarely report losses of fish to marine mammals. Incidental take in troll fisheries usually occurs as intentional lethal removal of animals that are depredating catch and gear. Since troll fisheries identified in Table 3 have not reported fish losses and troll gear only rarely entangles a marine mammal, NOAA Fisheries believes that the likelihood that these fisheries will take a marine mammal is remote and proposes placing them in category III.

Marine mammal interactions have been documented for only a few of the

round haul fisheries (including beach seines and throw nets) identified in Table 3. The likelihood of entanglement, serious injury, or mortality of marine mammals as a result of these interactions is remote. No marine mammal interactions have been reported from the remainder of the round haul fisheries identified in Table 3.

Marine mammal interactions have also been documented for longline fisheries, but the likelihood of entanglement or intentional takings is remote. More commonly, the mammals raid the baited hooks, diminishing the fishermen's efficiency.

With the exception of Alaska, the west coast trawl fisheries generally have a remote likelihood of incidentally taking a marine mammal. On rare occasions, marine mammals may become entrapped in trawl nets. In the Pacific whiting fishery observers have documented between 1 and 12 takings of marine mammals per year since 1976 by foreign and joint venture operations. Interactions tend to be with pinnipeds attempting to remove fish from the cod end as the net is retrieved (Miller et al. 1983). Fishermen generally are not bothered by this and few reports of intentional lethal removal are known. Since the likelihood of mortality, serious injury, or entanglement is remote NOAA Fisheries proposes placing these fisheries in Category III.

The nature of the gear or methods used in the remainder of the fisheries in Table 3 is such that the likelihood of entanglement, serious injury, or mortality of a marine mammal or intentional takings to protect gear or catch is remote.

For the following East coast fisheries, there have been reports and information concerning incidental takings in these fisheries, but based on factors mentioned in criterion (3) above there is only a remote likelihood of these takings.

The Gulf of Maine (GME) Tub Trawl identified in Table 6, is a bottom longline operation that occurs within 25 miles offshore. The interactions reported are usually seals robbing bait and fish from the hooks. But, there is only a remote likelihood of entanglement or intentional takings to protect gear or catch.

Only five vessels are licensed for the GME, Southern New England (SNE), Mid-Atlantic (MDA) Atlantic bluefin tuna purse seine fishery. In 1986, three humpback whales were reported taken by these vessels. This appears to be an anomalous event because there have been no other reports of marine mammals taken in other years. Since the season for this fishery is very short and the purse seines are relatively small compared to those used in other types of tuna fisheries, there is only a remote likelihood of incidental takings in this fishery.

There have been no reports of marine mammal mortalities in the GME Atlantic Herring Purse Seine and Fixed Gear fisheries. Marine mammals do become captured by gear in these fisheries, but because mesh size of nets used is small there is only a remote likelihood of entanglement. When marine mammals are captured in this gear, they are generally released without injury.

Based on gear type and areas fished, the GME, SNE and MDA coastal gillnet fisheries have only a remote likelihood of incidentally taking marine mammals. These fisheries take place within the lower reaches of the large river systems, or near the coastal embayments along the East Coast. The fisheries commonly occur in the spring during anadromous fish runs. Mammal abundance in the coastal areas is usually low at that time. A small gillnet fishery operates year-round in the Mid-Atlantic area for various pelagic fish species. The fine mesh nets do not entangle the larger mammal species that frequent the area.

Although there have been some reports of entanglement of marine mammals in gear used by SNE and MDA Trap and Pound Net fishery, the likelihood is remote. The reports of entanglement often involve decaying carcasses that have floated into the gear.

There have been periodic reports of marine mammals being entangled in lobster lines and gear over the past fifteen years in the Gulf of Maine/Southern New England inshore lobster pot fishery. However, given the large number of individual vessels, the nature of this fishery and the gear type used, the likelihood of incidental takings is remote.

The GME Atlantic salmon farming fishery is a growing industry along the coast of Maine. The marine mammal interactions involve seal interference with the pens. Non-harassing methods, such as double netting around the pens, have been used to protect fish to date. At this time, however, there does not appear to be more than a remote likelihood of entanglement or intentional takings of these marine mammals.

For the remaining fisheries listed in Table 6, there is only a remote likelihood of incidental takings based on gear type, the nature of these fisheries, and other factors listed in criterion 3 above.

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Proposed List of Fisheries Associated With Exemption Procedures

TABLE 1.—CATEGORY I, COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
Gillnet fisheries salmon:		
AK Prince William Sound drift gillnet	525	2, 6, 13, 14, and 15.
AK Prince William Sound set gillnet	17	2, 6, 13, and 15.
AK Peninsula drift gillnet	164	2, 6, 13, 15, and 30.
WA marine set gillnet in Areas 4, 4A, and 4B	66	6, 15, and 30.
WA, OR Lower Columbia River Region, Willipa Bay, Grays Harbor (includes rivers, estuaries, etc.) drift gillnet	914	2, 3, 6, and 30.
Other finfish:		
WA, OR, CA thresher shark and swordfish drift gillnet	309	2, 3, 6, 11, 14, 15, 16, 17, 18, 22, 23, 29, 30, 32, and 33.
CA California halibut and angel shark—set gillnet	788	3, 6, 13, 15, 16, and 30.
Long line/set line fisheries sablefish:		
AK Prince William Sound	25	25, 28.
AK Southern Bering Sea	66	25.
Trawl fisheries groundfish:		
AK Bering Sea/Gulf of Alaska	70	1, 2, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 25, and 32.
Purse seine fisheries salmon:		
AK South Unimak (False Pass and Unimak Pass)	102	1, 2, and 13.

TABLE 2.—CATEGORY II, COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
Gillnet fisheries salmon:		
AK Southeast Alaska drift gillnet	460	2, 6, 13, 14, 15, 23, 30, and 31.
AK Yakutat—set gillnet	154	2, 6, 13, 14, and 30.
AK Cook Inlet—set and drift gillnet	1,213	2, 6, 13, 15, and 26.
AK Kodiak—set gillnet	174	2, 6, 13, and 15.
AK Peninsula—set gillnet	100	2, 6, 13, and 30.
AK Bristol Bay—set and drift gillnet	2,692	2, 6, 26, and 30.
WA Puget Sound Region, Hood Canal, Straits of Juan de Fuca (includes rivers, estuaries, etc.)—set and drift gillnet	3,900	1, 2, 3, 6, 14, 15, and 25.
WA coastal river gillnet	255	2, 3, and 6.
Other finfish:		
AK gillnets	6	Unknown.
CA gillnets for white sea bass, yellow tail, soupfin shark, white croaker, bonito/flying fish	144	3, 6, 13, 27, and 30.
Troll fisheries:		
AK salmon	1,607	1, 2, 28, and 31.
WA, OR, CA salmon	4,727	2, 3, and 6.
HI trolling, rod and reel	903	20, 21, and 24.
Round haul (seine and lampara), beach seine, and throw net fisheries:		
AK salmon beach or purse seine	1,199	2, 13, and 15.
CA herring purse seine	43	3, 6.
CA anchovy, mackerel, tuna purse seine	330	3, 27.
CA sardine purse seine	345	3, 27.
CA squid purse seine	40	3, 22, 23, and 27.
Long line/Set line fisheries:		
AK groundfish	1,607	2, 31.
Pot, ring net, and trap fisheries:		
AK metlakatla fish trap	4	2, 6.
Handline and jig fisheries:		
HI deepsea bottomfish	434	12, 20.
HI tuna	144	12, 20, and 21.
Dip net fisheries:		
CA squid	10	3, 23.
Aquaculture, ranch pens:		
WA, OR salmon net pens	21	2, 3, and 6.
OR, WA/tribal salmon ranch	6	3, 6.

TABLE 3.—CATEGORY III, COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
Gillnet fisheries:		
AK Kuskokwim, Yukon, Norton, Kotzebue salmon gillnets	1,808	15.
WA, OR Upper Columbia River Basin (above Bonneville Dam) salmon and other finfish gillnets	100	3.
AK, WA, OR, CA gillnets for herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish	2,592	2, 3, and 6.
HI gillnet	81	None documented.
Troll fisheries:		
Non-salmon troll fisheries AK North Pacific halibut AK bottom fish WA, OR, CA albacore, groundfish, bottom fish CA halibut.	1,354	4, 6.
Guam tuna	<50	Non documented.
Commonwealth of the Northern Mariana Islands tuna	?	Do.
American Samoa tuna	?	Do.
Round haul (seine and lampara), beach seine, and throw net fisheries:		
AK herring beach or purse seine	550	13.
AK other finfish	9	None documented.
WA salmon purse seine	440	6, 14.
WA salmon reef net	53	6.
WA, OR herring, smelt, squid purse seine	100	3, 6.
WA beach seine all species	199	None documented.
HI purse seine	18	Do.
HI opelu/akule net	3	Do.
HI throw net, cast net	24	Do.
HI net unclassified	8	Do.
Western Pacific yellowfin tuna purse seine (South Pacific Tuna Treaty)	32	Do.
Long line/set line fisheries:		
AK, WA, OR North Pacific halibut	5,893	2, 4, 25, and 28.
WA, OR, CA groundfish, bottomfish	367	3, 4, 6, and 17.
CA shark/bonito	10	3.
HI ahi flagline	18	21, 24.
Trawl fisheries:		
AK food/bait herring	2	None documented.
AK, WA, OR, CA shrimp	382	Do.
WA, OR, CA groundfish, squid, smelt, bottomfish	585	2, 3, 6, 17, and 33.
CA California halibut	25	3.
CA sea cucumber	6	None documented.
Pot, ring net, and trap fisheries:		
AK shellfish—pot	1,533	13.
AK finfish—pot	226	None documented.
WA, OR, CA sablefish—pot	176	4, 6.
WA, OR, CA dungeness crab	1,426	4, 6, 30, and 32.
WA, OR shrimp—pot	231	None documented.
CA lobster, prawns, shrimp, rock crab, fish—pot	608	Do.
OR, CA hagfish	7	Do.
HI lobster—trap	21	12.
HI crab—trap	5	None documented.
HI fish—trap	2	Do.
HI shrimp—trap	2	Do.
HI other—trap	6	Do.
Handline and jig fisheries:		
AK North Pacific halibut	69	Do.
AK other finfish	33	Do.
WA groundfish, bottomfish	679	4, 6.
HI aku boat, pole and line	17	None documented.
HI inshore handline	76	20.
Guam bottomfish	<50	None documented.
Commonwealth of the Northern Mariana Islands bottomfish	?	Do.
American Samoa bottomfish	?	Do.
Dip net fisheries:		
WA, OR smelt, herring	119	Do.
Harpoon fishery:		
CA swordfish	228	Do.
Pound fisheries:		
AK, Prince William Sound herring spawn on kelp	81	Do.
AK Southeast Alaska herring food/bait	1	Do.
WA herring—brush weir	1	Do.
WA herring spawn on kelp	4	Do.
Bait pens:		
WA, OR herring	12	6.
Dredge fishery:		
Coastwide scallop	106	Do.
Dive, hand/mechanical collection fisheries:		
AK abalone	23	Do.
AK dungeness crab	3	Do.
AK herring spawn on kelp	172	Do.
AK urchin and other fish/shellfish	19	Do.
AK clam hand shovel	64	Do.
AK clam mechanical/hydraulic fisheries	3	Do.
WA geoduck	37	4.

TABLE 3.—CATEGORY III, COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
WA, OR sea urchin, other clams, octopus, oysters, sea cucumbers, scallops	647	2, 6.
CA abalone	129	None documented.
CA sea urchin	800	Do.
HI squiding, spear	49	Do.
HI lobster diving	16	Do.
HI coral diving	2	Do.
HI handpick	85	Do.
Aquaculture, ponds:		
WA oyster farm	316	Do.
WA mussel/clam	224	Do.
WA, CA kelp	4	Do.
HI fish pond	3	Do.
Commercial passenger fishing vessel (charter boat) fisheries:		
WA, OR, CA all species	998	3, 6.
Other fisheries:		
HI	17	None documented.

TABLE 4.—CATEGORY I, COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
Trawl fishery:		
SNE, MDA Foreign mackerel (1988, 3 countries)	15	16, 20, 22, 23, and 34.
Gillnet fisheries:		
GME groundfish	130	6, 15, 23, 31, 32, 34, 35, and 38.
GME mackerel	10	6, 23, 34, and 35.

TABLE 5.—CATEGORY II, COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN AND GULF OF MEXICO

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
Trawl fisheries:		
SNE, MDA offshore squid	20	16, 22, 23, and 34.
Atlantic Ocean mackerel	200	23, 16.
Longline:		
Atlantic Ocean and GMX tuna, shark, swordfish	820	22, 23, 24, 27, 31, 32, and 37.

TABLE 6.—CATEGORY III, COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN AND GULF OF MEXICO—CONTINUED

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
Trawl fisheries bottom:		
GME northern shrimp—trawl	320	None documented.
GA, SC whelk	25	Do.
GMX, SOA shrimp	18,292	20, 40.
Calico scallops	200	None documented.
Bluefish, croaker, flounder	550	Do.
Crab	400	Do.
Off bottom:		
GME, SNE groundfish	1,052	Do.
SNE, MDA mixed species	>1,000	Do.
GMX, SOA coastal herrings	5	36.
GMX butterfish	5	36.
Otter trawls:		
GME, SNE sea scallops	215	None documented.
Tub:		
GME tub trawl	46	6, 35.
Purse seine:		
GME, SNE, MDA menhaden	10	20.
GME, SNE, MDA Atlantic bluefin tuna	5	31.
GMX, SOA menhaden	97	20.

TABLE 6.—CATEGORY III, COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN AND GULF OF MEXICO—CONTINUED—Continued

Fishery	Estimated number of vessels/ persons	Marine mammal species involved
FL west coast sardines	16	20.
GME Atlantic herring	30	6, 15, and 35.
Bottom longline and hook and line:		
GMX, SOA snapper-grouper and other reef fish	1,300	None documented.
Hook and line: GMX, SOA pelagics	1,446	Do.
Hook/line, harpoon: GME, SNE Atlantic bluefin tuna	26,218	Do.
Gillnet/harpoon: SNE, MDA swordfish	5	Do.
Gillnet:		
GME, SNE, MDA coastal shad, sturgeon	4,500	15, 20, and 32.
FL east coast, GMX pelagics king and spanish mackerel	271	20?
FL east coast shark	24	None documented.
SOA shad and sturgeon	15	20.
GMX, SOA coastal	4,000	None documented.
Fixed gear fisheries trap:		
SNE, MDA	50–60	6, 15, 31, 32, and 35.
FL east and west coast, TX stone crab	500	None documented.
GMX, SOA blue crab	300	40, 20.
GMX, SOA, CB spiny lobster	2,500	None documented.
GMX, SOA, CB reef fish	2,200	Do.
Stop seine, weirs: GME Atlantic herring	50–100	6, 15, 31, 32, 35, and 38.
Pot:		
GME, SNE inshore lobster	10,613	6, 31, 32, 38, and 39.
GME, SNE offshore lobster	2,902	None documented.
MDA crab	?	Do.
MDA black sea bass	30	Do.
Dredge fisheries:		
GME, SNE sea scallops	233	31.
SNE, MDA offshore clam	159	None documented.
GME mussel	?	Do.
MDA oyster	?	Do.
Haul seine: SOA, CB	150	None documented.
Pound net: MDA	250	Do.
Beach seine: CB	15	40.
Farming: GME Atlantic salmon	>30	6, 35.
Coastal shellfish: GME, SNE, MDA	?	None documented.

List of State Abbreviations Used in Tables
- AK—Alaska
- CA—California
- FL—Florida
- GA—Georgia
- HI—Hawaii
- OR—Oregon
- SC—South Carolina
- TX—Texas
- WA—Washington

Acronyms and the Areas They Represent
- GME—Gulf of Maine—Canadian Border to Northern Massachusetts
- SNE—Southern New England—Southern Massachusetts to New York
- MDA—Mid Atlantic—New Jersey to Cape Hatteras, NC
- SOA—Southern Atlantic—South Carolina to Florida
- GMX—Gulf of Mexico—All Gulf States
- CB—Caribbean

SPECIES CODES FOR MARINE MAMMAL TAKEN IN COMMERCIAL FISHERIES

Species codes and common name	Scientific name
1. Northern fur seal	*Callorhinus ursinus.*
2. Northern sea lion	*Eumetopias jubatus.*
3. California sea lion	*Zalophus californianus.*
4. Unidentified sea lion	
5. Walrus	*Odobenus rosmarus.*
6. Harbor seal	*Phoca vitulina.*
7. Spotted seal	*Phoca larga.*
8. Ringed seal	*Phoca hispida.*
9. Ribbon seal	*Phoca fasciata.*
10. Bearded seal	*Erignathus barbatus.*
11. Northern elephant seal	*Mirounga angustirostris.*
12. Hawaiian monk seal	*Monachus schauinslandi.*
13. Sea otter	*Enhydra lutris.*
14. Dall's porpoise	*Phocoenoides dalli.*
15. Harbor porpoise	*Phocoena phocoena.*
16. Common dolphin	*Delphinus delphis.*
17. Pacific whitesided dolphin	*Lagenorhynchus obliguidens.*

SPECIES CODES FOR MARINE MAMMAL TAKEN IN COMMERCIAL FISHERIES—Continued

Species codes and common name	Scientific name
18. Northern right whale dolphin	*Lissodelphis borealis.*
19. Striped dolphin	*Stenella coeruleoalba.*
20. Bottlenose dolphin	*Tursiops truncatus.*
21. Rough toothed dolphin	*Steno bredanensis.*
22. Risso's dolphin	*Grampus griseus.*
23. Pilot whale	*Globicephala sp.*
24. False killer whale	*Pseudorca crassidens.*
25. Killer whale	*Orcinus orca.*
26. Beluga whale	*Delphinapterus leucas.*
27. Unidentified small cetacean	
28. Sperm whale	*Physeter catodon.*
29. Beaked whales	*Ziphiidae.*
30. Gray whale	*Eschrichtius robustus.*
31. Humpback whale	*Megaptera novaeangliae.*
32. Minke whale	*Balaenoptera acutorostrata.*
33. Unidentified large cetacean	
34. Atlantic whitesided dolphin	*Lagenorhynchus acutus.*
35. Gray seal	*Halichoerus grypus.*
36. Spotted dolphin	*Stenella plagiodon.*
37. Saddleback dolphin	*Delphinus delphis.*
38. Northern right whale	*Eubalaena glacialis.*
39. Fin whale	*Balaenoptera phsalus.*
40. Manatee	*Trichechus manatus.*

(**Authority:** 16 U.S.C. 1361 *et seq.*)

Date: January 19, 1989.

James W. Brennan,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

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Part IV

Department of the Treasury

Comptroller of the Currency

12 CFR Part 3
Risk-Based Capital Guidelines; Final Rule

DEPARTMENT OF THE TREASURY

Comptroller of the Currency

12 CFR Part 3

[Docket No. 89-2]

Risk-Based Capital Guidelines

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is amending 12 CFR Part 3 by adopting an Appendix A thereto which contains risk-based capital guidelines. The OCC's current capital regulations provide a disincentive to national banks holding low risk assets, because the same amount of capital is required to be held against those assets that must be maintained against a highly risky and high yielding asset. Furthermore, the current capital regulations, which are based on total assets, do not take account of a bank's off-balance sheet activities. The effect of the risk-based capital guidelines will be to individualize bank capital requirements by tying them to the riskiness of a particular bank's assets and off-balance sheet activities.

EFFECTIVE DATE: December 31, 1990.

FOR FURTHER INFORMATION CONTACT: Sanford M. Brown, Attorney, Legal Advisory Services Division, (202) 447–1880, Jennifer C. Kelly, National Bank Examiner, Commercial Activities Division (202) 447–1164, or Larry Winter, National Bank Examiner, Multinational and Regional Bank Analysis Division (202) 447–1747, Office of the Comptroller of the Currency, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Introduction

These final risk-based capital guidelines are derived from the risk-based capital proposal that the U.S. banking agencies published for public comment at 53 FR 8550, March 15, 1988. Portions of the proposal have been modified in response to the comments received from the public. A complete discussion of the issues raised by the commenters and the changes from the proposed guidelines is preceded by a brief overview of the final guidelines in this preamble.

These guidelines are supplemental to the existing capital requirements detailed in 12 CFR Part 3. The OCC is considering amendments to 12 CFR Part 3, and expects to publish a Notice of Proposed Rulemaking in the very near future. The amendments, which would become effective December 31, 1990, would implement a capital definition that is consistent with the definition in these risk-based capital guidelines and establish a new minimum capital-to-total assets requirement. Transitional arrangements will govern compliance with the risk-based capital guidelines until they are fully implemented on December 31, 1992. A brief explanation of the proposed amendments to Part 3 and a complete discussion of the OCC's transitional arrangements for the risk-based capital guidelines follow this overview of the final guidelines.

Background and Purpose

These final guidelines are consistent with the international framework for capital standards established in July 1988 by the Committee on Banking Regulations and Supervisory Practices (frequently referred to as the Cooke Committee or the Basle Supervisors Committee),[1] which meets under the auspices of the Bank for International Settlements in Basle, Switzerland. The international framework is also known as the Basle Agreement.

Efforts to develop a risk-based capital measure in the United States date back a number of years. The three U.S. banking agencies (the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency) first issued a risk-based capital proposal for public comment at 51 FR 10602, March 27, 1986. A majority of the public comments on the 1986 proposal expressed general support for the concept of basing a bank's capital requirement on the riskiness of its assets and off-balance sheet activities. Many commenters asserted, however, that without similar requirements for foreign competitors, the proposed requirements would put U.S. banks at a competitive disadvantage.

In light of those concerns, the U.S. banking agencies began working with the Bank of England on the development of a common approach. The OCC published a proposal based upon a joint U.S./U.K. risk-based capital agreement at 52 FR 23045, June 17, 1987. The scope of the international convergence effort expanded further when the Cooke Committee took the U.S./U.K. proposal under consideration and addressed the possibility of expanding the agreement to include all of the countries represented on the Committee.

As a result of the Cooke Committee's efforts, the international framework, upon which the guidelines are based, was developed. Thus, the final guidelines represent the culmination of efforts over several years to develop internationally consistent capital standards.

These final risk-based capital guidelines have a twofold purpose: To make capital requirements more sensitive to differences in risk profiles among banking organizations and to aid in making the definition of bank capital uniform internationally.

To achieve this purpose, the risk-based capital guidelines make several modifications to the current capital standard. First, the guidelines recognize the riskiness of assets by lowering capital requirements for some assets that clearly have less credit risk than others. Second, the guidelines recognize the risk inherent in off-balance sheet activities and require that banks hold capital against them. Third, the guidelines establish a definition of capital and a minimum risk-based capital standard that are consistent internationally, and place a greater emphasis on equity capital. A bank's risk-based capital ratio is obtained by dividing its capital base by its risk-weighted assets.

Differences Between the Risk-Based Capital Guidelines and the Existing Capital Standard

The following sections describe in greater detail the three areas in which the risk-based capital guidelines differ from the existing capital standard.

I. Assets are Risk-Weighted

Under the risk-based capital guidelines, assets are placed into one of four risk categories, based primarily on credit risk. To calculate a bank's minimum risk-based capital requirement, the face value of assets in each risk category is adjusted to reflect the relative riskiness of that category.

For example, assets in the first risk category, which includes cash, reserves at Federal Reserve Banks, and securities issued by the U.S. Government, have no credit risk and therefore carry a 0% risk-weight and require no capital.

Capital is required for assets in the remaining three risk categories. Capital is required for 20, 50, or 100 percent of the asset's face value, depending on the risk category in which the asset is placed. For example, an asset with a 20% risk weight requires only one-fifth the capital support of an asset with a 100% risk-weight. The asset risk weights for specific items are presented in Table 1 of Appendix A to 12 CFR Part 3.

[1] The Cooke Committee consists of representatives of the central banks and supervisory authorities from the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom, United States), and Luxembourg.

II. Off-Balance Sheet Activities are Included

The second change from the existing capital standard is that the final risk-based capital guidelines take account of the credit risk exposure that results from off-balance sheet activities. The OCC followed the Cooke Committee framework in the treatment of off-balance sheet items.

Because of the contingent nature of off-balance sheet items, the guidelines take a two-step approach. In the first step, the face value of each off-balance sheet instrument is converted into an amount that permits it to be related to an on-balance sheet asset in terms of credit risk. This quantity is referred to as the instrument's "credit-risk equivalent" and is calculated by multiplying the notional principal amount of the off-balance sheet instrument by a credit conversion factor.

For example, a standby letter of credit serving as a financial guarantee exposes a bank to the same amount of credit risk as a loan to that customer. Therefore, it is assigned a credit conversion factor of 100%. Other off-balance sheet instruments entail less credit risk and, therefore, are assigned lower conversion factors—some as low as 0%.

In the second step, the credit-risk equivalent is placed into one of the four risk categories, based upon the obligor, collateral, or guarantee involved. For example, an off-balance sheet instrument with a credit conversion factor of 50% that is issued to an obligor who falls into the 50% risk category would require capital against 25% of the face amount of the instrument. The credit conversion factors are listed in Table 2 of Appendix A. The method for calculating the credit-risk equivalents for interest and exchange rate contracts is shown in Table 3 of Appendix A.

III. Capital is Redefined

These final risk-based capital guidelines also redefine capital. The elements of the new definition of capital are listed in Table 4 of Appendix A.

Capital instruments are divided into two tiers. Core (Tier 1) capital includes common equity, noncumulative perpetual preferred stock (excluding auction rate issues), and minority interests that are held by others in a bank's consolidated subsidiaries. Supplementary (Tier 2) capital includes, among other items, cumulative and limited-life preferred stock, mandatory convertible securities, subordinated debt, and the allowance for loan and lease losses. Tier 2 capital elements qualify as part of a bank's total capital base up to a maximum of 100% of that bank's Tier 1 capital.

Some Tier 2 capital elements, however, are subject to additional limitations. The loan loss reserve is limited to 1.25% of risk-weighted assets. Term subordinated debt and intermediate-term limited-life preferred stock are subject to a combined limit of 50% of Tier 1 capital. Moreover, these latter instruments, as well as other limited-life capital instruments, are amortized over the last five years of their term. Thus, for example, term subordinated debt with less than a year to maturity does not qualify as capital at all.

Further, some assets are deducted from capital. Intangibles, including goodwill, are deducted from Tier 1 capital unless they meet certain criteria. One exception is goodwill acquired through supervisory mergers of problem or failed depository institutions. The application of this exception is decided on a case-by-case basis and banks are made aware of the proper treatment of goodwill in conjunction with the OCC's merger approval. In contrast, majority investments in unconsolidated banking or finance subsidiaries are deducted from total capital. The Basle Agreement also requires the deduction of intentional reciprocal holdings of capital instruments by banks.

Transition Period and Minimum Capital Requirements

The final risk-based capital guidelines require banks to hold a minimum total risk-based capital ratio of 8% as of December 31, 1992. Of this 8%, half must be comprised of Tier 1 capital. However, a transition period is provided, beginning on December 31, 1990 and ending on December 30, 1992. No formal risk-based capital standard will be set prior to December 31, 1990. On that date, banks will be required to meet an interim minimum total risk-based capital ratio of 7.25%.

Banks should immediately begin monitoring their risk-based capital ratios and working toward achieving the interim and final minimum ratios. In the near future, the OCC will be providing guidance to assist banks in making a preliminary estimate of their risk-based capital ratio. In particular, a worksheet will be distributed that will assist small banks with less complex balance sheets in determining their conformance with the guidelines.

Any bank that has risk-based ratios of less than 4% Tier 1 capital and 8% total capital should begin planning for achieving those standards by December 31, 1992 as well as the interim ratio of 7.25% by December 31, 1990.

Furthermore, banks that at present have risk-based capital in excess of the 8% minimum should not take any action which would cause their risk-based capital ratio to fall below 8%.

During the transition period, there will be exceptions to the limitations on the use of Tier 2 capital instruments. In addition, some elements of capital will be grandfathered during the transition. Descriptions of the exceptions to the capital limitations and the grandfathered elements of capital are contained in section 4 of the final guidelines.

The OCC stresses that the 8% risk-based capital ratio is a minimum, and that most banks will be expected to maintain risk-based capital levels that exceed the 8% minimum. This ratio is considered a minimum because, while the risk-based capital standard focuses primarily on credit risk, a bank's capital base must also be available to absorb losses stemming from other types of risk, such as interest rate risk, operational risk, and asset concentrations. Therefore, the OCC will continue to assess both the quality of risk management systems and the level of overall risk in individual banks through the supervisory process, and will require additional capital when warranted. In addition, work will continue within the Cooke Committee on developing a common approach to assessing interest rate risk and exchange rate risk.

The OCC's assessment of overall capital adequacy takes into account these and other risks and involves a qualitative judgment made in conjunction with the OCC's supervision of national banks. This assessment involves analysis of the quality and level of earnings, the quality of loans and investments, the effectiveness of loan and investment policies, and management's overall ability to monitor and control risk. Thus, the assessment of a banking organization's capital adequacy goes far beyond a simple risk-based capital ratio. Nevertheless, the risk-based ratio provides bankers and examiners an important benchmark or starting point for the analysis of capital adequacy.

Proposed Leverage Constraint

In the near future, the OCC intends to propose amendments to its current leverage ratios in 12 CFR Part 3. If adopted, a minimum capital-to-total assets requirement (leverage constraint) will continue to be contained in 12 CFR Part 3. The proposed amendments would make the definition of capital in Part 3 consistent with that of the risk-based capital guidelines. In this respect, it is

anticipated that the proposed leverage constraint will be based solely on a ratio of Tier 1 capital to total assets. These amendments to the existing capital requirements will provide a minimum level of capital below which no national bank may operate without a mandate to restore capital to an adequate level. Because of the redefinition of capital in the new leverage constraint, it is difficult to compare the current requirements to the new standard. However, it is anticipated that this new minimum leverage ratio will be lower than the current standard.

An amended form of the existing minimum capital requirements is being retained for two reasons. First, the risk-based capital guidelines are designed solely as a measure of credit risk; therefore, there are a number of other banking risks that are not addressed—*e.g.*, interest rate risk, operational risk and asset concentrations. Second, the existing capital requirement is based upon total rather than risk-adjusted assets, and therefore, eliminates the possibility for significant leverage which exists under the risk-based capital guidelines. This possibility exists because some assets receive a 0% risk weight under the guidelines and therefore require no capital.

The OCC believes that the combination of risk-based capital and the leverage constraint should produce a level of capital that adequately protects banks against losses. However, it is the opinion of the OCC that a bank's capital requirement should be related to the riskiness of its assets and off-balance sheet activities and, therefore, that the risk-based standard should be the primary focus in determining the adequacy of a bank's capital.

If adopted, the proposed amendments to 12 CFR Part 3 would become effective on December 31, 1990. In the interim, banks should maintain capital in accordance with the requirements for primary and total capital contained in the existing provisions of 12 CFR Part 3. In other words, until December 31, 1990, the capital requirements of national banks will not change; after December 31, 1990, if the proposed amendments are adopted, banks will be required to maintain a minimum capital ratio computed as a percentage of total assets, in addition to complying with the provisions of the risk-based capital guidelines.

Except for a few minor, mostly technical changes, the OCC's Interpretive Ruling 3.100 (*See* 12 CFR 3.100), which interprets the statutory phrase "capital and surplus" will remain unchanged. Thus, the proposed amendments to 12 CFR Part 3 would have no effect on a bank's lending limit or other activities that are statutorily constrained by the amount of a bank's "capital and surplus."

Summary of the Comment Letters and Changes from the Proposed Guidelines

The final guidelines include a number of changes from the proposed guidelines which appeared at 53 FR 8550, March 15, 1988. These changes were influenced, in part, by letters received during the comment period, which ended May 13, 1988.

The OCC received 122 comment letters, including 46 from multinational and regional banks and 25 from community banks. The remaining commenters were trade associations, investment bankers, government-sponsored agencies, Members of Congress, multilateral lending institutions, savings and loan associations, and various other groups representing the financial services industry.

The commenters discussed a number of issues, some of which precipitated changes to the final guidelines. The major issues regarding risk-based capital and the changes from the original proposal are discussed in the remainder of this preamble. The most significant changes from the proposed guidelines are: the assignment of certain mortgage loans to the 50% risk category; the elimination of the 10% risk category; the recognition of noncumulative perpetual preferred stock as a Tier 1 capital instrument; the expansion of the treatment of intangible assets; and the recognition of a group of industrialized countries whose central governments and banks should receive similar treatment under the risk-based capital system. These and other issues are discussed more fully below, and are arranged alphabetically within the following categories: I. General Issues, II. Balance Sheet Assets, III. Off-Balance Sheet Items, and IV. Capital Elements.

I. General Issues

Applicability—The proposed guidelines stated that the risk-based capital guidelines were intended to apply to all national banks, regardless of size. Although a number of the commenters expressed their agreement with that position, 11 suggested that the guidelines should apply only to larger banks. Commenters suggested a number of cutoffs based on asset size. The commenters' basic argument in support of exempting smaller banks from the risk-based capital guidelines was that the resultant reporting burden for those institutions would far outweigh any benefits that might be realized.

Although the OCC acknowledges this concern, the OCC believes that the risk-based capital guidelines should be applied to banks of all sizes. The risk-based capital measure is sensitive to the credit risk profiles of individual institutions and therefore, it represents an important element of the capital adequacy assessment process, regardless of a bank's size.

The OCC desires to minimize the reporting burden for those institutions with very strong risk-based capital ratios. For that reason, the proposal requested specific comment on the appropriate focus, based on asset size, of off-site data collection and monitoring efforts for risk-based capital. The comments received in response to that question will be given careful consideration during the process of developing the reporting and monitoring procedures. The details of those arrangements will be provided at a later date.

Average versus Period-end Figures—The OCC requested specific comment regarding whether average or period-end figures should be used in calculating the ratio. The proposed guidelines asked three questions: "(1) Should the ratio be calculated for average figures? (2) For which items used in calculating the ratio are average figures most important? (3) How can the burden involved in determining average figures be minimized?"

The OCC received 31 comments responding to these questions. While most agreed that average figures are philosophically better, the general sentiment was that the benefit gained by using average figures would not outweighs the reporting burden. Several commenters said that the fear of "window dressing" is overstated and that the examination process is sufficient to monitor this type of distortion.

The OCC recognizes the reporting burden that would be created by requiring the use of average figures for the calculation of the risk-based capital ratio. Therefore, period-end numbers will be used under these final guidelines, and issues such as "window dressing" will be addressed through the supervisory process. However, the final guidelines do permit the OCC to require a bank to compute its risk-based capital ratio on the basis of average, rather than period-end, risk-weighted assets in response to specific supervisory concerns.

The OCC believes that a risk-based capital ratio based upon average data is superior to one based upon period-end figures. It is the intention of the OCC

ultimately to incorporate the use of average data in the risk-based capital calculation, and banks are urged to develop systems that will provide this information.

Original versus Residual Maturity—In the proposed guidelines, the OCC requested specific comment regarding claims on foreign banks and loan commitments. The issue was whether these items should be risk-weighted based upon their original or residual maturity. Thirty-six commenters were strongly in favor of using residual maturity. Most focused on loan commitments, and argued that there is no direct relationship between maturity alone and the likelihood of a drawdown under an outstanding commitment. Twelve commenters asserted that the use of original maturity would require the development of new reporting systems, which would be an onerous and costly task.

After careful consideration of this issue, the OCC has determined that while it is appropriate to risk-weight claims on foreign banks on the basis of residual maturity, loan commitments should be risk-weighted according to their original maturity. It is the OCC's considered opinion that the longer the term of a commitment, the greater the risk of deterioration of the credit. In this light, original maturity is viewed as the most accurate means of assessing the inherent riskiness of a loan commitment for purposes of risk-based capital.

The OCC recognizes that many bank reporting systems do not currently reflect the original maturity of loan commitments. Therefore, until December 31, 1992, national banks will be permitted to use remaining maturity in determining the appropriate credit conversion factor for off-balance sheet loan commitments. This transitional rule is intended to provide all national banks with sufficient opportunity to make any necessary systems modifications.

Tandem Ratios—The proposal raised the possibility that the existing minimum capital requirements in 12 CFR Part 3 would not be replaced in favor of the risk-based capital guidelines, but rather would be supplemented by the new standard. Further, the proposed guidelines stated that if a leverage constraint should be retained, the definition of capital would be modified to be consistent with the one contained in the guidelines.

Sixteen commenters discussed whether the current capital requirements should remain in place alongside the new risk-based capital standard—*i.e.*, whether there should be "tandem capital ratios," with one being calculated as a percentage of total assets and the other based on a bank's risk-weighted assets. The majority of those commenters felt that the existing requirements should be phased out as quickly as possible to avoid what could be a burdensome system that might decrease the risk-reducing incentives offered by the risk-based capital system.

After careful consideration, the OCC has determined that it is best to retain some form of leverage constraint. The risk-based capital ratio is based strictly on credit risk, and thus might understate the amount of capital needed to safeguard a bank against its overall risk exposure. For example, the risk-based capital guidelines place some assets in a 0% risk category and create the possibility for significant leverage. The OCC is of the opinion that the guidelines should be the primary focus of the capital adequacy determination; however, the OCC also believes that any banking activity entails some risk, thereby requiring a certain base level of capital.

In this regard, the OCC intends to propose amendments to 12 CFR Part 3—its existing minimum capital requirement. The amendments, if adopted, would create a definition of capital that is identical to the definition in Appendix A to Part 3. It is anticipated that the proposed amendments to 12 CFR Part 3 will require all banks to maintain a minimum level of capital computed as a percentage of total assets, regardless of the bank's risk-based capital ratio. It is likely that the new leverage ratio will be lower than the current standard. If adopted, the proposed amendments would be effective on December 31, 1990, the same time the risk-based capital guidelines go into place. In the interim, all banks are required to maintain capital in accordance with the current provisions of Part 3 relating to primary and total capital.

II. Balance Sheet Assets

Claims on Foreign Banks—Under the proposed guidelines, claims on foreign banks with an original maturity of one year or less were placed in the 20% risk category; longer-term claims were placed in the 100% risk category. This treatment of longer-term claims on foreign banks suggested greater credit and/or transfer risk than similar claims on domestic banks.

Comments on this issue were received from ten of the nation's largest banks and three trade associations. All commenters resoundingly favored reducing the weight on longer term claims on foreign banks to 20%, at least for banks domiciled in countries that are parties to the Basle Agreement. Most commenters pointed out that the disparate treatment of foreign and domestic claims (the proposal placed all claims on domestic banks in the 20% risk category) was a departure from the earlier U.S./U.K. proposal, and was contradictory to the aim of the Basle Agreement, *i.e.*, establishing a level playing field for all international banks. In addition, the commenters felt that the adoption of parallel capital standards in each of the participating countries should narrow any perceived differences in the creditworthiness of foreign banks.

Several commenters suggested that by weighting longer-term claims on foreign banks five times more heavily than similar claims on domestic banks, the proposal implied that a long-term transaction with a prime European bank is more risky than an identical transaction with any domestic bank. As a result of this weighting disparity, the commenters claimed that banks would pay a higher price (in the form of increased capital) to transact business with foreign counterparties. The majority of the commenters felt that this would create an artificial incentive for banks to engage in transactions with domestic banks to the exclusion of foreign banks.

According to the commenters, a major consequence of this bias against foreign banks would be its effect on international funding markets. Interbank dealings in the global market would be unnecessarily disrupted and each nation's banking system would become more isolated. Barriers to the free flow of international funds would discourage healthy diversification and reduce important funding sources.

The commenters also noted that the proposed treatment of longer-term claims on foreign banks differs from the way in which the risk-based capital guidelines handle the loan portfolio, which is not weighted according to maturity or degree of transfer risk.

The OCC agreed with the majority of the commenters' conclusions and has drafted the final guidelines so as to avoid the problems created by placing a high risk weight on long-term claims on all foreign banks. Using the term "OECD-based country," which is defined in section 1(c)(15) of Appendix A [2] and is derived from the Basle

[2] The term "OECD-based country" as defined in section 1(c)(15) of Appendix A, currently includes Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States, plus Saudi Arabia. These countries are hereinafter referred to as "OECD countries".

Agreement, the final guidelines place a 20% risk weight on all claims on or guaranteed by a depository institution organized in one of these countries. Claims on depository institutions that are not organized in an OECD country are also placed in the 20% risk category if they have a remaining maturity of one year or less: otherwise, claims on or guaranteed by non-OECD depository institutions are placed in the 100% risk category.

Claims on Foreign Governments—Three commenters addressed the proposed treatment of claims on foreign governments. The proposal placed local currency claims on foreign central governments, to the extent the bank has local currency liabilities, in the 20% risk category. All other claims on foreign governments were deemed to entail and element of transfer risk and, therefore, were placed in the 100% risk category. Comments on this issue were received from two banks and a trade association.

Both of the banks felt that, at least for many countries, the level of transfer risk was insufficient to warrant placement in the 100% risk category. One bank further suggested that this treatment would result in competitive inequalities for U.S. banks when the European Common Market begins reciprocal treatment among European Economic Community banks. One bank proposed assigning all claims of central governments that are members of the Bank for International Settlements to the 20% risk category. The other bank recommended the development of a list of countries with assigned weightings, or the establishment of simple criteria from which a credit distinction could be drawn. The trade association responded in favor of the 100% risk weight, because they were pleased that claims on governments of industrialized countries were assigned an equal risk weighting with that of domestic commercial and industrial loans.

In accordance with the Basle Agreement, the OCC's final guidelines give identical treatment to all claims on OECD countries, as that term is defined in section 1(c)(15) of the final guidelines. As an example, securities issued by the central government of an OECD country receive a 0% risk weight.

This grouping of countries was chosen because it was felt that claims on these industrialized nations entail very little transfer risk. For countries outside the grouping, direct claims on their central governments and central banks, with a remaining maturity of one year or less, also are placed in the 0% risk category, to the extent they are denominated in the local currency and funded by local currency liabilities. Claims backed with a full faith and credit guarantee from the central government or central bank of a non-OECD country are also assigned to the 0% risk category if they meet these criteria. Otherwise, claims on the central government of a non-OECD country are assigned to the 100% risk category. Claims on the central bank of a non-OECD country that do not meet the criteria for assignment of a 0% risk weight are placed in the 20% risk category if the remaining maturity is one year or less, and the 100% risk category if the remaining maturity exceeds one year.

Financial Guarantee Insurance—The proposal placed claims guaranteed by domestic depository institutions in the 20% risk category. Generally speaking, this means that claims otherwise belonging in the 50% or 100% risk category which are supported by a financial guarantee-type standby letter of credit from an OECD depository institution are placed in the 20% risk category. Municipalities are among those entities whose obligations are traditionally backed by bank-issued standby letters of credit. The concessionary weight given to claims guaranteed by a bank is particularly important with municipal revenue bonds, which are otherwise placed in the 50% risk category; however, if a municipal revenue bond is supported by a standby letter of credit, it receives a 20% risk weight. Municipal revenue bonds frequently are supported by municipal bond insurance, rather than a standby letter of credit. Under the risk-based capital proposal, the fact that a municipal revenue bond is supported by financial guarantee insurance would not entitle it to preferential treatment.

The OCC received eight comment letters from entities in the municipal bond insurance business—seven insurance companies and one trade association. All eight of the commenters argued for similar treatment for municipal revenue bonds supported by financial guaranty insurance and municipal revenue bonds supported by standby letters of credit.

Several commenters pointed out that financial guarantee insurers receive ratings from national credit rating organizations, and that virtually all insurers receive the highest rating possible. Commenters suggested that the rating of the financial guarantor be incorporated into the risk weighting, and that only instruments guaranteed by insurers with the highest rating be placed in the 20% risk category.

After careful consideration of this issue, the OCC has decided not to give preferential risk weights to any guarantees or other commitments by private sector entities, other than depository institutions. Although a number of bank investments receive credit ratings, the risk-based capital guidelines are not presently designed to incorporate this type of credit allocation. Nevertheless, the OCC is sympathetic to the concerns raised by the fact that highly-rated insurers are not given preferential treatment in the guidelines and will work toward eradicating any inequities that arise from the disparate treatment.

Weight on Municipal Securities—Fifteen commenters, including commenters from the financial guarantee insurance industry discussed above, addressed the proposed risk categories for municipal securities. Seven commenters discussed the risk categories to which obligations of state and local governments were assigned, irrespective of any credit enhancement devices. Virtually all of the commenters agreed that 20% is the proper risk category for general obligations; however, several commenters objected to the placement of revenue bonds in the 50% risk category, claiming that neither the market nor the credit rating services make such a wide distinction.

The credit quality of a revenue bond is limited by the ability of the issuer to collect revenues from the project financed. Therefore, the OCC has retained the distinction between general obligations and revenue bonds. Risk categories are very broad measures of credit risk and should not be viewed as fine-tuned determinations of the riskiness of a particular asset or off-balance sheet activity.

Weight on Residential Mortgages—The proposed guidelines placed residential mortgages in the 100% risk category. This proposed weight represented a departure from the Basle Agreement, which placed residential mortgages in the 50% risk category. The departure resulted from the OCC's concern that a lower risk weight for residential mortgages might be preceived as credit allocation within the loan portfolio.

Forty-two commenters addressed this issue. The majority advocated assigning residential mortgages to a lower risk category, and justified this position by citing the superior credit quality of residential mortgages.

Commenters also stated that a 100% risk weight for residential mortgages would place U.S. banks at a competitive disadvantage. This disadvantage would result because, under the terms of the Basle Agreement, foreign banks would hold half as much capital against residential mortgages as U.S. banks.

Commenters pointed out that national banks compete with foreign depository institutions in both overseas and domestic real estate markets.

In addition, a number of commenters felt that domestic competitors from the thrift industry would have an edge, as savings and loans are generally allowed to operate with less capital than national banks. Commenters stated that this competitive disadvantage could ultimately have an adverse effect on the U.S. housing market.

While the OCC is still concerned about creating the perception of allocating credit within the loan portfolio, the agency agrees that a competitive disadvantage could result if national banks were required to hold more capital against residential mortgages than their competitors. The OCC further recognizes that a competitive disadvantage such as this could ultimately have an adverse impact on U.S. consumers. It is for these reasons that the OCC has decided to place residential mortgages in the 50% risk category.

In order to ensure that residential mortgages which are placed in the 50% risk category deserve this preferential treatment, the OCC has decided to require that these assets meet certain prudential qualifications before receiving a 50% risk weight. Thus, the mortgage must be a first lien on a one-to-four-family residential property. The residence may be rented or owner-occupied. The note secured by the mortgage must not be more than 90 days past due, on nonaccrual or restructured. The assignment of mortgages to the 50% risk category is based upon the presumption that banks will adhere to prudent underwriting standards with respect to the maximum loan-to-value ratio, the borrower's paying capacity and the long-term expectations for the real estate market in which it is lending. If, in the course of the supervisory process, it is determined that a bank has failed to do this, the OCC may require additional capital, increased reserves, or both. In all cases, residential property loans made for purposes of construction financing do not qualify for the 50% risk weight; however, this exclusion from the 50% risk category does not apply to loans made to individual purchasers for the construction of their own homes.

The proposed guidelines did not address the treatment of mortgage-backed securities. However, after careful consideration the OCC has decided to treat such instruments as if the bank has an interest in the underlying pool of mortgages. For mortgage-backed securities issued by government or government-sponsored agencies, the security is assigned to the risk category appropriate for a claim on the issuing entity, assuming the issuing agency guarantees the timely repayment of principal and interest. The guidelines set forth certain criteria that a mortgage-backed security must meet before it can be assigned to any risk category lower than 100%.

Privately-issued mortgaged-backed securities that meet the above-mentioned criteria are assigned to the highest risk category appropriate for any one of the underlying mortgages or securities in the pool. The OCC may, on a case-by-case basis, allow a bank to assign the security to the various risk categories in proportion to the respective risk weights that make up the security—that is, the security may be separated into its components for purposes of risk weighting. In order for a bank to proportionately risk weight a mortgage-backed security, it must obtain the necessary data on the underlying pool as of each reporting date. This information must be available to the bank for use in preparing the Report of Condition. If current data is unavailable, the entire security must be assigned to the highest risk weight appropriate for any underlying mortgage or security, based on the original or last-known composition of the pool.

Any class of a mortgage-backed security that, in the event of loss of principal or interest, incurs more than its pro rata share of loss without the whole mortgage-backed security issue being in default (*e.g.*, subordinated classes or residual interests) is to be assigned a risk weight of 100%. Furthermore, all stripped mortgage-backed securities, *i.e.*, interest only portions (IOs), principal only portions (POs), and similar instruments, are assigned to the 100% risk category, regardless of the issuer. While the OCC recognizes that these instruments can be used to hedge interest rate risk and does not wish to discount their appropriate use for this purpose, IOs and POs are assigned to the highest risk category because of their extreme price volatility, market risk, and otherwise inherent riskiness as a bank asset. As a measure for interest rate risk is perfected, the OCC may reconsider the assignment of these instruments to the 100% risk category.

Weight on Obligations of U.S. Government-sponsored Agencies—In the proposal, the OCC requested specific comment on the treatment of obligations of U.S. Government-sponsored agencies. These obligations include claims on, and portions of claims guaranteed by, U.S. Government-sponsored agencies, as well as claims collateralized with securities issued or guaranteed by U.S. Government-sponsored agencies. The proposed guidelines placed these obligations in the 20% risk category, a change from the previous proposal at 52 FR 23045, June 17, 1987, which placed obligations of U.S. Government-sponsored agencies in the 50% risk category.

Thirty-one commenters responded on this issue. While a number supported the proposed risk weight, the majority felt that the risk weight was to high. They stated that there should be no distinction between obligations of U.S. Government-sponsored agencies and obligations of the U.S. Government, because the former have the implied faith and credit of the U.S. Government.

A number of commenters particularly objected to the distinction between obligations of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC), both of which are U.S. Government-sponsored agencies, and obligations of the Government National Mortgage Association (GNMA), which are guaranteed by the U.S. Government. These commenters claimed that such a distinction could have a negative effect on the housing markets.

After careful consideration of this issue as well as the proposed maturity break for claims on the U.S. Government, the OCC has determined that obligations of U.S. Government-sponsored agencies should remain in the 20% risk category. However, the 10% risk category has been eliminated and all obligations collateralized by securities issued or guaranteed by the U.S. Government or one of its agencies have been moved into the 20% category. This category also encompasses indirect holdings of pools of assets that represent direct claims on the U.S. Government and its agencies, *e.g.*, mutual funds and privately-issued mortgage-backed securities where the underlying assets are GNMA securities.

Weight on U.S. Government Securities—The proposed guidelines placed U.S. Government securities with a remaining maturity of 91 days or less in the 0% risk category and longer term U.S. Government securities in the 10% risk category. Fourteen commenters addressed this issue. Several supported the proposed weights, while the majority argued that no maturity distinction should be made. These commenters noted that U.S. Government securities carry no credit risk and, since the proposal does not address interest rate risk in general, it is inappropriate to do so for U.S. Government securities.

After careful consideration of this issue, the OCC has placed all claims on or directly and unconditionally guaranteed by the U.S. Government and its agencies in the 0% risk category, regardless of maturity. This category would generally include all securities guaranteed by the U.S. Government or its agencies, including GNMA pass-through securities. Furthermore, the OCC has determined that it is appropriate to eliminate the 10% category altogether. Thus, portions of claims conditionally guaranteed or collateralized by securities issued or guaranteed by the U.S. Government or its agencies are included in the 20% risk category. This includes, for example, repurchase agreements, loans guaranteed by the Veterans Administration, and student loans on which the Department of Education acts as a reinsurer. Indirect holdings of direct claims on the U.S. Government and its agencies, *e.g.*, mutual funds and mortgage-backed securities, are also included in the 20% risk category.

Although a bank's interest rate risk profile is an important and appropriate supervisory concern, the OCC recognizes that the proposed treatment of longer-term U.S. Government securities did not fully address the concept of interest rate risk. Therefore, the OCC will continue to monitor interest rate risk through the supervisory process, and may require additional capital if warranted. In addition, work will continue within the Cooke Committee on developing a common approach to assessing interest rate risk.

III. Off-Balance Sheet Items

Credit Card Lines—Under the proposed guidelines, unused credit card lines were deemed to be short-term commitments with a 0% credit conversion factor, if the bank has the unconditional option to cancel the card at any time. Four commenters addressed this issue. The commenters recommended that, in addition to credit card lines, other open-end retail credit arrangements with similar characteristics be included in this category.

The OCC agrees that it is the nature of the credit line, rather than the actual device used to access the line, that should be used as the determinant for application of the risk-based capital guidelines. Therefore, the OCC has expanded the definition of credit card lines in section 3(b)(4)(iii) to include other related plans. Examples of arrangements that might be encompassed by this definition are overdraft checking plans and credit advances under a credit card plan accessed by check.

Commenters also recommended that open-end retail credit arrangements should receive a conversion factor of 0% to the extent they are unconditionally cancellable "in accordance with applicable law." In an effort to avoid inequities that could arise in states that have notice requirements before such credit arrangements can be cancelled, the OCC has adopted the recommended phraseology. However, to the extent state law makes open-end retail credit arrangements practically uncancellable, these items will be treated as long-term commitments and receive a credit conversion factor of 50%.

Interest Rate and Exchange Rate Contracts—Commenters addressed several different subjects within this issue:

(1) Risk Weights. Under the proposed guidelines, risk weights for interest rate and exchange rate contracts are determined by a two-step process. First, the notional principal amount of the item is converted into a balance sheet equivalent measure that approximates the amount of credit exposure involved. Second, the resulting credit equivalent amount is assigned to an appropriate risk category, based primarily on the identity of the counterparty, or where relevant, on the nature of the guarantee or the underlying collateral. However, the proposed guidelines specified that the maximum risk weight assigned to the credit equivalent amount of an interest rate or exchange rate contract is 50%, rather than 100% as previously stated at 52 FR 23045, June 17, 1987.

The OCC requested specific comment on the change. Seventeen commenters expressed their support for reducing the maximum risk weight for these contracts from 100% to 50%. However, three commenters felt that 50% was still overly harsh and suggested making the 20% risk category the maximum for all counterparties. Other commenters called for a 20% risk category for all contracts with foreign and domestic banks, regardless of maturity.

After careful consideration of the comments received on this subject, the OCC has extended the 20% risk category to include all claims, including interest rate and exchange rate contracts, on depository institutions incorporated in OECD countries. The OCC has incorporated this change in section 3(a)(2)(i) of the final guidelines.

(2) Netting. The proposed guidelines did not permit multiple contracts with a single counterparty to be netted in the calculation of risk-weighted credit equivalents for interest rate and foreign exchange rate contracts. Seventeen commenters argued that the practice has been sufficiently affirmed by legal opinions to merit recognition in the risk-based capital guidelines.

After consideration of the comments, the OCC has revised section 3(b)(5)(i) of the final guidelines to permit netting of multiple contracts with a single counterparty if they are subject to novation. This change encompasses only those contracts under which the gross obligations are replaced in law and fact by a single net obligation. In the future, the OCC, in conjunction with the other members of the Cooke Committee, may consider recognizing other forms of netting when their enforceability in bankruptcy proceedings is supported by authoritative legal opinions.

(3) Exempted Transactions. The proposed guidelines permitted banks to exclude exchange rate contracts with an original maturity of seven days or less from the calculation of the denominator of the risk-based capital ratio. The Cooke Committee subsequently agreed to extend this maturity cutoff to 14 calendar days. Although the OCC did not receive any specific comments on this issue, section 3(b)(5)(iv)(A) of the final guidelines was amended to give national banks the benefit of this concession.

Loan Strips—Several commenters requested clarification of the definition of loan strips. The OCC has done this under section 3(b)(1)(iii) of the final guidelines. The definition of loan strips has been narrowed to include only those loan strips that represent assets sold without recourse, and that mature before the underlying loan. This narrower definition excludes loan strips written such that the maturity of the transaction coincides with the maturity of the underlying loan. This second type of loan strip is tantamount to a loan participation, and therefore is generally excluded from the originating bank's risk-weighted assets.

Unfunded Participations—Under the proposed guidelines, letters of credit and commitments are assigned a risk weight on an amount net of participations. However, because these off-balance sheet items, as well as the participations sold in them, are unfunded, a participation is treated as a claim on the entity to which it was sold.

Five commenters argued that requiring the selling bank to treat the participation as a claim on the entity to which it was sold results in double counting, since the purchaser is also required to hold capital against the same item. Virtually all of the commenters addressing this issue felt that the

proposed treatment would have the effect of inhibiting a constructive activity that diversifies risk.

This treatment of unfunded participations was intended to account for the contingency where the lead bank is called upon to advance funds to the beneficiary/counterparty and the participant is unable to reimburse the lead bank for its share of the advance. That risk is separate and distinct from the counterparty risk recognized by the capital requirement for the purchaser of the participation. Furthermore, since the initial off-balance sheet activity and the participation are unfunded, the participation can be viewed as a guarantee of a portion of the off-balance sheet item. Thus, since claims guaranteed by depository institutions in OECD countries receive a 20% risk weight, that portion of an item which has been participated to a depository institution in an OECD country should logically receive a risk weight of 20%. Therefore, the OCC considers the proposed treatment reasonable.

In the final analysis, even though the treatment of unfunded participations may not be as favorable as some commenters would wish to see, the sale of participations generally allows a lead bank to maintain less capital against an item in total, than if participating interests had not been sold.

Capital Elements

Allowance for Loan and Lease Losses—The proposed guidelines limited the amount of loan and lease loss reserves that qualify as Tier 2 capital to 1.25% of risk-weighted assets. Thirty-three commenters expressed concern that placing a limit on the allowance for loan and lease losses would create a disincentive for prudent reserving practices. Many also suggested that the allowance is equivalent to equity and should be included in Tier 1 rather than Tier 2.

The allowance for loan and lease losses is intended to absorb future losses. Although future losses may not be identified specifically at the time a provision is made, a presumption exists that losses are inherent in the loan and lease portfolio. The obvious link between the allowance and inherent losses in the loan and lease portfolio precludes it from qualifying as Tier 1 capital, which encompasses only the purest and most stable forms of capital. Furthermore, it is intended that the loan loss reserves which qualify for inclusion as Tier 2 capital will be general in nature. That is, any portion of the allowance for loan and lease losses which is ascribed to particular assets that have been identified as possessing a reasonable probability of some loss is not to be included as Tier 2 capital.

Allocated transfer risk reserves are an obvious example of loan loss reserves that are not general in nature and, therefore, do not qualify for inclusion as Tier 2 capital. They are reserves that have been established in accordance with section 905(a) of the International Lending Supervision Act of 1983 (12 U.S.C. 3907 and 3909) against certain assets whose value has been found by the U.S. banking agencies to have been impaired significantly by protracted transfer risk problems. Similarly, reserves for other real estate owned, since they are earmarked for a specific asset, do not qualify as Tier 2 capital.

Beyond the clearly identified specific loan loss reserves, it is difficult to distinguish between the portion of the loan loss reserve that is freely available to absorb future losses within the portfolio and the portion that reflects likely losses on existing problem or troubled loans. However, a bank that maintains a relatively large allowance for loan and lease losses usually has a relatively greater incidence of identified asset quality problems in its loan and lease portfolio, and in this situation the entire allowance for loan and lease losses cannot be considered to be a true general reserve for the purposes of risk-based capital. Therefore, a standard percentage limitation, based on total risk-weighted assets, is the most reasonable method of eliminating the bulk of the non-qualifying loan loss reserves from banks' capital calculations. The figure of 1.25% of risk-weighted assets was determined on the basis of historical data, after making appropriate adjustments for recent experience with large reserves against exposures to lesser-developed countries.

The OCC has determined that it is prudent to limit the portion of the allowance for loan and lease losses that may be counted as Tier 2 capital. The OCC will continue to participate in the Cooke Committee's effort to clarify the distinction between those portions of the allowance for loan and lease losses which should conceptually be regarded as part of capital and those which should not qualify. When a suitable definition is agreed, the OCC will reconsider the need for a standard percentage limitation in the guidelines.

Although some institutions may perceive the limit as a disincentive for prudent reserving practices, every national bank must still maintain an adequate allowance for loan and lease losses. The OCC will continue to enforce the standards for reserve adequacy on a case-by-case basis through the supervisory process.

Several commenters requested clarification of the treatment of the portion of the allowance for loan and lease losses that does not qualify as Tier 2 capital. In response to those inquiries, a footnote has been added to section 2(b)(1) of the final guidelines stating that any excess reserves, as well as allocated transfer risk reserves and reserves held against other real estate owned, are deducted from the gross sum of risk-weighted assets in computing the denominator of the risk-based capital ratio.

Goodwill and Other Intangibles—Under the proposed guidelines, all goodwill and other intangible assets were deducted from capital, with the exception of purchased mortgage servicing rights and certain goodwill acquired in connection with supervisory mergers with problem or failed banks. This treatment was similar to the OCC's existing capital-to-total assets requirements under 12 CFR Part 3, which includes only purchased mortgage servicing rights within the definition of primary capital.

Thirty-eight commenters addressed this issue. Most focused strictly on goodwill and all firmly supported the inclusion of goodwill, or at a minimum certain intangibles, in the proposed definition of capital. Several commenters recommended that intangible assets be included within the definition of capital, but limited to a certain percentage of Tier 1 capital. Strong arguments were given by a number of banks for the permanent grandfathering of existing goodwill. Commenters also urged that the OCC address these matters in a manner consistent with the Federal Reserve and the FDIC.

Intangible assets represent the excess of the purchase price over the fair market value of assets acquired in acquisitions accounted for under the purchase method of accounting. The excess amount is first allocated to identifiable intangibles (such as mortgage servicing rights, favorable leaseholds, and core deposit intangibles), with the remainder accounted for as goodwill.

The true market value of intangible assets is often difficult to ascertain, as it involves a number of assumptions which are subject to changes in general economic circumstances or to changes in an individual institution's future prospects. Experience has shown that the value of many intangibles declines when the condition of a bank deteriorates, the most critical point at which capital is needed. It is because of this inherent weakness in the value of

certain intangibles that goodwill and most intangible assets cannot be relied upon for capital support, and therefore are not counted in the determination of capital adequacy.

The OCC recognizes that not all intangibles possess the same characteristics, and that some may be more acceptable in terms of the quality of the values they represent. Mortgage servicing rights were included within the definition of capital under the capital requirements of 12 CFR Part 3, and the proposed risk-based capital guidelines, because they possess attributes very similar to intangible assets. The OCC has determined that, rather than list the types of intangibles acceptable as capital, a more appropriate method is to define those attributes which make the intangible asset a more reliable support for capital.

In this regard, these final guidelines delineate in section 2(c)(3) the criteria an intangible asset must meet before it qualifies as Tier 1 capital. The principal considerations in evaluating intangibles for purposes of capital adequacy are based on the separability, marketability and certainty of a stream of cash flows. Furthermore, in order to limit a bank's reliance on intangibles as capital, the amount of intangible assets that qualify as Tier 1 capital are subject to a limit of 25% of total Tier 1 capital.

The criteria purposely avoid excluding by name any particular category of identifiable intangible. The OCC expects includable types of intangibles to encompass most mortgage servicing rights. Banks may include other intangible assets which meet the criteria. Goodwill does not meet the criteria and the exclusion of goodwill from capital in consistent with the capital requirements of the current 12 CFR Part 3.

Supervisory goodwill is the one exception to these criteria, and the OCC has expanded this exception in the final guidelines to include supervisory goodwill acquired in connection with assisted mergers with problem or failed depository institutions. In the proposed guidelines, this exception was limited to mergers with problem or failed banks.

While the final guidelines allow banks to include a potentially greater number of intangible assets within the definition of capital, all intangibles that were grandfathered under the previous capital standard must be deducted from capital after the transition period ends, as detailed in section 4 of the final guidelines. The OCC has determined that in view of this more liberral treatment of intangibles, and since intangibles that fail to meet the delineated criteria test are not reliable as a means of capital support, grandfathering of intangible assets is not justified after the transition period of the new guidelines.

Preferred Stock—Thirty-four commenters addressed the proposed treatment of the various forms of preferred stock. The OCC specifically sought comment concerning the distinction between long-term and intermediate-term preferred stock. The proposed placement of perpetual preferred stock in Tier 2 capital generated a significant amount of comment. The manner in which the commenters discussed preferred stock was broken down into perpetual and limited-life issues.

(1) Perpetual Preferred Stock. The commenters that addressed the proposal's placement of perpetual preferred stock in Tier 2 capital argued that those instruments are so close to common equity that they cannot justifiably be relegated to the status of supplementary capital. A consistent theme throughout the comment letters was that, from a regulator's capital adequacy point of view, perpetual preferred stock provides an equally effective cushion against losses as does an equivalent amount of common stock. A number of commenters stated that Generally Accepted Accounting Principles (GAAP), bank regulations, and securities regulations have long considered perpetual preferred stock a full-fledged component of equity.

Some commenters suggested that only noncumulative perpetual preferred stock should be allowed to qualify as Tier 1 capital. However, in arguing for the inclusion of preferred stock in Tier 1 capital, a number of commenters stated that noncumulative preferred stock will be difficult to market and is not a viable financing vehicle for banks.

Several commenters expressed concern over certain forms of variable rate perferred stock and observed that as a bank gets into trouble it has to pay higher divideneds on its preferred stock. One commenter suggested that the problem with so-called auction rate preferred stock can be cured by requiring that dividends on Tier 1 capital instruments be tied to something other than the creditworthiness of the issuer. However, according to another commenter, recent issues of auction rate preferred stock have contained a feature permitting the issuer to fix the dividend period at one or more years.

In light of the comment letters and the amendments to the Basle Agreement, the OCC has determined that noncumulative perpetual preferred stock should be included as Tier 1 capital. All cumulative preferred stock, as well as those preferred stock instruments with a limited life, will continue to qualify as Tier 2 capital. All preferred stock having a dividend rate that is periodically reset in an auction-type process to reflect the creditworthiness of the issuer—*e.g.*, auction rate, remarketable and money market preferred stock—is included as Tier 2 capital only, regardless of whether dividends are cumulative or not. Furthermore, in order to meet the definition of perpetual preferred stock, the issue cannot be redeemed at the option of the holder of the instrument or have other provisions that would require future redemption of the stock.

The OCC believes that noncumulative perpetual preferred stock provides a degree of capital support so similar to common stock that it should not be excluded from Tier 1 capital. Notwithstanding commenters' arguments for including cumulative preferred stock in Tier 1, the OCC, the other federal banking agencies, and the signatories to the Basle Agreement reached a consensus that the accumulation of dividends has the potential of being a drain on future earnings; therefore, preferred stock instruments with a cumulative dividend feature are placed in Tier 2 capital.[3] By placing cumulative preferred stock in Tier 2, Tier 1 continues to be comprised of only the purest and most stable forms of capital. The OCC has revised section 2 of the guidelines to specifically include certain noncumulative preferred stock instruments in Tier 1 capital.

(2) Limited-Life Preferred Stock. When addressing the proposed distinction between long-term and intermediate-term preferred stock, the commenters were not as unified as they were in their response to the proposed treatment of perpetual preferred stock. A majority of those commenters felt that no distinction should be drawn based on the original maturity of an instrument. However, a strong minority stated that the proposed distinction was appropriate. Several commenters suggested that all limited-life preferred stock should be included in Tier 2 without limit.

The OCC has not changed its treatment of limited-life preferred stock instruments in the final guidelines; *i.e.*, preferred stock with an original maturity

[3] This treatment of preferred stock is consistent with the Federal Reserve Board's treatment for state member banks. The Federal Reserve's risk-based captal guidelines for bank holding companies allow certain cumulative preferred stock in Tier 1 capital. Historically, few national banks have used preferred stock as a source of capital; rather, the majority of the preferred stock issuances have been accomplished at the holding company level.

of 20 years or more qualifies as Tier 2 capital up to 100% of Tier 1, while preferred stock with an original maturity of less than 20 years, together with term subordinated debt, qualifies as Tier 2 capital up to 50% of Tier 1 capital. The OCC believes that this maturity distinction is a valid measure of the capital support that the instrument provides. As proposed, all limited-life capital instruments are discounted in the last five years to maturity.

Executive Order 12291

It is certified that this final rule does not constitute a "major rule" and, therefore, does not require the preparation of a final regulatory impact analysis.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, it is certified that these changes will not have a significant economic impact on a substantial number of small entities. Accordingly, a final Regulatory Flexibility Analysis is not required.

List of Subjects in 12 CFR Part 3

National banks, Capital, Risk.

Authority and Issuance

For the reasons set forth in the preamble, Part 3 of Chapter I of Title 12 of the Code of Federal Regulations is amended as set fourth below.

PART 3—[AMENDED]

1. The authority citation for 12 CFR Part 3 is revised to read as follows:

Authority: 12 U.S.C. 93a, 161, 1818; and 12 U.S.C. 3907 and 3909.

2. A new Appendix A is added to Part 3 after § 3.100 to read as follows:

Appendix A—Risk-Based Capital Guidelines

Section 1. Purpose, Applicability of Guidelines, and Definitions.

(a) *Purpose.* (1) An important function of the Office of the Comptroller of the Currency ("OCC") is to evaluate the adequacy of capital maintained by each national bank. Such an evaluation involves the consideration of numerous factors, including the riskiness of a bank's assets and off-balance sheet items. This Appendix A implements the OCC's risk-based capital guidelines. The risk-based capital ratio derived from those guidelines is more systematically sensitive to the credit risk associated with various bank activities than is a capital ratio based strictly on a bank's total balance sheet assets. A bank's risk-based capital ratio is obtained by dividing its capital base (as defined in section 2 of this Appendix A) by its risk-weighted assets (as calculated pursuant to section 3 of this Appendix A). These guidelines were created within the framework established by the report issued by the Committee on Banking Regulations and Supervisory Practices in July 1988. The OCC believes that the risk-based capital ratio is a useful tool in evaluating the capital adequacy of all national banks, not just those that are active in the international banking system.

(2) The purpose of this Appendix A is to explain precisely (i) how a national bank's risk-based capital ratio is determined and (ii) how these risk-based capital guidelines are applied to national banks. The OCC will review these guidelines periodically for possible adjustments commensurate with its experience with the risk-based capital ratio and with changes in the economy, financial markets and domestic and international banking practices.

(b) *Applicability.* (1) The risk-based capital ratio derived from these guidelines is an important factor in the OCC's evaluation of a bank's capital adequacy. However, since this measure addresses only credit risk, the 8% minimum ratio should not be viewed as the level to be targeted, but rather as a floor. The final supervisory judgment on a bank's capital adequacy is based on an individualized assessment of numerous factors, including those listed in 12 CFR 3.10. As a result, it may differ from the conclusion drawn from an isolated comparison of a bank's risk-based capital ratio to the 8% minimum specified in these guidelines. In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR Part 3.

(2) Effective December 31, 1990, these risk-based capital guidelines will apply to all national banks. In the interim, banks must maintain minimum capital-to-total assets ratios as required by 12 CFR Part 3, and should begin preparing for the implementation of these risk-based capital guidelines. In this regard, each national bank that does not currently meet the final minimum ratio established in section 4(b)(1) of this Appendix A should begin planning for achieving that standard.

(3) These risk-based capital guidelines will not be applied to federal branches and agencies of foreign banks.

(c) *Definitions.* For purposes of this Appendix A, the following definitions apply:

(1) "Allowances for loan and lease losses" means the balance of the valuation reserve on December 31, 1968, plus additions to the reserve charged to operations since that date, less losses charged against the allowance net of recoveries.

(2) "Associated company" means any corporation, partnership, business trust, joint venture, association or similar organization in which a national bank directly or indirectly holds a 20 to 50 percent ownership interest.

(3) "Banking and finance subsidiary" means any subsidiary of a national bank that engages in banking- and finance-related activities.

(4) "Cash items in the process of collection" means checks or drafts in the process of collection that are drawn on another depository institution, including a central bank, and that are payable immediately upon presentation in the country in which the reporting bank's office that is clearing or collecting the check or draft is located; U.S. Government checks that are drawn on the United States Treasury or any other U.S. Government or Government-sponsored agency and that are payable immediately upon presentation; broker's security drafts and commodity or bill-of-lading drafts payable immediately upon presentation in the United States or the country in which the reporting bank's office that is handling the drafts is located; and unposted debits.

(5) "Central government" means the national governing authority of a country; it includes the departments, ministries and agencies of the central government. This definition does not include the following: State, provincial, or local governments; commercial enterprises owned by the central government, which are entities engaged in activities involving trade, commerce or profit that are generally conducted or performed in the private sector of the United States economy; and non-central government entities whose obligations are guaranteed by the central government.

(6) "Commitment" means any arrangement that obligates a national bank to: (i) Purchase loans or securities; or (ii) extend credit in the form of loans or leases, participations in loans or leases, overdraft facilities, revolving credit facilities, or similar transactions.

(7) "Common stockholders' equity" means common stock, common stock surplus, undivided profits, capital reserves, adjustments for the cumulative effect of foreign currency translation and net of unrealized losses on non-current marketable equity securities.

(8) "Conditional guarantee" means a contingent obligation of the United states Government or its agencies, or the central government of an OECD country, the validity of which to the beneficiary is dependent upon some affirmative action—*e.g.*, servicing requirements—on the part of the beneficiary of the guarantee or a third party.

(9) "Depository institution" means a financial institution that engages in the business of banking; that is recognized as a bank by the bank supervisory or monetary authorities of the country of its incorporation and the country of its principal banking operations; that receives deposits to a substantial extent in the regular course of business; and that has the power to accept demand deposits. In the U.S., this definition encompasses all federally insured offices of commercial banks, mutual and stock savings banks, savings or building and loan associations (stock and mutual), cooperative banks, credit unions, and international banking facilities of domestic depository institution. Bank holding companies are excluded from this definition. For the purposes of assigning risk weights, the differentiation between OECD depository institutions and non-OECD depository institutions is based on the country of incorporation. Claims on branches and agencies of foreign banks located in the United States are to be categorized on the basis of the parent bank's country of incorporation.

(10) "Exchange rate contracts" include: Cross-currency interest rate swaps; forward foreign exchange rate contracts; currency options purchased; and any similar instrument that, in the opinion of the OCC, gives rise to similar risks.

(11) "Goodwill" means an intangible asset that represents the excess of the purchase price over the fair market value of tangible and identifiable intangible assets acquired in purchases accounted for under the purchase method of accounting.

(12) "Intangible assets" include, but are not limited to, purchased mortgage and credit card servicing rights, goodwill, favorable leaseholds, and core deposit value.

(13) "Interest rate contracts" include: Single currency interest rate swaps; basis swaps; forward rate agreements; interest rate options purchased; forward forward deposits accepted; and any similar instrument that, in the opinion of the OCC, gives rise to similar risks, including when-issued securities.

(14) "Novation" means a bilateral contract between two counterparties under which any obligation to each other to deliver a given currency on a given date is automatically amalgamated with all other obligations for the same currency and value date legally substituting one single net amount for the previous gross obligations.

(15) "OECD-based country" means a member of the grouping of countries that are full members of the Organization of Economic Cooperation and Development, plus countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. These countries are hereinafter referred to as "OECD countries"

(16) "Original maturity" means, with respect to a commitment, the earliest possible date after a commitment is made on which it expires or is unconditionally cancellable at the option of the issuing bank.

(17) "Preferred stock" includes the following instruments: (i) "Convertible preferred stock," which means preferred stock that is mandatorily convertible into either common or perpetual preferred stock; (ii) "Intermediate-term preferred stock," which means preferred stock with an original maturity of at least five years, but less than 20 years; (iii) "Long-term preferred stock," which means preferred stock with an original maturity of 20 years or more; and (iv) "Perpetual preferred stock," which means preferred stock without a fixed maturity date that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. For purposes of these instruments, preferred stock that can be redeemed at the option of the holder is deemed to have an "original maturity" of the earliest possible date on which it may be so redeemed.

(18) "Public-sector entities" include states, local authorities and governmental subdivisions below the central government level in an OECD country. In the United States, this definition encompasses a state, county, city, town, or other municipal corporation, a public authority, and generally any publicly-owned entity that is an instrumentality of a state or municipal corporation. This definition does not include commercial companies owned by the public sector.[1]

(19) "Reciprocal holdings of bank capital instruments" means cross-holdings or other formal or informal arrangements in which two or more banking organizations swap, exchange, or otherwise agree to hold each other's capital instruments. This definition does not include holdings of capital instruments issued by other banking organizations that were taken in satisfaction of debts previously contracted, provided that the reporting national bank has not held such instruments for more than five years or a longer period approved by the OCC.

(20) "Replacement cost" means, with respect to interest rate and exchange rate contracts, the loss that would be incurred in the event of a counterparty default, as measured by the net cost of replacing the contract at the current market value. If default would result in a theoretical profit, the replacement value is considered to be zero. The mark-to-market process should incorporate changes in both interest rates and counterparty credit quality.

(21) "Residential properties" means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence

(22) "Risk-weighted assets" means the sum of total risk-weighted balance sheet assets and the total of risk-weighted off-balance sheet credit equivalent amounts. Risk-weighted balance sheet and off-balance sheet assets are calculated in accordance with Section 3 of this Appendix A

(23) "State" means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

(24) "Subsidiary" means any corporation, partnership, business trust, joint venture, association or similar organization in which a national bank directly or indirectly holds more than a 50% ownership interest. This definition does not include ownership interests that were taken in satisfaction of debts previously contracted, provided that the reporting bank has not held the interest for more than five years or a longer period approved by the OCC.

(25) "Total capital" means the sum of a national bank's core (Tier 1) and qualifying supplementary (Tier 2) capital elements.

(26) "Unconditionally cancellable," means, with respect to a commitment-type lending arrangement, that the bank may, at any time, with or without cause, refuse to advance funds or extend credit under the facility.

(27) "United States Government or its agencies" means an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of

[1] *See* Definition (5), "Central government," for further explanation of commercial companies owned by the public sector

principal and interest by the full faith and credit of the United States Government.

(28) "United States Government-sponsored agency" means an agency originally established or chartered to serve public purposes specified by the United States Congress, but whose obligations are not explicitly guaranteed by the full faith and credit of the United States Government.

Section 2. Components of Capital.

A national bank's qualifying capital base consists of two types of capital—core (Tier 1) and supplementary (Tier 2).

(a) *Tier 1 Capital.* The following elements comprise a national bank's Tier 1 capital:

(1) Common stockholders' equity;

(2) Noncumulative perpetual preferred stock and related surplus; and [2]

(3) Minority interests in the equity accounts of consolidated subsidiaries.

(b) *Tier 2 Capital.* The following elements comprise a national bank's Tier 2 capital:

(1) Allowance for loan and lease losses, up to a maximum of 1.25% of risk-weighted assets,[3] subject to the transition rules in section 4(a)(2) of this Appendix A;

(2) Cumulative perpetual preferred stock, long-term preferred stock, convertible preferred stock, and any related surplus, without limit, if the issuing national bank has the option to defer payment of dividends on these instruments. For long-term preferred stock, the amount that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of the instrument (net of redemptions) at the beginning of each of the last five years of the life of the instrument;

(3) Hybrid capital instruments, without limit. Hybrid capital instruments are those instruments that combine certain characteristics of debt and equity, such as perpetual debt. To be included as Tier 2 capital, these instruments must meet the following criteria: [4]

(i) The instrument must be unsecured, subordinated to the claims of depositors and general creditors, and fully paid-up;

(ii) The instrument must not be redeemable at the option of the holder prior to maturity, except with the prior approval of the OCC;

(iii) The instrument must be available to participate in losses while the issuer is operating as a going concern (in this regard, the instrument must automatically convert to common stock or perpetual preferred stock, if the sum of the retained earnings and capital surplus accounts of the issuer shows a negative balance); and

(iv) The instrument must provide the option for the issuer to defer principal and interest payments, if

(A) The issuer does not report a net profit for the most recent combined four quarters, and

(B) The issuer eliminates cash dividends on its common and preferred stock.

(4) Term subordinated debt instruments, and intermediate-term preferred stock and related surplus are included in Tier 2 capital, but only to a maximum of 50% of Tier 1 capital. To be considered capital, term subordinated debt instruments must meet the requirements of 12 CFR 3.100(f)(1). Also, at the beginning of each of the last five years of the life of either type of instrument, the amount that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of that instrument (net of redemptions). [5]

(c) *Deductions From Capital.* The following items are deducted from the appropriate portion of a national bank's capital base when calculating its risk-based capital ratio.

(1) Deductions from Tier 1 capital:

(i) All goodwill is deducted from Tier 1 capital before the Tier 2 portion of the calculation is made, subject to the transition rules contained in section 4(a)(1)(ii) of this Appendix A; [6] and

(ii) Other intangible assets which do not meet the conditions established in section 2(c)(2) below, are deducted from Tier 1 capital before the Tier 2 portion of the calculation is made.

(2) Certain other intangible assets need not be deducted from Tier 1 capital, subject to the following conditions:

(i) The intangible assets must meet each of the following criteria:

(A) The intangible asset must be able to be separated and sold apart from the bank or from the bulk of the bank's assets;

(B) The market value of the intangible asset must be established on an annual basis through an identifiable stream of cash flows, and there must be a high degree of certainty that the asset will hold this market value notwithstanding the future prospects of the bank; and

(C) The bank must demonstrate that a market exists which will provide liquidity for the intangible asset;

(ii) Intangibles which are included as Tier 1 capital are limited to 25% of total Tier 1 capital and, for capital adequacy purposes, must be valued at the lower of either the current amortized book value or the current market value as established as part of the bank's annual audit.

(3) Deductions from total capital:

(i) Investments, both equity and debt, in unconsolidated banking and finance subsidiaries that are deemed to be capital of the subsidiary;[7] and

(ii) Reciprocal holdings of bank capital instruments.

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items

The denominator of the risk-based capital ratio, *i.e.*, a national bank's risk-weighted assets,[8] is derived by assigning that bank's assets and off-balance sheet items to one of the four risk categories detailed in section 3(a) of this Appendix A. Each category has a specific risk weight. Before an off-balance sheet item is assigned a risk weight, it is converted to an on-balance sheet credit equivalent amount in accordance with section 3(b) of this Appendix A. The risk weight assigned to a particular asset or on-balance sheet credit equivalent amount determines the percentage of that asset/credit

[2] Preferred stock issues where the dividend is reset periodically based upon current market conditions and the bank's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to Tier 2 capital, regardless of whether the dividends are cumulative or noncumulative.

[3] The amount of the allowance for loan and lease losses that may be included in capital is based on a percentage of risk-weighted assets. A banking organization may deduct reserves for loan and lease losses in excess of the amount permitted to be included as capital, as well as allocated transfer risk reserves and reserves held against other real estate owned, from the gross sum of risk-weighted assets in computing the denominator of the risk-based capital ratio.

[4] Mandatory convertible debt instruments that meet the requirements of 12 CFR 3.100(e)(5), or that have been previously approved as capital by the OCC, are treated as qualifying hybrid capital instruments.

[5] Capital instruments may be redeemed prior to maturity and without the prior approval of the OCC, as long as the instruments are redeemed with the proceeds of, or replaced by, a like amount of a similar or higher quality capital instrument. However, the OCC must be notified in writing at least 30 days in advance of such redemption.

[6] The OCC may not require national banks to deduct goodwill that they acquire, or have previously acquired, in connection with supervisory mergers with problem or failed depository institutions. Generally, this determination will be made by the OCC on a case-by-case basis at the time of the merger approval.

[7] The OCC may require deduction of investments in other subsidiaries and associated companies, on a case-by-case basis.

[8] The OCC reserves the right to require a bank to compute its risk-based capital ratio on the basis of average, rather than period-end, risk-weighted assets when necessary to carry out the purposes of these guidelines.

equivalent that is included in the denominator of the bank's risk-based capital ratio. Any asset deducted from a bank's capital in computing the numerator of the risk-based capital ratio is not included as part of the bank's risk-weighted assets.

Some of the assets on a bank's balance sheet may represent an indirect holding of a pool of assets, *e.g.*, mutual funds, that encompasses more than one risk weight within the pool. In those situations, the asset is assigned to the risk category applicable to the highest risk-weighted asset that pool is permitted to hold pursuant to its stated investment objectives. However, the minimum risk weight that may be assigned to such a pool is 20%. If, in order to maintain a necessary degree of liquidity, the fund is permitted to hold an insignificant amount of its investments in short-term, highly-liquid securities of superior credit quality (that do not qualify for a preferential risk weight), such securities generally will not be taken into account in determining the risk category into which the bank's holding in the overall pool should be assigned. More detail on the treatment of mortgage-backed securities is provided in section 3(a)(3)(iv) of this Appendix A.

(a) *On-Balance Sheet Assets.* The following are the risk categories/weights for on-balance sheet assets.

(1) *Zero percent risk weight.* (i) Cash, including domestic and foreign currency owned and held in all offices of a national bank or in transit. Any foreign currency held by a national bank should be converted into U.S. dollar equivalents.

(ii) Deposit reserves and other balances at Federal Reserve Banks.

(iii) Securities issued by, and other direct claims on, the United States Government or its agencies, or the central government of an OECD country.

(iv) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.[9]

(v) Local currency claims on or guaranteed by central governments and central banks in non-OECD countries, to the extent the bank has local currency liabilities in that country. Any amount of such claims that exceed the amount of the bank's local currency liabilities is assigned to the 100% risk category of section 3(a)(4) of this Appendix A, except in the case of claims on a central bank with a residual maturity of one year or less which would be assigned to the 20% risk category of section 3(a)(2).

(vi) Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is backed by gold bullion liabilities.

(vii) The book value of paid-in Federal Reserve Bank stock.

(2) *20 percent risk weight.* (i) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the customer or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category, but are assigned to the 100% risk category of section 3(a)(4) of this Appendix A.

(ii) Claims on depository institutions incorporated in a non-OECD country, as well as claims on the central bank of a non-OECD country, with a residual maturity of one year or less.

(iii) Cash items in the process of collection.

(iv) That portion of assets collateralized by the current market value of securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country.

(v) That portion of assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.

(vi) Securities issued by, or other direct claims on, United States Government-sponsored agencies.

(vii) That portion of assets guaranteed by United States Government-sponsored agencies.[10]

(viii) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies.

(ix) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity. In the U.S., these obligations must meet the requirements of 12 CFR 1.3(g).

(x) Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.[11]

(xi) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.

(xii) Assets collateralized by cash held in a segregated deposit account by the reporting national bank.

(3) *50 percent risk weight.* (i) Revenue obligations of any public-sector entity in an OECD country for which the underlying obligor is the public-sector entity, but which are repayable solely from the revenues generated by the project financed through the issuance of the obligations.

(ii) The credit equivalent amount of interest rate and exchange rate contracts, calculated in accordance with section 3(b)(5) of this Appendix A, that do not qualify for inclusion in a lower risk category.

(iii) Loans secured by first mortgages on one-to-four family residential properties, either owner-occupied or rented, provided that such loans are not more than 90 days past due, or on nonaccrual or restructured. It is presumed that such loans will meet prudent underwriting standards.

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[9] For the treatment of privately-issued mortgage-backed securities where the underlying pool is comprised solely of mortgage-related securities issued by GNMA, *see infra* note 10.

[10] Privately issued mortgage-backed securities, *e.g.*, CMOs and REMICs, where the underlying pool is comprised solely of mortgage-related securities issued by GNMA, FNMA and FHLMC, will be treated as an indirect holding of the underlying assets and assigned to the 20% risk category of this section 3(a)(2). If the underlying pool is comprised of assets which attract different risk weights, *e.g.*, FNMA securities and conventional mortgages, the bank should generally assign the security to the highest risk category appropriate for any asset in the pool. However, on a case-by-case basis, the OCC may allow the bank to assign the security proportionately to the various risk categories based on the proportion in which the risk categories are represented by the composition cash flows of the underlying pool of assets. Before the OCC will consider a request to proportionately risk-weight such a security, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of assets. Furthermore, before a mortgage-related security will receive a risk weight lower than 100%, it must meet the criteria set forth in section 3(a)(3)(iv) of this Appendix A.

[11] These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

Furthermore, residential property loans that are made for the purpose of construction financing are assigned to the 100% risk category of section 3(a)(4) of this Appendix A; however, this exclusion from the 50% risk category does not apply to loans to individual purchasers for the construction of their own homes.

(iv) Privately-issued mortgage-backed securities, *i.e.*, those that do not carry the guarantee of a government or government-sponsored agency, fully secured by mortgages that, at the time of origination, qualify for this 50% risk weight under section 3(a)(3)(iii) above,[12] provided they meet the following criteria:

(A) The underlying assets must be held by an independent trustee that has a first priority, perfected security interest in the underlying assets for the benefit of the holders of the security;

(B) The holder of the security must have an undivided pro rata ownership interest in the underlying assets or the trust that issues the security must have no liabilities unrelated to the issued securities;

(C) The trust that issues the security must be structured such that the cash flows from the underlying assets fully meet the cash flows requirements of the security without undue reliance on any reinvestment income; and

(D) There must not be any material reinvestment risk associated with any funds awaiting distribution to the holder of the security.

(4) *100 percent risk weight.* All other assets not specified above, including, but not limited to:

(i) Claims on or guaranteed by depository institutions incorporated in a non-OECD country, as well as claims on the central bank of a non-OECD country, with a residual maturity exceeding one year.

(ii) All non-local currency claims on non-OECD central governments, as well as local currency claims on non-OECD central governments that are not included in section 3(a)(1)(v) of this Appendix A.

(iii) Any classes of a mortgage-backed security that can absorb more than their pro rata share of the principal loss without the whole issue being in default, *e.g.*, subordinated classes or residual interests, regardless of the issuer or guarantor.

(iv) All stripped mortgage-backed securities, including interest only portions (IOs), principal only portions (POs) and other similar instruments, regardless of the issuer or guarantor.

(v) Obligations issued by any state or any political subdivision thereof for the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligation, *e.g.*, industrial development bonds.

(vi) Claims on commercial enterprises owned by non-OECD and OECD central governments.

(vii) Any investment in an unconsolidated subsidiary that is not required to be deducted from total capital pursuant to section 2(c)(3) of this Appendix A.

(viii) Instruments issued by depository institutions incorporated in OECD and non-OECD countries that qualify as capital of the issuer.

(ix) Investments in fixed assets, premises, and other real estate owned.

(b) *Off-Balance Sheet Activities.* The risk weight assigned to an off-balance sheet activity is determined by a two-step process. First, the face amount of the off-balance sheet item is multiplied by the appropriate credit conversion factor specified in this section. This calculation translates the face amount of an off-balance sheet item into an on-balance sheet credit equivalent amount. Second, the resulting credit equivalent amount is then assigned to the proper risk category using the criteria regarding obligors, guarantors and collateral listed in section 3(a) of this Appendix A; however, collateral and guarantees are applied to the face amount of an off-balance sheet item, not the credit equivalent amount of such an item. The following are the credit conversion factors and the off-balance sheet items to which they apply.

(1) *100 percent credit conversion factor.* (i) Direct credit substitutes, including financial guarantee-type standby letters of credit that support financial claims on the account party.[13] The face amount of a direct credit substitute is netted against the amount of any participations sold in that item. The amount not sold is converted to an on-balance sheet credit equivalent and assigned to the proper risk category using the criteria regarding obligors, guarantors and collateral listed in section 3(a) of this Appendix A. Participations are treated as follows:

(A) If the originating bank remains liable to the beneficiary for the full amount of the standby letter of credit, in the event the participant fails to perform under its participation agreement, the amount of participations sold are converted to an on-balance sheet credit equivalent using a credit conversion factor of 100%, with that amount then being assigned to the risk category appropriate for the purchaser of the participation.

(B) If the participations are such that each participant is responsible only for its pro rata share of the risk, and there is no recourse to the originating bank, the full amount of the participations sold is excluded from the originating bank's risk-weighted assets;

(ii) Risk participations purchased in bankers' acceptances and participations purchased in direct credit substitutes;

(iii) Assets sold under an agreement to repurchase and assets sold with recourse,[14] to the extent that these assets are not reported on a national bank's statement of condition (this includes loan strips sold without direct recourse, where the maturity of the participation is shorter than the maturity of the underlying loan); and

(iv) Contingent obligations with a certain draw down, *e.g.*, legally binding agreements to purchase assets as a specified future date.

(v) Indemnification of customers whose securities the bank has lent as agent. If the customer is not indemnified against loss by the bank, the transaction is excluded from the risk-based capital calculation.[15]

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[12] If all of the underlying mortgages in the pool do not qualify for the 50% risk weight, the bank should generally assign the entire value of the security to the 100% risk category of section 3(a)(4) of this Appendix A; however, on a case-by-case basis, the OCC may allow the bank to assign only the portion of the security which represents an interest in, and the cash flows of, nonqualifying mortgages to the 100% risk category, with the remainder being assigned a risk weight of 50%. Before the OCC will consider a request to risk weight a mortgage-backed security on a proportionate basis, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of mortgages.

[13] For purposes of this section 3(b)(1)(i), a "financial guarantee-type standby letter of credit" is any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer (1) to repay money borrowed by or advanced to or for the account of the account party or (2) to make payment on account of any indebtedness undertaken by the account party, in the event that the account party fails to fulfill its obligation to the beneficiary. Performance-based standby letters of credit are defined differently in section 3(b)(2)(i), *infra* note 16.

[14] For risk-based capital purposes, the definition of the sale of assets with recourse, including one-to-four family residential mortgage loans, is the same as the definition contained in the Instructions for the preparation of the Consolidated Reports of Condition and Income (the Call Report).

[15] When a bank lends its own securities, the transaction is treated as a loan. When a bank lends its own securities or, acting as agent, agrees to indemnify a customer, the transaction is assigned to the risk weight appropriate to the obligor or

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(2) *50 percent credit conversion factor.* (i) Transaction-related contingencies including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction.[16] To the extent permitted by law or regulation, performance-based standby letters of credit include such things as arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids;

(ii) Unused portion of commitments, including home equity lines of credit, with an original maturity exceeding one year; [17] and

(iii) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the bank's customer can issue short-term debt obligations in its own name, but for which the bank has a legally binding commitment to either:

(A) Purchase the obligations the customer is unable to sell by a stated date; or

(B) Advance funds to its customer, if the obligations cannot be sold.

(3) *20 percent credit conversion factor.* (i) Trade-related contingencies. These are short-term self-liquidating instruments used to finance the movement of goods and are collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(4) *Zero percent credit conversion factor.* (i) Unused commitments with an original maturity of one year or less;

(ii) Unused commitments with an original maturity of greater than one year, if:

(A) They are unconditionally cancellable,[18] and

(B) The bank has the contractual right to, and in fact does, make a separate credit decision based upon the borrower's current financial condition, before each drawing under the lending facility; and

(iii) Unused portion of retail credit card lines that are unconditionally cancellable in accordance with applicable law by the bank.

(5) *Interest rate and exchange rate contracts.* The credit equivalent amount of such contracts is the sum of two measures of credit exposure—current and potential credit exposure.

(i) *Current credit exposure*—The replacement cost of the contract reflects the current credit exposure, and is measured in U.S. dollars, regardless of the currency specified in the contract. A bank may net multiple contracts with a single counterparty only if those contracts are subject to novation.

(ii) *Potential credit exposure*—To complete the calculation of the on-balance sheet credit equivalent amount of a contract, an estimate of the potential increase in credit exposure over the remaining life of the contract is added on (the "add-on") to the contract's current credit exposure, including contracts with no current credit exposure. The add-on is calculated by multiplying the notional principal amount of the contract by one of the following credit conversion factors, as appropriate: [19]

(A) Interest rate contracts—

(I) Zero percent, if the contract has a remaining maturity of one year or less, and

(II) 0.5%, for contracts with a remaining maturity greater than one year;

(B) Exchange rate contracts—

(I) 1.0%, if the contract has a remaining maturity of one year or less, and

(II) 5.0%, for contracts with a remaining maturity greater than one year.

(iii) *Risk weighting*—The credit equivalent amount, which is derived from sections 3(b)(5) (i) and (ii) of this Appendix A, is then assigned to the proper risk category using the criteria regarding obligors, guarantors, and collateral listed in section 3(a) of this Appendix A.[20] However, the maximum risk weight assigned to the credit equivalent amount of an interest rate or exchange rate contract is 50%.

(iv) *Exceptions*—The following contracts are not subject to the above calculation and, therefore, are not considered part of the denominator of a national bank's risk-based capital ratio:

(A) Exchange rate contracts with an original maturity of 14 calendar days or less; and

(B) Any interest rate or exchange rate contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

Section 4. Implementation, Transition Rules, and Target Ratios

(a) *December 31, 1990 to December 30, 1992.* During this time period:

(1) All national banks are expected to maintain a minimum ratio of total capital (after deductions) to risk-weighted assets of 7.25%.

(i) Fifty percent of this 7.25% must be made up of Tier 1 capital; however, up to 10% of Tier 1 capital can be comprised of Tier 2 capital elements, before any deductions for goodwill. The amount of Tier 2 elements included in Tier 1 will not be subject to the sublimits on the amount of such elements in Tier 2 capital, with the exception of the allowance for loan and lease losses.

(ii) Goodwill that national banks have been allowed to count as capital as a result of the transition rules contained in 12 CFR 3.3 is grandfathered until December 31, 1992, but will be deducted from Tier 1 capital after that date.

(2) The allowance for loan and lease losses can be included in total capital up to a maximum of 1.5% of a bank's risk-weighted assets, including the portion that can be borrowed to make up Tier 1.

(3) Tier 2 capital elements that are not used as part of Tier 1 capital will qualify as part of a national bank's total capital base up to a maximum of 100% of the bank's Tier 1 capital.

(4) In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR Part 3.

(b) *On December 31, 1992.* (1) All national banks are expected to maintain a minimum ratio of total capital (after deductions) to risk-weighted assets of 8.0%.

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collateral that is delivered to the lending or indemnifying institution or to an independent custodian acting on their behalf.

[16] For purposes of this section 3(b)(2)(i), a "performance-based standby letter of credit" is any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by the account party in the performance of a nonfinancial or commercial obligation. Participations in performance-based standby letters of credit are treated in accordance with the provisions of section 3(b)(1)(i)(A)&(B) of this Appendix A. Financial guarantee-type standby letters of credit are defined in section 3(b)(1)(i), *supra* note 13.

[17] Participations in commitments are treated in accordance with the provisions of section 3(b)(1)(i)(A)&(B) of this Appendix A. Until December 31, 1992, national banks will be permitted to use remaining maturity in determining the appropriate credit conversion factor for the unused portion of loan commitments.

[18] In the case of home equity lines of credit, the bank is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the credit line and terminate the commitment to the full extent permitted by relevant Federal law.

[19] No potential credit exposure is calculated for single currency floating/floating interest rate swaps; rather, the on-balance sheet credit equivalent of these contracts is evaluated solely on the basis of the amount of their current credit exposure.

[20] Interest rate and exchange rate contracts are an exception to the general rule of applying collateral and guarantees to the face value of off-balance sheet items. The sufficiency of collateral and guarantees is determined on the basis of the credit equivalent amount of interest rate and exchange rate contracts.

(2) Tier 2 capital elements qualify as part of a national bank's total capital base up to a maximum of 100% of that bank's Tier 1 capital.

(3) In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR Part 3.

Table 1.—Summary of Risk Weights and Risk Categories

Category 1: Zero Percent

1. Cash (domestic and foreign).
2. Balances due from, and claims on, Federal Reserve Banks and central banks in other OECD countries.
3. Claims on, or unconditionally guaranteed by, the U.S. Government or its agencies, or other OECD central governments.[1]
4. Local currency claims on non-OECD central governments and central banks, to the extent the bank has local currency liabilities in that country.
5. Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is backed by gold bullion liabilities.
6. Federal Reserve Bank stock.

Category 2: 20 Percent

1. Portions of loans and other assets collateralized by securities issued or guaranteed by the U.S. Government or its agencies, or other OECD central governments.[2]
2. Portions of loans and other assets conditionally guaranteed by the U.S. Government or its agencies, or other OECD central governments.
3. Portions of loans and other assets collateralized by cash on deposit in the lending institution.
4. All claims (long- and short-term) on, or guaranteed by, OECD depository institutions.
5. Claims on, or guaranteed by, non-OECD depository institutions, including central banks, with a residual maturity of one year or less.
6. Cash items in the process of collection.
7. Securities and other claims on, or guaranteed by, U.S. Government-sponsored agencies.[3]
8. Portions of loans and other assets collateralized by securities issued by, or guaranteed by, U.S. Government-sponsored agencies.[4]
9. Claims that represent general obligations of, and portions of claims guaranteed by, public-sector entities in OECD countries, below the level of central government.
10. Claims on or guaranteed by official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or a contributing member.
11. Portions of loans and other assets collateralized with securities issued by official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or a contributing member.

Category 3: 50 Percent

1. Revenue bonds or similar obligations, including loans and leases, that are obligations of public sector entities in OECD countries, but for which the government entity is committed to repay the debt only out of revenues from the facilities financed.
2. Credit equivalent amounts of interest rate and exchange rate related contracts, except for those assigned to a lower risk category.
3. Assets secured by a first mortgage on a one-to-four family residential property that are not more than 90 days past due, on nonaccrual or restructured.

Category 4: 100 Percent

1. All other claims on private obligors.
2. Claims on non-OECD financial institutions with a residual maturity exceeding one year. Claims on non-OECD central banks with a residual maturity exceeding one year are included in this category unless they qualify for item 4 of Category 1.
3. Claims on non-OECD central governments that are not included in item 4 of Category 1.
4. Obligations issued by state or local governments (including industrial development authorities and similar entities) repayable solely by a private party or enterprise.
5. Premises, plant, and equipment; other fixed assets; and other real estate owned.
6. Investments in unconsolidated subsidiaries, joint ventures, or associated companies (unless deducted from capital).
7. Capital instruments issued by other banking organizations.
8. All other assets (including claims on commercial firms owned by the public sector).

Table 2—Credit Conversion Factors for Off-Balance Sheet Items

100 Percent Conversion Factor

1. Direct credit substitutes (general guarantees of indebtedness and guarantee-type instruments, including standby letters of credit serving as financial guarantees for, or supporting, loans and securities).
2. Risk participations in bankers acceptances and participations in direct credit substitutes (*e.g.*, standby letters of credit).
3. Sale and repurchase agreements and asset sales with recourse, if not already included on the balance sheet.
4. Forward agreements (*i.e.*, contractual obligations) to purchase assets, including financing facilities with *certain* drawdown.

50 Percent Conversion Factor

1. Transaction-related contingencies (*e.g.*, bid bonds, performance bonds, warranties, and standby letters of credit related to particular transactions).
2. Unused commitments with an original maturity exceeding one year.
3. Revolving underwriting facilities (RUFs), note issuance facilities (NIFs) and other similar arrangements.

20 Percent Conversion Factor

1. Short-term, self-liquidating trade-related contingencies, including commercial letters of credit.

Zero Percent Conversion Factor

1. Unused commitments with an original maturity of one year or less.
2. Unused commitments which are unconditionally cancellable at any time, regardless of maturity.

Table 3—Treatment of Interest Rate and Exchange Rate Contracts

The Current Exposure Method (described below) is utilized to calculate the "credit equivalent amounts" of these instruments. These amounts are assigned a risk weight appropriate to the obligor or any collateral or guarantee. However, the maximum risk weight is limited to 50 percent. Multiple contracts with a single counterparty may be netted if those contracts are subject to novation.

Residual maturity	Interest rate contracts	Exchange rate contracts
One year and less.	Replacement Cost (RC).	RC + 1.0% of total notional principal (NP).
Over one year	RC + 0.5% of NP.	RC + 5.0% of NP.

The following instruments will be excluded:

- Exchange rate contracts with an original maturity of 14 calendar days or less, and
- Instruments traded on exchanges and subject to daily margin requirements.

Table 4—Definition of Capital

Capital components are distributed between two categories (Tier 1 and Tier 2). Tier 2 capital elements will qualify as part of a bank's total capital base up to a maximum of 100% of that bank's Tier 1 capital. Beginning December 31, 1992, the minimum risk-based capital standard will be 8.0%.

Definition of Capital

Tier 1:

- Common stockholders' equity;

[1] For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely repayment of principal and interest by the full faith and credit of the U.S. Government.

[2] Degree of collateralization is determined by current market value.

[3] For the purpose of calculating the risk-based capital ratio, a U.S. Government-sponsored agency is defined as an agency originally established or chartered to serve public purposes specified by the U.S. Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. Government.

[4] Degree of collateralization is determined by current market value.

• Noncumulative perpetual preferred stock and any related surplus; and

• Minority interests in the equity accounts of consolidated subsidiaries.

Tier 2:

• Cumulative perpetual, long-term and convertible preferred stock, and any related surplus; [5]

• Perpetual debt and other hybrid debt/equity instruments;

• Intermediate-term preferred stock and term subordinated debt (to a maximum of 50% of Tier 1 capital); and

• Loan loss reserves (to a maximum of 1.25% of risk-weighted assets).

Deductions from Capital:

From Tier 1:

• Goodwill and other intangibles, with the exception of identified intangibles that satisfy the criteria included in the guidelines.

From Total Capital:

• Investments in unconsolidated banking and finance subsidiaries;

• Reciprocal holdings of capital instruments

Transitional Definition

During a transition period beginning December 31, 1990, all national banks are expected to maintain a capital to risk-weighted asset ratio of 7.25%, of which at least 3.25 percentage points must consist of Tier 1 capital. In other words, during this period upon to approximately 4 percentage points of the 7.25% capital ratio may consist of Tier 2 capital. Also during this period, the sublimit on loan loss reserves will be 1.5% of risk-weighted assets.

Robert L. Clarke,

Comptroller of the Currency.

Date: December 21, 1988.

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[5] The amount of long-term and intermediate-term preferred stock, as well as term subordinated debt that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of the instrument at the beginning of each of the last five years of the life of the instrument.

Friday
January 27, 1989

Part V

Federal Reserve System

12 CFR Parts 208 and 225
Capital; Risk-Based Capital Guidelines; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Reg. H, Reg. Y; Docket No. R-0628]

Capital; Risk-Based Capital Guidelines

January 18, 1989.

AGENCY: Federal Reserve System.

ACTION: Final Risk-Based Capital Guidelines.

SUMMARY: Since the early 1980s, the Board of Governors of the Federal Reserve System has employed minimum supervisory leverage ratios of primary and total capital-to-total assets in assessing the capital adequacy of state-chartered banks that are members of the Federal Reserve System and bank holding companies (collectively, "banking organizations").

While these ratios of capital-to-total assets have served as useful tools for assessing capital adequacy, the Board has determined that there is a need for a measure that is more sensitive to the risk profiles of individual banking organizations. In this regard, the Board, together with the other U.S. Federal banking agencies, first proposed in early 1986, and again in 1987 in conjunction with the Bank of England, the adoption of a risk-based capital measure that took explicit account of board differences in risks among a banking organization's assets and off-balance sheet items.

The Board deferred action on these earlier proposals in order to participate in the development of a more broadly based capital framework that would be applicable to international banking organizations. As a result of consultations with supervisory authorities from certain major industrial countries, on March 1, 1988, the Federal Reserve issued for public comment a revised risk-based capital framework that superseded the previous proposals. The revised proposal was based upon a risk-based capital measure developed jointly by supervisory authorities from the 12 countries that are represented on the Basle Committee on Banking Regulations and Supervisory Practices.

The comment period for the Federal Reserve's proposal ended on May 13, 1988. The Board received comments that addressed various aspects of its proposal from over 180 respondents. Based upon the comments received, discussion with the other U.S. banking agencies, and further consultation with international supervisory authorities, the Board has made some modifications to its March 1988 proposal.

The Board is now issuing in final form its revised proposal as Risk-Based Capital Guidelines. The Board is issuing two sets of guidelines: one is applicable to state member banks, and the other is applicable to bank holding companies. The guidelines will be appended to the appropriate supervisory regulations for those organizations—for state member banks, the Board's Regulation H (12 CFR Part 208) and for the bank holding companies, Regulation Y (12 CFR Part 225).

The Board's adoption of these guidelines achieves important goals long sought by U.S. banking supervisors. First, it establishes a risk-based capital framework that is more sensitive than the current leverage ratios to risk factors, including off-balance sheet exposures. Second, it encourages international banking organizations to strengthen their capital positions. Finally, it mitigates a source of competitive inequity arising from different supervisory capital requirements across countries.

These guidelines represent a major step in the process of coordinating with regulatory authorities or other countries to establish appropriate capital standards for banking organizations, in accordance with the International Lending Supervision Act of 1983. In that regard, the Board notes that the regulatory authorities of the 12 major industrial countries intend to issue appropriate directives to those banking organizations falling under their supervision, in order to facilitate implementation of the risk-based capital framework on an international basis.

EFFECTIVE DATE: March 15, 1989. The framework for calculating risk-based capital ratios will take effect on March 15, 1989. As further detailed below, the minimum supervisory ratios reflected in the framework's transitional provisions become effective on December 31, 1990. The supervisory ratios in their final form become effective on December 31, 1992.

FOR FURTHER INFORMATION CONTACT: Richard Spillenkothen, Deputy Associate Director (202/452–2594), Roger Cole, Assistant Director (202/452–2618), Stephen M. Lovette, Manager (202/452–3622, Rhoger H. Pugh, Manager (202/728–5883), Norah Barger, Senior Financial Analyst (202/452–2402), or Kelly S. Shaw, Financial Analyst (202/452–3054), Division of Banking Supervision and Regulation, Board of Governors; or J. Virgil Mattingly, Deputy General Counsel (202/452–3430), or Michael J. O'Rourke, Senior Attorney (202/452–3288), Legal Division, Board of Governors; or Andrew Spindler, Vice President (212/720–5846), Betsy B. White, Vice President (212/720–5874), Donald E. Schmid, Manager (212/720–6611) or Jeffrey Bardos, Special Assistant (212/720–7962), Federal Reserve Bank of New York. For the hearing impaired *only*, Telecommunication Device for the Deaf, Earnestine Hill or Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION:

I. Supplementary Information and Background

A. Purpose and History of the Risk-Based Capital Guidelines

In 1986, and again in 1987 in conjunction with the Bank of England, the Federal banking agencies issued for public comment risk-based capital proposals applicable to U.S. banks and bank holding companies. The principal objectives of these early proposals were: (1) To develop more systematic procedures for factoring on- and off-balance sheet risks into supervisory assessments of capital adequacy; (2) to reduce disincentives to holding liquid, low-risk assets; and (3) to foster coordination among supervisory authorities from major industrial countries, many of which employ risk-sensitive capital measures.

These risk-based capital proposals were consistent with one of the major goals of the International Lending Supervision Act of 1983 ("ILSA"), 12 U.S.C. 3901 *et seq.*, which was to strengthen the bank regulatory framework by encouraging greater coordination among regulatory authorities in different countries. In addition to enhancing the banking agencies' authority to establish and enforce minimum levels of capital for U.S. banking organizations, this Act instructed those agencies to work with governments, central banks, and regulatory authorities of other countries to maintain and, where necessary, strengthen the capital positions of banking institutions involved in international lending.

The Federal Reserve deferred final action on the 1986 and 1987 proposals in order to participate in the development of a more broadly based capital framework that would be applicable to international banking organizations from the major industrial countries. In December 1987, the Basle Committee on Banking Regulations and Supervisory Practices ("Basle Supervisors' Committee") issued a consultative paper (the "Basle Accord") containing proposals for a risk-based capital

framework.[1] The principal objectives of the framework were to achieve greater convergence in the measurement and assessment of capital adequacy internationally and to strengthen the capital positions of major international banking organizations. That document served as the basis for consultations and public comment in the Group of Ten ("G–10") countries.

Domestically, the vehicle for consultation and public comment took the form of proposed risk-based capital guidelines, which were based upon the December 1987 Basle Accord, and which the Federal Reserve issued for public comment on March 1, 1988. The comment period on the proposed guidelines formally ended May 13, 1988, although the Board continued to receive and consider comments after that date. Over 180 comment letters were received that addressed various aspects of the proposed guidelines.[2]

A number of changes were made to the December 1987 Basle Accord in light of comments received by both domestic and foreign banking authorities and as a result of consultations among the G–10 countries. The revised July 1988 Basle Accord that was endorsed by the central bank governors of the G–10 countries on July 11, 1988, reflects these changes.[3]

The Board is not issuing in final form its risk-based capital guidelines, revised in light of the public comments received in response to the March 1988 proposal, the ongoing consultative process among the G–10 countries, and discussions with the other U.S. banking agencies. The Board is issuing two sets of guidelines: one is applicable to state member banks and the other is applicable to bank holding companies. The guidelines will be appended to the appropriate supervisory regulations for those organizations—for state member banks, the Board's Regulation H (12 CFR Part 208) and for bank holding companies, Regulation Y (12 CFR Part 225).

These guidelines establish a systematic analytical framework that: (1) Makes regulatory capital requirements more sensitive to differences in risk profiles among banking organizations; (2) takes off-balance sheet exposures into explicit account in assessing capital adequacy; and (3) minimizes disincentives to holding liquid, low-risk assets.

The development of a risk-based framework in conjunction with supervisory officials from other industrial countries acknowledges the growing internationalization of major banking and financial markets throughout the world. The harmonization and strengthening of capital standards worldwide should contribute to a more stable and resilient international banking system and help mitigate a source of competitive inequality for international banks stemming from differences in national supervisory capital requirements.

In addition to international banks (to which the Basle Accord is specifically directed), the Federal Reserve is extending the application of the risk-based capital framework to all other U.S. banking organizations under its jurisdiction, regardless of size (as suggested in the March 1988 proposal). The Board believes that the underlying rationale behind the use of a risk-based capital approach applies to small domestic banking institutions as well as large international banking organizations.

The final guidelines contemplate, as did the March 1988 proposal, that the calculation of a risk-based capital ratio is only one step in evaluating capital adequacy. The focus of these guidelines is principally on broad categories of credit risk, although the risk-based framework does take some transfer risk considerations, as well as limited instances of interest rate and market risk, into account in assigning certain assets to risk categories. The measure does not take explicit account of other factors that can affect an organization's financial condition, such as overall interest rate exposure; liquidity, funding and market risks; the quality and level of earnings; investment or loan portfolio concentrations; the quality of loans and investments; the effectiveness of loan and investment policies; and management's overall ability to monitor and control other financial and operating risks. A complete assessment of capital adequacy must take account of each of these considerations including, in particular, the level and severity of problem and classified assets. Thus, the risk-based capital ratio is but one element in the assessment of overall capital adequacy, and the final supervisory judgment of an organization's capital adequacy may differ significantly from conclusions that might be drawn solely from the absolute level of the organization's risk-based capital ratio.

The guidelines, both for state member banks and bank holding companies, consist of a definition of capital, a system for assigning assets and off-balance sheet items to risk categories, a schedule for achieving a *minimum* risk-based capital ratio, and a phase-in period that provides for transitional arrangements. In light of the considerations just discussed, the Board expects that banking organizations will, as a general matter, operate with capital levels well above the minimum risk-based levels. As the Board previously has noted, this is particularly appropriate for banking organizations contemplating significant expansion proposals, as well as for institutions with high or inordinate levels of risk. In all cases, institutions should hold capital commensurate with the level and nature of the risks to which they are exposed.

B. Overview of the Final Risk-Based Capital Guidelines

The guidelines comprise four basic elements:

(1) An agreed definition of core or Tier 1 capital, consisting primarily of common stockholders' equity and certain categories of perpetual preferred stock, and a "menu" of internationally accepted items for supplementing core capital (supplementary or Tier 2 capital).

(2) A general framework for assigning assets and off-balance sheet items to broad risk categories and procedures for calculating a risk-based capital ratio.

(3) A schedule for achieving, by no later than the end of 1990, a minimum ratio of total capital-to-risk-weighted assets of 7.25 percent (of which at least 3.25 percentage points should be in the form of core capital elements) and, by no later than the end of 1992, a ratio of 8.0 percent (of which at least 4.0 percentage points should be in the form of core capital elements).

(4) Transitional arrangements and a phase-in period (running through the end of 1992) permitting banking organizations to include some supplementary capital elements in Tier 1 capital on a temporary basis and providing time to bring their capital positions into full comformity with the risk-based capital definitions and minimum supervisory standards.

C. Comments Received in Response to the March 1988 Proposal

As mentioned above, these final guidelines include a number of changes

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[1] The Basle Supervisors' Committee is comprised of representatives of the central banks and supervisory authorities from the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, the United Kingdom, and the United States), and Luxembourg.

[2] A summary of the comments received is contained in a memorandum distributed at the Federal Reserve's August 3, 1988, public meeting, at which the Board approved in principle certain revisions to the risk-based capital proposal.

[3] The Basle Accord is described in a paper prepared by the Basle Supervisors' Committee entitled "International Convergence of Capital Measurement and Capital Standards" dated July 1988.

to the March 1988 proposed guidelines based, in part, on the public comments received by the Board. Most respondents expressed general support for the concept of a risk-based capital measure; however, many objected to specific aspects of the proposed ratios. In addition, some large institutions and bank trade associations opposed the Board's proposal to apply the risk-based framework to bank holding companies. Some respondents expressed the view that the risk-based capital proposal might adversely affect the ability of banking organizations to compete with nonbank financial institutions that are not subject to similar standards.

Specific comments on the framework covered the proposed capital definition, the treatment of assets and off-balance sheet activities, and the application of the framework. The principal concerns regarding the definition of capital focused on the treatment of perpetual preferred stock, loan loss reserves, and goodwill. Comments on risk weights addressed the proposed treatment of country exposures, claims on domestic central governments, claims on local governments, claims on international institutions, claims on government-sponsored agencies, claims backed by private sector financial guarantees, and residential mortgages. With respect to off-balance sheet items, the major comments related to the recognition of counterparty netting arrangements and the credit conversion factor for long-term foreign exchange rate contracts. Comments were received on the use of original, rather than remaining, maturity in both the assignment of risk weights to long-term claims on foreign banks and the assignment of credit conversion factors to commitments. Some commenters also addressed the use of average, versus period-end, data in calculating the risk-based capital ratio. Finally, a number of respondents commented on the relationship of the risk-based capital ratio to the Board's existing guidelines and policy statements, as well as the application of the risk-based framework to small banking organizations.

Sections II through V below describe modifications to the March 1988 proposal that the Board has adopted as a result of public comments received and changes incorporated into the July 1988 Basle Accord, or as part of the continuing consultative process within the Basle Supervisors' Committee (and with the other Federal banking agencies). Section II outlines revisions made to the definition of capital; Section III describes changes in the treatment of assets and off-balance sheet exposures; Section IV deals with the implementation of the risk-based framework; and Section V discusses the requirements for bank holding companies.

II. Definition of Capital

The final guideline set forth a definition of capital for state member banks that is substantially similar to that contained in the March proposal. This section reviews comments received on, and revisions made in, the treatment of three elements of capital—perpetual preferred stock, loan loss reserves, and term subordinated debt.

A. Perpetual Preferred Stock

Consistent with the December 1987 Basle Accord, the March 1988 proposed guidelines stated that for supervisory purposes capital would consist of two tiers: Tier 1 capital comprising core capital elements, and Tier 2 capital, comprising supplementary capital elements. Tier 1 capital was defined to include common stockholders' equity and disclosed reserved that represent after-tax retained earnings. Perpetual preferred stock was excluded from the definition of Tier 1 capital.

A large number of organizations argued that perpetual preferred stock should count as an element of Tier 1 capital. These organizations suggested that perpetual preferred stock, in terms of its ability to absorb losses, serves as a nearly perfect substitute for common equity because it is permanent, it is subordinate to deposits and general debt obligations, and preferred dividends can be deferred without triggering an act of default. Some respondents favored including only limited amounts of perpetual preferred stock within Tier 1, while others took the position that regulations should define the characteristics of preferred stock that may be of some supervisory concern and include those forms of preferred stock that do not possess such characteristics. Several organizations noted that perpetual preferred stock is the most expensive form of Tier 2 capital, and suggested that outstanding issues of such stock might be redeemed if not given Tier 1 treatment.

Consistent with the revised Basle Accord, the Board has modified its definition of Tier 1 capital for state member banks to include *noncumulative* perpetual preferred stock [4] in Tier 1 capital with no limitations. Cumulative preferred stock, however, remains in Tier 2 for banks. Perpetual preferred stock that has a noncumulative feature is a closer substitute for common stock than cumulative preferred stock since any dividend payments that have been waived do not represent a contingent claim on the issuer. Despite the inclusion of preferred stock in Tier 1, the Board believes that, from a supervisory standpoint, it is desirable that common shareholders' equity remain the dominant form of Tier 1 capital. Thus, state member banks are expected to avoid overreliance on preferred stock or any type of non-voting equity elements within Tier 1.[5]

The decision to include perpetual preferred stock in Tier 1 raises the question of whether there are some specific forms of preferred stock that possess features that do not warrant such favorable treatment. While the Board believes that reasonable amounts of noncumulative perpetual preferred stock should be included in Tier 1, it has determined that auction rate preferred stock (including so-called "Dutch auction" preferred stock) has certain features that do not allow it to fulfill the supervisory purposess of Tier 1 capital and, hence, has excluded such stock as a core capital element.[6]

Although auction rate preferred stock is not included in Tier 1, the guidelines do not prohibit the inclusion of floating rate or adjustable rate perpetual preferred stock in Tier 1 capital, so long as the yield on these instruments is based solely on general market interest rates and is not subject to an auction mechanism that requires or allows the rate to vary in relation to the financial standing or credit rating of the issuer.

B. Loan Loss Reserves

Recognizing that it is not always possible to distinguish clearly between general and specific reserves, the December 1987 Basle Accord proposed phasing in a limit on the amount of loan loss reserves includable in Tier 2 capital. By the end of 1992, the allowance for loan and lease losses included in Tier 2 capital cannot exceed 1.25 percent of weighted risk assets. The Board's March proposal treated the allowance for loan and lease losses as Tier 2 capital up to this limit, and, consistent with the Basle Accord, excluded from capital any specific

[4] Perpetual preferred stock is defined as preferred stock that has no maturity date, that cannot be redeemed at the option of the holder of the instrument and that has no other provisions that will require future redemption of the issue.

[5] As discussed in Section V (B) below, the Board has limited the amount of perpetual preferred stock in Tier 1 for bank holding companies to 25 percent of total Tier 1 capital.

[6] The decision to exclude auction rate stock is discussed further in Section V (B).

reserve established against identified losses.

Comments received from U.S. banking organizations on the proposed treatment of loan loss reserves suggested including general reserves in Tier 1 and raising or eliminating the proposed limits on reserves. Banking organizations in other G–10 countries, on the other hand, expressed the view that certain types of reserves, such as those established against loans to developing countries, are not in fact freely available, and noted that in many G–10 countries such reserves are excluded from bank capital. These commenters accordingly argued for the exclusion of all such reserves from capital.

Under generally accepted accounting principles, the loan loss allowance in U.S. banking organizations takes the form of a valuation adjustment to the entire loan portfolio. These adjustments represent losses inherent or anticipated in the existing portfolio but not yet identified. Because capital is intended to serve as buffer against unanticipated losses, it would appear appropriate to place such reserves in Tier 2 subject to the limit contained in the Basle Accord. In addition, the amount of reserves includable in Tier 2 is generally consistent with the amount of loan loss reserves that historically were included in U.S. bank regulatory capital until 1987, when banking organizations established large reserves against country risk exposure.

During the transition period, the Basle Supervisor's Committee intends to continue to try to reach agreement on the types of reserves that are truly general in nature and, therefore, freely available to absorb losses anywhere in the portfolio. If an acceptable agreement is reached, then the Basle Accord and these guidelines would permit the inclusion of unlimited amounts of such general reserves within Tier 2. If an acceptable agreement is not reached, then the amount of general reserves includable in Tier 2 capital by the end of the transition period would be limited to 1.25 percent of weighted risk assets, as originally proposed in the Board's March 1988 proposal, and subsequently set forth in the revised July 1988 Basle Accord.

C. Term Subordinated Debt Instruments

The December 1987 Basle proposal included subordinated debt instruments with a fixed term to maturity as a limited element of Tier 2 capital but did not specify a minimum term to maturity for these instruments. Consistent with the Board's existing capital guidelines, the March 1988 proposal stated that subordinated debt issues and limited-life preferred stock must have a minimum original weighted average maturity of at least seven years to qualify for inclusion in Tier 2 capital.

The revised Basle Accord specifies that term debt instruments must have a minimum original term to maturity of over five years to qualify for inclusion in Tier 2. Accordingly, the final risk-based guidelines state that term subordinated debt instruments and intermediate-term preferred stock with an original average weighted maturity of at least five years are includable as limited elements within Tier 2 capital.

III. Risk Weights and Off-Balance Sheet Items

A. Treatment of Country Exposure

The December 1987 Basle proposal did not attempt to incorporate transfer risk. In general, claims on foreign governments and banks were treated alike without distinguishing among the countries involved and received less favorable risk weights that claims on similar domestic institutions. Banks in European Community ("EC") countries, however, were permitted to treat claims on institutions in member countries as domestic claims.

This aspect of the March proposal generally met with criticism from foreign banks and large U.S. banks, which noted that the treatment accorded to long-term claims on foreign banks and claims guaranteed by foreign banks might disrupt the interbank market and create disincentives for U.S. banks to convey risk participations to foreign banks. Some commenters also argued that the preferential treatment accorded banks in EC counties gave these institutions a competitive advantage in dealing with each other. Others argued for equal, low-risk treatment for claims on banks and governments from a group of countries identified as being of high credit quality, such as the signatories to the Basle Accord or members of the Organization for Economic Cooperation and Development ("OECD").

Taking into account these comments, and consistent with the revised July 1988 Basle Accord, these guidelines treat claims on governments and banks of a defined group of countries, which includes members of the OECD and countries that have concluded special lending arrangements with the International Monetary Fund ("IMF") associated with its General Arrangements to Borrow (the OECD-based group of countries) [7], in the same manner as they do claims on similar domestic institutions. Claims on central governments of other countries are assigned to the 100 percent risk category unless denominated in local currency and funded in local currency liabilities, in which case they may be treated the same as claims on domestic central governments. Short-term claims on banks domiciled in countries that do not belong to the OECD-based group of countries will receive the same 20 percent risk weight that claims on domestic banks do; however, long-term claims (remaining maturity of over one year) on the banks from these countries will receive a 100 percent risk weight.

B. Claims on Central Governments

The December 1987 Basle Accord assigned claims on domestic central governments (including claims guaranteed by domestic central governments or collateralized by their securities) to the zero or a low risk category to reflect the presumed absence of credit risk. National supervisors were granted discretion, however, to place some of these claims, including long-term claims, in a slightly higher risk category in order to capture a degree of market and interest rate risk. The guidelines proposed in March, accordingly, assigned a zero percent risk weight to securities (direct obligations) issued by the U.S. Government with a remaining maturity of 91 days or less and a 10 percent risk weight to similar claims or over 91 days. A 10 percent risk weight also was assigned to all claims guaranteed by the U.S. Government or collateralized by its securities.

A number of respondents to the March proposal disagreed with the proposed method for incorporating interest rate risk because it did not take into account all assets, liabilities, and off-balance sheet transactions. Some commenters argued that all government obligations, long-and short-term, should be assigned to the zero percent risk category due to the absence of credit risk. Others expressed concern about the framework's lack of a more sophisticated approach to interest rate risk, arguing that placing long-term government bonds in the zero percent risk category could imply (incorrectly) that there are no risk to holding such instruments.

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[7] The OECD includes the following countries: Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, Finland, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. Saudi Arabia has concluded special lending arrangements with the IMF associated with the Fund's General Arrangements to Borrow.

In addition, some commenters opposed the proposed maturity split for government securities on the grounds that it would place them at a competitive disadvantage to banks in other G–10 countries. In this regard, respondents asserted that most G–10 countries intended to assign a zero percent risk weight to all claims on their domestic central governments, regardless of maturity. It should be noted that, in light of the recognition of transfer risk now incorporated in the Basle framework, the zero percent risk weight would apply not only to claims on the domestic central government, but also to claims on, and guaranteed by, foreign central governments of the OECD-based group of countries.

After careful consideration of all of the above factors and consultation with the other U.S. Federal banking agencies, the Board has decided to eliminate the distinction between long- and short-term OEDC central government securities. The Board has decided to assign all such securities, as well as all claims unconditionally guaranteed by the full faith and credit of OECD central governments, to the lowest (zero percent) risk category. If the validity of the guarantee to the holder of the claim is dependent upon some affirmative action by the holder or a third party, then the guarantee is not considered unconditional. Thus, with respect to the United States, all direct U.S. Treasury obligations are assigned to the zero percent risk weight category. This category would generally include all securities with unconditional guarantees by the U.S. Government or its agencies intended to facilitate active trading in financial markets, including Government National Mortgage Association (GNMA) pass-through securities. Loans guaranteed by the U.S. Export-Import Bank (Exim Bank) would generally also be assigned to the zero percent risk category.

This approach has the benefit of restricting the lowest risk category to obligations of the central government in the form of direct claims on or claims unconditionally guaranteed by the central government. By eliminating the maturity break on central government securities, this approach also simplifies the framework.

Claims that are conditionally guaranteed by OECD central governments (including the U.S. Government and its agencies) are generally assigned to the 20 percent risk category. For example, in the case of the United States, such claims generally would include loans guaranteed under certain programs administered by the Veterans' Administration (VA) and the Federal Housing Administration (FHA). Student loans that are indirectly guaranteed or reinsured by the U.S. Government would also be assigned to the 20 percent risk category. In addition, all claims *collateralized* by securities issued by OECD-based central governments (including the U.S. Government and its agencies) will generally be assigned to the 20 percent risk category. The Board believes that this treatment is appropriate since, as a general matter, such secured claims on private counterparties are not in all respects equivalent from a risk standpoint to the direct holding of central government debt securities. Moreover, the Board believes that restricting the zero percent category to direct holdings of government securities and obligations unconditionally guaranteed by the government lessens supervisory concerns regarding the volume and riskiness of assets assigned the zero percent risk weight.

Assigning long-term direct government obligations to the zero percent risk category differs from past Board proposals, and should not be interpreted as suggesting that the holding of such instruments involves little or no risk. The Board's previous concerns about this treatment are mitigated by the retention of an overall leverage constraint (see Section IV (A)). Retaining a leverage ratio does, in fact, ensure a minimum capital charge for central government securities, together with all other assets, and precludes the possibility of excessive leveraging of the government securities portfolio. Moreover, examiners will continue to carefully scrutinize banking organizations' interest rate exposure and require that institutions with undue levels of interest rate risk strengthen their capital positions even though they may meet the minimum capital standards. In addition, the Federal Reserve will continue to work with the other domestic and international supervisory authorities to develop better procedures for measuring and assessing interest rate exposure.

C. Claims on the Non-Cental (Local) Government Public Sector

The July 1988 revised Basle Accord continues to provide for national discretion in assigning risk weights to claims on domestic local governments to the risk categories. However, the framework generally assigns a standard 20 percent risk weight to claims on, or guaranteed by, foreign local governments of the OECD-based group of countries.

The Board's March 1988 proposal assigned a 20 percent risk weight to *general* obligation (full faith and credit) claims on a domestic local government, as well as to all claims guaranteed by the full faith and credit of a domestic local government. It also assigned a 50 percent risk weight to local domestic government *revenue* obligations for which the government entity is committed to repay the debt only with revenues from facilities financed, rather than from general tax funds. Consistent with the December 1987 Basle proposal, revenue obligations issued by local governments for the benefit of *private entities* that are committed to repay the principal and interest were accorded a 100 percent risk weight as were claims on, or guaranteed by, foreign local government entities.

Several commenters suggested that all public sector claims that a local government is committed to repay (including revenue bonds) receive a 20 percent risk weight. In their views, assigning a 20 percent or 50 percent risk weight to such obligations based on the source of repayment would create unwarranted distinctions among classes of state and municipal debt.

Upon consideration of all relevant factors, the Board has decided to retain the proposed risk weights for claims on domestic local governments and, consistent with the Basle framework, to extend the same treatment to similar claims on foreign local governments of the OECD-based group of countries. Also consistent with the Basle framework, a 100-percent risk weight is assigned to all claims on local government entities of countries that do not belong to the OECD-based group of countries.

Financial guaranty insurance industry commenters objected to an aspect of the March proposal related to the treatment accorded to local government revenue obligations. Consistent with the Basle framework, the proposal recognized bank, but not nonbank, guarantees of local government obligations (or of any other type of claim). The commenters argued that the proposal's preferential treatment for bank-issued guarantees creates an incentive for banks to hold local government revenue obligations backed by bank-issued standbys, which would have a 20-percent risk weight, rather than similar obligations backed by triple A-rated financial guaranty insurance companies, which would have a 50 percent or 100 percent risk weight, depending upon the nature of the underlying obligor.

Because the Basle Accord does not recognize nonbank private sector

guarantees or take private sector credit ratings into account in assigning assets to risk categories, recognition of private sector financial guarantees for risk-based capital purposes, as urged by this group, would be inconsistent with the framework agreed upon by the G–10 countries. Accordingly, the final guidelines do not recognize such guarantees. Nonetheless, the treatment of private sector financial guarantees may be considered in the future in connection with international discussions on refinements to the risk-based capital framework.

D. International Institutions

The December 1987 Basle proposal granted national supervisory authorities discretion to assign a zero to 20 percent risk weight to claims on multilateral lending and regional development institutions and assigned a 100 percent risk weight to claims guaranteed by these organizations or collateralized by their securities. Several international organizations expressed concern that proposals of member countries to the Accord inconsistently assigned risk weights to claims on the same international institutions. Others supported a 20 percent risk weight for *all* such institutions, and requested that this treatment be extended to claims guaranteed by these entities and to claims collateralized by their securities.

These final guidelines reflect the revised Basle Accord's uniform 20 percent risk weight for claims on five multilateral development banks—the African Development Bank, the Asian Development Bank, the European Investment Bank, the Inter-American Development Bank, and the World Bank—as well as for claims guaranteed by these institutions or collateralized by their securities. As permitted by the revised Basle Accord, the final guidelines extend the same treatment to claims on similar institutions in which the U.S. is a shareholding or contributing member.

E. Government-Sponsored Agencies

The Board's March 1988 proposal assigned a preferential 20 percent risk weight to claims on U.S. Government-sponsored agencies to reflect their relatively low risk and what is viewed as their special relationship to the U.S. Government.[8] Of the comments received on this issue, about half, including some from government-sponsored agencies themselves, offered support for the proposed 20 percent risk weight; about half the commenters advocated a lower 10 percent risk weight.

Respondents that opposed a risk weight lower than 20 percent pointed out that government-sponsored agency securities lack the explicit full faith and credit backing of the U.S. Government. Respondents in favor of a lower risk weight contended that the market does not distinguish in a significant way between the level of risk associated with these obligations and the risk associated with long-term claims on the U.S. Government, which the proposal weighted at 10 percent. Several commenters opposed the differential between the 10 percent risk weight proposed for GNMA securities—which bear the full faith and credit guarantee of the U.S. Government—and the 20 percent risk weight assigned to Federal Home Loan Mortgage Corporation ("FHLMC") and Federal National Mortgage Association ("FNMA") securities—which do not explicitly bear such a guarantee—on the grounds that it would create tiering in the secondary mortgage market and raise mortgage costs for consumers.

In view of the structure of the Basle framework, the Board has determined to maintain the 20 percent risk weight for claims on all government-sponsored agencies. The Board continues to believe that the debt obligations of government-sponsored agencies should not be accorded the same treatment as other direct government obligations that carry the explicit U.S. Government guarantee. The Board notes that the 20 percent risk weight is much lower than the implied risk weight of 100 percent under the current leverage guidelines.

F. Mortgages and Mortgage-Backed Securities

1. Mortgages

The Board's March 1988 proposal assigned a 100 percent risk weight to loans secured by owner-occupied 1–4 family residential mortgages, rather than the preferential 50 percent risk weight proposed by the Basle Supervisors' Committee. In proposing not to apply the preferential weight, the Federal Reserve sought to avoid the appearance or reality of regulatory credit allocation among private sector borrowers.

Those commenters that addressed this issue overwhelmingly opposed the proposed 100 percent risk weight. Respondents stated that it would place U.S. banks at a competitive disadvantage in both domestic and foreign mortgage markets and cited the historically low default rate on residential mortgages as a justification for a lower risk weight.

Upon consideration of these comments, the Board has determined to assign a preferential risk weight of 50 percent to loans secured by owner-occupied 1–4 family residential mortgages. Consistent with the revised Basle Accord, the Board is extending this preferential risk weight to mortgages on 1–4 family residential properties that are rented as well. In this regard, the revised Basle Accord instructs national supervisory authorities to apply this preferential weight restrictively as to emcompass only residential purposes; that is, it is not to apply to speculative property development. Moreover, national authorities are granted the latitude to develop strict prudential criteria for the application of this low risk weight. Accordingly, the guidelines assign a 50 percent risk weight only to laons secured by *first* liens on 1–4 family residential properties that are performing in accordance with their original terms and are not 90 days or more past due or carried in nonaccrual status.

The assignment of mortgages to the 50 percent risk category is based upon the presumption that banking organizations will adhere to prudent and conservative underwriting standards with respect to the maximum loan-to-value ratio, the borrower's paying capacity, and the long-term expectations for the real estate market in which they are lending. If, in the course of the supervisory process, it is determined that an organization has not adhered to such standards, the Federal Reserve may require additional capital, increased reserves, or both.

The treatment of 1–4 family residential mortgages also affects the risk weight assigned to the *undrawn* portion of home equity lines of credit. As is the case with other commitments, home equity loan commitments that a bank: (1) Can unconditionally cancel within one year [9]; and (2) reviews at

[8] Government-sponsored agencies are entities that were established or chartered by the U.S. Government to serve public purposes specified by the U.S. Congress but whose obligations do not carry the explicit full faith and credit guarantee of the U.S. Government.

[9] In the case of consumer home equity lines of credit secured by liens on 1–4 family residential property, a bank is deemed able to unconditionally cancel the line for purposes of this criterion if, at its option, the bank can prohibit additional extensions of credit, reduce the credit line, and terminate the line of full extent permitted by relevant Federal law. The Board has determined that this approach is appropriate in view of the preferential treatment that the Basle Accord grants home mortgages generally and in light of the Congressional purposes behind the Home Equity Loan Consumer Protection Act of 1988, which sets forth certain guidelines under which lenders may cancel or not make advances on home equity lines.

least annually to determine whether or not they should be extended, are treated as short-term commitments. Short-term commitments are deemed to involve low risk and, therefore, are not assessed a capital charge. However, like other long-term commitments, the undrawn portion of long-term home equity lines of credit are converted at 50 percent. The resulting credit equivalent amount is then assigned a 50 percent risk weight if it is secured by a first lien or a 100 percent risk weight if it is secured by a junior lien.

2. Mortgage-Backed Securities

The Basle Accord does not specifically address certain instruments, such as mortgage-backed securities and the newly developed stripped mortgage-backed securities. Nonetheless, the Board has determined that within the context of the overall risk-based capital framework, it is appropriate to view privately-issued mortgage-backed securities, such as mortgage pass-through securities and collateralized mortgage obligations (CMOs), that meet certain criteria outlined in the guidelines as essentially indirect holdings of the underlying assets. Accordingly, such securities are generally assigned to the same risk weight appropriate to the highest risk-weighted asset in the underlying asset pool, except that in no case will these securities be assigned to the zero percent risk weight category,[10] which is reserved for *direct* claims on central governments. Privately-issued mortgage-backed securities that do not meet the specified criteria are assigned to the 100 percent risk weight category. Any classes of a mortgage-backed security that can absorb more than their *pro rata* share of the loss without the whole mortgage-backed security issue being in default, for example, so-called subordinated classes or residual interests, are also assigned to 100 percent risk weight regardless of the issuer or guarantor of the security.

Stripped mortgage-backed securities, including interest-only strips (IOs), principal-only strips (POs), and similar instrument, posses different structural characteristics from the typical mortgage-backed securities. These differing characteristics are reflected in the extreme price volatility and market risk that may be associated with these instruments. For this reason, the Board at this time has assigned these instruments, regardless of issuer or guarantor, to the 100 percent risk category.

Nonetheless, the Board recognizes that these instruments can be used to hedge risk and does not want to discourage their use for this purpose. Accordingly, examiners will take into account the manner in which an organization uses IOs and POs, as well as other instruments, in its hedging strategy before making an overall judgment on the organization's capital adequacy. While organizations will be encouraged to operate above minimum capital levels, organizations that have property hedged their interest rate exposure will, other things being equal, be permitted to operate with lower levels of capital than those that are vulnerable to rate changes. The treatment of stripped mortgage-backed securities will also be considered in connection with efforts to develop a means for incorporating interest rate risk into the risk-based capital standard. These efforts will endeavor to recognize the risk-reducing (hedging) characteristics of these instruments when they are used properly. Finally, the treatment of IOs, POs, and similar instruments may also be considered in future discussions of the the Basle Supervisors' Committee intended to refine the risk-based capital framework.

G. Interest Rate and Foreign Exchange Rate Contracts

1. Netting

Consistent with the December 1987 Basle proposal, the proposed March guidelines did not recognize netting of interest and exchange rate contracts between counterparties for the purpose of calculating the risk-based capital ratio. The proposal indicated that this would not be done until legal opinion firmly established that such contracts may be offset.

Commenters on this issue unanimously asserted that netting reduces risk and that, therefore, some form of netting should be recognized. Of those that favored a specific netting arrangement, a majority endorsed netting by novation.[11] A number of commenters offered legal opinions that the legal efficacy of certain types of netting arrangements was less tenuous than it was characterized in the December 1987 Basle proposal.

The revised Basle Accord reflects the determination by the Basle Supervisors' Committee that novated contracts replace in law and in fact the contracts they have extinguished and that novation is the only form of netting legally enforcable at this time under the bankruptcy laws of all member countries.

Accordingly, these guidelines recognize netting by novation, but no other forms of netting, for the purpose of calculating credit equivalent amounts of interest and exchange rate contracts. The Federal Reserve will continue to work with the Basle Supervisors' Committee to assess the acceptability of various other forms of netting.

2. Conversion Factor for Long-Term Exchange Rate Contracts

Consistent with the December 1987 Basle Accord, the March guidelines proposed a 5 percent conversion factor for calculating potential future exposure of exchange rate contracts with a remaining maturity of over one year. U.S. and foreign bank commenters stated their view that the conversion factor was too high. They argued that it not only overstated the risks associated with such contracts, but also might hurt the competitiveness of banks in this market vis-a-vis other financial firms that are not subject to the same capital requirements. The Basle Supervisors' Committee decided against reducing this factor in light of the risks relating to the volatility of exchange rates and because currency swaps, unlike interest rate swaps, involve an exchange of principal on maturity. Accordingly, these guidelines retain the 5 percent conversion factor for long-term exchange rate contracts.

The Board notes that while this factor has not been reduced, rate contracts in general receive favorable treatment under the Basle framework. While direct extensions of credit to standard risk obligors are assigned a risk weight of 100 percent, credit equivalent amounts of rate contracts involving such obligors are assigned a preferential maximum risk weight of 50 percent on the grounds that most counterparties in these markets are of high credit quality. The Federal Reserve intends to monitor the quality of credits in these markets and, in the future, might consider, if circumstances so warrant, assigning a 100 percent risk weight to credit equivalent amounts of rate contracts.

H. Original Versus Remaining Maturity

The Board's March 1988 proposal, consistent with the December 1987 Basle Accord, assigned risk weights to claims

[10] Mortgage-backed securities issued or guaranteed by U.S. Government agencies or U.S. Government-sponsored agencies are assigned to the same risk weight as other claims issued or guaranteed by such agencies.

[11] Netting by novation is a contract between two counterparties under which any obligation to each other to deliver a given currency on a given date is automatically amalgamated with all other obligations for the same currency and value date, *legally* substituting one single net amount for the previous gross obligations.

on foreign banks and credit conversion factors for off-balance sheet loan commitment based, in part, on their *original* maturity. The action reflected the view that, other things being equal, the longer the term of a claim or commitment, the greater the risk. According to this vew, after a long-term claim or commitment has been extended, many events can occur to reduce the creditworthiness of the borrower. If such events do occur, the lending institution is subject to risks greater than those foreseen when the claim or commitment was originally extended, even if only a short amount of time remains under the facility.

U.S. commenters, however, disagreed with this view and overwhelmingly favored the use of *remaining* maturity which, they stated, reflects more accurately the risk associated with these transactions. Moreover, most respondents noted that their internal information systems were based on remaining maturity, and that maintenance of a separate system based on original maturity solely for risk-based capital purposes would entail substantial costs.

Partially in response to these concerns, the revised Basle Accord and the guidelines apply differential risk weights to claims on foreign banks domiciled in non-OECD countries based on their *remaining*, rather than original, maturity. The Basle Supervisors' Committee remained of the belief, however, that such treatment continued to be inappropriate for commitments. Consequently, the revised accord bases the credit conversion factors that apply to loan commitments on their *original* maturity, but allows banks to use *remaining* maturity until year-end 1992. The final guidelines provide for this transition rule so that those banking organizations that currently track loan commitments according to their remaining, rather than original, maturity will have sufficient time to adjust their internal information systems.

I. Average Versus Period-End Data

The Board's March 1988 proposal requested comment on whether the calculation of the risk-based ratio should be based on average or period-end data. Commenters on this issue overwhelmingly favored the use of average data in theory, on the ground that period-end figures could be misleading. However, many of these respondents, as well as those commenters that favored the use of period-end data, often cited the cost and impracticability of generating average data for all assets and off-balance sheet items. A number of respondents suggested that average data be used for some items and period-end data be used for others for the purpose of calculating the ratio. No consensus emerged, however, on the items for which average or period-end data was appropriate.

Under the guidelines, banking organizations will use period-end data to calculate the risk-based capital ratio. However, on a case-by-case basis, banking organizations may also be required to calculate ratios based on average balances when supervisory concerns render such a calculation appropriate. In addition, to the extent banking organizations have data on average balances that can be used to calculate risk-based ratios, the Federal Reserve will take such data into account.

It can be argued that average figures are preferable to period-end figures. On the other hand, the burden of requiring average figures will need to be assessed more fully. As more experience is gained with the measure, the Board may consider whether the use of average data should be required to a greater extent in the future.

IV. Application of the Framework

A. The Current Capital (Leverage) Guidelines

The Basle framework and the Board's guidelines provide for: (1) A transition period through the end of 1992 during which minimum risk-based capital standards will be phased into the existing supervisory system, and (2) interim target ratios that take effect at the end of 1990. As proposed in the March guidelines, the existing primary and total capital-to-*total* assets ratios (leverage ratios) will be retained at least until the initial risk-based capital supervisory ratios take effect at the end of 1990. The majority of commenters that addressed the issue of whether to retain the current capital guidelines favored abandoning the existing leverage ratios because their continued use could be confusing and would be unnecessary in light of the risk-based framework. However, several commenters advocated retaining the leverage ratios out of concern that the risk-based standard was too lenient; others argued that continued application of a leverage standard was appropriate until greater experience is gained with the risk-based ratio.

The Board has determined that retention of the current leverage ratios is desirable in order to maintain some constraint on banking organizations' overall leverage until the minimum risk-based ratios take effect. Even after this has occurred, moreover, the Board believes that retention of an overall leverage contraint is important since, in the absence of such a constraint and without a comprehensive measure for interest rate risk, the assignment of a significant volume of assets to the zero percent risk category under the risk-based capital framework could allow a banking organization to assume an unwarranted degree of leveraging and risk-taking. In light of these concerns, the Federal banking agencies have been working toward a common leverage guideline. Continued use of existing leverage ratios also will provide an element of continuity as transition is made to a risk-based framework.

In the Board's view, retention of the existing capital standards, at least initially, does not mean that well-capitalized organizations would not benefit from the introduction of a risk-based standard. Indeed, organizations in sound condition and with strong risk-based capital ratios could, with the concurrence of the Federal Reserve, be allowed to reduce their primary and total capital ratios, so long as their ratios remain fully consistent with their overall financial condition.

At the same time, the Board, together with the other Federal banking agencies, recognizes that different capital definitions for leverage and risk-based capital purposes carry with them the potential for confusion and perhaps an element of undue burden. Once the risk-based framework has been implemented, the Federal banking supervisors will consider proposing a revised leverage constraint that would replace the existing leverage guidelines at or before the end of 1990. It is contemplated that the definition of capital for the new leverage guidelines would be consistent with the risk-based capital definition and would be set at a lower level than the current capital-to-total assets standard.

B. Application to Small Banks

The Basle Accord applies only to internationally active banks, but it recognizes that each national supervisory authority may wish to apply the framework to a broader class of commercial banking organizations. The Federal Reserve believes that the risk-based capital guidelines should apply to all banks on a consolidated basis on the grounds that the principle of assessing capital adequacy against broad levels of risk exposure is relevant to all banks, regardless of size.

Nonetheless, the Federal banking agencies recognize that to a large extent the impact of these guidelines will predominantly fall on large banking

organizations and those with significant off-balance sheet exposures. Accordingly, the agencies solicited public comment on several options regarding the appropriate focus of off-site supervisory data collection and monitoring efforts. These options included focusing data collection and monitoring efforts on either all banking organizations, large banking organizations or institutions with significant off-balance sheet activities.

A majority of commenters on this issue recommended that supervisory data collection and monitoring efforts focus on organizations above some asset threshold or level of off-balance sheet exposure. This consensus reflected concern about the reporting burden that the proposed capital guidelines could place on small banks. Several multinational banking organizations and two respondents from the domestic public sector did, however, support industry-wide monitoring and data collection. A trade association for smaller institutions favored application of the standard to all banks, but urged that additional reporting requirements focus on institutions with assets in excess of $1 billion.

The Board remains of the opinion that the risk-based ratio should be applied to *all* banks, since all banks hold low, as well as high, risk assets and all banks may engage in off-balance sheet activities. Moreover, this approach would avoid the appearance of a dual standard for large and small institutions. The Board has also determined, however, that any additional reporting requirements for small institutions should be minimized. The Board, together with the other U.S. Federal banking agencies, intends to be guided by this principle in developing reporting forms that will allow for the monitoring of compliance with the risk-based capital standards, while minimizing the burden on small institutions.

V. Capital Requirements for Bank Holding Companies

A. Application

The terms and provisions of the Basle Accord, as noted above, apply to international *banks*, not to companies or entities that own banks. Of course, many international banking organizations conduct banking activities, as well as nonbanking financial business, in separate subsidiaries and affiliates. For this reason, and because the risks assumed by these entities can have a significant effect on the parent bank's overall financial strength, the Basle Accord states that the capital framework "is intended to be applied to banks on a consolidated basis, including subsidiaries undertaking banking and financial business." The Accord also indicates that the normal practice will be to consolidate subsidiaries with parent banks for the purpose of assessing the capital adequacy of banking groups.

As suggested by this approach, the extension of prudential supervision, including the application of capital standards and reporting requirements to banks on a consolidated basis, has long been encouraged by banking supervisory authorities as a way to strengthen an increasingly interdependent international financial system. As banking organizations open offices in other countries, the bank supervisors in these countries, or "host" supervisors, generally have oversight authority only for those offices of the organization that are located in the host country. However, the condition of these entities, as well as their potential impact on the host country's financial markets, are obviously affected by the health of the consolidated organization. Therefore, given the large role that foreign firms are increasingly playing in other countries' financial markets, host supervisory authorities want assurance that foreign banks operating in their country are adequately supervised on a consolidated, worldwide basis by home country supervisory authorities.

While the application of a risk-based capital framework to companies that own banks is clearly left to the discretion of national supervisory authorities, the Basle Accord does express concern that bank ownership structures or affiliations with other firms not be allowed to weaken the capital position of the bank or expose the bank to undue risks. The Basle Accord states that the Basle Supervisors' Committee will monitor developments and ownership structures in member countries "in order to ensure that the integrity of the capital of banks is maintained."

In issuing the March 1988 proposal for comment, the Board exercised its discretion to apply the Basle framework to bank holding companies on a consolidated basis. This is generally consistent with the treatment of holding companies under the Board's current primary and total capital adequacy guidelines, although the definition of bank holding company capital under the current guidelines differs somewhat from the definition of bank capital. The application of risk-based standards to holding companies is also consistent with the risk-based capital proposals issued for comment by the Board in 1986 and 1987.

The Board has long applied capital standards to bank holding companies on a consolidated basis in connection with both on-site inspections and in acting on bank holding company applications. The Board has applied minimum capital standards to bank holding companies on a consolidated basis because experience has shown that, as with a bank and its affiliates, the risks and problems in the holding company and its nonbank subsidiaries can have an impact on the condition of affiliated banks. In addition to this concern, consolidated supervision of capital adequacy is consistent with the Board's belief that the parent holding company should serve as a source of strength to its subsidiary banks. In evaluating bank holding company applications, capital adequacy is viewed as a particularly important indicator of the soundness of organizations seeking to expand their banking and nonbanking activities.

Furthermore, the practice of double leveraging—in which a holding company can borrow against and, in effect, replace a portion of its subsidiaries' equity capital with debt at the consolidated level—has confirmed over the years the need for some minimum capital standards for bank holding companies. Without such standards, excessive holding company borrowing or double leveraging could undermine the capital strength of the overall holding company as well as its subsidiary banks.

Application of capital standards to bank holding companies also is consistent with the fact that holding companies are frequently managed on a consolidated basis—indeed, the benefits from such integration are one of the key incentives for establishing holding companies—and, under generally accepted accounting standards, bank holding companies file financial statements that fully consolidate the assets, liabilities, income and losses of their bank and nonbank activities with the parent company.

In issuing the Board's risk-based capital proposal for public comment, the Board made clear that it retained the flexibility to exclude the assets of and investments in certain nonbank subsidiaries of the holding company from the calculation of the holding company's risk-based capital ratio. This would be done, for example, to facilitate functional regulation or to assure that the remainder of the holding company meets the Federal Reserve's minimum capital standards without reliance on

the capital resources invested in specified nonbank affiliates.

In response to the Board's risk-based capital proposal, many large multinational banking organizations and bank trade associations opposed application of the framework to bank holding companies. Only a small number of the regional banking organizations took issue with this aspect of the proposal.

The respondents that opposed application of the capital standards to bank holding companies argued that: (1) Consolidated capital ratios are unnecessary if nonbank subsidiaries are functionally regulated and subject to firewalls designed to protect affiliated banks; (2) the holding company structure is unique to the United States and, therefore, consolidated risk-based capital requirements would constitute a competitive disadvantage for U.S. banking organizations; (3) such requirements could induce increased holding company risk-taking; and (4) applying capital standards to holding companies could imply an undesirable extension of the federal safety net to parent companies and nonbank affiliates.

The Board remains of the belief that companies that own insured depository institutions should have adequate capital and, in particular, that bank holding companies as presently structured should be subject to minimum capital standards. First, as noted, double leveraging can affect the capital that is, in fact, available at the holding company level to support the subsidiaries. Second, with regard to nonbanking activities, adequate firewalls may not currently exist between banks and all their affiliates. The Board believes that it is appropriate to *first* ensure that adequate firewalls are in place and sufficient capital exists in the nonbank subsidiaries to fully protect affiliated banks *before* exempting, as a general policy, certain affiliates from minimum consolidated capital standards.

In light of the above factors, the Board has decided to retain its existing policy of applying capital standards, including a risk-based capital framework similar to that set forth in the Basle Accord, to bank holding companies on a consolidated basis. However, the Board also has adopted a flexible framework at the holding company level that will facilitate functional regulation and the prudent expansion of bank holding company powers, while at the same time assuring a minimum level of capital for companies whose principal function is the ownership of banking institutions. Through these guidelines, the Board retains the latitude to deduct from a banking organization's consolidated capital, investments in certain nonbank subsidiaries, *provided that* strong firewalls, adequate nonbank capital, and any other protections the Board deems necessary are first put in place to safeguard the health of affiliated banks. If such a deduction is warranted, the nonbank subsidiary's assets also would be excluded from the holding company's consolidated capital calculation.

B. Definition of Capital for Bank Holding Companies

In implementing a risk-based capital framework for bank holding companies, the Board has adopted a definition of capital for bank holding companies that differs somewhat from the definition contained in the final guidelines for state member banks. These differences, which are discussed in greater detail below, involve the inclusion of cumulative perpetual preferred stock in Tier 1 for bank holding companies and the treatment of goodwill. Also discussed below is a general approach for deducting investments in certain designated subsidiaries from the capital and assets of the bank holding company. The Board believes that applying a similar, but not identical, framework to holding companies provides a reasonable degree of flexibility to these companies in structuring their capital bases and raising additional capital, while maintaining the integrity and adequacy of minimum holding company capital requirements.

1. Perpetual Preferred Stock

The treatment of perpetual preferred stock for bank holding companies differs somewhat from the treatment accorded to banks. As with banks, noncumulative perpetual preferred stock has been included in Tier 1 capital of bank holding companies, but subject to certain limitations discussed below. In addition, in light of the comments received and further consideration of the issues involved, the Board has decided that bank holding companies also should be allowed to include *cumulative* preferred stock in Tier 1. While cumulative preferred dividends can only be deferred, the deferral can last as long as necessary to enable the organization to regain its financial health. Moreover, supervisors have the authority to prohibit the resumption of preferred, as well as common, dividends until they are satisfied that resumption of such payments is in the best interest of the institution.

While the Board believes that cumulative perpetual preferred stock should be included in Tier 1 for bank holding companies, it does not believe that such instruments, as a matter of general policy, should be viewed as a perfect substitute for common equity. First, it is very difficult, if not impossible, to issue new common stock if there exist large dividend arrearages on preferred stock that must be repaid before common shareholders can receive dividends. Second, preferred dividends, unlike common dividends, are often fixed or set in relation to an external market index, rather than based upon the bank's earnings. Third, the prior claim on earnings associated with many forms of preferred stock gives these instruments some of the characteristics of debt obligations. Finally, most forms of preferred stock lack voting rights under normal circumstances. In light of these and other considerations, the guidelines specify that, in the aggregate, the total amount of perpetual preferred stock (the sum of both cumulative and noncumulative preferred) included in Tier 1 capital be limited to 25 percent of the sum of all core capital elements.

The practical impact of this limitation on the current composition of bank holding company capital is likely to be minimal since, at present, the amount of perpetual preferred stock in major U.S. bank holding companies, most of which is cumulative, is generally consistent with the limitation. Moreover, amounts of perpetual preferred stock in excess of the Tier 1 limit can be included in Tier 2 without any sublimits within that tier. This treatment recognizes the value of perpetual preferred stock in a bank holding company's capital structure and provides flexibility to holding companies in raising additional capital. At the same time, it establishes provisions that limit the substitution of preferred for common stock and protects the integrity of the holding company's common equity capital base.

Paralleling the policy for banks (see Section II (A)), the policy for bank holding companies disallows auction rate perpetual preferred stock (including so-called "Dutch auction" preferred stock)—whether cumulative or noncumulative—from Tier 1. The Board has determined that certain unique features of auction rate preferred stock do not allow it to fulfill adequately the supervisory purpose of Tier 1 capital, and hence must be excluded from treatment as a core capital element.

Auction-rate preferred stock refers to those types of preferred stock (including money market and remarketable preferred) where the dividend is reset periodically based to some degree upon the banking organization's current credit rating. A number of supervisory

concerns stem from this type of instrument. If sufficient buyers are not interested in holding the stock at the maximum rate at which it can be offered, the auction is said to have failed. This, in itself, can raise questions about the issuer's financial standing and subject the issuer to pressure from unhappy or unwilling investors to repurchase the outstanding stock. In addition, the very fact that the preferred stock dividend yield can rise when a banking organization's financial condition or credit rating is deteriorating can exacerbate the institution's financial difficulties. In light of these considerations, the Board believes that the auction rate features of such preferred shares render them inconsistent with the notion of Tier 1 instruments as the highest quality form of capital. Auction-rate perpetual preferred stock continues to qualify as an element of Tier 2 capital.

2. Goodwill

The Board's March 1988 proposal stated that all good will carried on the balance sheet of a bank holding company would be deducted from its Tier 1 capital after December 31, 1992, and that any goodwill acquired after March 12, 1988, would be deducted immediately. The proposal also stated that goodwill in existence before March 12, 1988, would be "grandfathered" during the transition period but would be deducted from Tier 1 capital after December 31, 1992.

Banking organizations strongly opposed the proposed deduction of good will for several reasons. First, they argued that good will has realizable value. Second, they stated their belief that the deduction would place banking organizations at a competitive disadvantage relative to nonbank competitors in bidding for acquisitions. Third, they argued that the deduction would hamper the process of domestic banking consolidation by effectively eliminating purchase accounting as a viable method of consummating mergers and acquisitions. Many respondents also indicated that the deduction of goodwill is contrary both to generally accepted accounting principles and existing Board policy. Because of these concerns, several commenters argued that at least a limited amount of goodwill (generally, 25 percent) should be allowed in Tier 1 capital. They viewed this "cap" on goodwill as consistent with the Board's existing policy of closely monitoring goodwill in excess of 25 percent of tangible primary capital.

In the Board's view, the uncertainty often associated with determining the future benefits and useful lives of certain intangible assets, especially goodwill, raises significant supervisory concerns. During periods of financial adversity some intangibles may not provide the degree of support that is normally expected from an organization's assets. In this regard, goodwill—which represents the excess of the purchase price over the fair market value of tangible, as well as identifiable intangible, assets acquired in a purchase accounting transaction—in particular raises concerns. As indicated above, the Board's proposal will exclude from capital only goodwill. Purchased mortgage servicing rights and other identifiable intangibles will not be deducted automatically from the capital base under the revised Basle Accord as they would have been under earlier risk-based capital proposals.

Since good will represents the capitalization of anticipated future earnings over and above what is implied by the fair market value of tangible and identifiable intangible assets acquired, the Board is of the view that its eventual exclusion from capital does not seem unreasonable. If the expected superior future earnings materialize, they will be taken into retained earnings and thereby reflected in capital. Supervisory experience suggests that when organizations are under serious financial strain and need to draw upon their capital base, goodwill is not generally a source of financial strength.

Accordingly, the Board has determined to adhere to its March proposal to grandfather existing goodwill for the transition period, but to deduct all new goodwill—and, after 1992, *all* goodwill—from a holding company's Tier 1 capital. While this represents a departure from the initial capital guidelines promulgated by the Board in 1985, it is generally consistent with the Basle framework and the approach the Board has been employing in acting on major bank holding company acquisitions. In this connection, the Board will retain its existing policy that organizations undertaking significant expansion, either through internal growth or acquisitions, are expected to have strong capital positions substantially above minimum levels without significant reliance on intangibles, particularly goodwill.

3. Investments in Designated Subsidiaries

The Board's application of a risk-based capital measure to bank holding companies is intended to accommodate functional regulation and the expansion of holding company powers. To accomplish this objective, as indicated in the March 1988 proposal, the guidelines allow the Board to deduct investments in certain subsidiaries from the parent organization's capital and to exclude the assets of these subsidiaries from the parent's consolidated assets, provided that strong firewalls, adequate nonbank capital, and any other protections the Board deems necessary are first put in place to safeguard affiliated banks. This exclusion is designed to ensure that the parent bank holding company maintains a level of capital, exclusive of the resources invested in such subsidiaries, that is sufficient to support its bank and other nonbank subsidiaries.

Accordingly, the risk-based capital guidelines for bank holding companies specifically allow for the exclusion of the parent's investments in, and the assets of, designated subsidiaries from the calculation of the holding company's capital ratio. For this purpose, aggregate capital investments (that is, the sum of any equity or debt capital investments and other instruments that are deemed to be capital) in these subsidiaries will be deducted from the parent banking organization's total capital components. Advances (that is, loans, extensions of credit, guarantees, commitments, or any other forms of credit exposure) to such subsidiaries that are not deemed to be capital will generally not be deducted from capital. Rather, such investments will normally be included in the parent banking organization's consolidated assets and assigned to the 100 percent risk category, unless such obligations are backed by recognized collateral or guarantees, in which case they will be assigned to the risk category appropriate to such collateral or guarantees. These other extensions of credit may, however, be deducted from the parent's capital if, in the judgment of the Federal Reserve, the risks stemming from such advances are comparable to the risks associated with capital investments, or if the advances involve other risk factors that warrant such an adjustment to capital for supervisory purposes. These other factors could include, for example, the absence of collateral support for these advances. In assessing the overall capital adequacy of a banking organization, the Board will, as noted above, also consider the fully consolidated capital position of the organization.

In general, when investments in subsidiary are deducted from a parent banking organization's capital, the subsidiary's assets will also be excluded from the assets of the parent banking organization in order to assess the

latter's capital adequacy. If the subsidiary's assets are consolidated with the parent banking organization for financial reporting purposes, this adjustment will involve excluding the subsidiary's assets on a line-by-line basis from the consolidated parent organization's assets. The parent banking organization's capital ratio will then be calculated on a consolidated basis with the exception that the assets of the excluded subsidiary will not be consolidated with the remainder of the parent banking organization.

The Board has considered the most equitable way in which to implement these deductions within the context of the revised Basle Accord. That Accord states that the "deduction for such investments will be made against the total capital base." The Board recognizes that several formulae could be devised which would be consistent with this provision. The Board has determined, at least as an initial matter and as a general approach, that the most equitable method for implementing such deductions is to deduct one-half (50 percent) of the aggregate amount of deductible investments from the parent banking organization's Tier 1 capital and one-half (50 percent) from the parent's Tier 2 capital. However, the Federal Reserve may, on a case-by-case basis, deduct a proportionately greater amount from Tier 1 if the risks associated with the subsidiary so warrant. If the amount deductible from Tier 2 capital exceeds actual Tier 2 capital, the excess would be deducted from Tier 1 capital. Bank holding companies' risk-based capital ratios, net of these deductions, must exceed the minimum standards set forth above.

This method for deducting capital investments is generally consistent with the Basle Accord's instruction to deduct such investments from total capital, as well as with the structure of the overall capital framework, which permits equal amounts of Tier 1 and Tier 2 capital. Nonetheless, the Board will examine the utilization of this general approach over time as it is implemented by bank holding companies, and is prepared to reassess this method should circumstances so warrant.

C. Exemption for Small Bank Holding Companies

The Board's March 1988 proposal indicated that bank holding companies with less than $150 million in consolidated assets would generally be exempt from the calculation and analysis of risk-based ratios on a consolidated holding company basis under the same terms and conditions as provided in the Board's existing primary and total capital, leverage-based guidelines. That is, to qualify for the exemption, such companies may not be engaged in nonbank activities involving significant leverage or have significant amounts of debt outstanding to members of the general public. In such instances, the leverage capital requirements would apply only to the subsidiary banks, which are required to maintain a total capital-to-total assets ratio of 7 percent.

Two trade organizations representing smaller institutions argued that the asset size threshold for purposes of this exemption should be raised to $500 million, in order to reflect the effect of inflation on bank asset growth since the Board initially adopted the small bank holding company exemption.

The Board adopted its liberalized policy for assessing financial factors in small one-bank holding companies in March 1980 in order to facilitate the transfer of ownership in small banks. In pertinent part, this policy allows an applicant involved in the formation of a small bank holding company (total assets of $150 million or less) to borrow up to 75 percent of the purchase price of the bank being acquired provided the applicant satisfies certain other requirements. When the Board adopted its leverage-based capital guidlines in December 1981, it decided to continue this policy and specifically exempted bank holding companies with consolidated assets of $150 million or less from meeting the minimum capital guidelines on a consolidated basis. If such companies were to be consolidated, a significant number could have very low capital ratios due to the amount of leverage at the parent level.

The Board believes that raising the $150 million threshold would run counter to a basic objective of both the leverage and the risk-based capital guidelines, which is to encourage consolidated banking organizations to strengthen their capital positions. That is, if this threshold were raised, a larger number of companies would be able to utilize the small bank holding company liberalized debt guidelines to borrow against the equity of their subsidiary banks. This could put significant pressure on bank subsidiaries to increase their dividends to service parent company borrowings, and, in the absense of consolidated capital ratios, could materially reduce the holding companies' consolidated capital bases. Accordingly, consistent with the existing leverage-based capital guidelines, the risk-based guidelines retain the $150 million cutoff.

VI. Regulatory Flexibility Act Analysis

The Federal Reserve Board certifies that adoption of these guidelines would not have a significant economic impact on a substantial number of small business entities, in this case small banking organizations, in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) While all commercial banking organizations would presumably be required to make some revisions to their reporting procedures to permit supervisory monitoring of risk-based capital ratios, the Board, in conjunction with the other Federal banking agencies, intends to adopt, after an opportunity for public comment, reporting procedures designed to lessen the burden on small institutions. In addition, these guidelines would generally not apply to bank holding companies with consolidated assets less than $150 million.

The guidelines are designed primarily to take account of those practices, such as the increased use of off-balance sheet risk and the decline in the holdings of low-risk, liquid assets, which have been engaged in primarily by certain larger banking organizations. Moreover, rather than requiring all banking organizations to raise additional capital, the guidelines are directed at institutions whose capital positions are less than fully adequate in relation to their risk profiles.

List of Subjects

12 CFR Part 208

Banks, Banking, Capital adequacy, Federal Reserve System, Reporting and recordkeeping requirements, State member banks.

12 CFR Part 225

Banks, Banking, Capital adequacy, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, State member banks.

For the reasons set out in this notice, and pursuant to the Board's authority under section 5(b) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(b)), and section 910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3909), the Board amends 12 CFR Parts 208 and 225 as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM

1. The authority citation for Part 208 continues to read as follows:

Authority: 12 U.S.C. 248, 321–338, 486, 1814, 3907, 3909, and 15 U.S.C. 781(i).

2. The Board revises § 208.13 of Part 208 to read as follows:

§ 208.13 Capital adequacy.

The standards and guidelines by which the capital adequacy of state member banks will be evaluated by the Board are set forth in Appendix A to Part 208 for risk-based capital purposes, and in Appendix B to the Board's Regulation Y, 12 CFR Part 225, with respect to the ratios relating capital to total assets.

3. The Board adds an Appendix A to Part 208 to read as set forth below.

APPENDIX A TO PART 208: Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure

I. Overview

The Board of Governors of the Federal Reserve System has adopted a risk-based capital measure to assist in the assessment of the capital adequacy of state member banks.[1] The principal objectives of this measure are to: (i) Make regulatory capital requirements more sensitive to differences in risk profiles among banks; (ii) factor off-balance sheet exposures into the assessment of capital adequacy; (iii) minimize disincentives to holding liquid, low-risk assets; and (iv) achieve greater consistency in the evaluation of the capital adequacy of major banks throughout the world.[2]

The risk-based capital guidelines include both a definition of capital and a framework for calculating weighted risk assets by assigning assets and off-balance sheet items to broad risk categories. A bank's risk-based capital ratio is calculated by dividing its qualifying capital (the numerator of the ratio) by its weighted risk assets (the denominator).[3] The definition of qualifying capital is outlined below in section II, and the procedures for calculating weighted risk assets are discussed in Section III. Attachment I illustrates a sample calculation of weighted risk assets and the risk-based capital ratio.

The risk-based capital guidelines also establish a schedule for achieving a minimum supervisory standard for the ratio of qualifying capital to weighted risk assets and provide for transitional arrangements during a phase-in period to facilitate adoption and implementation of the measure at the end of 1992. These interim standards and transitional arrangements are set forth in section IV.

The risk-based guidelines apply to all state member banks on a consolidated basis. They are to be used in the examination and supervisory process as well as in the analysis of applications acted upon by the Federal Reserve. Thus, in considering an application filed by a state member bank, the Federal Reserve will take into account the bank's risk-based capital ratio, the reasonableness of its capital plans, and the degree of progress it has demonstrated toward meeting the interim and final risk-based capital standards.

The risk-based capital ratio focuses principally on broad categories of credit risk, although the framework for assigning assets and off-balance sheet items to risk categories does incorporate elements of transfer risk, as well as limited instances of interest rate and market risk. The risk-based ratio does not, however, incorporate other factors that can affect a bank's financial condition. These factors include overall interest rate exposure; liquidity, funding and market risks; the quality and level of earnings; investment or loan portfolio concentrations; the quality of loans and investments; the effectiveness of loan and investment policies; and management's ability to monitor and control financial and operating risks.

In addition to evaluating capital ratios, an overall assessment of capital adequacy must take account of these other factors, including, in particular, the level and severity of problem and classified assets. For this reason, the final supervisory judgment on a bank's capital adequacy may differ significantly from conclusions that might be drawn solely from the level of its risk-based capital ratio.

The risk-based capital guidelines establish *minimum* ratios of capital to weighted risk assets. In light of the considerations just discussed, banks generally are expected to operate well above the minimum risk-based ratios. In particular, banks contemplating significant expansion proposals are expected to maintain strong capital levels substantially above the minimum ratios and should not allow significant diminution of financial strength below these strong levels to fund their expansion plans. Institutions with high or inordinate levels of risk are also expected to operate well above minimum capital standards. In all cases, institutions should hold capital commensurate with the level and nature of the risks to which they are exposed. Banks that do not meet the minimum risk-based standard, or that are otherwise considered to be inadequately capitalized, are expected to develop and implement plans acceptable to the Federal Reserve for achieving adequate levels of capital within a reasonable period of time.

The Board will monitor the implementation and effect of these guidelines in relation to domestic and international developments in the banking industry. When necessary and appropriate, the Board will consider the need to modify the guidelines in light of any significant changes in the economy, financial markets, banking practices, or other relevant factors.

II. Definition of Qualifying Capital for the Risk-Based Capital Ratio

A bank's qualifying total capital consists of two types of capital components: "core capital elements" (comprising Tier 1 capital) and "supplementary capital elements" (comprising Tier 2 capital). These capital elements and the various limits, restrictions, and deductions to which they are subject, are discussed below and are set forth in Attachment II.

To qualify as an element of Tier 1 or Tier 2 capital, a capital instrument may not contain or be covered by any covenants, terms, or restrictions that are inconsistent with safe and sound banking practices.

Redemptions of permanent equity or other capital instruments before stated maturity could have a significant impact on a bank's overall capital structure. Consequently, a bank considering such a step should consult with the Federal Reserve before redeeming any equity or debt capital instrument (prior to maturity) if such redemption could have a material effect on the level or composition of the institution's capital base.[4]

A. The Components of Qualifying Capital

1. *Core capital elements (Tier 1 capital).* The Tier 1 component of a bank's qualifying capital must represent at least 50 percent of qualifying total capital and may consist of the following items that are defined as core capital elements:

(i) Common stockholders' equity.

(ii) Qualifying noncumulative perpetual preferred stock (including related surplus).

(iii) Minority interest in the equity accounts of consolidated subsidiaries.

Tier 1 capital is generally defined as the sum of the core capital elements less goodwill.[5] (See section II (B) below for a more detailed discussion of the treatment of goodwill, including an explanation of certain limited grandfathering arrangements.)

a. *Common stockholders' equity.* Common stockholders' equity includes: common stock; related surplus; and retained earnings, including capital reserves and adjustments for the cumulative effect of foreign currency translation, net of any treasury stock.

b. *Perpetual preferred stock.* Perpetual preferred stock is defined as preferred stock that does not have a maturity date, that cannot be redeemed at the option of the holder of the instrument, and that has no other provisions that will require future redemption of the issue. In general, preferred stock will qualify for inclusion in capital only if it can absorb losses while the issuer operates as a going concern (a fundamental

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[1] Supervisory ratios that relate capital to total assets for state member banks are outlines in Appendix B to Part 225 of the Federal Reserve's Regulation Y, 12 CFR Part 225.

[2] The risk-based capital measure is based upon a framework developed jointly by supervisory authorities from the countries represented on the Basle Committee on Banking Regulations and Supervisory Practices (Basle Supervisors' Committee) and endorsed by the Group of Ten Central Bank Governors. The framework is described in a paper prepared by the BSC entitled "International Convergence of Capital Measurement," July 1988.

[3] Banks will initially be expected to utilize period-end amounts in calculating their risk-based capital ratios. When necessary and appropriate, ratios based on average balances may also be calculated on a case-by-case basis. Moreover, to the extent banks have data on average balances that can be used to calculate risk-based ratios, the Federal Reserve will take such data into account.

[4] Consultation would not ordinarily be necessary if an instrument were redeemed with the proceeds of, or replaced by, a like amount of a similar or higher quality capital instrument and the organization's capital position is considered fully adequate by the Federal Reserve.

[5] During the transition period and subject to certain limitations set forth in section IV below, Tier 1 capital may also include items defined as supplementary capital elements.

characteristic of equity capital) *and* only if the issuer has the ability and legal right to defer or eliminate preferred dividends.

The only form of perpetual preferred stock that state member banks may consider as an element of Tier 1 capital is noncumulative perpetual preferred. While the guidelines allow for the inclusion of noncumulative perpetual preferred stock in Tier 1, it is desirable from a supervisory standpoint that voting common stockholders' equity remain the dominant form of Tier 1 capital. Thus, state member banks should avoid overreliance on preferred stock or non-voting equity elements within Tier 1.[6]

Perpetual preferred stock in which the dividend is reset periodically based, in whole or in part, upon the bank's current credit standing (that is, auction rate perpetual preferred stock, including so-called Dutch auction, money market, and remarketable preferred) will not qualify for inclusion in Tier 1 capital.[7] Such instruments, however, qualify for inclusion in Tier 2 capital.

c. *Minority interest in equity accounts of consolidated subsidiaries.* This element is included in Tier 1 because, as a general rule, it represents equity that is freely available to absorb losses in operating subsidiaries. While not subject to an explicit sublimit within Tier 1, banks are expected to avoid using minority interest in the equity accounts of consolidated subsidiaries as an avenue for introducing into their capital structures elements that might not otherwise qualify as Tier 1 capital or that would, in effect, result in an excessive reliance on preferred stock within Tier 1.

2. *Supplementary capital elements (Tier 2 capital).* The Tier 2 component of a bank's qualifying total capital may consist of the following items that are defined as supplementary capital elements:

(i) Allowance for loan and lease losses (subject to limitations discussed below).

(ii) Perpetual preferred stock and related surplus (subject to conditions discussed below).

(iii) Hybrid capital instruments (as defined below) and mandatory convertible debt securities.

(iv) Term subordinated debt and intermediate-term preferred stock, including related surplus (subject to limitations discussed below).

The maximum amount of Tier 2 capital that may be included in a bank's qualifying total capital is limited to 100 percent of Tier 1 capital (net of goodwill).

The elements of supplementary capital are discussed in greater detail below.[8]

a. *Allowance for loan and lease losses.* Allowances for loan and lease losses are reserves that have been established through a charge against earnings to absorb future losses on loans or lease financing receivables. Allowances for loan and lease losses exclude "allocated transfer risk reserves," [9] and reserves created against identified losses.

During the transition period, the risk-based capital guidelines provide for reducing the amount of this allowance that may be included in an institution s total capital. Initially, it is unlimited. However, by year-end 1990, the amount of the allowance for loan and lease losses that will qualify as capital will be limited to 1.5 percent of an institution's weighted risk assets. By the end of the transition period, the amount of the allowance qualifying for inclusion in Tier 2 capital may not exceed 1.25 percent of weighted risk assets.[10]

b. *Perpetual preferred stock.* Perpetual preferred stock, as noted above, is defined as preferred stock that has no maturity date, that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. Such instruments are eligible for inclusion in Tier 2 capital without limit.[11]

c. *Hybrid capital instruments and mandatory convertible debt securities.* Hybrid capital instruments include instruments that are essentially permanent in nature and that have certain characteristics of both equity and debt. Such instruments may be included in Tier 2 without limit. The general criteria hybrid capital instruments must meet in order to qualify for inclusion in Tier 2 capital are listed below:

(1) The instrument must be unsecured; fully paid-up; and subordinated to general creditors and must also be subordinated to claims of depositors.

(2) The instrument must not be redeemable at the option of the holder prior to maturity, except with the prior approval of the Federal Reserve. (Consistent with the Board's criteria for perpetual debt and mandatory convertible securities, this requirement implies that holders of such instruments may not accelerate the payment of principal except in the event of bankruptcy, insolvency, or reorganization.)

(3) The instrument must be available to participate in losses while the issuer is operating as a going concern. (Term subordinated debt would not meet this requirement.) To satisfy this requirement, the instrument must convert to common or perpetual preferred stock in the event that the accumulated losses exceed the sum of the retained earnings and capital surplus accounts of the issuer.

(4) The instrument must provide the option for the issuer to defer interest payments if: (a) The issuer does not report a profit in the preceding annual period (defined as combined profits for the most recent four quarters), *and* (b) the issuer eliminates cash dividends on common and preferred stock.

Mandatory convertible debt securities in the form of equity contract notes that meet the criteria set forth in 12 CFR Part 225, Appendix B, also qualify as unlimited elements of Tier 2 capital. In accordance with that appendix, equity commitment notes issued prior to May 15, 1985 also qualify for inclusion in Tier 2.

d. *Subordinated debt and intermediate-term preferred stock.* The aggregate amount of term subordinated debt (excluding mandatory convertible debt) and intermediate-term preferred stock that may be treated as supplementary captial is limited to 50 percent of Tier 1 capital (net of goodwill). Amounts in excess of these limits may be issued and, while not included in the ratio calculation, will be taken into account in the overall assessment of a bank's funding and financial condition.

Subordinated debt and intermediate-term preferred stock must have an original weighted average maturity of at least five years to qualify as supplementary capital. (If the holder has the option to require the issuer to redeem, repay, or repurchase the instrument prior to the original stated maturity, maturity would be defined, for risk-based capital purposes, as the earliest possible date on which the holder can put the instrument back to the issuing bank.)

In the case of subordinated debt, the instrument must be unsecured and must clearly state on its face that it is not a deposit and is not insured by a Federal agency. To qualify as capital in banks, debt must be subordinated to general creditors and claims of depositors. Consistent with current regulatory requirements, if a state member bank wishes to redeem subordinated debt before the stated maturity, it must receive prior approval of the Federal Reserve.

e. *Discount of supplementary capital instruments.* As a limited-life capital

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[6] The Federal Reserve's capital guidelines for bank holding companies limit the amount of perpetual preferred stock that may be included in Tier 1 to 25 percent of Tier 1. (See 12 CFR Part 225, Appendix A.)

[7] Adjustable rate noncumulative perpetual preferred stock (that is, perpetual preferred stock in which the dividend rate is not affected by the issuer's credit standing or financial condition but is adjusted periodically according to a formula based solely on general market interest rates) may be included in Tier 1.

[8] The Basle capital framework also provides for the inclusion of "undisclosed reserves" in Tier 2. As defined in the framework, undisclosed reserves represent accumulated after-tax retained earnings that are not disclosed on the balance sheet of a bank. Apart from the fact that these reserves are not disclosed publicly, they are essentially of the same quality and character as retained earnings, and, to be included in capital, such reserves must be accepted by the bank's home supervisor. Although such undisclosed reserves are common in some countries, under generally accepted accounting principles (GAAP) and long-standing supervisory practice, these types of reserves are not recognized for state member banks.

[9] Allocated transfer risk reserves are reserves that have been established in accordance with Section 905(a) of the International Lending Supervision Act of 1983, 12 U.S.C. 3904(a), against certain assets whose value U.S. supervisory authorities have found to be significantly impaired by protracted transfer risk problems.

[10] The amount of the allowance for loan and lease losses that may be included in Tier 2 capital is based on a percentage of gross weighted risk assets. A bank may deduct reserves for loan and lease losses in excess of the amount permitted to be included in Tier 2 capital, as well as allocated transfer risk reserves, from the sum of gross weighted risk assets and use the resulting net sum of weighted risk assets in computing the denominator of the risk-based capital ratio.

[11] Long-term preferred stock with an original maturity of 20 years or more (including related surplus) will also qualify in this category as an element of Tier 2. If the holder of such an instrument has a right to require the issuer to redeem, repay, or repurchase the instrument prior to the original stated maturity, maturity would be defined, for risk-based capital purposes, as the earliest possible date on which the holder can put the instrument back to the issuing bank.

instrument approaches maturity it begins to take on characteristics of a short-term obligation. For this reason, the outstanding amount of term subordinated debt and any long- or intermediate-life, or term, preferred stock eligible for inclusion in Tier 2 is reduced, or discounted, as these instruments approach maturity: one-fifth of the original amount, less any redemptions, is excluded each year during the instrument's last five years before maturity.[12]

f. *Revaluation reserves.* Such reserves reflect the formal balance sheet restatement or revaluation for capital purposes of asset carrying values to reflect current market values. In the United States, banks for the most part, follow GAAP when preparing their financial statements, and GAAP generally does not permit the use of market-value accounting. For this and other reasons, the Federal banking agencies generally have not included unrealized asset values in capital ratio calculations, although they have long taken such values into account as a separate factor in assessing the overall financial strength of a bank.

Consistent with long-standing supervisory practice, the excess of market values over book values for assets held by state member banks will generally not be recognized in supplementary capital or in the calculation of the risk-based capital ratio. However, all banks are encouraged to disclose their equivalent or premises (building) and equity revaluation reserves. Such values will be taken into account as additional considerations in assessing overall capital strength and financial condition.

B. Deductions from Capital and Other Adjustments

Certain assets are deducted from a bank's capital for the purpose of calculating the risk-based capital ratio.[13] These assets include:

(i) Goodwill—deducted from the sum of core capital elements.

(ii) Investments in banking and finance subsidiaries that are not consolidated for accounting or supervisory purposes and, on a case-by-case basis, investments in other designated subsidiaries or associated companies at the discretion of the Federal Reserve—deducted from total capital components.

(iii) Reciprocal holdings of capital instruments of banking organizations—deducted from total capital components.

1. *Goodwill and other intangible assets.*—a. *Goodwill.* Goodwill in an intangible asset that represents the excess of the purchase price over the fair market value of identifiable assets acquired less liabilities assumed in acquisitions accounted for under the purchase method of accounting. State member banks generally have not been allowed to include goodwill in regulatory capital under current supervisory policies. Consistent with this policy, all goodwill in state member banks will be deducted from Tier 1 capital.[14]

b. *Other intangible assets.* The Federal Reserve is not proposing, as a matter of general policy, to deduct automatically any other intangible assets from the capital of state member banks. The Federal Reserve, however, will continue to monitor closely the level and quality of other intangible assets—including purchased mortgage servicing rights, leaseholds, and core deposit value—and take them into account in assessing the capital adequacy and overall asset quality of banks.

Generally, banks should review all intangible assets at least quarterly and, if necessary, make appropriate reductions in their carrying values. In addition, in order to conform with prudent banking practice, an institution should reassess such values during its annual audit. Banks should use appropriate amortization methods and assign prudent amortization periods for intangible assets. Examiners will review the carrying value of these assets, together with supporting documentation, as well as the appropriateness of including particular intangible assets in a bank's capital calculation. In making such evaluations, examiners will consider a number of factors, including:

(1) The reliability and predictability of any cash flows associated with the asset and the degree of certainty that can be achieved in periodically determining the asset's useful life and value;

(2) The existence of an active and liquid market for the asset; and

(3) The feasibility of selling the asset apart from the bank or from the bulk of its assets.

While all intangible assets will be monitored, intangible assets (other than goodwill) in excess of 25 percent of Tier 1 capital (which is defined net of goodwill) will be subject to particularly close scrutiny, both through the examination process and by other appropriate means. Whenever necessary—in particular, when assessing applications to expand or to engage in other activities that could entail unusual or higher-than-normal risks—the Board will, on a case-by-case basis, continue to consider the level of an individual bank's tangible capital ratios (after deducting all intangible assets), together with the quality and value of the bank's tangible and intangible assets, in making an overall assessment of capital adequacy.

Consistent with long-standing Board policy, banks experiencing substantial growth, whether internally or by acquisition, are expected to maintain strong capital positions substantially above minimum supervisory levels, without significant reliance on intangible assets.

2. *Investments in certain subsidiaries.* The aggregate amount of investments in banking or finance subsidiaries[15] whose financial statements are not consolidated for accounting or bank regulatory reporting purposes will be deducted from a bank's total capital components.[16] Generally, investments for this purpose are defined as equity and debt capital investments and any other instruments that are deemed to be capital in the particular subsidiary.

Advances (that is, loans, extensions of credit, guarantees, commitments, or any other forms of credit exposure) to the subsidiary that are not deemed to be capital will generally not be deducted from a bank's capital. Rather, such advances generally will be included in the bank's consolidated assets and be assigned to the 100 percent risk category, unless such obligations are backed by recognized collateral or guarantees, in which case they will be assigned to the risk category appropriate to such collateral or guarantees. These advances may, however, also be deducted from the bank's capital if, in the judgment of the Federal Reserve, the risks stemming from such advances are comparable to the risks associated with capital investments or if the advances involve other risk factors that warrant such an adjustment to capital for supervisory purposes. These other factors could include, for example, the absence of collateral support.

Inasmuch as the assets of unconsolidated banking and finance subsidiaries are not fully reflected in a bank's consolidated total assets, such assets may be viewed as the equivalent of off-balance sheet exposures since the operations of an unconsolidated subsidiary could expose the bank to considerable risk. For this reason, it is generally appropriate to view the capital resources invested in these unconsolidated entities as primarily supporting the risks inherent in these off-balance sheet assets, and not generally available to support risks or absorb losses elsewhere in the bank.

The Federal Reserve may, on a case-by-case basis, also deduct from a bank's capital, investments in certain other subsidiaries in order to determine if the consolidated bank meets minimum supervisory capital

[12] For example, outstanding amounts of these instruments that count as supplementary capital include: 100 percent of the outstanding amounts with remaining maturities of more than five years; 80 percent of outstanding amounts with remaining maturities of four to five years; 60 percent of outstanding amounts with remaining maturities of three to four years; 40 percent of outstanding amounts with remaining maturities of two to three years; 20 percent of outstanding amounts with remaining maturities of one to two years; and 0 percent of outstanding amounts with remaining maturities of less than one year. Such instruments with a remaining maturity of less than one year are excluded from Tier 2 capital.

[13] Any assets deducted from capital in computing the numerator of the ratio are not included in weighted risk assets in computing the denominator of the ratio.

[14] An exception is made for those state member banks that have acquired goodwill in connection with supervisory mergers with troubled or failed depository institutions and that were given explicit authority to include such goodwill in capital under the then-existing capital policy. Consistent with this approach, state member banks will be allowed to include such goodwill in Tier 1 capital for risk-based capital purposes.

[15] For this purpose, a banking and finance subsidiary generally is defined as any company engaged in banking or finance in which the parent institution holds directly or indirectly more than 50 percent of the outstanding voting stock, or which is otherwise controlled or capable of being controlled by the parent institution.

[16] An exception to this deduction would be made in the case of shares acquired in the regular course of securing or collecting a debt previously contracted in good faith. The requirements for consolidation are spelled out in the instructions to the commercial bank Consolidated Reports of Condition and Income (Call Report).

requirements without reliance on the resources invested in such subsidiaries.

The Federal Reserve will not automatically deduct investments in other consolidated subsidiaries or investments in joint ventures and associated companies.[17] Nonetheless, the resources invested in these entities, like investments in unconsolidated banking and finance subsidiaries, support assets not consolidated with the rest of the bank's activities and, therefore, may not be generally available to support additional leverage or absorb losses elsewhere in the bank. Moreover, experience has shown that banks stand behind the losses of affiliated institutions, such as joint ventures and associated companies, in order to protect the reputation of the organization as a whole. In some cases, this has led to losses that have exceeded the investments in such organizations.

For this reason, the Federal Reserve will monitor the level and nature of such investments for individual banks and, on a case-by-case basis may, for risk-based capital purposes, deduct such investments from total capital components, apply an appropriate risk-weighted capital charge against the bank's proportionate share of the assets of its associated companies, require a line-by-line consolidation of the entity (in the event that the bank's control over the entity makes it the functional equivalent of a subsidiary), or otherwise require the bank to operate with a risk-based capital ratio above the minimum.

In considering the appropriateness of such adjustments or actions, the Federal Reserve will generally take into account whether:

(1) The bank has significant influence over the financial or managerial policies or operations of the subsidiary, joint venture, or associated company;

(2) The bank is the largest investor in the affiliated company; or

(3) Other circumstances prevail that appear to closely tie the activities of the affiliated company to the bank.

3. *Reciprocal holdings of banking organizations' capital instruments.* Reciprocal holdings of banking organizations' capital instruments (that is, instruments that qualify as Tier 1 or Tier 2 capital) [18] will be deducted from a bank's total capital components for the purpose of determining the numerator of the risk-based capital ratio.

Reciprocal holdings are cross-holdings resulting from formal or informal arrangements in which two or more banking organizations swap, exchange, or otherwise agree to hold each other's capital instruments. Generally, deductions will be limited to intentional cross-holdings. At present, the Board does not intend to require banks to deduct non-reciprocal holdings of such capital instruments.[19] [20]

III. Procedures for Computing Weighted Risk Assets and Off-Balance Sheet Items

A. Procedures.

Assets and credit equivalent amounts of off-balance sheet items of state member banks are assigned to one of several broad risk categories, according to the obligor, or, if relevant, the guarantor or the nature of the collateral. The aggregate dollar value of the amount in each category is then multiplied by the risk weight associated with that category. The resulting weighted values from each of the risk categories are added together, and this sum is the bank's total weighted risk assets that comprise the denominator of the risk-based capital ratio. Attachment I provides a sample calculation.

Risk weights for all off-balance sheet items are determined by a two-step process. First, the "credit equivalent amount" of off-balance sheet items is determined, in most cases by multiplying the off-balance sheet item by a credit conversion factor. Second, the credit equivalent amount is treated like any balance sheet asset and generally is assigned to the appropriate risk category according to the obligor, or, if relevant, the guarantor or the nature of the collateral.

In general, if a particular item qualifies for placement in more than one risk category, it is assigned to the category that has the lowest risk weight. A holding of a U.S. municipal revenue bond that is fully guaranteed by a U.S. bank, for example, would be assigned the 20 percent risk weight appropriate to claims guaranteed by U.S. banks, rather than the 50 percent risk weight appropriate to U.S. municipal revenue bonds.[21]

The terms "claims" and "securities" used in the context of the discussion of risk weights, unless otherwise specified, refer to loans or debt obligations of the entity on whom the claim is held. Assets in the form of stock or equity holdings in commercial or financial firms are assigned to the 100 percent risk category, unless some other treatment is explicitly permitted.

B. Collateral, Guarantees, and Other Considerations

1. *Collateral.* The only forms of collateral that are formally recognized by the risk-based capital framework are: Cash on deposit in the bank; securities issued or guaranteed by the central governments of the OECD-based group of countries[22], U.S. Government agencies, or U.S. Government-sponsored agencies; and securities issued by multilateral lending institutions or regional development banks. Claims fully secured by such collateral are assigned to the 20 percent risk weight category.

The extent to which qualifying securities are recognized as collateral is determined by their current market value. If a claim is only partially secured, that is, the market value of the pledged securities is less than the face amount of a balance sheet asset or an off-balance sheet item, the portion that is covered by the market value of the qualifying collateral is assigned to the 20 percent risk category, and the portion of the claim that is not covered by collateral in the form of cash or a qualifying security is assigned to the risk category appropriate to the obligor or, if relevant, the guarantor. For example, to the extent that a claim on a private sector obligor is collateralized by the current market value of U.S. Government securities, it would be placed in the 20 percent risk category, and the balance would be assigned to the 100 percent risk category.

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[17] The definition of such entities is contained in the instructions to the commercial bank Call Report. Under regulatory reporting procedures, associated companies and joint ventures generally are defined as companies in which the bank owns 20 to 50 percent of the voting stock.

[18] See 12 CFR Part 225, Appendix A for instruments that qualify as Tier 1 and Tier 2 capital for bank holding companies.

[19] Deductions of holdings of capital securities also would not be made in the case of interstate "stake out" investments that comply with the Board's Policy Statement on Nonvoting Equity Investments, 12 CFR 225.143. In addition, holdings of capital instruments issued by other banking organizations but taken in satisfaction of debts previously contracted would be exempt from any deduction from capital.

[20] The Board intends to monitor non-reciprocal holdings of other banking organizations' capital instruments and to provide information on such holdings to the Basle Supervisors' Committee as called for under the Basle capital framework.

[21] An investment in shares of a fund whose portfolio consists solely of various securities or money market instruments that, if held separately, would be assigned to different risk categories, is generally assigned to the risk category appropriate to the highest risk-weighted security or instrument that the fund is permitted to hold in accordance with its stated investment objectives. However, in no case will indirect holdings through shares in such funds be assigned to the zero percent risk category. For example, if a fund is permitted to hold U.S. Treasuries and commercial paper, shares in that fund would generally be assigned the 100 percent risk weight appropriate to commercial paper, regardless of the actual composition of the fund's investments at any particular time. Shares in a fund that may invest only in U.S. Treasury securities would generally be assigned to the 20 percent risk category. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk weight, such securities will generally not be taken into account in determining the risk category into which the bank's holding in the overall fund should be assigned. Regardless of the composition of the fund's securities, if the fund engages in any activities that appear speculative in nature (for example, use of futures, forwards, or option contracts for purposes other than to reduce interest rate risk) or has any other characteristics that are inconsistent with the preferential risk weighting assigned to the fund's investments, holdings in the fund will be assigned to the 100 percent risk category. During the examination process, the treatment of shares in such funds that are assigned to a lower risk weight will be subject to examiner review to ensure that they have been assigned an appropriate risk weight.

[22] The OECD-based group of countries comprises all full members of the Organization for Economic Cooperation and Development (OECD), as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the Fund's General Arrangements to Borrow. The OECD includes the following countries: Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, Finland, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Saudi Arabia has concluded special lending arrangements with the IMF associated with the Fund's General Arrangements to Borrow.

2. *Guarantees.* Guarantees of the OECD and non-OECD central governments, U.S. Government agencies, U S. Government-sponsored agencies, state and local governments of the OECD-based group of countries, multilateral lending institutions and regional development banks, U.S. depository institutions, and foreign banks are also recognized. If a claim is partially guaranteed, that is, coverage of the guarantee is less than the face amount of a balance sheet asset or an off-balance sheet item, the portion that is not fully covered by the guarantee is assigned to the risk category appropriate to the obligor or, if relevant, to any collateral. The face amount of a claim covered by two types of guarantees that have different risk weights, such as a U.S. Government guarantee and a state guarantee, is to be apportioned between the two risk categories appropriate to the guarantors.

The existence of other forms of collateral or guarantees that the risk-based capital framework does not formally recognize may be taken into consideration in evaluating the risks inherent in a bank's loan portfolio—which, in turn, would affect the overall supervisory assessment of the bank's capital adequacy

3. *Mortgage-backed securities.* Mortgage-backed securities, including pass-throughs and collateralized mortgage obligations (but not stripped mortgage-backed securities), that are *issued* or *guaranteed* by a U.S. Government agency or U.S. Government-sponsored agency are assigned to the risk weight category appropriate to the issuer or guarantor. Generally, a privately-issued mortgage-backed security meeting certain criteria set forth in the accompanying footnote,[23] is treated as essentially an indirect holding of the underlying assets, and assigned to the same risk category as the underlying assets, but in no case to the zero percent risk category. Privately-issued mortgage-backed securities whose structures do not qualify them to be regarded as indirect holdings of the underlying assets are assigned to the 100 percent risk category. During the examination process, privately-issued mortgage-backed securities that are assigned to a lower risk weight category will be subject to examiner review to ensure that they meet the appropriate criteria.

While the risk category to which mortgage-backed securities is assigned will generally be based upon the issuer or guarantor or, in the case of privately-issued mortgage-backed securities, the assets underlying the security, any class of a mortgage-backed security that can absorb more than its *pro rata* share of loss without the whole issue being in default (for example, a so-called subordinate class or residual interest), is assigned to the 100 percent risk category. Furthermore, all stripped mortgage-backed securities, including interest-only strips (IOs), principal-only strips (POs), and similar instruments are also assigned to the 100 percent risk weight category, regardless of the issuer or guarantor.

4. *Maturity.* Maturity is generally not a factor in assigning items to risk categories with the exception of claims on non-OECD banks, commitments, and interest rate and foreign exchange rate contracts. Except for commitments, short-term is defined as one year or less *remaining* maturity and long-term is defined as over one year *remaining* maturity. In the case of commitments, short-term is defined as one year or less *original* maturity and long-term is defined as over one year *original* maturity.[24]

C. Risk Weights

Attachment III contains a listing of the risk categories, a summary of the types of assets assigned to each category and the weight associated with each category, that is, 0 percent, 20 percent, 50 percent, and 100 percent. A brief explanation of the components of each category follows.

1. *Category 1: zero percent.* This category includes cash (domestic and foreign) owned and held in all offices of the bank or in transit and gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is offset by gold bullion liabilities.[25] The category also includes all direct claims (including securities, loans, and leases) on, and the portions of claims that are directly and unconditionally guaranteed by, the central governments [26] of the OECD countries and U.S. Government agencies,[27] as well as all direct local currency claims on, and the portions of local currency claims that are directly and unconditionally guaranteed by, the central governments of non-OECD countries, to the extent that the bank has liabilities booked in that currency. A claim is not considered to be unconditionally guaranteed by a central government if the validity of the guarantee is dependent upon some affirmative action by the holder or a third party. Generally, securities guaranteed by the U.S. Government or its agencies that are actively traded in financial markets, such as GNMA securities, are considered to be unconditionally guaranteed.

2. *Category 2: 20 percent.* This category includes cash items in the process of collection, both foreign and domestic; short-term claims (including demand deposits) on, and the portions of short-term claims that are guaranteed [28] by, U.S. depository institutions [29] and foreign banks [30]; and long-

[23] A privately-issued mortgage-backed security may be treated as an indirect holding of the underlying assets provided that: (1) The underlying assets are held by an independent trustee and the trustee has a first priority, perfected security interest in the underlying assets on behalf of the holders of the security; (2) either the holder of the security has an undivided *pro rata* ownership interest in the underlying mortgage assets or the trust or single purpose entity (or conduit) that issues the security has no liabilities unrelated to the issued securities; (3) the security is structured such that the cash flow from the underlying assets in all cases fully meets the cash flow requirements of the security without undue reliance on any reinvestment income; and (4) there is no material reinvestment risk associated with any funds awaiting distribution to the holders of the security. In addition, if the underlying assets of a mortgage-backed security are composed of more than one type of asset, for example, U.S. Government-sponsored agency securities and privately-issued pass-through securities that qualify for the 50 percent risk category, the entire mortgage-backed security is generally assigned to the category appropriate to the highest risk-weighted asset underlying the issue. Thus, in this example, the security would receive the 50 percent risk weight appropriate to the privately-issued pass-through securities.

[24] Through year-end 1992, remaining, rather than original, maturity may be used for determining the maturity of commitments.

[25] All other holdings of bullion are assigned to the 100 percent risk category.

[26] A central government is defined to include departments and ministries, including the central bank, of the central government. The U.S. central bank includes the 12 Federal Reserve Banks, and the stock held in these banks as a condition of membership is assigned to the zero percent risk category. The definition of central government does not include state, provincial, or local governments; or commercial enterprises owned by the central government. In addition, it does not include local government entities or commercial enterprises whose obligations are guaranteed by the central government, although any claims on such entities guaranteed by central governments are placed in the same general risk category as other claims guaranteed by central governments. OECD central governments are defined as central governments of the OECD-based group of countries; non-OECD central governments are defined as central governments that do not belong to the OECD-based group countries.

[27] A U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the U.S. Government. Such agencies include the Government National Mortgage Association (GNMA), the Veterans Administration (VA), the Federal Housing Administration (FHA), the Export-Import Bank (Exim Bank), the Overseas Private Investment Corporation (OPIC), the Commodity Credit Corporation (CCC), and the Small Business Administration (SBA).

[28] Claims guaranteed by U.S. depository institutions and foreign banks include risk participations in both bankers acceptances and standby letters of credit, as well as participations in commitments, that are conveyed to other U.S. depository institutions or foreign banks.

[29] U.S. depository institutions are defined to include branches (foreign and domestic) of federally-insured banks and depository institutions chartered and headquartered in the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions. The definition encompasses banks, mutual or stock savings banks, savings or building and loan associations, cooperative banks, credit unions, and international banking facilities of domestic banks. U.S.-chartered depository institutions owned by foreigners are also included in the definition. However, branches and agencies of foreign banks located in the U.S., as well as all bank holding companies, are excluded.

[30] Foreign banks are distinguished as either OECD banks or non-OECD banks. OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries (other than the U.S.) that belong to the OECD-based group of countries. Non-OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries that do not belong to the OECD-based group of countries. For this purpose, a bank is defined as an institution that engages in the business of banking; is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations; receives deposits to a substantial extent in the regular course of business; and has the power to accept demand deposits. Claims on, and the portions of claims that are guaranteed by, a non-OECD central bank are treated as claims on, or

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term claims on, and the portions of long-term claims that are guaranteed by, U.S. depository institutions and OECD banks.[31]

This category also includes the portions of claims that are conditionally guaranteed by OECD central governments and U.S. Government agencies, as well as the portions of local currency claims that are conditionally guaranteed by non-OECD central governments, to the extent that the bank has liabilities booked in that currency. In addition, this category includes claims on, and the portions of claims that are guaranteed by, U.S. Government-sponsored [32] agencies and claims on, and the portions of claims guaranteed by, the International Bank for Reconstruction and Development (World Bank), the Interamerican Development Bank, the Asian Development Bank, the African Development Bank, the European Investment Bank, and other multilateral lending institutions or regional development banks in which the U.S. Government is a shareholder or contributing member. General obligation claims on, or portions of claims guaranteed by the full faith and credit of, states or other political subdivisions of the U.S. or other countries of the OECD-based group are also assigned to this category.[33]

This category also includes the portions of claims (including repurchase agreements) collateralized by cash on deposit in the bank; by securities issued or guaranteed by OECD central governments, U.S. Government agencies, or U.S. Government-sponsored agencies; or by securities issued by multilateral lending institutions or regional development banks in which the U.S. Government is a shareholder or contributing member.

3. *Category 3: 50 percent.* This category includes loans fully secured by first liens [34] on 1–4 family residential properties [35], either owner-occupied or rented, provided that such loans have been made in accordance with prudent underwriting standards, including a conservative loan-to-value ratio; [36] are performing in accordance with their original terms; and are not 90 days or more past due or carried in nonaccrual status.[37] Also included in this category are privately-issued mortgage-backed securities provided that: (1) The structure of the security meets the criteria described in section III (B)(3) above; (2) if the security is backed by a pool of conventional mortgages, *each* underlying mortgage meets the criteria described above in this section for eligibility for the 50 percent risk weight category at the time the pool is originated; and (3) if the security is backed by privately-issued mortgage-backed securities, *each* underlying security qualifies for the 50 percent risk category. Privately-issued mortgage-backed securities that do not meet these criteria or that do not qualify for a lower risk weight are generally assigned to the 100 percent risk weight category.

Also assigned to this category are *revenue* (non-general obligation) bonds or similar obligations, including loans and leases, that are obligations of states or other political subdivisions of the U.S. (for example, municipal revenue bonds) or other countries of the OECD-based group, but for which the government entity is committed to repay the debt with revenues from the specific projects financed, rather than from general tax funds.

Credit equivalent amounts of interest rate and foreign exchange rate contracts involving standard risk obligors (that is, obligors whose loans or debt securities would be assigned to the 100 percent risk category) are included in the 50 percent category, unless they are backed by collateral or guarantees that allow them to be placed in a lower risk category.

4. *Category 4: 100 percent.* All assets not included in the categories above are assigned to this category, which comprises standard risk assets. The bulk of the assets typically found in a loan portfolio would be assigned to the 100 percent category.

This category includes long-term claims on, or guaranteed by, non-OECD banks, and all claims on non-OECD central governments that entail some degree of transfer risk.[38] This category also includes all claims on foreign and domestic private sector obligors not included in the categories above (including loans to nondepository financial institutions and bank holding companies); claims on commercial firms owned by the public sector; customer liabilities to the bank on acceptances outstanding involving standard risk claims [39]; investments in fixed assets, premises, and other real estate owned; common and preferred stock of corporations, including stock acquired for debts previously contracted; commercial and consumer loans (except those assigned to lower risk categories due to recognized guarantees or collateral and loans for residential property that qualify for a lower risk weight); mortgage-backed securities that do not meet criteria for assignment to a lower risk weight (including any classes of mortgage-backed securities that can absorb more than their *pro rata* share of loss without the whole issue being in default); and all stripped mortgage-backed and similar securities.

Also included in this category are industrial development bonds and similar obligations issued under the auspices of states or political subdivisions of the OECD-based group of countries for the benefit of a private party or enterprise where that party or enterprise, not the government entity, is obligated to pay the principal and interest, and all obligations of states or political subdivisions of countries that do not belong to the OECD-based group.

The following assets also are assigned a risk weight of 100 percent if they have not been deducted from capital: investments in unconsolidated companies, joint ventures or associated companies; instruments that qualify as capital issued by other banking organizations; and any intangibles, including grandfathered goodwill.

D. Off-Balance Sheet Items

The face amount of an off-balance sheet item is incorporated into the risk-based capital ratio by multiplying it by a credit conversion factor. The resultant credit equivalent amount is assigned to the appropriate risk category according to the obligor, or, if relevant, the guarantor or the nature of the collateral.[40] Attachment IV sets

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guaranteed by, a non-OECD bank, except for local currency claims on, and the portions of local currency claims that are guaranteed by, non-OECD central bank that are funded in local currency liabilities. The latter claims are assigned to either the zero percent risk category.

[31] Long-term claims on, or guaranteed by, non-OECD banks and all claims on bank holding companies are assigned to the 100 percent risk category, as are holdings of bank-issued securities that qualify as capital of the issuing banks.

[32] For this purpose, U.S. Government-sponsored agencies are defined as agencies originally established or chartered by the Federal government to serve public purposes specified by the U.S. Congress but whose obligations are *not explicitly* guaranteed by the full faith and credit of the U.S. Government. These agencies include the Federal Home Loan Mortgage Corporation (FHLMC), the Federal National Mortgage Association (FNMA), the Farm Credit System, the Federal Home Loan Bank System, and the Student Loan Marketing Association (SLMA). Claims on U.S. Government-sponsored agencies include capital stock in a Federal Home Loan Bank that is held as a condition of membership in that bank.

[33] Claims on, or guaranteed by, states or other political subdivisions of countries that do not belong to the OECD-based group of countries are placed in the 100 percent risk category.

[34] If a bank holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purpose of determining the loan-to-value ratio.

[35] The types of properties that qualify as 1–4 family residences are listed in the instructions to the commercial bank Call Report.

[36] The loan-to-value ratio is based upon the most current appraised value of the property. All appraisals must be made in a manner consistent with the Federal banking agencies' real estate appraisal guidelines and with the bank's own appraisal guidelines.

[37] Residential property loans that do not meet all the specified criteria or that are made for the purpose of speculative property development are placed in the 100 percent risk category.

[38] Such assets include all non-local currency claims on, or guaranteed by, non-OECD central governments and those portions of local currency claims on, or guaranteed by, non-OECD central governments that exceed the local currency liabilities held by the bank.

[39] Customer liabilities on acceptances outstanding involving non-standard risk claims, such as claims on U.S. depository institutions, are assigned to the risk category appropriate to the identity of the obligor or, if relevant, the nature of the collateral or guarantees backing the claims. Portions of acceptances conveyed as risk participations to U.S. depository institutions or foreign banks are assigned to the 20 percent risk category appropriate to short-term claims guaranteed by U.S. depository institutions and foreign banks.

[40] The sufficiency of collateral and guarantees for off-balance sheet items is determined by the market value of the collateral or the amount of the guarantee in relation to the face amount of the item, except for interest and foreign exchange rate contracts, for which this determination is made in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under Section III (B).

forth the conversion factors for various types of off-balance sheet items.

1. *Items with a 100 percent conversion factor.* A 100 percent conversion factor applies to direct credit substitutes, which include guarantees, or equivalent instruments, backing financial claims, such as outstanding securities, loans, and other financial liabilities, or that back off-balance sheet items that require capital under the risk-based capital framework. Direct credit substitutes include, for example, financial standby letters of credit, or other equivalent irrevocable undertakings or surety arrangements, that guarantee repayment of financial obligations such as: commercial paper, tax-exempt securities, commercial or individual loans or debt obligations, or standby or commercial letters of credit. Direct credit substitutes also include the acquisition of risk participations in bankers acceptances and standby letters of credit, since both of these transactions, in effect, constitute a guarantee by the acquiring bank that the underlying account party (obligor) will repay its obligation to the originating, or issuing, institution.[41] (Standby letters of credit that are performance-related are discussed below and have a credit conversion factor of 50 percent.)

The full amount of a direct credit substitute is converted at 100 percent and the resulting credit equivalent amount is assigned to the risk category appropriate to the obligor or, if relevant, the guarantor or the nature of the collateral. In the case of a direct credit substitute in which a risk participation [42] has been conveyed, the full amount is still converted at 100 percent. However, the credit equivalent amount that has been conveyed is assigned to whichever risk category is lower: the risk category appropriate to the obligor, after giving effect to any relevant guarantees or collateral, or the risk category appropriate to the institution acquiring the participation. Any remainder is assigned to the risk category appropriate to the obligor, guarantor, or collateral. For example, the portion of a direct credit substitute conveyed as a risk participation to a U.S. domestic depository institution or foreign bank is assigned to the risk category appropriate to claims guaranteed by those institutions, that is, the 20 percent risk category.[43] This approach recognizes that such conveyances replace the originating bank's exposure to the obligor with an exposure to the institutions acquiring the risk participations.[44]

In the case of direct credit substitutes that take the form of a syndication as defined in the instructions to the commercial bank Call Report, that is, where each bank is obligated only for its *pro rata* share of the risk and there is no recourse to the originating bank, each bank will only include its *pro rata* share of the direct credit substitute in its risk-based capital calculation.

Financial standby letters of credit are distinguished from loan commitments (discussed below) in that standbys are irrevocable obligations of the bank to pay a third-party beneficiary when a customer (account party) *fails to repay* an outstanding loan or debt instrument (direct credit substitute). Performance standby letters of credit (performance bonds) are irrevocable obligations of the bank to pay a third-party beneficiary when a customer (account party) *fails to perform* some other contractual non-financial obligation.

The distinguishing characteristic of a standby letter of credit for risk-based capital purposes is the combination of irrevocability with the fact that funding is triggered by some failure to repay or perform an obligation. Thus, any commitment (by whatever name) that involves an *irrevocable* obligation to make a payment to the customer or to a third party in the event the customer *fails to repay* an outstanding debt obligation or *fails to perform* a contractual obligation is treated, for risk-based capital purposes, as respectively, a financial guarantee standby letter of credit or a performance standby.

A loan commitment, on the other hand, involves an obligation (with or without a material adverse change or similar clause) of the bank to fund its customer *in the normal course* of business should the customer seek to draw down the commitment.

Sale and repurchase agreements and asset sales with recourse (to the extent not included on the balance sheet) and forward agreements also are converted at 100 percent. The risk-based capital definition of the sale of assets with recourse, including the sale of 1–4 family residential mortgages, is the same as the definition contained in the instructions to the commercial bank Call Report. So-called "loan strips" (that is, short-term advances sold under long-term commitments without direct recourse) are defined in the instructions to the commercial bank Call Report and for risk-based capital purposes as assets sold with recourse.

Forward agreements are legally binding contractual obligations to purchase assets with *certain* drawdown at a specified future date. Such obligations include forward purchases, forward forward deposits placed,[45] and partly-paid shares and securities; they do not include commitments to make residential mortgage loans or forward foreign exchange contracts.

Securities lent by a bank are treated in one of two ways, depending upon whether the lender is at risk of loss. If a bank, as agent for a customer, lends the customer's securities and does not indemnify the customer against loss, then the transaction is excluded from the risk-based capital calculation. If, alternatively, a bank lends its own securities or, acting as agent for a customer, lends the customer's securities and indemnifies the customer against loss, the transaction is converted at 100 percent and assigned to the risk weight category appropriate to the obligor, to any collateral delivered to the lending bank, or, if applicable, to the independent custodian acting on the lender's behalf.

2. *Items with a 50 percent conversion factor.* Transaction-related contingencies are converted at 50 percent. Such contingencies include bid bonds, performance bonds, warranties, standby letters of credit related to particular transactions, and performance standby letters of credit, as well as acquisitions of risk participations in performance standby letters of credit. Performance standby letters of credit represent obligations backing the performance of nonfinancial or commercial contracts or undertakings. To the extent permitted by law or regulation, performance standby letters of credit include arrangements backing, among other things, subcontractors' and suppliers performance, labor and materials contracts, and construction bids.

The unused portion of commitments with an *original* maturity exceeding one year,[46] including underwriting commitments, and commercial and consumer credit commitments also are converted at 50 percent. Original maturity is defined as the length of time between the date the commitment is issued and the earliest date on which: (1) The bank can, at its option, unconditionally (without cause) cancel the commitment,[47] *and* (2) the bank is scheduled to (and as a normal practice actually does) review the facility to determine whether or not it should be extended. Such reviews must continue to be conducted at least annually for such a facility to qualify as a short-term commitment.

Commitments are defined as any legally binding arrangements that obligate a bank to extend credit in the form of loans or leases; to purchase loans, securities, or other assets; or to participate in loans and leases. They also include overdraft facilities, revolving credit, home equity and mortgage lines of credit, and similar transactions. Normally, commitments involve a written contract or agreement and a commitment fee, or some other form of consideration. Commitments are included in weighted risk assets regardless of whether they contain "material adverse change" clauses or other provisions that are intended to relieve the issuer of its funding obligation under certain conditions. In the case of commitments structured as syndications,

[41] Credit equivalent amounts of acquisitions of risk participations are assigned to the risk category appropriate to the account party obligor, or, if relevant, the nature of the collateral or guarantees.

[42] That is, a participation in which the originating bank remains liable to the beneficiary for the full amount of the direct credit substitute if the party that has acquired the participation fails to pay when the instrument is drawn.

[43] Risk participations with a remaining maturity of over one year that are conveyed to non-OECD banks are to be assigned to the 100 percent risk category, unless a lower risk category is appropriate to the obligor, guarantor, or collateral.

[44] A risk participation in bankers acceptances conveyed to other institutions is also assigned to the risk category appropriate to the institution acquiring the participation or, if relevant, the guarantor or nature of the collateral.

[45] Forward forward deposits accepted are treated as interest rate contracts.

[46] Through year-end 1992, remaining maturity may be used for determining the maturity of off-balance sheet loan commitments; thereafter, original maturity must be used.

[47] In the case of consumer home equity or mortgage lines of credit secured by liens on 1–4 family residential properties, the bank is deemed able to unconditionally cancel the commitment for the purpose of this criterion if, at its option, it can prohibit additional extensions of credit, reduce the credit line, and terminate the commitment to the full extent permitted by relevant Federal law.

where the bank is obligated solely for its *pro rata* share, only the bank's proportional share of the syndicated commitment is taken into account in calculating the risk-based capital ratio.

Facilities that are unconditionally cancellable (without cause) at any time by the bank are not deemed to be commitments, provided the bank makes a separate credit decision before each drawing under the facility. Commitments with an original maturity of one year or less are deemed to involve low risk and, therefore, are not assessed a capital charge. Such short-term commitments are defined to include the unused portion of lines of credit on retail credit cards and related plans (as defined in the instructions to the commercial bank Call Report) if the bank has the unconditional right to cancel the line of credit at any time, in accordance with applicable law.

Once a commitment has been converted at 50 percent, any portion that has been conveyed to other U.S. depository institutions or OECD banks as participations in which the originating bank retains the full obligation to the borrower if the participating bank fails to pay when the instrument is drawn, is assigned to the 20 percent risk category. This treatment is analogous to that accorded to conveyances of risk participations in standby letters of credit. The acquisition of a participation in a commitment by a bank is converted at 50 percent and assigned to the risk category appropriate to the account party obligor or, if relevant, the nature of the collateral or guarantees.

Revolving underwriting facilities (RUFs), note issuance facilities (NIFs), and other similar arrangements also are converted at 50 percent regardless of maturity. These are facilities under which a borrower can issue on a revolving basis short-term paper in its own name, but for which the underwriting banks have a legally binding commitment either to purchase any notes the borrower is unable to sell by the roll-over date or to advance funds to the borrower.

3. *Items with a 20 percent conversion factor.* Short-term, self-liquidating trade-related contingencies which arise from the movement of goods are converted at 20 percent. Such contingencies generally include commercial letters of credit and other documentary letters of credit collateralized by the underlying shipments.

4. *Items with a zero percent conversion factor.* These include unused portions of commitments with an original maturity of one year or less,[48] or which are unconditionally cancellable at any time, provided a separate credit decision is made before each drawing under the facility. Unused portions of lines of credit on retail credit cards and related plans are deemed to be short-term commitments if the bank has the unconditional right to cancel the line of credit at any time, in accordance with applicable law.

E. Interest Rate and Foreign Exchange Rate Contracts

1. *Scope.* Credit equivalent amounts are computed for each of the following off-balance sheet interest rate and foreign exchange rate instruments:

I. Interest Rate Contracts
- A. Single currency interest rate swaps.
- B. Basis swaps.
- C. Forward rate agreements.
- D. Interest rate options purchased (including caps, collars, and floors purchased).
- E. Any other instrument that gives rise to similar credit risks (including when-issued securities and forward deposits accepted).

II. Exchange Rate Contracts
- A. Cross-currency interest rate swaps.
- B. Forward foreign exchange contracts.
- C. Currency options purchased.
- D. Any other instrument that gives rise to similar credit risks.

Exchange rate contracts with an original maturity of fourteen calendar days or less and instruments traded on exchanges that require daily payment of variation margin are excluded from the risk-based ratio calculation. Over-the-counter options purchased, however, are included and treated in the same way as the other interest rate and exchange rate contracts.

2. *Calculation of credit equivalent amounts.* Credit equivalent amounts are calculated for each individual contract of the types listed above. To calculate the credit equivalent amount of its off-balance sheet interest rate and exchange rate instruments, a bank sums these amounts:

(1) The mark-to-market value [49] (positive values only) of each contract (that is, the current exposure); and

(2) An estimate of the potential future credit exposure over the remaining life of each contract.

The potential future credit exposure on a contract, including contracts with negative mark-to-market values, is estimated by multiplying the notional principal amount by one of the following credit conversion factors, as appropriate:

[In percent]

Remaining maturity	Interest rate contracts	Exchange rate contracts
One year or less	0	1.0
Over one year	0.5	5.0

Examples of the calculation of credit equivalent amounts for these instruments are contained in Attachment V.

Because exchange rate contracts involve an exchange of principal upon maturity, and exchange rates are generally more volatile than interest rates, higher conversion factors have been established for foreign exchange contracts than for interest rate contracts.

No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices, so-called floating/floating or basis swaps; the credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values.

3. *Risk weights.* Once the credit equivalent amount for interest rate and exchange rate instruments has been determined, that amount is assigned to the risk weight category appropriate to the counterparty, or, if relevant, the nature of any collateral or guarantees.[50] However, the maximum weight that will be applied to the credit equivalent amount of such instruments is 50 percent.

4. *Avoidance of double counting.* In certain cases, credit exposures arising from the interest rate and exchange instruments covered by these guidelines may already be reflected, in part, on the balance sheet. To avoid double counting such exposures in the assessment of capital adequacy and, perhaps, assigning inappropriate risk weights, counterparty credit exposures arising from the types of instruments covered by these guidelines may need to be excluded from balance sheet assets in calculating banks' risk-based capital ratios.

5. *Netting.* Netting of swaps and similar contracts is recognized for purposes of calculating the risk-based capital ratio *only* when accomplished through netting by novation.[51] While the Federal Reserve encourages any reasonable arrangements designed to reduce the risks inherent in these transactions, other types of netting arrangements are not recognized for purposes of calculating the risk-based ratio at this time.

IV. Minimum Supervisory Ratios and Standards

The interim and final supervisory standards set forth below specify *minimum* supervisory ratios based primarily on broad credit risk considerations. As noted above, the risk-based ratio does not take explicit account of the quality of individual asset portfolios or the range of other types of risks to which banks may be exposed, such as interest rate, liquidity, market or operational risks. For this reason, banks are generally expected to operate with capital positions above the minimum ratios. This is particularly true for institutions that are undertaking significant expansion or that are exposed to high or unusual levels of risk.

Upon adoption of the risk-based framework, any bank that does not meet the

[48] Through year-end 1992, remaining maturity may be used for determining term to maturity for off-balance sheet loan commitments; thereafter, original maturity must be used.

[49] Mark-to-market values are measured in dollars, regardless of the currency or currencies specified in the contract, and should reflect changes in both interest rates and counterparty credit quality.

[50] For interest and exchange rate contracts, sufficiency of collateral or guarantees is determined by the market value of the collateral or the amount of the guarantee in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under section III(B).

[51] Netting by novation, for this purpose, is a written bilateral contract between two counterparties under which any obligation to each other to deliver a given currency on a given date is automatically amalgamated with all other obligations for the same currency and value date, *legally* substituting one single net amount for the previous gross obligations.

interim or final supervisory ratios, or whose capital is otherwise considered inadequate, is expected to develop and implement a plan acceptable to the Federal Reserve for achieving an adequate level of capital consistent with the provisions of these guidelines or with the special circumstances affecting the individual institution. In addition, such banks should avoid any actions, including increased risk-taking or unwarranted expansion, that would lower or further erode their capital positions.

A. Minimum Risk-Based Ratio After Transition Period

As reflected in Attachment VI, by year-end 1992, all state member banks should meet a minimum ratio of qualifying total capital to weighted risk assets of 8 percent, of which at least 4.0 percentage points should be in the form of Tier 1 capital net of goodwill. (Section II above contains detailed definitions of capital and related terms used in this section.) The maximum amount of supplementary capital elements that qualifies as Tier 2 capital is limited to 100 percent of Tier 1 capital net of goodwill. In addition, the combined maximum amount of subordinated debt and intermediate-term preferred stock that qualifies as Tier 2 capital is limited to 50 percent of Tier 1 capital. The maximum amount of the allowance for loan and lease losses that qualifies as Tier 2 capital is limited to 1.25 percent of gross weighted risk assets. Allowances for loan and lease losses in excess of this limit may, of course, be maintained, but would not be included in a bank's total capital. The Federal Reserve will continue to require banks to maintain reserves at levels fully sufficient to cover losses inherent in their loan portfolios.

Qualifying total capital is calculated by adding Tier 1 capital and Tier 2 capital (limited to 100 percent of Tier 1 capital) and then deducting from this sum certain investments in banking or finance subsidiaries that are not consolidated for accounting or supervisory purposes, reciprocal holdings of banking organization capital securities, or other items at the direction of the Federal Reserve. These deductions are discussed above in section II(B).

B. Transition Arrangements

The transition period for implementing the risk-based capital standard ends on December 31, 1992.[52] Initially, the risk-based capital guidelines do not establish a minimum level of capital. However, by year-end 1990, banks are expected to meet a minimum interim target ratio for qualifying total capital to weighted risk assets of 7.25 percent, at least one-half of which should be in the form of Tier 1 capital. For purposes of meeting the 1990 interim target, the amount of loan loss reserves that may be included in capital is limited to 1.5 percent of weighted risk assets and up to 10 percent of a bank's Tier 1 capital may consist of supplementary capital elements. Thus, the 7.25 percent interim target ratio implies a minimum ratio of Tier 1 capital to weighted risk assets of 3.6 percent (one-half of 7.25) and a minimum ratio of core capital elements to weighted risk assets ratio of 3.25 percent (nine-tenths of the Tier 1 capital ratio).

[52] The Basle capital framework does not establish an initial minimum standard for the risk-based capital ratio before the end of 1990. However, for the purpose of calculating a risk-based capital ratio prior to year-end 1990, no sublimit is placed on the amount of the allowance for loan and lease losses includable in Tier 2. In addition, this framework permits, under temporary transition arrangements, a certain percentage of a bank's Tier 1 capital to be made up of supplementary capital elements. In particular, supplementary elements may constitute 25 percent of a bank's Tier 1 capital (before the deduction of goodwill) up to the end of 1990; from year-end 1990 up to the end of 1992, this allowable percentage of supplementary elements in Tier 1 declines to 10 percent of Tier 1 (before the deduction of goodwill). Beginning on December 31, 1992, supplementary elements may not be included in Tier 1. The amount of subordinated debt and intermediate-term preferred stock temporarily included in Tier 1 under these arrangements will not be subject to the sublimit on the amount of such instruments includable in Tier 2 capital. Goodwill must be deducted from the sum of a bank's permanent core capital elements (that is, common equity, noncumulative perpetual preferred stock, and minority interest in the equity of unconsolidated subsidiaries) plus supplementary items that may temporarily qualify as Tier 1 elements for the purpose of calculating Tier 1 (net of goodwill), Tier 2, and total capital.

ATTACHMENT I.—SAMPLE CALCULATION OF RISK-BASED CAPITAL RATIO FOR STATE MEMBER BANKS

Example of a bank with $6,000 in total capital and the following assets and off-balance sheet items:

Balance Sheet Assets:	
Cash	$5,000
U.S. Treasuries	20,000
Balances at domestic banks	5,000
Loans secured by first liens on 1–4 family residential properties	5,000
Loans to private corporations	65,000
Total Balance Sheet Assets	$100,000
Off-Balance Sheet Items:	
Standby letters of credit ("SLCs") backing general obligation debt issues of U.S. municipalities ("GOs")	$10,000
Long-term legally binding commitments to private corporations	20,000
Total Off-Balance Sheet Items	30,000

This bank's total capital to *total* assets (leverage) ratio would be: ($6,000/$100,000)=6.00%

To compute the bank's weighted risk assets:

1. Compute the credit equivalent amount of each off-balance sheet ("OBS") item

OBS item	Face value		Conversion factor		Credit equivalent amount
SLCS backing municipal GOs	$10,000	×	1.00	=	$10,000
Long-term commitments to private corporations	20,000	×	0.50	=	10,000
2. Multiply each balance sheet asset and the credit equivalent amount of each OBS item by the appropriate risk weight.					
0% Category:					
Cash	$ 5,000				
U.S. Treasuries	20,000				
	25,000	×	0	=	0
20% Category:					
Balances at domestic banks	5,000				
Credit equivalent amounts of SLCs backing GOs of U.S. municipalities	10,000				
	15,000	×	.20	=	$3,000

OBS item	Face value		Conversion factor		Credit equivalent amount
50% Category:					
Loans secured by first liens on 1–4 family residential properties	5,000	×	.50	=	2,500
100% Category:					
Loans to private corporations	65,000				
Credit equivalent amounts of long-term commitments to private corporations	10,000				
	75,000	×	1.00	=	75,000
Total risk-weighted assets					80,500

This bank's ratio of total capital to weighted risk assets (risk-based capital ratio) would be: ($6,000/$80,500)=7.45%

ATTACHMENT II.—SUMMARY DEFINITION OF QUALIFYING CAPITAL FOR STATE MEMBER BANKS* USING THE YEAR-END 1992 STANDARDS

Components	Minimum requirements after transition period
Core Capital (Tier 1):	Must equal or exceed 4% of weighted risk assets.
Common stockholders' equity	No limit.
Qualifying non-cumulative perpetual preferred stock	No limit; banks should avoid undue reliance on preferred stock in Tier 1.
Minority interest in equity accounts of consolidated subsidiaries	Banks should avoid using minority interests to introduce elements not otherwise qualifying for Tier 1 capital.
Less: Goodwill [1]	
Supplementary Capital (Tier 2):	Total of Tier 2 is limited to 100% of Tier 1.[2]
Allowance for loan and lease losses	Limited to 1.25% of weighted risk assets.[2]
Perpetual preferred stock	No limit within Tier 2.
Hybrid capital instruments and equity contract notes	No limit within Tier 2.
Subordinated debt and intermediate-term preferred stock (original weighted average maturity of 5 years or more).	Subordinated debt and intermediate-term preferred stock are limited to 50% of Tier 1; [3] amortized for capital purposes as they approach maturity.
Revaluation reserves (equity and building)	Not included; banks encouraged to disclose; may be evaluated on a case-by-case basis for international comparisons; and taken into account in making an overall assessment of capital.
Deductions (from sum of Tier 1 and Tier 2):	
Investments in unconsolidated subsidiaries	
Reciprocal holdings of banking organizations' capital securities	
Other deductions (such as other subsidiaries or joint ventures) as determined by supervisory authority.	On a case-by-case basis or as a matter of policy after formal rulemaking.
Total Capital (Tier 1+Tier 2-Deductions	Must equal or exceed 8% of weighted risk assets.

*See discussion in section II of the Guidelines for a complete description of the requirements for, and the limitations on, the components of qualifying capital.
[1] All goodwill, except previously grandfathered goodwill approved in supervisory mergers, is deducted immediately.
[2] Amounts in excess of limitations are permitted but do not qu alify as capital.
[3] Amounts in excess of limitations are permitted but do not qualify as capital.

Attachment III—Summary of Risk Weights and Risk Categories for State Member Banks

Category 1: Zero Percent

1. Cash (domestic and foreign) held in the bank or in transit.

2. Balances due from Federal Reserve Banks (including Federal Reserve Bank stock) and central banks in other OECD countries.

3. Direct claims on, and the portions of claims that are unconditionally guaranteed by, the U.S. Treasury and U.S. Government agencies [1] and the central governments of other OECD countries, and local currency claims on, and the portions of local currency claims that are unconditionally guaranteed by, the central governments of non-OECD countries including the central banks of non-OECD countries), to the extent that the bank has liabilities booked in that currency.

4. Gold bullion held in the bank's vaults or in another's vaults on an allocated basis, to the extent offset by gold bullion liabilities.

Category 2: 20 Percent

1. Cash items in the process of collection.

2. All claims (long- or short-term) on, and the portions of claims (long- or short-term) that are guaranteed by, U.S. depository institutions and OCED banks.

3. Short-term claims (remaining maturity of one year or less) on, and the portions of short-term claims that are guaranteed by, non-OECD banks.

4. The portions of claims that are conditionally guaranteed by the central governments of OECD countries and U.S. Government agencies, and the portions of local currency claims that are conditionally guaranteed by the central governments of non-OECD countries, to the extent that the bank has liabilities booked in that currency.

5. Claims on, and the portions of claims that are guaranteed by, U.S. Government-sponsored agencies.[2]

6. General obligation claims on, and the portions of claims that are guaranteed by the full faith and credit of, local governments and political subdivisions of the U.S. and other OECD local governments.

7. Claims on, and the portions of claims that are guaranteed by, official multilateral lending institutions or regional development banks.

8. The portions of claims that are collateralized [3] by securities issued or guaranteed by the U.S. Treasury, the central governments of other OECD countries, U.S. Government agencies, U.S. Government-sponsored agencies, or by cash on deposit in the bank.

9. The portions of claims that are collateralized [3] by securities issued by official multilateral lending institutions or regional development banks.

10. Certain privately-issued securities representing indirect ownership of mortgage-backed U.S. Government agency or U.S. Government-sponsored agency securities.

11. Investment in shares of a fund whose portfolio is permitted to hold only securities

[1] For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the U.S. Government.

[2] For the purpose of calculating the risk-based capital ratio, a U.S. Government-sponsored agency is defined as an agency originally established or chartered to serve public purposes specified by the U.S. Congress but whose obligations are not *explicitly* guaranteed by the full faith and credit of the U.S. Government.

[3] The extent of collateralization is determined by current market value.

that would qualify for the zero or 20 percent risk categories.

Category 3: 50 Percent

1. Loans fully secured by first liens on 1–4 family residential properties that have been made in accordance with prudent underwriting standards, that are performing in accordance with their original terms, and are not past due or in nonaccrual status, and certain privately-issued mortgage-backed securities representing indirect ownership of such loans. (Loans made for speculative purposes are excluded.)

2. Revenue bonds or similar claims that are obligations of U.S. state or local governments, or other OECD local governments, but for which the government entity is committed to repay the debt only out of revenues from the facilities financed.

3. Credit equivalent amounts of interest rate and foreign exchange rate related contracts, except for those assigned to a lower risk category.

Category 4: 100 Percent

1. All other claims on private obligors.

2. Claims on, or guaranteed by, non-OECD foreign banks with a remaining maturity exceeding one year.

3. Claims on, or guaranteed by, non-OECD central governments that are not included in item 3 of Category 1 or item 4 of Category 2; all claims on non-OECD state or local governments.

4. Obligations issued by U.S. state or local governments, or other OECD local governments (including industrial development authorities and similar entities), repayable solely by a private party or enterprise.

5. Premises, plant, and equipment; other fixed assets; and other real estate owned.

6. Investments in any unconsolidated subsidiaries, joint ventures, or associated companies—if not deducted from capital.

7. Instruments issued by other banking organizations that qualify as capital—if not deducted from capital.

8. Claims on commercial firms owned by a government.

9. All other assets, including any intangible assets that are not deducted from capital.

Attachment IV—Credit Conversion Factors for Off-Balance Sheet Items for State Member Banks

100 Percent Conversion Factor

1. Direct credit substitutes. (These include general guarantees of indebtedness and all guarantee-type instruments, including standby letters of credit backing the financial obligations of other parties.)

2. Risk participations in bankers acceptances and direct credit substitutes, such as standby letters of credit.

3. Sale and repurchase agreements and assets sold with recourse that are not included on the balance sheet.

4. Forward agreements to purchase assets, including financing facilities, on which drawdown is *certain*.

5. Securities lent for which the bank is at risk.

50 Percent Conversion Factor

1. Transaction-related contingencies. (These include bid bonds, performance bonds, warranties, and standby letters of credit backing the nonfinancial performance of other parties.)

2. Unused portions of commitments with an original maturity [1] exceeding one year, including underwriting commitments and commercial credit lines.

3. Revolving underwriting facilities (RUFs), note issuance facilities (NIFs), and similar arrangements.

20 Percent Conversion Factor

1. Short-term, self-liquidating trade-related contingencies, including commercial letters of credit.

Zero Percent Conversion Factor

1. Short-term self-liquidating trade-related contingences, including commercial letters of credit.

Zero Percent Conversion Factor

1. Unused portions of commitments with an original maturity [1] of one year or less, or which are unconditionally cancellable at any time, provided a separate credit decision is made before each drawing.

Credit Conversion for Interest Rate and Foreign Exchange Contracts

The total replacement cost of contracts (obtained by summing the positive mark-to-market values of contracts) is added to a measure of future potential increases in credit exposure. This future potential exposure measure is calculated by multiplying the total notional value of contracts by one of the following credit conversion factors, as appropriate:

Remaining maturity	Interest rate contracts (percent)	Exchange rate contracts (percent)
One year or less	0	1.0
Over one year	0.5	5.0

No potential exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices, that is, so called floating/floating or basis swaps. The credit exposure on these contracts is evaluated solely on the basis of their mark-to-market value. Exchange rate contracts with an original maturity of fourteen days or less are excluded. Instruments traded on exchanges that require daily payment of variation margin are also excluded. The only form of netting recognized is netting by novation.

[1] Remaining maturity may be used until year-end 1992.

ATTACHMENT V.—CALCULATION OF CREDIT EQUIVALENT AMOUNTS INTEREST RATE AND FOREIGN EXCHANGE RATE RELATED TRANSACTIONS FOR STATE MEMBER BANKS

Type of Contract (remaining maturity)	Potential Exposure				Current Exposure			Credit equivalent amount (dollars)
	National principal (dollars)	x	Potential exposure conversion factor	= Potential exposure (dollars)	+ Replacement Cost[1]	Current exposure (dollars)[2]	=	
(1) 120-day forward foreign exchange	5,000,000		.01	50,000	100,000	100,000		150,000
(2) 120-day forward foreign exchange	6,000,000		.01	60,000	−120,000			60,000
(3) 3-year single-currency fixed/floating interest rate swap	10,000,000		.005	50,000	200,000	200,000		250,000
(4) 3-year single-currency fixed/floating interest rate swap	10,000,000		.005	50,000	−250,000			50,000
(5) 7-year cross-currency floating/floating interest rate swap	20,000,000		.05	1,000,000	−1,300,000			1,000,000
Total	51,000,000							1,510,000

[1] These numbers are purely for illustration.
[2] The larger of zero or a positive mark-to-market value.

ATTACHMENT VI.—SUMMARY

	Transitional arrangements for State member banks		Final arrangement—Year-end 1992
	Initial	Year-end 1990	
1. Minimum standard of total capital to weighted risk assets.	None	7.25%	8.0%
2. Definition of Tier 1 capital	Common equity, qualifying noncum. perpetual preferred stock, minority interests, *plus* supplementary elements [1] *less* goodwill.	Common equity, qualifying noncum. perpetual preferred stock, minority interests, *plus* supplementary elements [2] *less* goodwill.	Common equity, qualifying noncum. perpetual preferred stock, and minority interests *less* goodwill.
3. Minimum standard of Tier 1 capital to weighted risk assets.	None	3.625%	4.0%
4. Minimum standard of stockholders' equity to weighted risk assets.	None	3.25%	4.0%
5. Limitations on supplementary capital elements:			
a. Allowance for loan and lease losses.	No limit within Tier 2	1.5% of weighted risk assets	1.25% of weighted risk assets.
b. Qualifying perpetual preferred stock.	No limit within Tier 2	No limit within Tier 2	No limit within Tier 2.
c. Hybrid capital instruments and equity contract notes.	No limit within Tier 2	No limit within Tier 2	No limit within Tier 2.
d. Subordinated debt and intermediate term preferred stock.	Combined maximum of 50% of Tier 1	Combined maximum of 50% of Tier 1	Combined maximum of 50% of Tier 1.
e. Total qualifying Tier 2 capital	May not exceed Tier 1 capital	May not exceed Tier 1 capital	May not exceed Tier 1 capital.
6. Definition of total capital	Tier 1 *plus* Tier 2 *less* —reciprocal holdings of banking organizations' capital instruments. —investments in unconsolidated subsidiaries.	Tier 1 *plus* Tier 2 *less* —reciprocal holdings of banking organizations' capital instruments. —investments in unconsolidated subsidiaries.	Tier 1 *plus* Tier 2 *less* —reciprocal holdings of banking organizations' capital instruments. —investments in unconsolidated subsidiaries.

[1] Supplementary elements may be included in Tier 1 up to 25% of the sum of Tier 1 plus goodwill.
[2] Supplementary elements may be included in Tier 1 up to 10% of the sum of Tier 1 plus goodwill.

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL

1. The authority citation for Part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1843(c)(8), 1844(b), 3106, 3108, 3907, 3909.

Appendix A to Part 225 [Redesignated as Appendix B to Part 225]

2. The Board amends the Appendices to Part 225 by redesignating the current Appendix A as Appendix B and adding a new Appendix A to read as set forth below.

3. The Board amends the redesignated Appendix B to Part 225 by adding at the end of the title to Appendix B ": Leverage Measure".

Appendix B to Part 225 [Redesignated as Appendix C to Part 225]

4. The Board redesignates the current Appendix B as Appendix C.

Appendix A to Part 225—Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

I. Overview

The Board of Governors of the Federal Reserve System has adopted a risk-based capital measure to assist in the assessment of the capital adequacy of bank holding companies ("banking organizations"). [1] The principal objectives of this measure are to: (i) Make regulatory capital requirements more sensitive to differences in risk profiles among banking organizations; (ii) factor off-balance sheet exposures into the assessment of capital adequacy; (iii) minimize disincentives to holding liquid, low-risk assets; and (iv) achieve greater consistency in the evaluation of the capital adequacy of major banking organizations throughout the world.[2]

The risk-based capital guidelines include both a definition of capital and a framework for calculating weighted risk assets by assigning assets and off-balance sheet items to broad risk categories. An institution's risk-based capital ratio is calculated by dividing its qualifying capital (the numerator of the ratio) by its weighted risk assets (the denominator).[3] The definition of qualifying capital is outlined below in section II, and the procedures for calculating weighted risk assets are discussed in section III. Attachment I illustrates a sample calculation of weighted risk assets and the risk-based capital ratio.

The risk-based capital guidelines also establish a schedule for achieving a minimum supervisory standard for the ratio of qualifying capital to weighted risk assets and provide for transitional arrangements during a phase-in period to facilitate adoption and implementation of the measure at the end of 1992. These interim standards and transitional arrangements are set forth in section IV.

The risk-based guidelines apply on a consolidated basis to bank holding companies with consolidated assets of $150 million or more. For bank holding companies with less than $150 million in consolidated assets, the guidelines will be applied on a bank-only basis unless: (a) The parent bank holding company is engaged in nonbank activity involving significant leverage; [4] or (b) the parent company has a significant amount of outstanding debt that is held by the general public.

The risk-based guidelines are to be used in the inspection and supervisory process as well as in the analysis of applications acted upon by the Federal Reserve. Thus, in considering an application filed by a bank holding company, the Federal Reserve will take into account the organization's risk-based capital ratio, the reasonableness of its capital plans, and the degree of progress it has demonstrated toward meeting the interim and final risk-based capital standards.

The risk-based capital ratio focuses principally on broad categories of credit risk,

[1] Supervisory ratios that relate capital to total assets for bank holding companies are outlined in Appendix B of this part.

[2] The risk-based capital measure is based upon a framework developed jointly by supervisory authorities from the countries represented on the Basle Committee on Banking Regulations and Supervisory Practices (Basle Supervisors' Committee) and endorsed by the Group of Ten Central Bank Governors. The framework is described in a paper prepared by the BSC entitled "International Convergence of Capital Measurement," July 1988.

[3] Banking organizations will initially be expected to utilize period-end amounts in calculating their risk-based capital ratios. When necessary and appropriate, ratios based on average balances may also be calculated on a case-by-case basis. Moreover, to the extent banking organizations have data on average balances that can be used to calculate risk-based ratios, the Federal Reserve will take such data into account.

[4] A parent company that is engaged in significant off-balance sheet activities would generally be deemed to be engaged in activities that involve significant leverage.

although the framework for assigning assets and off-balance sheet items to risk categories does incorporate elements of transfer risk, as well as limited instances of interest rate and market risk. The risk-based ratio does not, however, incorporate other factors that can affect an organization's financial condition. These factors include overall interest rate exposure; liquidity, funding and market risks; the quality and level of earnings; investment or loan portfolio concentrations; the quality of loans and investments; the effectiveness of loan and investment policies; and management's ability to monitor and control financial and operating risks.

In addition to evaluating capital ratios, an overall assessment of capital adequacy must take account of these other factors, including, in particular, the level and severity of problem and classified assets. For this reason, the final supervisory judgment on an organization's capital adequacy may differ significantly from conclusions that might be drawn solely from the level of the organization's risk-based capital ratio.

The risk-based capital guidelines establish *minimum* ratios of capital to weighted risk assets. In light of the considerations just discussed, banking organizations generally are expected to operate well above the minimum risk-based ratios. In particular, banking organizations contemplating significant expansion proposals are expected to maintain strong capital levels substantially above the minimum ratios and should not allow significant diminution of financial strength below these strong levels to fund their expansion plans. Institutions with high or inordinate levels of risk are also expected to operate above minimum capital standards. In all cases, institutions should hold capital commensurate with the level and nature of the risks to which they are exposed. Banking organizations that do not meet the minimum risk-based standard, or that are otherwise considered to be inadequately capitalized, are expected to develop and implement plans acceptable to the Federal Reserve for achieving adequate levels of capital within a reasonable period of time.

The Board will monitor the implementation and effect of these guidelines in relation to domestic and international developments in the banking industry. When necessary and appropriate, the Board will consider the need to modify the guidelines in light of any significant changes in the economy, financial markets, banking practices, or other relevant factors.

II. Definition of Qualifying Capital for the Risk Based Capital Ratio

An institution's qualifying total capital consists of two types of capital components: "core capital elements" (comprising Tier 1 capital) and "supplementary capital elements" (comprising Tier 2 capital). These capital elements and the various limits, restrictions, and deductions to which they are subject, are discussed below and are set forth in Attachment II.

To qualify as an element of Tier 1 or Tier 2 capital, a capital instrument may not contain or be covered by any convenants, terms, or restrictions that are inconsistent with safe and sound banking practices.

Redemptions of permanent equity or other capital instruments before stated maturity could have a significant impact on an organization's overall capital structure. Consequently, an organization considering such a step should consult with the Federal Reserve before redeeming any equity or debt capital instrument (prior to maturity) if such redemption could have a material effect on the level or composition of the organization's capital base.[5]

A. The Components of Qualifying Capital

1. *Core capital elements (Tier 1 capital).* The Tier 1 component of an institution's qualifying capital must represent at least 50 percent of qualifying total capital and may consist of the following items that are defined as core capital elements:

(i) Common stockholders' equity.

(ii) Qualifying perpetual preferred stock (including related surplus), subject to certain limitations described below.

(iii) Minority interest in the equity accounts of consolidated subsidiaries.

Tier 1 capital is generally defined as the sum of the core capital elements less goodwill.[6] (See section II(B) below for a more detailed discussion of the treatment of goodwill, including an explanation of certain limited grandfathering arrangements.)

a. *Common stockholders' equity.* Common stockholders' equity includes: common stock; related surplus; and retained earnings, including capital reserves and adjustments for the cumulative effect of foreign currency translation, net of any treasury stock.

b. *Perpetual preferred stock.* Perpetual preferred stock is defined as preferred stock that does not have a maturity date, that cannot be redeemed at the option of the holder of the instrument, and that has no other provisions that will require future redemption of the issue. In general, preferred stock will qualify for inclusion in capital only if it can absorb losses while the issuer operates as a going concern (a fundamental characteristic of equity capital) *and* only if the issuer has the ability and legal right to defer or eliminate preferred dividends.

Perpetual preferred stock in which the dividend is reset periodically based, in whole or in part, upon the banking organization's current credit standing (that is, auction rate perpetual preferred stock, including so-called Dutch auction money market, and remarketable preferred) will not qualify for inclusion in Tier 1 capital.[7] Such instruments, however, qualify for inclusion in Tier 2 capital.

For bank holding companies, both cumulative and noncumulative perpetual preferred stock qualify for inclusion in Tier 1. However, the aggregate amount of such stock (whether cumulative or noncumulative) that may be included in a holding company's Tier 1 is limited to one-third of the sum of core capital elements, excluding the perpetual preferred stock (that is, items (i) and (iii) above). Stated differently, the aggregate amount may not exceed 25 percent of the sum of all core capital elements, including perpetual preferred stock (that is, items (i), (ii) and (iii) above). Any perpetual preferred stock outstanding in excess of this limit may be included in Tier 2 capital without any sublimits within that Tier (see discussion below).

The limits on preferred stock are consistent with the Board's long-standing view that common equity should remain the dominant form of a banking organization's capital structure. In addition to these limits, the Board believes that, in general, banking organizations should avoid overreliance on other nonvoting equity instruments in their Tier 1 capital.

c. *Minority interest in equity accounts of consolidated subsidiaries.* This element is included in Tier 1 because, as a general rule, it represents equity that is freely available to absorb losses in operating subsidiaries. While not subject to an explicit sublimit within Tier 1, banking organizations are expected to avoid using minority intererst in the equity accounts of consolidated subsidiaries as an avenue for introducing into their capital structures elements that might not otherwise qualify as Tier 1 capital or that would, in effect, result in an excessive reliance on perferred stock within Tier 1.

2. *Supplementary capital elements (Tier 2 capital).* The Tier 2 component of an institution's qualifying total capital may consist of the following items that are defined as supplementary capital elements:

(i) Allowance for loan and lease losses (subject to limitations discussed below).

(ii) Perpetual preferred stock and related surplus (subject to conditions discussed below).

(iii) Hybrid capital instruments (as defined below), perpetual debt, and mandatory convertible debt securities.

(iv) Term subordinated debt and intermediate-term preferred stock, including related surplus (subject to limitations discussed below).

The maximum amount of Tier 2 capital that may be included in an organization's qualifying total capital is limited to 100 percent of Tier 1 capital (net of goodwill).

The elements of supplementary capital are discussed in greater detail below.[8]

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[5] Consultation would not ordinarily be necessary if an instrument were redeemed with the proceeds of, or replaced by, a like amount of a similar or higher quality capital instrument and the organization's capital position is considered fully adequate by the Federal Reserve. In the case of limited-life Tier 2 instruments, consultation would generally be obviated if the new security is of equal or greater maturity than the one it replaces.

[6] During the transition period and subject to certain limitations set forth in Section IV below, Tier 1 capital may also include items defined as supplementary capital elements.

[7] Adjustable rate perpetual preferred stock (that is, perpetual preferred stock in which the dividend rate is not affected by the issuer's credit standing or financial condition but is adjusted periodically according to a formula based solely on general market interest rates) may be included in Tier 1 up to the limits specified for perpetual preferred stock.

[8] The Basle capital framework also provides for the inclusion of "undisclosed reserves" in Tier 2. As defined in the framework, undisclosed reserves represent accumulated after-tax retained earnings that are not disclosed on the balance sheet of a banking organization. Apart from the fact that these reserves are not disclosed publicly, they are essentially of the same quality and character as

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a. *Allowance for loan and lease losses.* Allowances for loan and lease losses are reserves that have been established through a charge against earnings to absorb future losses on loans or lease financing receivables. Allowances for loan and lease losses exclude "allocated transfer risk reserves," [9] and reserves created against identified losses.

During the transition period, the risk-based capital guidelines provide for reducing the amount of this allowance that may be included in an institution's total capital. Initially, it is unlimited. However, by year-end 1990, the amount of the allowance for loan and lease losses that will qualify as capital will be limited to 1.5 percent of an institution's weighted risk assets. By the end of the transition period, the amount of the allowance qualifying for inclusion in Tier 2 capital may not exceed 1.25 percent of weighted risk assets.[10]

b. *Perpetual preferred stock.* Perpetual preferred stock, as noted above, is defined as preferred stock that has no maturity date, that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. Such instruments are eligible for inclusion in Tier 2 capital without limit.[11]

c. *Hybrid capital instruments, perpetual debt, and mandatory convertible debt securities.* Hybrid capital instruments include instruments that are essentially permanent in nature and that have certain characteristics of both equity and debt. Such instruments may be included in Tier 2 without limit. The general criteria hybrid capital instruments must meet in order to qualify for inclusion in Tier 2 capital are listed below:

(1) The instrument must be unsecured; fully paid-up and subordinated to general creditors. If issued by a bank, it must also be subordinated to claims or depositors.

(2) The instrument must not be redeemable at the option of the holder prior to maturity, except with the prior approval of the Federal Reserve. (Consistent with the Board's criteria for perpetual debt and mandatory convertible securities, this requirement implies that holders of such instruments may not accelerate the payment of principal except in the event of bankruptcy, insolvency, or reorganization.)

(3) The instrument must be available to participate in losses while the issuer is operating as a going concern. (Term subordinated debt would not meet this requirement.) To satisfy this requirement, the instrument must convert to common or perpetual preferred stock in the event that the accumulated losses exceed the sum of the retained earnings and capital surplus accounts of the issuer.

(4) The instrument must provide the option for the issuer to defer interest payments if: a) the issuer does not report a profit in the preceding annual period (defined as combined profits for the most recent four quarters), *and* b) the issuer eliminates cash dividends on common and preferred stock.

Perpetual debt and mandatory convertible debt securities that meet the criteria set forth in 12 CFR Part 225, Appendix B, also qualify as unlimited elements of Tier 2 capital for bank holding companies.

d. *Subordinated debt and intermediate-term preferred stock.* The aggregate amount of term subordinated debt (excluding mandatory convertible debt) and intermediate-term preferred stock that may be treated as supplementary capital is limited to 50 percent of Tier 1 capital (net of goodwill). Amounts in excess of these limits may be issued and, while not included in the ratio calculation, will be taken into account in the overall assessment of an organization's funding and financial condition.

Subordinated debt and intermediate-term preferred stock must have an original weighted average maturity of at least five years to qualify as supplementary capital.[12] (If the holder has the option to require the issuer to redeem, repay, or repurchase the instrument prior to the original stated maturity, maturity would be defined, for risk-based capital purposes, as the earliest possible date on which the holder can put the instrument back to the issuing banking organization.)

In the case of subordinated debt, the instrument must be unsecured and must clearly state on its face that it is not a deposit and is not insured by a Federal agency. Bank holding company debt must be subordinated in right of payment to all senior indebtedness of the company.

e. *Discount of supplementary capital instruments.* As a limited-life capital instrument approaches maturity it begins to take on characteristics of a short-term obligation. For this reason, the outstanding amount of term subordinated debt and any long- or intermediate-life, or term, preferred stock eligible for inclusion in Tier 2 is reduced, or discounted, as these instruments approach maturity: one-fifth of the original amount, less any redemptions, is excluded each year during the instrument's last five years before maturity.[13]

f. *Revaluation reserves.* Such reserves reflect the formal balance sheet restatement or revaluation for capital purposes of asset carrying values to reflect current market values. In the United States, banking organizations, for the most part, follow GAAP when preparing their financial statements, and GAAP generally does not permit the use of market-value accounting. For this and other reasons, the Federal banking agencies generally have not included unrealized asset values in capital ratio calculations, although they have long taken such values into account as a separate factor in assessing the overall financial strength of a banking organization.

Consistent with long-standing supervisory practice, the excess of market values over book values for assets held by bank holding companies will generally not be recognized in supplementary capital or in the calculation of the risk-based capital ratio. However, all banking organizations are encouraged to disclose their equivalent of premises (building) and equity revaluation reserves. Such values will be taken into account as additional considerations in assessing overall capital strength and financial condition.

B. Deductions from Capital and Other Adjustments

Certain assets are deducted from an organization's capital for the purpose of calculating the risk-based capital ratio.[14] These assets include:

(i) Goodwill—deducted from the sum of core capital elements. (See discussion below of limited grandfathering of bank holding company goodwill during the transition period.)

(ii) Investments in banking and finance subsidiaries that are not consolidated for

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retained earnings, and, to be included in capital, such reserves must be accepted by the banking organization's home supervisor. Although such undisclosed reserves are common in some countries, under generally accepted accounting principles (GAAP) and long-standing supervisory practice, these types of reserves are not recognized for banking organizations in the United States. Foreign banking organizations seeking to make acquisitions or conduct business in the United States would generally be expected to disclose publicly at least the degree or reliance on such reserves in meeting supervisory capital requirements.

[9] Allocated transfer risk reserves are reserves that have been established in accordance with Section 905(a) of the International Lending Supervision Act of 1983, 12 U.S.C. 3904(a), against certain assets whose value U.S. supervisory authorities have found to be significantly impaired by protracted transfer risk problems.

[10] The amount of the allowance for loan and lease losses that may be included in Tier 2 capital is based on a percentage of gross weighted risk assets. A banking organization may deduct reserves for loan and lease losses in excess of the amount permitted to be included in Tier 2 capital, as well as allocated transfer risk reserves, from the sum of gross weighted risk assets and use the resulting net sum of weighted risk assets in computing the denominator of the risk-based capital ratio.

[11] Long-term preferred stock with an original maturity of 20 years or more (including related surplus) will also qualify in this category as an element of Tier 2. If the holder of such an instrument has a right to require the issuer to redeem, repay, or repurchase the instrument prior to the original stated maturity, maturity would be defined, for risk-based capital purposes, as the earliest possible date on which the holder can put the instrument back to the issuing banking organization.

[12] Unsecured term debt issued by bank holding companies prior to March 12, 1988, and qualifying as secondary capital at the time of issuance would continue to qualify as an element of supplementary capital under the risk-based framework, subject to the 50 percent of Tier 1 capital limitation. Bank holding company term debt issued on or after March 12, 1988, must be subordinated in order to qualify as capital.

[13] For example, outstanding amounts of these instruments that count as supplementary capital include: 100 percent of the outstanding amounts with remaining maturities of more than five years; 80 percent of outstanding amounts with remaining maturities of four to five years; 60 percent of outstanding amounts with remaining maturities of three to four years; 40 percent of outstanding amounts with remaining maturities of two to three years; 20 percent of outstanding amounts with remaining maturities of one to two years; and 0 percent of outstanding amounts with remaining maturities of less than one year. Such instruments with a remaining maturity of less than one year are excluded from Tier 2 capital.

[14] Any assets deducted from capital in computing the numerator of the ratio are not included in weighted risk assets in computing the denominator of the ratio.

accounting or supervisory purposes, and investments in other designated subsidiaries or associated companies at the discretion of the Federal Reserve—deducted from total capital components (as described in greater detail below).

(iii) Reciprocal holdings of capital instruments of banking organizations—deducted from total capital components.

1. *Goodwill and other intangible assets*—a. *Goodwill.* Goodwill is an intangible asset that represents the excess of the purchase price over the fair market value of identifiable assets acquired less liabilities assumed in acquisitions accounted for under the purchase method of accounting. Any goodwill carried on the balance sheet of a bank holding company after December 31, 1992, will be deducted from the sum of core capital elements in determining Tier 1 capital for ratio calculation purposes. Any goodwill in existence before March 12, 1988, is "grandfathered" during the transition period and is not deducted from core capital elements until after December 31, 1992. However, bank holding company goodwill acquired as a result of a merger or acquisition that was consummated on or after March 12, 1988, is deducted immediately.[15]

b. *Other intangible assets.* The Federal Reserve is not proposing, as a matter of general policy, to deduct automatically any other intangible assets from the capital of bank holding companies. The Federal Reserve, however, will continue to monitor closely the level and quality of other intangible assets—including purchased mortgage servicing rights, leaseholds, and core deposit value—and take them into account in assessing the capital adequacy and overall asset quality of banking institutions.

Generally, banking organizations should review all intangible assets at least quarterly and, if necessary, make appropriate reductions in their carrying values. In addition, in order to conform with prudent banking practice, an organization should reassess such values during its annual audit. Banking organizations should use appropriate amortization methods and assign prudent amortization periods for intangible assets. Examiners will review the carrying value of these assets, together with supporting documentation, as well as the appropriateness of including particular intangible assets in a banking organization's capital calculation. In making such evaluations, examiners will consider a number of factors, including:

(1) The reliability and predictability of any cash flows associated with the asset and the degree of certainty that can be achieved in periodically determining the asset's useful life and value;

(2) The existence of an active and liquid market for the asset; and

(3) The feasibility of selling the asset apart from the banking organization or from the bulk of its assets.

While all intangible assets will be monitored, intangible assets (other than goodwill) in excess of 25 percent of Tier 1 capital (which is defined net of goodwill) will be subject to particularly close scrutiny, both through the inspection process and by other appropriate means. Whenever necessary—in particular, when assessing applications to expand or to engage in other activities that could entail unusual or higher-than-normal risks—the Board will, on a case-by-case basis, continue to consider the level of an individual organization's tangible capital ratios (after deducting all intangible assets), together with the quality and value of the organization's tangible and intangible assets, in making an overall assessment of capital adequacy.

Consistent with long-standing Board policy, banking organizations experiencing substantial growth, whether internally or by acquisition, are expected to maintain strong capital positions substantially above minimum supervisory levels, without significant reliance on intangible assets.

2. *Investments in certain subsidiaries.*— a. *Unconsolidated banking or finance subsidiaries.* The aggregate amount of investments in banking or finance subsidiaries [16] whose financial statements are not consolidated for accounting or regulatory reporting purposes, regardless of whether the investment is made by the parent bank holding company or its direct or indirect subsidiaries, will be deducted from the consolidated parent banking organization's total capital components.[17] Generally, investments for this purpose are defined as equity and debt capital investments and any other instruments that are deemed to be capital in the particular subsidiary.

Advances (that is, loans, extensions of credit, guarantees, commitments, or any other forms of credit exposure) to the subsidiary that are not deemed to be capital will generally not be deducted from an organization's capital. Rather, such advances generally will be included in the parent banking organization's consolidated assets and be assigned to the 100 percent risk category, unless such obligations are backed by recognized collateral or guarantees, in which case they will be assigned to the risk category appropriate to such collateral or guarantees. These advances may, however, also be deducted from the consolidated parent banking organization's capital if, in the judgment of the Federal Reserve, the risks stemming from such advances are comparable to the risks associated with capital investments or if the advances involve other risk factors that warrant such an adjustment to capital for supervisory purposes. These other factors could include, for example, the absence of collateral support.

Inasmuch as the assets of unconsolidated banking and finance subsidiaries are not fully reflected in a banking organization's consolidated total assets, such assets may be viewed as the equivalent of off-balance sheet exposures since the operations of an unconsolidated subsidiary could expose the parent organization and its affiliates to considerable risk. For this reason, it is generally appropriate to view the capital resources invested in these unconsolidated entities as primarily supporting the risks inherent in these off-balance sheet assets, and not generally available to support risks or absorb losses elsewhere in the organization.

b. *Other subsidiaries and investments.* The deduction of investments, regardless of whether they are made by the parent bank holding company or by its direct or indirect subsidiaries, from a consolidated banking organization's capital will also be applied in the case of any subsidiaries, that, while consolidated for accounting purposes, are not consolidated for certain specified supervisory or regulatory purposes, such as to facilitate functional regulation. For this purpose, aggregate capital investments (that is, the sum of any equity or debt instruments that are deemed to be capital) in these subsidiaries will be deducted from the consolidated parent banking organization's total capital components.[18]

Advances (that is, loans, extensions of credit, guarantees, commitments, or any other forms of credit exposure) to such subsidiaries that are not deemed to be capital will generally not be deducted from capital. Rather, such advances will normally be included in the parent banking organization's consolidated assets and assigned to the 100 percent risk category, unless such obligations are backed by recognized collateral or guarantees, in which case they will be assigned to the risk category appropriate to such collateral or guarantees. These advances may, however, be deducted from the consolidated parent banking organization's capital if, in the judgment of the Federal Reserve, the risks stemming from such advances are comparable to the risks associated with capital investments or if such advances involve other risk factors that

[15] Goodwill acquired by a subsidiary bank in connection with a merger with a troubled or failed depository institution that regulatory authorities have specifically allowed the bank to include in its capital will generally not be deducted from the core capital elements of its parent bank holding company.

[16] For this purpose, a banking and finance subsidiary generally is defined as any company engaged in banking or finance in which the parent institution holds directly or indirectly more than 50 percent of the outstanding voting stock, or which is otherwise controlled or capable of being controlled by the parent institution.

[17] An exception to this deduction would be made in the case of shares acquired in the regular course of securing or collecting a debt previously contracted in good faith. The requirements for consolidation are spelled out in the instructions to the Consolidated Financial Statements for Bank Holding Companies (FR Y-9C Report).

[18] Investments in unconsolidated subsidiaries will be deducted from both Tier 1 and Tier 2 capital. As a general rule, one-half (50 percent) of the aggregate amount of capital investments will be deducted from the bank holding company's Tier 1 capital and one-half (50 percent) from its Tier 2 capital. However, the Federal Reserve may, on a case-by-case basis, deduct a proportionately greater amount from Tier 1 if the risks associated with the subsidiary so warrant. If the amount deductible from Tier 2 capital exceeds actual Tier 2 capital, the excess would be deducted from Tier 1 capital. Bank holding companies' risk-based capital ratios, net of these deductions, must exceed the minimum standards set forth in section IV.

warrant such an adjustment to capital for supervisory purposes. These other factors could include, for example, the absence of collateral support.[19]

In general, when investments in a consolidated subsidiary are deducted from a consolidated parent banking organization's capital, the subsidiary's assets will also be excluded from the consolidated assets of the parent banking organization in order to assess the latter's capital adequacy.[20]

The Federal Reserve may also deduct from a banking organization's capital, on a case-by-case basis, investments in certain other subsidiaries in order to determine if the consolidated banking organization meets minimum supervisory capital requirements without reliance on the resources invested in such subsidiaries.

The Federal Reserve will not automatically deduct investments in other unconsolidated subsidiaries or investments in joint ventures and associated companies.[21] Nonetheless, the resources invested in these entities, like investments in unconsolidated banking and finance subsidiaries, support assets not consolidated with the rest of the banking organization's activities and, therefore, may not be generally available to support additional leverage or absorb losses elsewhere in the banking organization. Moreover, experience has shown that banking organizations stand behind the losses of affiliated institutions, such as joint ventures and associated companies, in order to protect the reputation of the organization as a whole. In some cases, this has led to losses that have exceeded the investments in such organizations.

For this reason, the Federal Reserve will monitor the level and nature of such investments for individual banking organizations and may, on a case-by-case basis, deduct such investments from total capital components, apply an appropriate risk-weighted capital charge against the organization's proportionate share of the assets of its associated companies, require a line-by-line consolidation of the entity (in the event that the parent's control over the entity makes it the functional equivalent of a subsidiary), or otherwise require the organization to operate with a risk-based capital ratio above the minimum.

In considering the appropriateness of such adjustments or actions, the Federal Reserve will generally take into account whether:

(1) The parent banking organization has significant influence over the financial or managerial policies or operations of the subsidiary, joint venture, or associated company;

(2) The banking organization is the largest investor in the affiliated company; or

(3) Other circumstances prevail that appear to closely tie the activities of the affiliated company to the parent banking organization.

3. *Reciprocal holdings of banking organizations' capital instruments.* Reciprocal holdings of banking organizations' capital instruments (that is, instruments that qualify as Tier 1 or Tier 2 capital) will be deducted from an organization's total capital components for the purpose of determining the numerator of the risk-based capital ratio.

Reciprocal holdings are cross-holdings resulting from formal or informal arrangements in which two or more banking organizations swap, exchange, or otherwise agree to hold each other's capital instruments. Generally, deductions will be limited to intentional cross-holdings. At present, the Board does not intend to require banking organizations to deduct non-reciprocal holdings of such capital instruments.[22] [23]

III. Procedures for Computing Weighted Risk Assets and Off-Balance Sheet Items

A. Procedures

Assets and credit equivalent amounts of off-balance sheet items of bank holding companies are assigned to one of several broad risk categories, according to the obligor, or, if relevant, the guarantor or the nature of the collateral. The aggregate dollar value of the amount in each category is then multiplied by the risk weight associated with that category. The resulting weighted values from each of the risk categories are added together, and this sum is the banking organization's total weighted risk assets that comprise the denominator of the risk-based capital ratio. Attachment I provides a sample calculation.

Risk weights for all off-balance sheet items are determined by a two-step process. First, the "credit equivalent amount" of off-balance sheet items is determined, in most cases, by multiplying the off-balance sheet item by a credit conversion factor. Second, the credit equivalent amount is treated like any balance sheet asset and generally is assigned to the appropriate risk category according to the obligor, or, if relevant, the guarantor or the nature of the collateral.

In general, if a particular item qualifies for placement in more than one risk category, it is assigned to the category that has the lowest risk weight. A holding of a U.S. municipal revenue bond that is fully guaranteed by a U.S. bank, for example, would be assigned the 20 percent risk weight appropriate to claims guaranteed by U.S. banks, rather than the 50 percent risk weight appropriate to U.S. municipal revenue bonds.[24]

The terms "claims" and "securities" used in the context of the discussion of risk weights, unless otherwise specified, refer to loans or debt obligations of the entity on whom the claim is held. Assets in the form of stock or equity holdings in commercial or financial firms are assigned to the 100 percent risk category, unless some other treatment is explicitly permitted.

B. Collateral, Guarantees, and Other Considerations

1. *Collateral.* The only forms of collateral that are formally recognized by the risk-based capital framework are: cash on deposit in a subsidiary lending institution; securities issued or guaranteed by the central governments of the OECD-based group of countries,[25] U.S. Government agencies, or U.S. Government-sponsored agencies; and securities issued by multilateral lending institutions or regional development banks. Claims fully secured by such collateral are assigned to the 20 percent risk category.

The extent to which qualifying securities are recognized as collateral is determined by their current market value. If a claim is only partially secured, that is, the market value of the pledged securities is less than the face amount of a balance sheet asset or an off-

[19] In assessing the overall capital adequacy of a banking organization, the Federal Reserve may also consider the organization's fully consolidated capital position.

[20] If the subsidiary's assets are consolidated with the parent banking organization for financial reporting purposes, this adjustment will involve excluding the subsidiary's assets on a line-by-line basis from the consolidated parent organization's assets. The parent banking organization's capital ratio will then be calculated on a consolidated basis with the exception that the assets of the excluded subsidiary will not be consolidated with the remainder of the parent banking organization.

[21] The definition of such entities is contained in the instructions to the Consolidated Financial Statements for Bank Holding Companies. Under regulatory reporting procedures, associated companies and joint ventures generally are defined as companies in which the banking organization owns 20 to 50 percent of the voting stock.

[22] Deductions of holdings of capital securities also would not be made in the case of interstate "stake out" investments that comply with the Board's Policy Statement on Nonvoting Equity Investments, 12 CFR 225.143. In addition, holdings of capital instruments issued by other banking organizations but taken in satisfaction of debts previously contracted would be exempt from any deduction from capital.

[23] The Board intends to monitor non-reciprocal holdings of other banking organizations' capital instruments and to provide information on such holdings to the Basle Supervisors' Committee as called for under the Basle capital framework.

[24] An investment in shares of a fund whose portfolio consists solely of various securities or money market instruments that, if held separately, would be assigned to different risk categories, is generally assigned to the risk category appropriate to the highest risk-weighted security or instrument that the fund is permitted to hold in accordance with its stated investment objectives. However, in no case will indirect holdings through shares in such funds be assigned to the zero percent risk category. For example, if a fund is permitted to hold U.S. Treasuries and commercial paper, shares in that fund would generally be assigned the 100 percent risk weight appropriate to commercial paper, regardless of the actual composition of the fund's investments at any particular time. Shares in a fund that may invest only in U.S. Treasury securities would generally be assigned to the 20 percent risk category. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk weight, such securities will generally not be taken into account in determining the risk category into which the banking organization's holding in the overall fund should be assigned. Regardless of the composition of the fund's securities, if the fund engages in any activities that appear speculative in nature (for example, use of futures, forwards, or option contracts for purposes other than to reduce interest rate risk) or has any other characteristics that are inconsistent with the preferential risk weighting assigned to the fund's investments, holdings in the fund will be assigned to the 100 percent risk category. During the examination process, the treatment of shares in such funds that are assigned to a lower risk weight will be subject to examiner review to ensure that they have been assigned an appropriate risk weight.

balance sheet item, the portion that is covered by the market value of qualifying collateral is assigned to the 20 percent risk category, and the portion of the claim that is not covered by collateral in the form of cash or a qualifying security is assigned to the risk category appropriate to the obligor or, if relevant, the guarantor. For example, to the extent that a claim on a private sector obligor is collateralized by the current market value of U.S. Government securities, it would be placed in the 20 percent risk category and the balance would be assigned to the 100 percent risk category.

2. *Guarantees.* Guarantees of the OECD and non-OECD central governments, U.S. Government agencies, U.S. Government-sponsored agencies, state and local governments of the OECD-based group of countries, multilateral lending institutions and regional development banks, U.S. depository institutions, and foreign banks are also recognized. If a claim is partially guaranteed, that is, coverage of the guarantee is less than the face amount of a balance sheet asset or an off-balance sheet item, the portion that is not fully covered by the guarantee is assigned to the risk category appropriate to the obligor or, if relevant, to any collateral. The face amount of a claim covered by two types of guarantees that have different risk weights, such as a U.S. Government guarantee and a state guarantee, is to be apportioned between the two risk categories appropriate to the guarantors.

The existence of other forms of collateral or guarantees that the risk-based capital framework does not formally recognize may be taken into consideration in evaluating the risks inherent in an organization's loan portfolio—which, in turn, would affect the overall supervisory assessment of the organization's capital adequacy.

3. *Mortgage-backed securities.* Mortgage-backed securities, including pass-throughs and collateralized mortgage obligations (but not stripped mortgage-backed securities), that are *issued* or *guaranteed* by a U.S. Government agency or U.S. Government-sponsored agency are assigned to the risk weight category appropriate to the issuer or guarantor. Generally, a privately-issued mortgage-backed security meeting certain criteria set forth in the accompanying footnote [26] is treated as essentially an indirect holding of the underlying assets, and is assigned to the same risk category as the underlying assets, but in no case to the zero percent risk category. Privately-issued mortgage-backed securities whose structures do not qualify them to be regarded as indirect holdings of the underlying assets are assigned to the 100 percent risk category. During the inspection process, privately-issued mortgage-backed securities that are assigned to a lower risk weight category will be subject to examiner review to ensure that they meet the appropriate criteria.

While the risk category to which mortgage-backed securities is assigned will generally be based upon the issuer or guarantor or, in the case of privately-issued mortgage-backed securities, the assets underlying the security, any class of a mortgage-backed security that can absorb more than its *pro rata* share of loss without the whole issue being in default (for example, a so-called subordinated class or residual interest), is assigned to the 100 percent risk category. Furthermore, all stripped mortgage-backed securities, including interest-only strips (IOs), principal-only strips (POs), and similar instruments, are also assigned to the 100 percent risk weight category, regardless of the issuer or guarantor.

4. *Maturity.* Maturity is generally not a factor in assigning items to risk categories with the exception of claims on non-OECD banks, commitments, and interest rate and foreign exchange rate contracts. Except for commitments, short-term is defined as one year or less *remaining* maturity and long-term is defined as over one year *remaining* maturity. In the case of commitments, short-term is defined as one year or less *original* maturity and long-term is defined as over one year *original* maturity.[27]

C. Risk Weights

Attachment III contains a listing of the risk categories, a summary of the types of assets assigned to each category and the risk weight associated with each category, that is, 0 percent, 20 percent, 50 percent, and 100 percent. A brief explanation of the components of each category follows.

1. *Category 1: zero percent.* This category includes cash (domestic and foreign) owned and held in all offices of subsidiary depository institutions or in transit and gold bullion held in either a subsidiary depository institution's own vaults or in another's vaults on an allocated basis, to the extent it is offset by gold bullion liabilities.[28] The category also includes all direct claims (including securities, loans, and leases) on, and the portions of claims that are directly and unconditionally guaranteed by, the central governments [29] of the OECD countries and U.S. Government agencies,[30] as well as all direct local currency claims on, and the portions of local currency claims that are directly and unconditionally guaranteed by, the central governments of non-OECD countries, to the extent that subsidiary depository institutions have liabilities booked in that currency. A claim is not considered to be unconditionally guaranteed by a central government if the validity of the guarantee is dependent upon some affirmative action by the holder or a third party. Generally, securities guaranteed by the U.S. Government or its agencies that are actively traded in financial markets, such as GNMA securities, are considered to be unconditionally guaranteed.

2. *Category 2: 20 percent.* This category includes cash items in the process of collection, both foreign and domestic; short-term claims (including demand deposits) on, and the portions of short-term claims that are guaranteed by,[31] U.S. depository

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[26] A privately-issued mortgage-backed security may be treated as an indirect holding of the underlying assets provided that: (1) The underlying assets are held by an independent trustee and the trustee has a first priority, perfected security interest in the underlying assets on behalf of the holders of the security; (2) either the holder of the security has an undivided *pro rata* ownership interest in the underlying mortgage assets or the trust or single purpose entity (or conduit) that issues the security has no liabilities unrelated to the issued securities; (3) the security is structured such that the cash flow from the underlying assets in all cases fully meets the cash flow requirements of the security without undue reliance on any reinvestment income; and (4) there is no material reinvestment risk associated with any funds awaiting distribution to the holders of the security. In addition, if the underlying assets of a mortgage-backed security are composed of more than one type of asset, for example, U.S. Government-sponsored agency securities and privately-issued pass-through securities that qualify for the 50 percent risk weight category, the entire mortgage-backed security is generally assigned to the category appropriate to the highest risk-weighted asset underlying the issue, but in no case to the zero percent risk category. Thus, in this example, the security would receive the 50 percent risk weight appropriate to the privately-issued pass-through securities.

[27] Through year-end 1992, remaining, rather than original, maturity may be used for determining the maturity of commitments.

[28] All other holdings of bullion are assigned to the 100 percent risk category.

[29] A central government is defined to include departments and ministries, including the central bank, of the central government. The U.S. central bank includes the 12 Federal Reserve Banks, and stock held in these banks as a condition of membership is assigned to the zero percent risk category. The definition of central government does not include state, provincial, or local governments; or commercial enterprises owned by the central government. In addition, it does not include local government entities or commercial enterprises whose obligations are guaranteed by the central government, although any claims on such entities guaranteed by central governments are placed in the same general risk category as other claims guaranteed by central governments. OECD central governments are defined as central governments of the OECD-based group of countries; non-OECD central governments are defined as central governments of countries that do not belong to the OECD-based group of countries.

[30] A U.S. Governmnt agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the U.S. Government. Such agencies include the Government National Mortgage Association (GNMA), the Veterans Administration (VA), the Federal Housing Administration (FHA), the Export-Import Bank (Exim Bank), the Overseas Private Investment Corporation (OPIC), the Commodity Credit Corporation (CCC), and the Small Business Administration (SBA).

[31] Claims guaranteed by U.S. depository institutions and foreign banks include risk participations in both bankers acceptances and standby letters of credit, as well as participations in commitments, that are conveyed to U.S. depository institutions or foreign banks.

institutions [32] and foreign banks [33]; and long-term claims on, and the portions of long-term claims that are guaranteed by, U.S. depository institutions and OECD banks.[34]

This category also includes the portions of claims that are conditionally guaranteed by OECD central governments and U.S. Government agencies, as well as the portions of local currency claims that are conditionally guaranteed by non-OECD central governments, to the extent that subsidiary depository institutions have liabilities booked in that currency. In addition, this category also includes claims on, and the portions of claims that are guaranteed by, U.S. Government-sponsored agencies [35] and claims on, and the portions of claims guaranteed by, the International Bank for Reconstruction and Development (World Bank), the Interamerican Development Bank, the Asian Development Bank, the African Development Bank, the European Investment Bank, and other multilateral lending institutions or regional development banks in which the U.S. Government is a shareholder or contributing member. General obligation claims on, or portions of claims guaranteed by the full faith and credit of, states or other political subdivisions of the U.S. or other countries of the OECD-based group are also assigned to this category.[36]

This category also includes the portions of claims (including repurchase agreements) collateralized by cash on deposit in the subsidiary lending institution; by securities issued or guaranteed by OECD central governments, U.S. Government agencies or U.S. Government-sponsored agencies; or by securities issued by multilateral lending institutions or regional development banks in which the U.S. Government is a shareholder or contributing member.

3. *Category 3: 50 percent.* This category includes loans fully secured by first liens [37] on 1–4 family residential properties,[38] either owner-occupied or rented, provided that such loans have been made in accordance with prudent underwriting standards, including a conservative loan-to-value ratio; [39] are performing in accordance with their original terms; and are not 90 days or more past due or carried in nonaccrual status.[40] Also included in this category are privately-issued mortgage-backed securities provided that: (1) The structure of the security meets the criteria described in section III(B)(3) above; (2) if the security is backed by a pool of conventional mortgages, *each* underlying mortgage meets the criteria described above in this section for eligibility for the 50 percent risk weight category at the time the pool is originated; and (3) if the security is backed by privately-issued mortgage-backed securities, *each* underlying security qualifies for the 50 percent risk category. Privately-issued mortgage-backed securities that do not meet these criteria or that do not qualify for a lower risk weight are generally assigned to the 100 percent risk weight category.

Also assigned to this category are *revenue* (non-general obligation) bonds or similar obligations, including loans and leases, that are obligations of states or other political subdivisions of the U.S. (for example, municipal revenue bonds) or other countries of the OECD-based group, but for which the government entity is committed to repay the debt with revenues from the specific projects financed, rather than from general tax funds.

Credit equivalent amounts of interest rate and foreign exchange rate contracts involving standard risk obligors (that is, obligors whose loans or debt securities would be assigned to the 100 percent risk category) are included in the 50 percent category, unless they are backed by collateral or guarantees that allow them to be placed in a lower risk category.

4. *Category 4: 100 percent.* All assets not included in the categories above are assigned to this category, which comprises standard risk assets. The bulk of the assets typically found in a loan portfolio would be assigned to the 100 percent category.

This category includes long-term claims on, and the portions of long-term claims that are guaranteed by, non-OECD banks, and all claims on non-OECD central governments that entail some degree of transfer risk.[41] This category also includes all claims on foreign and domestic private sector obligors not included in the categories above (including loans to nondepository financial institutions and bank holding companies); claims on commercial firms owned by the public sector; customer liabilities to the bank on acceptances outstanding involving standard risk claims; [42] investments in fixed assets, premises, and other real estate owned; common and preferred stock of corporations, including stock acquired for debts previously contracted; commercial and consumer loans (except those assigned to lower risk categories due to recognized guarantees or collateral and loans for residential property that qualify for a lower risk weight); mortage-backed securities that do not meet criteria for assignment to a lower risk weight (including any classes of mortgage-backed securities that can absorb more than their *pro rata* share of loss without the whole issue being in default); and all stripped mortgage-backed and similar securities.

Also included in this category are industrial development bonds and similar obligations issued under the auspices of states or political subdivisions of the OECD-based group of countries for the benefit of a

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[32] U.S. depository institutions are defined to include branches (foreign and domestic) of federally-insured banks and depository institutions chartered and headquartered in the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions. The definition encompasses banks, mutual or stock savings banks, savings or building and loan associations, cooperative banks, credit unions, and international banking facilities or domestic banks. U.S.-chartered depository institutions owned by foreigners are also included in the definition. However, branches and agencies of foreign banks located in the U.S., as well as all bank holding companies, are excluded.

[33] Foreign banks are distinguished as either OECD banks or non-OECD banks. OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries (other than the U.S.) that belong to the OECD-based group of countries. Non-OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries that do not belong to the OECD-based group of countries. For this purpose, a bank is defined as an institution that engages in the business of banking; is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations; receives deposits to a substantial extent in the regular course of business; and has the power to accept demand deposits. Claims on, and the portions of claims that are guaranteed by, a non-OECD central bank are treated as claims on, or guaranteed by, a non-OECD bank, except for local currency claims that are guaranteed by, a non-OECD central bank that are funded in local currency liabilities. The latter claims are assigned to the zero percent risk category.

[34] Long-term claims on, or guaranteed by, non-OECD banks and all claims on bank holding companies are assigned to the 100 percent risk category, as are holdings of bank-issued securities that qualify as capital of the issuing banks.

[35] For this purpose, U.S. Government-sponsored agencies are defined as agencies originally established or chartered by the Federal government to serve public purposes specified by the U.S. Congress but whose obligations are *not explicitly* guaranteed by the full faith and credit of the U.S. Government. These agencies include the Federal Home Loan Mortgage Corporation (FHLMC), the Federal National Mortgage Association (FNMA), the Farm Credit System, the Federal Home Loan Bank System, and the Student Loan Marketing Association (SLAM). Claims on U.S. Government-sponsored agencies include capital stock in a Federal Home Loan Bank that is held as a condition of membership in that Bank.

[36] Claims on, or guaranteed by, states or other political subdivisions of countries that do not belong to the OECD-based group of countries are placed in the 100 percent risk category.

[37] If a banking organization holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purpose of determining the loan-to-value ratio.

[38] The types of properties that qualify as 1–4 family residences are listed in the instructions to the FR Y–9C Report.

[39] The loan-to-value ratio is based upon the most current appraised value of the property. All the appraisals must be made in a manner consistent with the Federal banking agencies' real estate appraisal guidelines and with the banking organization's own appraisal guidelines.

[40] Residential property loans that do not meet all the specified criteria or that are made for the purpose of speculative property development are placed in the 100 percent risk category.

[41] Such assets include all non-local currency claims on, and the portions of claims that are guaranteed by, non-OECD central governments and those portions of local currency claims on, or guaranteed by, non-OECD central governments that exceed the local currency liabilities held by subsidiary depository institutions.

[42] Customer liabilities on acceptances outstanding involving non-standard risk claims, such as claims on U.S. depository institutions, are assigned to the risk category appropriate to the identity of the obligor or, if relevant, the nature of the collateral or guarantees backing the claims. Portions of acceptances conveyed as risk participations to U.S. depository institutions or foreign banks are assigned to the 20 percent risk category appropriate to short-term claims guaranteed by U.S. depository institutions and foreign banks.

private party or enterprise where that party or enterprise, not the government entity, is obligated to pay the principal and interest, and all obligations of states or political subdivisions of countries that do not belong to the OECD-based group.

The following assets also are assigned a risk weight of 100 percent if they have not been deducted from capital: investments in unconsolidated companies, joint ventures or associated companies; instruments that qualify as capital issued by other banking organizations; and any intangibles, including grandfathered goodwill.

D. Off-Balance Sheet Items

The face amount of an off-balance sheet item is incorporated into the risk-based capital ratio by multiplying it by a credit conversion factor. The resultant credit equivalent amount is assigned to the appropriate risk category according to the obligor, or, if relevant, the guarantor or the nature of the collateral.[43] Attachment IV sets forth the conversion factors for various types of off-balance sheet items.

1. *Items with a 100 percent conversion factor.* A 100 percent conversion factor applies to direct credit substitutes, which include guarantees, or equivalent instruments, backing financial claims, such as outstanding securities, loans, and other financial liabilities, or that back off-balance sheet items that require capital under the risk-based capital framework. Direct credit substitutes include, for example, financial standby letters of credit, or other equivalent irrevocable undertakings or surety arrangements, that guarantee repayment of financial obligations such as: commercial paper, tax-exempt securities, commercial or individual loans or debt obligations, or standby or commercial letters of credit. Direct credit substitutes also include the acquisition of risk participations in bankers acceptances and standby letters of credit, since both of these transactions, in effect, constitute a guarantee by the acquiring banking organization that the underlying account party (obligor) will repay its obligation to the originating, or issuing, institution.[44] (Standby letters of credit that are performance-related are discussed below and have a credit conversion factor of 50 percent.)

The full amount of a direct credit substitute is converted at 100 percent and the resulting credit equivalent amount is assigned to the risk category appropriate to the obligor or, if relevant, the guarantor or the nature of the collateral. In the case of a direct credit substitute in which a risk participation[45] has been conveyed, the full amount is still converted at 100 percent. However, the credit equivalent amount that has been conveyed is assigned to whichever risk category is lower: the risk category appropriate to the obligor, after giving effect to any relevant guarantees or collateral, or the risk category appropriate to the institution acquiring the participation. Any remainder is assigned to the risk category appropriate to the obligor, guarantor, or collateral. For example, the portion of a direct credit substitute conveyed as a risk participation to a U.S. domestic depository institution or foreign bank is assigned to the risk category appropriate to claims guaranteed by those institutions, that is, the 20 percent risk category.[46] This approach recognizes that such conveyances replace the originating banking organization's exposure to the obligor with an exposure to the institutions acquiring the risk participations.[47]

In the case of direct credit substitutes that take the form of a syndication, that is, where each banking organization if obligated only for its *pro rata* share of the risk and there is no recourse to the originating banking organization, each banking organization will only include its *pro rata* share of the direct credit substitute in its risk-based capital calculation.

Financial standby letters of credit are distinguished from loan commitments (discussed below) in that standbys are irrevocable obligations of the banking organization to pay a third-party beneficiary when a customer (account party) *fails to repay* an outstanding loan or debt instrument (direct credit substitute). Performance standby letters of credit (performance bonds) are irrevocable obligations of the banking organization to pay a third-party beneficiary when a customer (account party) *fails to perform* some other contractual non-financial obligation.

The distinguishing characteristic of a standby letter of credit for risk-based capital purposes is the combination of irrevocability with the fact that funding is triggered by some failure to repay or perform an obligation. Thus, any commitment (by whatever name) that involves an *irrevocable* obligation to make a payment to the customer or to a third party in the event the customer *fails to repay* an outstanding debt obligation or *fails to perform* a contractual obligation is treated, for risk-based capital purposes, as respectively, a financial guarantee standby letter of credit or a performance standby.

A loan commitment, on the other hand, involves an obligation (with or without a material adverse change or similar clause) of the banking organization to fund its customer *in the normal course* of business should the customer seek to draw down the commitment.

Sale and repurchase agreements and asset sales with recourse (to the extent not included on the balance sheet) and forward agreements also are converted at 100 percent.[48] So-called "loan strips" (that is, short-term advances sold under long-term commitments without direct recourse) are treated for risk-based capital purposes as assets sold with recourse and, accordingly, are also converted at 100 percent.

Forward agreements are legally binding contractual obligations to purchase assets with *certain* drawdown at a specified future date. Such obligations include forward purchases, forward forward deposits placed,[49] and partly-paid shares and securities; they do not include commitments to make residential mortage loans or forward foreign exchange contracts.

Securities lent by a banking organization are treated in one of two ways, depending upon whether the lender is at risk of loss. If a banking organization, as agent for a customer, lends the customer's securities and does not indemnify the customer against loss, then the transaction is excluded from the risk-based capital calculation. If, alternatively, a banking organization lends its own securities or, acting as agent for a customer, lends the customer's securities and indemnifies the customer against loss, the transaction is converted at 100 percent and assigned to the risk weight category appropriate to the obligor, to any collateral delivered to the lending banking organization, or, if applicable, to the independent custodian acting on the lender's behalf.

2. *Items with a 50 percent conversion factor.* Transaction-related contingencies are converted at 50 percent. Such contingencies include bid bonds, performance bonds, warranties, standby letters of credit related to particular transactions, and performance standby letters of credit, as well as acquisitions of risk participation in performance standby letters of credit. Peformance standby letters of credit represent obligations backing the performance of nonfinancial or commercial contracts or undertakings. To the extent permitted by law or regulation, performance standby letters of credit include arrangements backing, among other things, subcontractors' and suppliers' performance,

[43] The sufficiency of collateral and guarantees for off-balance sheet items is determined by the market value of the collateral or the amount of the guarantee in relation to the face amount of the item, except for interest and foreign exchange rate contracts, for which this determination is made in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under section III(B).

[44] Credit equivalent amounts of acquisitions of risk participations are assigned to the risk category appropriate to the account party obligor, or, if relevant, the nature of the collateral or guarantees.

[45] That is, a participation in which the originating banking organization remains liable to the beneficiary for the full amount of the direct credit substitute if the party that has acquired the participation fails to pay when the instrument is drawn.

[46] Risk participations with a remaining maturity of over one year that are conveyed to non-OECD banks are to be assigned to the 100 percent risk category, unless a lower risk category is appropriate to the obligor, guarantor, or collateral.

[47] A risk participation in bankers acceptances conveyed to other institutions is also assigned to the risk category appropriate to the institution acquiring the participation or, if relevant, the guarantor or nature of the collateral.

[48] In regulatory reports and under GAAP, bank holding companies are permitted to treat some asset sales with recourse as "true" sales. For risk-based capital purposes, however, such assets sold with recourse and reported as "true" sales by bank holding companies are converted at 100 percent and assigned to the risk category appropriate to the underlying obligor, or, if relevant the guarantor or nature of the collateral, provided that the transactions meet the definition of assets sold with recourse, including the sale of 1–4 family residential mortgages, that is contained in the instructions to the commercial bank Consolidated Reports of Condition and Income (Call Report).

[49] Forward forward deposits accepted are treated as interest rate contracts.

labor and materials contracts, and construction bids.

The unused portion of commitments with an *original* maturity exceeding one year,[50] including underwriting commitments, and commercial and consumer credit commitments also are converted at 50 percent. Original maturity is defined as the length of time between the date the commitment is issued and the earliest date on which: (1) The banking organization can, at its option, unconditionally (without cause) cancel the commitment; [51] and (2) the banking organization is scheduled to (and as a normal practice actually does) review the facility to determine whether or not it should be extended. Such reviews must continue to be conducted at least annually for such a facility to qualify as a short-term commitment.

Commitments are defined as any legally binding arrangements that obligate a banking organization to extend credit in the form of loans or leases; to purchase loans, securities, or other assets; or to participate in loans and leases. They also include overdraft facilities, revolving credit, home equity and mortgage lines of credit, and similar transactions. Normally, commitments involve a written contract or agreement and a commitment fee, or some other form of consideration. Commitments are included in weighted risk assets regardless of whether they contain "material adverse change" clauses or other provisions that are intended to relieve the issuer of its funding obligation under certain conditions. In the case of commitments structured as syndications, where the banking organization is obligated solely for its *pro rata* share, only the banking organization's proportional share of the syndicated commitment is taken into account in calculating the risk-based capital ratio.

Facilities that are unconditionally cancellable (without cause) at any time by the banking organization are not deemed to be commitments, provided the banking organization makes a separate credit decision before each drawing under the facility. Commitments with an original maturity of one year or less are deemed to involve low risk and, therefore, are not assessed a capital charge. Such short-term commitments are defined to include the unused portion of lines of credit on retail credit cards and related plans (as defined in the instructions to the FR Y-9C Report) if the banking organization has the unconditional right to cancel the line of credit at any time, in accordance with applicable law.

Once a commitment has been converted at 50 percent, any portion that has been conveyed to U.S. depository institutions or OECD banks as participations in which the originating banking organization retains the full obligation to the borrower if the participating bank fails to pay when the instrument is drawn, is assigned to the 20 percent risk category. This treatment is analogous to that accorded to conveyances of risk participations in standby letters of credit. The acquisition of a participation in a commitment by a banking organization is converted at 50 percent and assigned to the risk category appropriate to the account party obligor or, if relevant, the nature of the collateral or guarantees.

Revolving underwriting facilities (RUFs), note issuance facilities (NIFs), and other similar arrangements also are converted at 50 percent regardless of maturity. These are facilities under which a borrower can issue on a revolving basis short-term paper in its own name, but for which the underwriting organizations have a legally binding commitment either to purchase any notes the borrower is unable to sell by the roll-over date or to advance funds to the borrower.

3. *Items with a 20 percent conversion factor.* Short-term, self-liquidating trade-related contingencies which arise from the movement of goods are converted at 20 percent. Such contingencies generally include commercial letters of credit and other documentary letters of credit collateralized by the underlying shipments.

4. *Items with a zero percent conversion factor.* These include unused portions of commitments with an original maturity of one year or less,[52] or which are unconditionally cancellable at any time, provided a separate credit decision is made before each drawing under the facility. Unused portions of lines of credit on retail credit cards and related plans are deemed to be short-term commitments if the banking organization has the unconditional right to cancel the line of credit at any time, in accordance with applicable law.

E. Interest Rate and Foreign Exchange Rate Contracts

1. *Scope.* Credit equivalent amounts are computed for each of the following off-balance sheet interest rate and foreign exchange rate instruments:

I. Interest Rate Contracts
- A. Single currency interest rate swaps.
- B. Basis swaps.
- C. Forward rate agreements.
- D. Interest rate options purchased (including caps, collars, and floors purchased).
- E. Any other instrument that gives rise to similar credit risks (including when-issued securities and forward forward deposits accepted).

II. Exchange Rate Contracts
- A. Cross-currency interest rate swaps.
- B. Forward foreign exchange contracts.
- C. Currency options purchased.
- D. Any other instrument that gives rise to similar credit risks.

Exchange rate contracts with an original maturity of fourteen calendar days or less and instruments traded on exchanges that require daily payment of variation margin are excluded from the risk-based ratio calculation. Over-the-counter options purchased, however, are included and treated in the same way as the other interest rate and exchange rate contracts.

2. *Calculation of credit equivalent amounts.* Credit equivalent amounts are calculated for each individual contract of the types listed above. To calculate the credit equivalent amount of its off-balance sheet interest rate and exchange rate instruments, a banking organization sums these amounts:

(1) The mark-to-market value [53] (positive values only) of each contract (that is, the current exposure); and

(2) An estimate of the potential future credit exposure over the remaining life of each contract.

The potential future credit exposure on a contract, including contracts with negative mark-to-market values, is estimated by multiplying the notional principal amount by one of the following credit conversion factors, as appropriate:

Remaining maturity	Interest rate contracts (percent)	Exchange rate contracts (percent)
One year or less	0	1.0
Over one year	0.5	5.0

Examples of the calculation of credit equivalent amounts for these instruments are contained in Attachment V.

Because exchange rate contracts involve an exchange of principal upon maturity, and exchange rates are generally more volatile than interest rates, higher conversion factors have been established for foreign exchange contracts than for interest rate contracts.

No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices, so-called floating/floating or basis swaps; the credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values.

3. *Risk weights.* Once the credit equivalent amount for interest rate and exchange rate instruments has been determined, that amount is assigned to the risk weight category appropriate to the counterparty, or, if relevant, the nature of any collateral or guarantees.[54] However, the maximum weight

[50] Through year-end 1992, remaining maturity may be used for determining the maturity of off-balance sheet loan commitments; thereafter, original maturity must be used.

[51] In the case of consumer home equity or mortgage lines of credit secured by liens on 1–4 family residential properties, the bank is deemed able to unconditionally cancel the commitment for the purpose of this criterion if, at its option, it can prohibit additional extensions of credit, reduce the credit line, and terminate the commitment to the full extent permitted by relevant Federal law.

[52] Through year-end 1992, remaining maturity may be used for determining term to maturity for off-balance sheet loan commitments; thereafter, original maturity must be used.

[53] Mark-to-market values are measured in dollars, regardless of the currency or currencies specified in the contract, and should reflect changes in both interest rates and counterparty credit quality.

[54] For interest and exchange rate contracts, sufficiency of collateral or guarantees is determined by the market value of the collateral or the amount of the guarantee in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under section III (B).

that will be applied to the credit equivalent amount of such instruments is 50 percent.

4. *Avoidance of double counting.* In certain cases, credit exposures arising from the interest rate and exchange instruments covered by these guidelines may already be reflected, in part, on the balance sheet. To avoid double counting such exposures in the assessment of capital adequacy and, perhaps, assigning inappropriate risk weights, counterparty credit exposures arising form the types of instruments covered by these guidelines may need to be excluded from balance sheet assets in calculating banking organizations' risk-based capital ratios.

5. *Netting.* Netting of swaps and similar contracts is recognized for purposes of calculating the risk-based capital ratio *only* when accomplished through netting by novation.[55] While the Federal Reserve encourages any reasonable arrangements designed to reduce the risks inherent in these transactions, other types of netting arrangements are not recognized for purposes of calculating the risk-based ratio at this time.

IV. Minimum Supervisory Ratios and Standards

The interim and final supervisory standards set forth below specify *minimum* supervisory ratios based primarily on broad credit risk considerations. As noted above, the risk-based ratio does not take explicit account of the quality of individual asset portfolios or the range of other types of risks to which banking organizations may be exposed, such as interest rate, liquidity, market or operational risks. For this reason, banking organizations are generally expected to operate with capital positions well above the minimum ratios. This is particularly true for institutions that are undertaking significant expansion or that are exposed to high or unusual levels of risk.

Upon adoption of the risk-based framework, any organization that does not meet the interim or final supervisory ratios, or whose capital is otherwise considered inadequate, is expected to develop and implement a plan acceptable to the Federal Reserve for achieving an adequate level of capital consistent with the provisions of these guidelines or with the special circumstances affecting the individual organization. In addition, such organizations should avoid any actions, including increased risk-taking or unwarranted expansion, that would lower or further erode their capital positions.

A. Minimum Risk-Based Ratio After Transition Period

As reflected in Attachment VI, by year-end 1992, all bank holding companies [56] should meet a minimum ratio of qualifying total capital to weighted risk assets of 8 percent, of which at least 4.0 percentage points should be in the form of Tier 1 capital. (Section II above contains detailed definitions of capital and related terms used in this section.) The maximum amount of supplementary capital elements that qualifies as Tier 2 capital is limited to 100 percent of Tier 1 capital net of goodwill. In addition, the combined maximum amount of subordinated debt and intermediate-term preferred stock that qualifies as Tier 2 capital is limited to 50 percent of Tier 1 capital net of goodwill. The maximum amount of the allowance for loan and lease losses that qualifies as Tier 2 capital is limited to 1.25 percent of gross weighted risk assets. Allowances for loan and lease losses in excess of this limit may, of course, be maintained, but would not be included in an organization's total capital. The Federal Reserve will continue to require bank holding companies to maintain reserves at levels fully sufficient to cover losses inherent in their loan portfolios.

Qualifying total capital is calculated by adding Tier 1 capital and Tier 2 capital (limited to 100 percent of Tier 1 capital) and then deducting from this sum certain investments in banking or finance subsidiaries that are not consolidated for accounting or supervisory purposes, reciprocal holdings of banking organizations' capital securities, or other items at the direction of the Federal Reserve. The conditions under which these deductions are to be made and the procedures for making the deductions are discussed above in section II(B).

B. Transition Arrangements

The transition period for implementing the risk-based capital standard ends on December 31, 1992.[57] Initially, the risk-based capital guidelines do not establish a minimum level of capital. However, by year-end 1990, banking organizations are expected to meet a minimum interim target ratio for qualifying total capital to weighted risk assets of 7.25 percent, at least one-half of which should be in the form of Tier 1 capital. For purposes of meeting the 1990 interim target, the amount of loan loss reserves that may be included in capital is limited to 1.5 percent of weighted risk assets and up to 10 percent of an organization's Tier 1 capital may consist of supplementary capital elements. Thus, the 7.25 percent interim target ratio implies a minimum ratio of Tier 1 capital to weighted risk assets of 3.6 percent (one-half of 7.25) and a minimum ratio of core capital elements to weighted risk assets ratio of 3.25 percent (nine-tenths of the Tier 1 capital ratio).

ATTACHMENT I.—SAMPLE CALCULATION OF RISK-BASED CAPITAL RATIO FOR BANK HOLDING COMPANIES

Example of a banking organization with $6,000 in total capital and the following assets and off-balance sheet items:

Balance Sheet Assets:

Cash	$5,000
U.S. Treasuries	20,000
Balances at domestic banks	5,000
Loans secured by first liens on 1–4 family residential properties	5,000
Loans to private corporations	65,000
Total Balance Sheet Assets	$100,000

Off-Balance Sheet Items:

Standby letters of credit ("SLCs") backing general obligation debt issues of U.S. municipalities ("GOs")	$10,000

[55] Netting by novation, for this purpose, is a written bilateral contract between two counterparties under which any obligation to each other to deliver a given currency on a given date is automatically amalgamated with all other obligations for the same currency and value date, *legally* substituting one single net amount for the previous gross obligations.

[56] As noted in Section I above, bank holding companies with less than $150 million in consolidated assets would generally be exempt from the calculation and analysis of risk-based ratios on a consolidated holding company basis, subject to certain terms and conditions.

[57] The Basle capital framework does not establish an initial minimum standard for the risk-based capital ratio before the end of 1990. However, for the purpose of calculating a risk-based capital ratio prior to year-end 1990, no sublimit is placed on the amount of the allowance for loan and lease losses includable in Tier 2. In addition, this framework permits, under temporary transition arrangements, a certain percentage of an organization's Tier 1 capital to be made up of supplementary capital elements. In particular, supplementary elements may constitute 25 percent of an organization's Tier 1 capital (before the deduction of goodwill) up to the end of 1990; from year-end 1990 up to the end of 1992, this allowable percentage of supplementary elements in Tier 1 declines to 10 percent of Tier 1 (before the deduction of goodwill). Beginning on December 31, 1992, supplementary elements may not be included in Tier 1. The amount of subordinated debt and intermediate-term preferred stock temporarily included in Tier 1 under these arrangements will not be subject to the sublimit on the amount of such instruments includable in Tier 2 capital. While the transitional arrangements allow an organization to include supplementary elements in Tier 1 on a temporary basis, the amount of perpetual preferred stock that may be included in a bank holding company's Tier 1—both during and after the transition period—is, as described in section II(A), based solely upon a specified percentage of the organization's permanent core capital elements (that is, common equity, perpetual preferred stock, and minority interest in the equity of consolidated subsidiaries), not upon total Tier 1 elements that temporarily include Tier 2 items. Once the amount of supplementary items that may temporarily qualify as Tier 1 elements is determined, goodwill must be deducted from the sum of this amount and the amount of the organization's permanent core capital elements for the purpose of calculating Tier 1 (net of goodwill), Tier 2, and total capital.

ATTACHMENT I.—SAMPLE CALCULATION OF RISK-BASED CAPITAL RATIO FOR BANK HOLDING COMPANIES—Continued

Long-term legally binding commitments to private corporations	20,000
Total Off/Balance Sheet Items	$30,000

This bank holding company's total capital to *total* assets (leverage) ratio would be: ($6,000/$100,000) = 6.00%.

To compute the bank holding company's weighted risk assets:

1. Compute the credit equivalent amount of each off-balance sheet ("OBS") item.

OBS item	Face value		Conversion factor		Credit equivalent amount
SLCS backing municipal GOs	$10,000	×	1.00	=	$10,000
Long-term commitments to private corporations	$20,000	×	0.50	=	$10,000
2. Multiply each balance sheet asset and the credit equivalent amount of each OBS item by the appropriate risk weight.					
0% Category:					
Cash	5,000				
U.S. Treasuries	20,000				
	25,000	×	0	=	0
20% Category:					
Balances at domestic banks	5,000				
Credit equivalent amounts of SLCs backing GOs of U.S. municipalities	10,000				
	15,000	×	.20	=	$3,000
50% Category:					
Loans secured by first liens on 1–4 family residential properties	5,000	×	.50	=	$2,500
100% Category:					
Loans to private corporations	65,000				
Credit equivalent amounts of long-term committments to private corporations	10,000				
	$75,000	×	1.00	=	75,000
Total Risk-weighted Assets					80,500

This bank holding company's ratio of total capital to weighted risk assets (risk-based capital ratio) would be: ($6,000/$80,500) = 7.45%

ATTACHMENT II.—SUMMARY DEFINITION OF QUALIFYING CAPITAL FOR BANK HOLDING COMPANIES* (USING THE YEAR-END 1992 STANDARDS)

Components	Minimum requirements after transition period
Core Capital (Tier 1)	Must equal or exceed 4% of weighted risk assets.
Common stockholders' equity	No limit.
Qualifying cumulative and noncumulative perpetual preferred stock.	Limited to 25% of the sum of common stock, minority interests, and qualifying perpetual preferred stock.
Minority interest in equity accounts of consolidated subsidiaries.	Organizations should avoid using minority interests to introduce elements not otherwise qualifying for Tier 1 capital.
Less: Goodwill [1]	
Supplementary Capital (Tier 2)	Total of Tier 2 is limited to 100% of Tier 1.[2]
Allowance for loan and lease losses	Limited to 1.25% of weighted risk assets.[2]
Perpetual preferred stock	No limit within Tier 2.
Hybrid capital instruments, perpetual debt, and mandatory convertible securities.	No limit within Tier 2.
Subordinated debt and intermediate-term preferred stock (original weighted average maturity of 5 years or more)	Subordinated debt and intermediate-term preferred stock are limited to 50% of Tier 1;[3] amortized for capital purposes as they approach maturity.
Revaluation reserves (equity and building)	Not included; organizations encouraged to disclose; may be evaluated on a case-by-case basis for international comparisons; and taken into account in making an overall assessment of capital.
Deductions (from sum of Tier 1 and Tier 2):	
Investments in unconsolidated subsidiaries	As a general rule, one-half of the aggregate investments will be deducted from Tier 1 capital and one-half from Tier 2 capital.[4]
Reciprocal holdings of banking organizations' capital securities	
Other deductions (such as other subsidiaries or joint ventures) as determined by supervisory authority	On a case-by-case basis or as a matter of policy after formal rulemaking.
Total Capital (Tier 1 + Tier 2-Deductions)	Must equal or exceed 8% of weighted risk assets.

* See discussion in section II of the guidelines for a complete description of the requirements for, and the limitations on, the components of qualifying capital.

[1] Goodwill on books of bank holding companies before March 12, 1988, would be "grandfathered" for the transition period.

[2] Amounts in excess of limitations are permitted but do not qualify as capital.

[3] Amounts in excess of limitations are permitted but do not qualify as capital.

[4] A proportionately greater amount may be deducted from Tier 1 capital if the risks associated with the subsidiary so warrant.

Attachment III—Summary of Risk Weights and Risk Categories for Bank Holding Companies

Category 1: Zero Percent

1. Cash (domestic and foreign) held in subsidiary depository institutions or in transit.

2. Balances due from Federal Reserve Banks (including Federal Reserve Bank stock) and central banks in other OECD countries.

3. Direct claims on, and the portions of claims that are unconditionally guaranteed by, the U.S. Treasury and U.S. Government agencies [1] and the central governments of other OECD countries, and local currency claims on, and the portions of local currency claims that are unconditionally guaranteed by, the central governments of non-OECD countries (including the central banks of non-OECD countries), to the extent that subsidiary depository institutions have liabilities booked in that currency.

4. Gold bullion held in the vaults of a subsidiary depository institution or in another's vaults on an allocated basis, to the extent offset by gold bullion liabilities.

Category 2: 20 Percent

1. Cash items in the process of collection.

2. All claims (long- or short-term) on, and the portions of claims (long- or short-term) that are guaranteed by, U.S. depository institutions and OECD banks.

3. Short-term claims (remaining maturity of one year or less) on, and the portions of short-term claims that are guaranteed by, non-OECD banks.

4. The portions of claims that are conditionally guaranteed by the central governments of OECD countries and U.S. Government agencies, and the portions of local currency claims that are conditionally guaranteed by the central governments of non-OECD countries, to the extent that subsidiary depository institutions have liabilities booked in that currency.

5. Claims on, and the portions of claims that are guaranteed by, U.S. Government-sponsored agencies.[2]

6. General obligation claims on, and the portions of claims that are guaranteed by the full faith and credit of, local governments and political subdivisions of the U.S. and other OECD local governments.

7. Claims on, and the portions of claims that are guaranteed by, official multilateral lending institutions or regional development banks.

8. The portions of claims that are collateralized [3] by securities issued or guaranteed by the U.S. Treasury the central governments of other OECD countries, U.S. Government agencies, U.S. Government-sponsored agencies, or by cash on deposit in the subsidiary depository institution.

9. The portions of claims that are collateralized [3] by securities issued by official multilateral lending institutions or regional development banks.

10. Certain privately-issued securities representing indirect ownership of mortgage-backed U.S. Government agency or U.S. Government-sponsored agency securities.

11. Investments in shares of a fund whose portfolio is permitted to hold only securities that would qualify for the zero or 20 percent risk categories.

Category 3: 50 Percent

1. Loans fully secured by first liens on 1–4 family residential properties that have been made in accordance with prudent underwriting standards, that are performing in accordance with their original terms, and are not past due or in nonaccrual status, and certain privately-issued mortgage-backed securities representing indirect ownership of such loans. (Loans made for speculative purposes are excluded.)

2. Revenue bonds or similar claims that are obligations of U.S. state or local governments, or other OECD local governments, but for which the government entity is committed to repay the debt only out of revenues from the facilities financed.

3. Credit equivalent amounts of interest rate and foreign exchange rate related contracts, except for those assigned to a lower risk category.

Category 4: 100 Percent

1. All other claims on private obligors.

2. Claims on, or guaranteed by, non-OECD foreign banks with a remaining maturity exceeding one year.

3. Claims on, or guaranteed by, non-OECD central governments that are not included in item 3 of Category 1 of item 4 of Category 2; all claims on non-OECD state or local governments.

4. Obligations issued by U.S. state of local governments, or other OECD local governments (including industrial development authorities and similar entities), repayable solely by a private party or enterprise.

5. Premises, plant, and equipment; other fixed assets; and other real estate owned.

6. Investments in any unconsolidated subsidiaries, joint ventures, or associated companies—if not deducted from capital.

7. Instruments issued by other banking organizations that qualify as capital—if not deducted from capital.

8. Claims on commercial firms owned by a government.

9. All other assets, including any intangible assets that are not deducted from capital.

Attachment IV—Credit Conversion Factors for Off-Balance Sheet Items for Bank Holding Companies

100 Percent Conversion Factor

1. Direct credit substitutes. (These include general guarantees of indebtedness and all guarantee-type instruments, including standby letters of credit backing the financial obligations of other parties.)

2. Risk participations in bankers acceptances and direct credit substitutes, such as standby letters of credit.

3. Sale and repurchase agreements and assets sold with recourse that are not included on the balance sheet.

4. Forward agreements to purchase assets, including financing facilities, on which drawdown is *certain*.

5. Securities lent for which the banking organization is at risk.

50 Percent Conversion Factor

1. Transaction-related contingencies. (These include bid bonds, performance bonds, warranties, and standby letters of credit backing the nonfinancial performance of other parties.)

2. Unused portions of commitments with an original maturity [1] exceeding one year, including underwriting commitments and commercial credit lines.

3. Revolving underwriting facilities (RUFs), note issuance facilities (NIFs), and similar arrangements.

20 Percent Conversion Factor

1. Short-term, self-liquidating trade-related contingencies, including commercial letters of credit.

Zero Percent Conversion Factor

1. Unused portions of commitments with an original maturity [1] of one year or less, or which are unconditionally cancellable at any time, provided a separate credit decision is made before each drawing.

Credit Conversion for Interest Rate and Foreign Exchange Contracts

The total replacement cost of contracts (obtained by summing the positive mark-to-market values of contracts) is added to a measure of future potential increases in credit exposure. This future potential exposure measure is calculated by multiplying the total notional value of contracts by one of the following credit conversion factors, as appropriate:

Remaining Maturity	Interest Rate Contracts (percent)	Exchange Rate Contracts (percent)
One year or less	0	1.0
Over one year	0.5	5.0

No potential exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices, that is, so called floating/floating or basis swaps. The credit exposure on these contracts is evaluated solely on the basis of their mark-to-market value. Exchange rate contracts with an original maturity of fourteen days or less are excluded. Instruments traded on exchanges that require daily payment of variation margin are also excluded. The only form of netting recognized is netting by novation.

[1] For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and *explicitly* guaranteed as to the timely payment of principal and interest by the full faith and credit of the U.S. Government.

[2] For the purpose of calculating the risk-based capital ratio, a U.S. Government-sponsored agency is defined as an agency originally established or chartered to serve public purposes specified by the U.S. Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. Government.

[3] The extent of collateralization is determined by current market value.

[1] Remaining maturity may be used until year-end 1992.

ATTACHMENT V—CALCULATION OF CREDIT EQUIVALENT AMOUNTS INTEREST RATE AND FOREIGN EXCHANGE RATE RELATED TRANSACTIONS FOR BANK HOLDING COMPANIES

Type of contract (remaining maturity)	Potential exposure				Current exposure			Credit equivalent amount (dollars)
	Notional principal (dollars)	x	Potential exposure conversion factor	= Potential exposure (dollars)	+ Replacement cost [1]	Current exposure (dollars) [2]	=	
(1) 120-day forward foreign exchange	5,000,000		.01	50,000	100,000	100,000		150,000
(2) 120-day forward foreign exchange	6,000,000		.01	60,000	−120,000	0		60,000
(3) 3-year single-currency fixed/floating interest rate swap	10,000,000		.005	50,000	200,000	200,000		250,000
(4) 3-year single currency fixed/floating interest rate swap	10,000,000		.005	50,000	−250,000	0		50,000
(5) 7-year cross-currency floating/floating interest rate swap	20,000,000		.05	1,000,000	−1,300,000	0		1,000,000
Total	$51,000,000							$1,510,000

[1] These numbers are purely for illustration.
[2] The larger of zero or a positive mark-to-market value.

ATTACHMENT VI.—SUMMARY

	Transitional arrangements for bank holding companies		Final arrangement—Year-end 1992
	Initial	Year-end 1990	
1. Minimum standard of total capital to weighted risk assets.	None	7.25%	8.0%.
2. Definition of Tier 1 capital	Common equity, qualifying cum. and noncum. perpetual preferred stock,[1] and minority interests, *plus* supplementary elements,[2] *less* goodwill.[3].	Common equity, qualifying cum. and noncum. perpetual preferred stock,[1] and minority interests, *plus* supplementary elements,[4] *less* goodwill.[3].	Common equity, qualifying cum. and noncom. perpetual preferred stock,[1] and minority interests, *less* goodwill.[3]
3. Minimum standard of Tier 1 capital to weighted risk assets.	None	3.625%	4.0%.
4. Minimum standard of stockholders' equity to weighted risk assets.	None	3.25%	4.0%.
5. Limitations on supplementary capital elements:			
a. Allowance for loan and lease losses.	No limit within Tier 2	1.5% of weighted risk assets	1.25% of weighted risk assets.
b. Perpetual preferred stock	No limit within Tier 2	No limit within Tier 2	No limit within Tier 2.
c. Hybrid capital instruments, perpetual debt, and mandatory convertibles.	No limit within Tier 2	No limit within Tier 2	No limit within Tier 2.
d. Subordinated debt and intermediate term preferred stock.	Combined maximum of 50% of Tier 1	Combined maximum of 50% of Tier 1	Combined maximum of 50% of Tier 1
c. Total qualifying Tier 2 capital	May not exceed Tier 1 capital	May not exceed Tier 1 capital	May not exceed Tier 1 capital.
6. Definition of total capital	Tier 1 *plus* Tier 2 *less:* —reciprocal holdings of banking organizations' capital instruments. —investments in unconsolidated subsidiaries.[5].	Tier 1 *plus* Tier 2 *less:* —reciprocal holdings of banking organizations' capital instruments. —investments in unconsolidated subsidiaries.[5].	Tier 1 *plus* Tier 2 *less:* —reciprocal holdings of banking organizations' capital instruments —investments in unconsolidated subsidiaries.[5]

[1] Perpetual preferred stock is limited within Tier 1 to 25% of the sum of common stockholders' equity, qualifying perpetual preferred stock, and minority interests.
[2] Supplementary elements may be included in the Tier 1 up to 25% of the sum of Tier 1 plus good will.
[3] See the guidelines for discussion of relevant definitions and grandfathering arrangements for goodwill.
[4] Supplementary elements may be included in Tier 1 up to 10% of the sum of Tier 1 plus goodwill.
[5] As a general rule, one-half (50%) of the aggregate amount of investments will be deducted from Tier 1 capital and one-half (50%) from Tier 2 capital. A proportionally greater amount may be deducted from Tier 1 capital if the risks associated with the subsidiary so warrant.

Board of Governors of the Federal Reserve System, January 18, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89–1587 Filed 1–26–89; 8:45 am]

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Part VI

Environmental Protection Agency

40 CFR Part 133

Amendment to the Secondary Treatment Regulation: Percent Removal Requirements During Dry Weather Periods for Treatment Works Served by Combined Sewers; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 133

[FRL-3433-7]

Amendment to the Secondary Treatment Regulation: Percent Removal Requirements During Dry Weather Periods for Treatment Works Served by Combined Sewers

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule amends that portion of the EPA's secondary treatment regulation concerning the percent removal requirements during dry weather periods for treatment works served by combined sewers.

The secondary treatment regulation, originally promulgated in 1973, requires treatment works to meet both concentration-based effluent limitations for five-day biochemical oxygen demand (BOD_5) and total suspended solids (TSS) as well as an 85 percent removal requirement for these pollutants. The percent removal requirement was established to encourage municipalities to correct excessive infiltration and inflow (I/I) in their sewer systems and to prevent intentional dilution of the wastewater. When the regulation was amended in June 1985 to set separate limits for equivalent treatment (i.e., trickling filters and waste stabilization ponds), a 65 percent removal requirement was included for equivalent treatment facilities. Additionally, in June 1985, the Agency amended the regulation to allow additional flexibility in applying the percent removal requirements for separate sewer systems. The current regulation allows adjustment of the percent removal requirements during wet and dry weather periods for treatment works served by separate sewers provided that the treatment works meet certain criteria defined in § 133.103(d), "Less Concentrated Influent Wastewater for Separate Sewers." The current regulation also includes a provision authorizing adjustments to the percent removal requirements for treatment works served by combined sewers, but only during wet weather periods § 133.103(a)). It does not apply to treatment works served by combined sewers during dry weather periods.

After further consideration concerning the reference to 40 CFR 35.2005(b)(16) found in the proposed rule; it has been determined that the more specific reference is to 40 CFR 35.2005(b)(28). The final rule has been revised accordingly.

Today's rule amends the percent removal requirements to allow adjustments during dry weather periods for treatment works served by combined sewers, because nonexcessive infiltration can dilute the influent wastewater of treatment works served by combined sewers, just as it does for treatment works served by separate sewers.

This rule allows treatment works served by combined sewers an opportunity to request adjustments in the percent removal requirements for dry weather provided that the permittee meets the requirements specified in § 133.103(e).

DATES: In accordance with 40 CFR Part 23 (50 FR 7268, February 21, 1985), this regulation shall be considered issued for purposes of judicial review at 1:00 p.m. Eastern time on February 10, 1989. This regulation shall become effective February 27, 1989.

Under section 509(b)(1) of the Clean Water Act, judicial review of this regulation can be made only by filing a petition for review in the United States Court of Appeals within 120 days after the regulation is considered issued for purposes of judicial review. Under section 509(b)(2) of the Clean Water Act, the requirements in this regulation may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

The record for the final rule will be available for public review at the EPA Public Information Reference Unit, Room 2904 (EPA Library).

FOR FURTHER INFORMATION CONTACT: Randy Revetta, Office of Municipal Pollution Control (WH-595), Environmental Protection Agency, Washington, DC 20460, 202-382-7370.

SUPPLEMENTARY INFORMATION:

A. The EPA's Previous Actions on the Percent Removal Requirements

On August 17, 1973, the Agency defined the secondary treatment requirements for treatment works as the achievement of 30 mg/1 BOD_5 and 30 mg/1 TSS and 85 percent removal of those pollutants on a 30 day average (40 CFR 133.102 (a) and (b)). The Agency based these limits on what were previously believed to be typical treatment works influent concentrations of 200 mg/1 for BOD_5 and TSS. In addition, the Agency included a provision in § 133.103(a) of the original secondary treatment regulation allowing adjustment of the 85 percent removal requirement during wet weather periods for treatment works served by combined sewers.

In response to information that in some cases the 85 percent removal requirement resulted in forcing advanced treatment levels on some treatment works with dilute influent wastewater, the Agency, on November 16, 1983 issued a **Federal Register** notice soliciting public comment on a number of options for amending the percent removal requirement (48 FR 52258). Based on the public comments received in response to the notice, the Agency proposed an amendment to the percent removal requirement on September 20, 1984 that would authorize a mofication of the percent removal requirement for treatment works served by separate sewers if they demonstrated: (1) That they consistently met their concentration-based limitations; (2) that to meet the percent removal requirement, the treatment works would have to meet significantly more stringent concentration-based limitations; and (3) that the less concentrated influent wastewater to the treatment works was not a result of excessive infiltration and inflow (49 FR 37010).

In response to public comments, the Agency modified the title to read, "Less Concentrated Influent Wastewater for Separate Sewers." In addition, the EPA determined that the final amendment should apply to both the 85 and the new 65 percent removal requirements for equivalent treatment. The final amendment was published in the **Federal Register** on June 3, 1985 (50 FR 23282).

B. Challenge to the Final Amendment

On September 16, 1985, the City of New York filed a petition to review the percent removal amendment for separate sewers: *City of New York* v. *Environmental Protection Agency*, No. 85-4142 (2d Cir. 1985). New York, which has combined sewers, pointed out that treatment works served by combined sewers should also be eligible for adjustment of the percent removal requirements during dry weather periods. This was based on the concern that nonexcessive infiltration can dilute the influent wastewater of treatment works served by combined sewers just as it does for treatment works served by separate sewers.

C. Settlement Agreement

On January 7, 1986, the Agency and the City of New York filed a settlement agreement with the court. Today's rule is in fulfillment of the obligation under the consent decree. In the settlement agreement, the Agency agreed to initiate

and take final action on a rulemaking proceeding concerning whether the secondary treatment regulation should be amended to allow the permit-issuing authority to establish alternative percentage removal requirements for treatment works served by combined sewer systems during dry weather periods.

The agreement provided that such final Agency action may either be:

(1) the promulgation of an amendment to the secondary treatment regulation addressing the percentage removal requirements during dry weather periods for treatment works served by combined sewers; or

(2) a decision not to amend the secondary treatment regulation with a written explanation for the decision.

D. Background on Adjustment of the Percent Removal Requirement

1. Correction of Infiltration and Inflow

Under section 201(g)(3) of the Clean Water Act (33 U.S.C. 1281(g)(3)) and EPA's construction grant regulations (40 CFR 32.2005(b)(16), (28), (29) and 35.2120, grants for the construction of treatment works cannot be made unless an applicant has demonstrated that the sewer system is not, or will not be, subject to excessive infiltration and inflow ("I/I"). For the purposes of EPA's construction grants program, the Agency has defined "excessive I/I" as quantities of I/I that can be economically eliminated from a sewer system. Excessive I/I is determined from a cost-effectiveness analysis that compares the costs of correcting the I/I conditions (plus the costs of transporting and treating the remaining I/I) to the total costs of the alternative—transporting and treating all of the I/I.

Further definition of the individual components of I/I may be found in 40 CFR 35.2005(b) (28) and (29) titled "Nonexcessive infiltration" and "Nonexcessive inflow."

Theoretically, the percent removal requirements impose more stringent levels of treatment than the concentration-based limits for BOD_5 and TSS until the municipality corrects the causes of the less concentrated wastewater in the sewer system. This regulatory approach is based on the assumption that a municipality can take corrective measures to reduce I/I that are less costly than providing additional hydraulic capacity in the sewer system and at the treatment plant.

In 1973, the Agency believed that from 70 to 100 percent of the excessive I/I problem could be corrected through cost-effective sewer system rehabilitation. However, subsequent information ("Evaluation of Infiltration/Inflow Program" unpublished draft technical reports, 1979 and 1980) indicated that sewer rehabilitation is far less effective than formerly expected. In fact, cost-effective sewer rehabilitation was found to remove only up to 40 percent of the estimated infiltration. Accordingly, even large expenditures for the correction of I/I could produce only a small ultimate reduction of infiltration. As a result influent BOD_5 and TSS concentrations have often remained below 200 mg/1 even after cost-effective correction of excessive infiltration sources.

2. Expected Influent Concentration Under Allowable I/I Conditions

The Agency has determined that the correction of excessive infiltration is likely to be unsuccessful for sewer systems with a dry weather base flow of up to 120 gallons per capita per day (gpcd). This figure is based on the following typical values: 70 gpcd domestic wastewater flow, 10 gpcd commercial and small industrial wastewater flow, and 40 gpcd nonexcessive infiltration flow. Please note that the 120 gpcd figure includes dry weather inflow (non-rainfall induced) which is considered a minimal contributory factor to the total dry weather flow and furthermore, is indistinguishable as a separate flow component. If the dry weather base flow within the sewer system is less than 120 gpcd, no further infiltration correction work is required. The 120 gpcd figure is only a threshold value, and permittees may determine that even higher values of infiltration are nonexcessive through a cost-effective evaluation on a case-by-case sewer system basis.

3. Excessive-Nonexcessive Flow Study

In 1974 the Agency used historical records from water utilities to determine that the average non-consumptive water usage (i.e., water returned to the sewer system) in the United States is approximately 70 gpcd for domestic flows and 10 gpcd for commercial and small industrial flows. These estimates were used for the cost-effectiveness guidelines promulgated by EPA as part of the construction grant regulations (40 CFR Part 35).

The difference between the total dry weather base flow used for construction grant funding purposes, 120 gpcd, and 80 gpcd (i.e. 70+10) is the portion attributable to nonexcessive infiltration (e.g., 40 gpcd). The Agency reviewed data from numerous I/I analyses and sewer system evaluation studies and determined that the typical value for nonexcessive infiltration nationwide is 1500 galloons per day per inch diameter per mile of sewer (gpdim). The 1500 gpdim value was used in the construction grant program (Program Requirements Memorandum 78–10, March 17, 1978) as the threshold value to determine where more extensive sewer system evaluation would be required (i.e., infiltration less than 1500 gpdim was considered nonexcessive and did not require any further sewer system analysis). Using the estimated national averages for pipe diameters and length of pipe per capita, 1500 gpdim converts to 40 gpcd for nonexcessive infiltration.

Using 40 gpcd for nonexcessive infiltration, 10 gpcd for commercial and small industrial flow, and 70 gpcd for domestic flow, the total dry weather base flow calculated by the Agency for municipal wastewater treatment plants (i.e., wastewater plus nonexcessive infiltration) equals 120 gpcd (70+10+40). Data used for this calculation did not distinguish between separate and combined sewer systems and in fact were for both types of systems.

E. Treatment Works Served by Combined Sewers

Combined sewers are sewer systems designed to convey stormwater (mostly from street curb inlets and area drains) in addition to domestic sanitary sewage and commercial and small industrial wastewater. During storm events, combined sewer systems are subject to large increases in flow due to either rainwater or snowmelt that enters the system. Combined sewer systems are generally operated to convey the maximum feasible amount of combined wastewater and stormwater to the treatment works. The excess, which is often the larger portion of the flow during storms, is discharged from the system at several overflow points before reaching the treatment plant. The dramatic storm-related increase in flow which can occur at treatment plants served by combined sewer systems led to the inclusion of § 133.103(a) in the original secondary treatment regulations to allow either adjustment or suspension of the percent removal requirements during wet weather periods.

F. Determination of Nonexcessive Flow in Combined Sewers During Dry Weather Conditions

In fulfillment of the Settlement Agreement, the Agency analyzed § 133.103(d) of the secondary treatment regulation to determine if the language in that section should apply to systems with combined sewers as well as separate sewers.

The Agency's analysis of § 133.103(d) centered specifically on the provision requiring that the less concentrated influent wastewater not result from excessive I/I. Section 133.103(d) relies on definitions of excessive I/I, nonexcessive infiltration, and nonexcessive inflow found in 40 CFR 35.2005(b) (16), (28) and (29). According to those definitions infiltration is nonexcessive if the average dry weather base flow to the treatment works (i.e., wastewater plus infiltration) is less than 120 (gpcd), or if that portion of the dry weather base flow attributed to infiltration (40 gpcd) cannot be economically and effectively eliminated.

G. Threshold Value for Combined Sewers During Dry Weather Conditions

The Agency believes that the threshold value of 120 gpcd should be applied to treatment works served by combined sewers during dry weather conditions for the following reasons. First, as discussed above in Section D.3 ("Excessive-Nonexcessive Flow Study"), the 120 gpcd value was derived in a study that examined both combined and separate sewers. Secondly, the Agency compared the 120 gpcd figure with data from: (1) 1980 Agency study, "Evaluation of the Infiltration/Inflow Program" (final draft report (EPA–68–01–4913)); and (2) field measurements of wastewater flows developed from sewer system studies conducted by private contractors and submitted to the Agency. These data support the 120 gpcd figure as a valid threshold for either combined or separate sewer systems. The Agency believes, therefore, that the 120 gpcd limit should apply equally to treatment works served by either separate or combined sewers during dry weather.

Exclusion From the 120 gpcd Threshold of Industrial Discharges that Cause Interference

Today's rule provides that a permittee may not obtain a modification of its percent removal requirements if its less concentrated influent is due either to excessive infiltration or clear water industrial discharges or a combination of both. The Agency recognizes that less concentrated influent to municipal sewer systems does not necessarily, but in some instances may, hydraulically overload a treatment works in addition to diluting the influent. If less concentrated influent to a treatment works is caused in whole or in part by clear water industrial discharges, then the Agency expects the treatment works to control such discharges rather than seek a modification of its percent removal requirements. Local sewer ordinances, as directed by the pretreatment regulations (40 CFR Part 403; 54 FR 1586), should be enforced to prevent such hydraulic overloading.

The Agency is primarily concerned with clear water industrial discharges. The Agency considers clear water industrial discharges to include, but not be limited to, noncontact cooling water discharges or other discharges which do not contain pollutants in sufficient quantity to otherwise be of concern.

H. Applying the Amendment

Today's rulemaking applies only during dry weather periods for treatment works served by combined sewers. To obtain an adjustment in the percent removal requirements during dry weather under the rule, treatment works served by combined sewers must satisfy three conditions. First, the treatment works must consistently meet its permit effluent concentration limitations, but the percent removal requirements cannot be met due to less concentrated influent wastewater. Second, significantly more stringent effluent concentration than required by the concentration-based standards must be met to comply with the percent removal requirements and, third, the less concentrated influent wastewater must not result from either excessive infiltration or clear water industrial discharges to the system.

If the average dry weather base flow (i.e., the total of the wastewater flow plus infiltration) in a combined sewer system is less than the 120 gpcd threshold value, infiltration is assumed to be nonexcessive. However, sewer systems with average dry weather flows greater than 120 gpcd may also have nonexcessive infiltration if this is demonstrated on a case-by-case basis (i.e., the infiltration can not be cost-effectively reduced). A permittee would have the opportunity to demonstrate on a case-by-case basis that its combined sewer system is not subject to excessive infiltration even if the average total dry weather base flow exceeds the 120 gpcd threshold value.

I. Response to Comments on the Proposed Amendment to the Percent Removal Requirements

This section of the preamble addresses the comments received on the September 17, 1987 notice.

(1) One commenter suggested that the limiting value for nonexcessive infiltration for combined sewers should be set higher than 40 gallons per capita per day (gpcd). This comment was based on a concern that the limiting value is derived from estimated national averages for pipe diameters and lengths, but the average pipe diameter in a combined sewer system is significantly larger than the average diameter in a separately sewered drainage area. Therefore, the commenter believes that the 40 gpcd understates the expected average per capita infiltration into combined sewers.

The regulation has been revised to reflect this comment. Indeed, the typical value for the nonexcessive infiltration, nationwide, is 1500 gallons per day per inch diameter per mile of sewer (gpdim) and, by using the estimated national averages for pipe diameters and lengths of pipe per capita, the 1500 gpdim converts to 40 gpcd for nonexcessive infiltration. Because the data used for this calculation did not distinguish between separate and combined systems, and in fact were for both types of systems, either 1500 gpdim or 40 gpcd may be used as the threshold value for nonexcessive infiltration determination.

A permittee would have the opportunity to demonstrate, on a case-by-case basis, that its combined sewer system is not subject to excessive infiltration as follows:

Option A. Demonstrate that infiltration is less than 40 gpcd. If it is higher than 40 gpcd, then demonstrate that it is not cost effective to remove it; or,

Option B. Demonstrate that infiltration is less than 1500 gpdim. If it is higher than 1500 gpdim, then demonstrate that it is not cost effective to remove it.

(2) One commenter suggested that a limiting nonexcessive gpcd total flow should include normal dry weather inflow such as vehicle, street, sidewalk washing, lawn watering and other dry weather surface runoff.

No data were presented during the comment period to contradict the Agency's belief that normal dry weather inflow to combined sewers is negligible. The threshold value for infiltration, 40 gpcd or 1500 gpdim, was developed based upon a study of both separate and combined sewers during dry weather and would thus reflect any normal dry weather inflow into combined sewers.

(3) A concern was raised whether the proposed rule would take into account those municipalities that previously demonstrated non-excessive I/I under the September 27, 1978 construction grant regulations.

Permittees who performed studies demonstrating nonexcessive I/I under the September 27, 1978 construction grant regulations may be able to use the same studies to support an application for a lower percent removal requirement. Permittees wishing to apply for a lower percent removal

requirement or a mass loading limit in place of percent removal requirements must demonstrate to the Regional Administrator or State Director that their less concentrated influent wastewater does not result from either excessive infiltration or clear water industrial discharges during dry weather. The Regional Administrator or State Director will, on a case-by-case basis, determine if the data presented by the permittee, including studies performed at some time in the past, are sufficient for the demonstration.

(4) Another commenter asked if the threshold value of 120 gpcd should be checked under low groundwater conditions to minimize inflow from cellar drains, etc., during dry weather.

The threshold value should not be checked under low groundwater conditions. The determination of excessive infiltration is based on the highest average daily flow recorded over a 7 to 14 day period during a period of seasonal high groundwater.

(5) Also raised was the issue of how a permittee is treated if the 120 gpcd check is passed, but the 275 gpcd check is not, or vice-versa.

The 275 gpcd check applies to wet weather flow in a separate sewer system and has nothing to do with dry weather flow in a combined sewer system. If a POTW service area consists of both separate and combined sewers then the separate sewer subsystem must meet both the 120 gpcd and the 275 gpcd while the combined sewer subsystem must meet the 120 gpcd or other threshold values as demonstrated on a case-by-case basis.

(6) It was noted that the presence of less concentrated influent, at acceptable flows, does not necessarily constitute a hydraulic overload to the system as indicated in Section F.4 of the preamble to the September 17, 1987 notice.

The Agency recognizes that the discharge of less concentrated influent to municipal sewer systems does not necessarily constitute a hydraulic overload, but may in some instances hydraulically overload a treatment works in addition to diluting the influent.

(7) Concern was expressed about the use of the term "clear water" as too vague and suggested that it should not be used.

The Agency considers clear water industrial discharges to include, but not be limited to, non-contact cooling water discharges or other discharges which do not contain pollutants in sufficient quantity to otherwise be of concern.

(8) A recommendation was made that one area which should be addressed with respect to dry weather conditions during summer months in urban areas is the illegal opening of fire hydrants and legal fire hydrant sprinkle caps. The commenter maintains that these sources may significantly increase flow and decrease the influent strength.

The illegal opening of fire hydrants is a controllable source of inflow to combined sewers and is not justification for reduced percent removal requirements. As noted earlier, the 120 gpcd includes normal dry weather inflow into combined sewers. Permittees having uncontrollable sources of inflow have the option of demonstrating that flow above 120 gpcd can not be cost effectively eliminated.

(9) A comment was received concerning the construction of a storage tunnel to capture the overflow from combined sewers during a storm. The commenter was concerned whether the days of release of captured wastewater should be considered as dry weather or wet weather days.

Section 133.103(a) in the original secondary treatment regulation allows either adjustment or suspension of the percent removal requirements during wet weather periods for combined sewers. Today's rulemaking, new § 133.103(e) allows adjustment of percent removal requirements for treatment works served by combined sewers during dry weather under certain conditions. The permit-issuing authority will ultimately establish the applicability of wet weather or dry weather days on an individual basis. The permittee would then have the opportunity to apply for adjustment under either § 133.103 (a) or (e), consistent with the permit-issuing authority's determination regarding which sub-section applies.

(10) Concern was raised that the terms "wet weather" and "dry weather" are not defined.

Neither the proposed rule, nor the existing regulations define the terms dry weather and wet weather because any attempt to describe these terms, with respect to intensity and/or frequency parameters, would only limit the application of such a regulation on a national level. Each permittee has the opportunity to demonstrate dry weather and wet weather conditions on a case-by-case basis.

(11) It was also noted that the option of a mass loading limit should apply to the regulation for combined sewers during wet weather periods, § 133.103(a), and that same amendment should include references to §§ 133.102(a)(4)(iii) and 133.105(e)(1)(iii) regarding the adjustment of percent removal requirements.

These comments refer to technical changes to an existing regulation and are beyond the scope of today's rulemaking.

J. Regulatory Reviews

1. Executive Order 12291

Executive Order 12291 requires EPA and other agencies to perform regulatory impact analyses of major regulations. Major rules are those that impose a cost on the economy of $100 million or more annually or have certain other economic impacts. This regulation is not a major rule because it meets none of the criteria of a major rule as set forth in Section 1(b) of the Executive Order. The rule has been submitted to the Office of Management and Budget (OMB) for review.

2. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, EPA must submit a copy of any proposed rule that contains a collection of information requirements to the Director of OMB for review and approval. The Agency determined that this regulation does not contain information collection requirements.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires EPA and other agencies to prepare an initial regulatory flexibility analysis for all regulations that have a significant impact on a substantial number of small entities. No regulatory flexibility analysis is required, however, where the head of an Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Since this regulation allows permitting authorities to adjust the percent removal requirements for communities served by combined sewers, the operation and maintenance costs of existing facilities may be reduced. However, the estimates of ultimate benefits (i.e., cost reductions) that will accrue as a result of this amendment are uncertain. The uncertainty stems largely from insufficient flow data for communities with combined sewer systems. Although the quantification of costs and benefits is not possible, the Agency believes that this rule will result in cost savings. Accordingly, the Administrator certifies, pursuant to 5 U.S.C. 605(b), that this final regulation will not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 133

Treatment works, waste treatment and disposal, Water pollution control.

Date: January 19, 1989.

Lee M. Thomas,

Administrator.

For the reasons set forth in the preamble, EPA is amending 40 CFR Part 133 as follows:

PART 133—SECONDARY TREATMENT REGULATION

1. The authority citation for Part 133 continues to read as follows:

Authority: Sections 301(b)(1)(B), 304(d)(10), 304(d)(4), 308, and 501 of the Federal Water Pollution Control Act as amended by the Federal Water Pollution Control Act Amendments of 1972, the Clean Water Act of 1977, and the Municipal Wastewater Treatment Construction Grant Amendments of 1981; 33 U.S.C. 1311(b)(1)(B), 1314(d) (1) and (4), 1318, and 1361; 86 Stat. 816, Pub. L. 92–500; 91 Stat. 1567, Pub. L. 95–217; 95 Stat. 1623, Pub. L. 97–117.

2. Section 133.103 is amended by adding a new paragraph (e) to read as follows:

§ 133.103 Special considerations.

* * * * *

(e) Less concentrated influent wastewater for combined sewers during dry weather. The Regional Administrator or, if appropriate, the State Director is authorized to substitute either a lower percent removal requirement or a mass loading limit for the percent removal requirements set forth in §§ 133.102(a)(3), 133.102(a)(4)(iii), 133.102(b)(3), 133.105(a)(3), 133.105(b)(3) and 133.105(e)(1)(iii) provided that the permittee satisfactorily demonstrates that: (1) The treatment works is consistently meeting, or will consistently meet, its permit effluent concentration limits, but the percent removal requirements cannot be met due to less concentrated influent wastewater; (2) to meet the percent removal requirements, the treatment works would have to achieve significantly more stringent effluent concentrations than would otherwise be required by the concentration-based standards; and (3) the less concentrated influent wastewater does not result from either excessive infiltration or clear water industrial discharges during dry weather periods. The determination of whether the less concentrated wastewater results from excessive infiltration is discussed in 40 CFR 35.2005(b)(28), plus the additional criterion that either 40 gallons per capita per day (gpcd) or 1500 gallons per inch diameter per mile of sewer (gpdim) may be used as the threshold value for that portion of the dry weather base flow attributed to infiltration. If the less concentrated influent wastewater is the result of clear water industrial discharges, then the treatment works must control such discharges pursuant to 40 CFR Part 403.

[FR Doc. 89–1790 Filed 1–26–89; 8:45 am]

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federal register

Friday
January 27, 1989

Part VII

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 9, 14, 15, and 52
Federal Acquisition Regulation (FAR); Unbalanced Offers, First Article Test Pricing; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 14, 15, and 52

Federal Acquisition Regulation (FAR); Unbalanced Offers, First Article Test Pricing

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).
ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to FAR Parts 9, 14, 15, and 52 to provide notice to offerors and guidance to Government contracting personnel concerning unbalanced bids and proposals.

COMMENTS: Comments should be submitted to the FAR Secretariat at the address shown below on or before March 28, 1989 to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 88–68 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Background

A series of decisions of the General Accounting Office has indicated a need to amend regulations and clarify existing policy regarding unbalanced prices for separately priced contract line items. Changes are proposed to the FAR which would put offerors on notice regarding the policy on balanced bids and proposals, and provide contracting officers guidance on detecting unbalanced offers and what actions may be taken when an offer has been determined to be unbalanced. The policies would not apply to small purchase procedures.

B. Regulatory Flexibility Act

The proposed revisions may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, because it may affect how quickly a small business firm can recoup certain costs. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments from small businesses concerning the affected FAR sections will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite FAR Case 88–610 pertaining to First Article Test Pricing.

C. Paperwork Reduction Act.

The Paperwork Reduction Act does not apply because the proposed changes will not increase or decrease any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 9, 14, 15, and 52

Government procurement.

Dated: January 17, 1989.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Parts 9, 14, 15, and 52 be amended as set forth below:

1. The authority citation for Parts 9, 14, 15, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

2. Section 9.306 is amended by adding paragraph (j) to read as follows:

9.306 Solicitation requirements.

* * * * *

(j) Inform offerors that the prices for first articles and first article tests in relation to production quantities shall not be materially unbalanced (see 15.814) if first article test items or tests are to be separately priced.

PART 14—SEALED BIDDING

3. Section 14.404–2 is amended by redesignating existing paragraphs (g) through (k) as (h) through (l); and by adding a new paragraph (g) to read as follows:

14.404–2 Rejection of individual bids.

* * * * *

(g) Any bid may be rejected if the prices for any line items or subline items are materially unbalanced (see 15.814).

* * * * *

4. Section 14.407–2 is amended by designating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

14.407–2 Responsible bidder—reasonableness of price.

* * * * *

(b) The price analysis shall consider whether bids are materially unbalanced (see 15.814).

PART 15—CONTRACTING BY NEGOTIATION

5. Section 15.814 is added to read as follows:

15.814 Unbalanced offers.

(a) Offers shall also be analyzed to determine whether they are unbalanced with respect to prices or separately priced line items. This is particularly important when evaluating the relationship of the price for first article tests or test items to the price for the production units, and in evaluating the prices for options in relationship to the prices for the basic requirement.

(b) An offer is mathematically unbalanced if it is based on prices which are significantly less than cost for some contract line items and significantly overstated in relation to cost for others. An offer is materially unbalanced if it is mathematically unbalanced, and if—

(1) There is a reasonable doubt that the offer would result in the lowest overall cost to the Government, even though it is the lowest evaluated offer; or

(2) The offer is so grossly unbalanced that its acceptance would be tantamount to allowing an advance payment.

(c) Offers that are materially unbalanced may be rejected.

(d) Depending on the nature of the acquisition, contracting officers may need to use either price analysis or cost analysis techniques, or a combination of the two techniques, to determine if offers are materially unbalanced. The following are examples of techniques that can be used to determine if an offer is unbalanced. Although these examples specifically relate to first article testing, they may also be used for other procurements where unbalanced offers may be of concern.

(1) Compare all offers to determine if the offerors have significantly higher prices for the first articles than for the production units. The comparison

should consider whether the Government or the contractor will perform the first article test.

(2) For an individual offer, compare the relationship of first article prices to prices for production items. The cost to the offeror for first articles may be estimated (i) by comparing the total price offered, including the first article to an alternate proposal by the same offeror which does not include first article testing (see 9.306(d)); or (ii) if cost data has been submitted, by reviewing certain elements of cost to determine, for instance, whether manufacturing and special tooling, and test equipment costs, are prorated among the first articles and the production units, or are only applied to the first articles. If cost data is not available, it may be necessary for contracting officers to estimate contractor costs.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 52.214–10 is amended by removing in the title of the provision the date "(APR 1985)" and inserting in its place the date "(JAN 1989)"; and by adding paragraph (e) to read as follows:

52.214–10 Contract Award—Sealed Bidding.

* * * * *

(e) The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

* * * * *

6. Section 52.215–16 is amended by removing in the title of the provision the date "(APR 1985)" and inserting in its place the date "(JAN 1989)"; and by adding paragraph (g) to read as follows:

52.215–16 Contract Award.

* * * * *

(g) The Government may determine that an offer is unacceptable if the prices proposed are materially unbalanced between line items or subline items. An offer is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the offer will result in the lowest overall cost to the Government, even though it may be the low evaluated offer, or it is so unbalanced as to be tantamount to allowing an advance payment.

* * * * *

52.217–5 [Amended]

7. Section 52.217–5 is amended by removing in the title of the provision the date "(JUN 1988)" and inserting in its place the date "(JAN 1989)"; by removing the designation "(a)" from paragraph (a); and by removing paragraph (b).

[FR Doc. 89–1888 Filed 1–26–89; 8:45 am]

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federal register

Friday
January 27, 1989

Part VIII

Department of Labor

Employment Standards Administration, Wage and Hour Division, and Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts; Final Rule

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL) is revising the regulations governing the use of semiskilled "helpers" on federally-financed and assisted construction contracts subject to the Davis-Bacon and Related Acts (DBRA). This rule makes final the regulations for determining when the use of a helper classification will be found by DOL to be prevailing in an area to allow its use on construction projects subject to DBRA prevailing wage requirements. This rule also implements other regulations, previously issued as final regulations but not yet implemented because of court orders, concerning use of helpers on such projects.

EFFECTIVE DATE: After the injunction against implementation of some provisions of this regulation is lifted by the U.S. District Court for the District of Columbia, a notice will be published in the **Federal Register** providing an effective date 60 days thereafter.

FOR FURTHER INFORMATION CONTACT: Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 523–8305. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On August 19, 1987, DOL published in the **Federal Register** (52 FR 31366) proposed revisions to the regulations on labor standards applicable to federally-financed and assisted construction contracts subject to the prevailing wage standards of DBRA (29 CFR Parts 1 and 5). The proposal was intended to allow contractors to expand their use of semiskilled helpers on DBRA projects at wages lower than those required to be paid to skilled journeymen if the use of the helper classification was found to be a prevailing practice on construction projects in the area. This proposal resulted from DOL's reexamination of revised regulations previously issued in 1982 (47 FR 23644; 23658), which had been enjoined in a lawsuit filed by the AFL–CIO (*Building and Construction Trades Department, AFL–CIO, et al.*, v. *Donovan, et al.*, 712 F.2d 611 (D.C. Cir. 1983)).

Public comments were invited for 60 days on several proposed methods for determining if the use of a helper classification prevailed in an area. The comment period was subsequently extended for 30 additional days, and closed on November 18, 1987 (52 FR 38473; October 16, 1987). Approximately 2,000 comments were received on the proposal, which included submissions from the Building and Construction Trades Department, AFL–CIO ("BCTD"), the Laborers' International Union, individual trade unions (primarily locals from Texas, Oklahoma, and Georgia), The Associated General Contractors of America (AGC), The Associated Builders and Contractors, Inc. (ABC), the National Association of Home Builders, the Construction Committee of the Business Roundtable, the U.S. Chamber of Commerce, the American Subcontractors Association, the National Association of Manufacturers, the National Elevator Industry, Inc. (and 28 member firms), the Sheet Metal and Air Conditioning Contractors' National Association, the U.S. Small Business Administration (SBA), the U.S. Department of Energy (DOE), the American Farm Bureau Federation, individual contractors, and individuals. This document provides the text of the final rule of the method selected and explains the reasons for that selection and for any changes from the proposal that were made in response to the comments received.

Background

DOL attempted to implement helper rules in May 1982. (*See* 47 FR 23644, 23658 (May 28, 1982); 47 FR 32070 (July 26, 1982).) Among other provisions, lower paid helpers would have been allowed on DBRA projects under a broad definition of duties and in a maximum ratio of two helpers for three journeymen whenever the helper classification was "identifiable" in an area. The rules were enjoined by the U.S. District Court for the District of Columbia in a lawsuit brought by the BCTD and a number of individual unions ((*Building and Construction Trades Department, AFL–CIO, et al.*, v. *Donovan, et al.*, 543 F. Supp. 1282, 553 F. Supp. 352).

On appeal, the Court of Appeals for the District of Columbia Circuit upheld DOL's authority to allow an expanded use of helpers and approved the regulatory definition of a helper's duties (*Building and Construction Trades Department, AFL–CIO, et al.*, v. *Donovan, et al.*, 712 F.2d 611). However, that ruling required that the regulations be modified to require that DOL first find the use of a particular helper classification *prevailing* in an area (rather than identifiable) before it may be used. The court concluded that allowing a lower paid helper classification to be used on DBRA work when that classification was only "identifiable" would result in payment of less than prevailing wages for some work, which is prohibited by the Act. The court did not rule on the remaining helper provisions. *Certiorari* was denied by the Supreme Court (46 U.S. 1069).

The District Court subsequently issued an order which lifted the injunction on the definition of helper but continued the injunction against all the other helper provisions, and stated that DOL could "submit to this court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the court of appeals, they will be approved." (*Building and Construction Trades Department, AFL–CIO, et al.*, v. *Donovan, et al.*, 102 CCH Labor Cases para. 34, 648.

DOL reexamined the enjoined provisions to the extent required by the court rulings and on August 19, 1987, issued a new proposal with necessary revisions (52 FR 31366). Comments were invited on two primary alternatives, and three subordinate alternatives, for determining if the use of a helper classification prevailed, as follows:

Option A: This option, patterned after the codified regulatory standards for determining the prevailing *wage* for a given classification, provided a decision rule that proceeded in two steps:

(1) If the prevailing *journeyman* wage is set by the "majority rule" (29 CFR 1.2(a)(1); more than 50 percent of the journeymen are paid the same rate), then the practice followed by those contractors whose rates prevail for the journeymen is also deemed the prevailing practice for determining whether a helper classification prevails, or,

(2) If no majority journeyman rate exists and the prevailing wage is set by the "weighted average rule" (29 CFR 1.2(a)(1); the average of the wages paid to the journeymen, weighted by the total journeymen in the classification), then the total number of workers in the classification employed by contractors using helpers (journeymen plus helpers) will be compared to the total number of

workers in the classification employed by contractors *not* using helpers (journeymen only); the practice covering the larger number of workers will decide whether a helper classification prevails.

Option B: Compare the total number of workers (journeymen plus helpers) in the classification employed by contractors using helpers to the total number of workers in the classification employed by contractors not using helpers (classification only). The practice which covers the majority of the workers will in all cases determine whether use of a helper classification prevails. (This is the same as step 2 of Option A.)

Options C, D, and E: The preamble to the proposal also invited comments on three additional alternatives considered in formulating the proposal, namely, count by: (C) the number of projects on which helpers are employed; (D) the dollar value of construction projects on which helpers are employed; and (E) the number of contractors employing helpers.

The notice of proposed rulemaking proposed no changes to the helper definition promulgated in 1982. It was repeated in the preamble of the 1987 proposal for informational purposes only, as follows:

Section 5.2 Definitions

* * * * *

(n) The terms apprentice, trainee, and helper are defined as follows:

* * * * *

(4) A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

* * * * *

Summary of Comments

Issue: Methodology for determining if helpers "prevail"—proposed Options A through E.

Comments

SBA stated that Option A should be adopted, because it most closely conforms to the court's mandate in the underlying litigation and would more likely survive any possible court challenge. SBA noted that since Option A is specifically supported by existing Davis-Bacon case law, in particular the precedential ruling of DOL's Wage Appeals Board in *Fry Brothers Corp.*, WAB Case No. 76–6 (June 14, 1977), whereas Option B could produce anomalous results in wage determinations, the importance of implementing a workable helper rule weighs in favor of selecting an approach which is legally sound. (The Wage Appeals Board ruled in *Fry Brothers Corp.* that if the union journeyman rate is found prevailing for a classification, the union practice of not using helpers must also be found prevailing for purposes of Davis-Bacon wage determinations regardless of how many helpers are employed by nonunion contractors in the area.) SBA suggested that to the extent Option B deviates from the principles established in *Fry Brothers Corp.*, grounds could exist for the court to again enjoin the rules. SBA also postulated that the number of instances where the choice between Option A and Option B would make a difference should not be large. Normally either the unionized journeymen will substantially outnumber their nonunion counterparts, or vice versa, so that the number of helpers will make no material difference; or, no majority rate will prevail in either direction so that the "weighted average" rule would achieve the same results under either Option A or Option B, SBA asserted.

DOE noted Option A's consistency with established practices for determining prevailing wages, as opposed to Option B being inconsistent with such practices. DOE considered Options C, D, and E to be unacceptable because they all use criteria that are substantially removed from the number of *employees* (and thus don't consider the extent of the practice of using helpers) performing the work of a craft in a specific area.

The Business Roundtable favored Option A on the grounds that it would be more easily administered and would therefore be put into effect more rapidly.

Most of the major business and industry groups commenting (including Chamber of Commerce, AGC, ABC) stated a preference for Option B because it takes the number of helpers into consideration in all cases and may more often result in helpers prevailing, but without providing any detailed rationale to support their particular views. For example, while ABC characterized Option B as more accurate and fairer than Option A, ABC urged expeditious selection of the option which would best yield "prevailing" helper classifications and best withstand judicial review. The Chamber of Commerce argued that fewer journeymen are used where helpers are employed, which would give an advantage under Option A to journeymen on projects where helpers are not employed. Several of these industry commenters and others made the observation, in distinguishing between Options A and B, that Option A is supported by past precedential rulings of DOL's Wage Appeals Board (particularly citing *Fry Brothers Corp.*), and for this reason was more legally defensible than Option B. Furthermore, the ABC and the American Subcontractors Association (ASA), like the SBA, expressed the view that there would be little practical difference between the results in Options A and B.

AGC noted that Option B was the same as Option A under the weighted average method of Option A, but suggested that B has an advantage by concentrating on the actual number of workers in a classification using helpers as the primary criterion for determining area practice, in contrast to the other, more indirect indicators of area practice found in options C through E which do not include a weighting factor based on total employment in a classification.

Proposed Options C (projects), D (dollar value), and E (contractors) generated no substantial support in the comments (American Farm Bureau Federation recommended C or E; National Association of Home Builders preferred E over B; ASA found C and E "acceptable," but faulted them for not having any precedential basis in prior administrative practices; ABC, ASA, and the Chamber of Commerce considered D to be totally unacceptable). ABC suggested that Options C and E are more consistent with the word "prevailing" than either A or B. Many of the comments suggested that linking the method to projects, dollar value of construction, or contractors would establish an area practice by relating it to a variable that may have little or no relationship to the actual use of helpers in an area.

The BCTD and Laborers Union asserted that the proposed statistical formulas will result in recognition of a helper classification when it is merely an *identifiable*, rather than prevailing, area practice, which would be contrary to the court rulings on the challenged 1982 regulations. To illustrate, the BCTD contended that if only one helper worked on a project with 100 journeymen, compared to another 100 journeymen working on projects where no helpers were employed, the proposed formula would recognize helpers as prevailing since the majority of workers in the classification (101 out to 201 or

50.2 percent) are employed on a project with a helper, yet the helper would constitute less than ½ of 1 percent of the total workers working in the classification. Likewise, the BCTD suggested another example under which 20 helpers, working with 30 journeymen, compared to 49 journeymen on projects with no helpers, would yield "prevailing" helpers yet helpers would comprise roughly 20 percent of the total workers in the classification. Moreover, under the scenario, the *majority of journeymen*, 49 compared to 30 (or over 62 percent) would have been working on projects without any helpers.

The BCTD and Laborers Union also commented that the method for determining if a helper classification prevails should include conducting task-oriented, duties-based area practice surveys (an analysis of the prevailing craft content of work performed by the helpers in the area employed in the classification proposed to be recognized), since the definition of "helper" provides that "the particular duties performed by a helper vary according to area practice." Furthermore, they argue that the methodology should take into account locally prevailing practices concerning how semiskilled laborer classifications are used, contending that the duties to be performed by proposed "helpers" are the same in many cases as those performed by laborers. In this regard, the Laborers Union included with its comments copies of DOL's current general wage determinations to demonstrate the numerous laborer classifications that are currently recognized throughout the country as "prevailing" under DBRA, allegedly already performing the same duties proposed to be performed by helpers. However, no explanation of how laborers meet the helper definition or description of their duties was provided. The BCTD and Laborers Union also stated that DOL's rulemaking expressly recognized that new, lower paid helpers would substitute for currently prevailing laborers since the Regulatory Impact Analysis stated that such a substitution effect could occur in the estimate of annual cost savings.

The BCTD recommended an alternative method for determining if helpers prevail which would compare the total number of workers found in a prevailing area practice survey to be *classified* as "helper" as defined in the regulations, to the total number of laborers and mechanics other than "helpers" (regardless of classification title) performing the same helper-type duties; the classification practice which covers the majority of the workers would determine whether to issue a helper classification. Under this approach, a helper classification would be recognized as prevailing only if the majority of the workers who performed helper-type duties were expressly classified by contractors as "helpers".

The BCTD expressed an additional concern that helpers will displace (i.e., substitute for) formally-registered apprentices and trainees and destroy the union apprenticeship system. In contrast to the BCTD's view that the method for determining prevailing helpers should consider helpers separately from all other classifications that perform the same helper type duties, the BCTD suggested that all subjourneymen classifications should be *combined* with helpers when applying the two-helpers-for-three-journeymen ratio limitation (i.e., two helpers, apprentices, and/or trainees *combined* for every three journeymen in the contractor's workforce).

AGC suggested that determining the prevalence of helpers in an area should not be difficult if primary consideration is given to the work actually performed by helpers as defined in the regulations, as distinguished from the title of the worker's craft or trade. AGC stated that both union and open shop contractors may use laborers as helpers; in a union setting laborers often work under the supervision of carpenters, bricklayers, cement masons and other trades, while in an open shop setting the use of helpers and laborers under the supervision of skilled craftsmen can be unlimited. AGC recommended that the regulations emphasize that position or job title is not controlling in identifying "helpers".

ABC and the Business Roundtable stated there was an increasing trend in recently negotiated collective bargaining agreements to create new semiskilled union job classifications which fall within the definition of "helper," although they often are not so named. These commenters suggested that DOL recognize such "subjourneymen" classifications as actually consisting of helpers, where appropriate, and count such workers as helpers in determining whether helper classifications prevail in a given area.

Although commenters were requested to provide specific information and documentation concerning local practices of using helpers, no such information was received.

Discussion

Before addressing the specific options, it is necessary to address first the issue raised by the BCTD and Laborers Union of whether area practice surveys of the precise duties performed need be routinely conducted prior to determining whether a helper classification prevails in a locality.

Historically, the Department permitted the use of a helper classification only if the helper performed duties which were separate and distinguishable from those of journeymen and other classifications in the wage determination (helpers could not generally use "tools of the trade"). The new regulatory definition of "helper" approved by the courts allows a helper's duties to overlap with the duties performed by journeymen, so long as the work is performed under a journeyman's supervision. The new definition therefore differentiates a helper primarily in terms of whether the helper is performing under the direction and supervision of a journeyman, a supervisory-based distinction rather than the former task-oriented one. (*See* 712 F.2d at 622–623, "While some distinction between skilled and semiskilled tasks would be retained, the essential functional distinction would not be the nature of the task done but rather the subordinate position of the helper vis-a-vis a journeyman." * * *; Id., at 626, "The central objection to the Secretary's new regulation is that it would no longer define the "classes' of laborers and mechanics by the tasks a particular employee does, but rather in large part by whether he or she is acting under the supervision of a journeyman." * * *; Id., at 627, "We see nothing inherently task-oriented about the term 'classes.'" * * *; Id., at 628, "* * * we are unwilling to read the fairly ambiguous legislative references to a task-based classification system in such a way as to vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area." * * *; Id., at 629, "We simply say that the core concept of that term—that those things within the class be differentiable from those things outside of it—is not weakened by a definition that makes the common element supervision by journeymen rather than use of tools." * * *; Id., at 630, "The Secretary's definition here is not clearly unreasonable or on its face impossible to enforce. First, the distinction between supervised and supervising personnel is a common one in the labor field. It is thus not a completely untested distinction nor one that has proven impossible to draw. * * *")

In view of the Court of Appeals' broad endorsement of the expanded definition of a helper's duties, which permits overlap with the duties of journeymen

and distinguishes helpers on the basis of subordinate/supervisory distinctions vis-a-vis the journeymen rather than on the *former* basis of differentiating between classes by craft content and the particular duties performed, it is DOL's position that there is no need to conduct routine, detailed area practice surveys to determine the precise and specific craft content of helper classifications, as suggested by the union comments. Thus, under DOL's proposed approaches, data on helpers would be collected in the normal course of wage surveys. If required, any functional analysis of a helper's duties would be based on follow-up inquiries to survey respondents who indicated that they used helper classifications to assist journeymen. The WD–10 survey forms would be redesigned to include the general helper definition, and respondents would be advised to utilize the definition in reporting employees as helpers in the survey. Questions as to whether a particular duty is within the scope of a helper classification or as to whether workers have properly been counted as helpers would be resolved if necessary during the wage survey process, or after the wage determination has been issued through standard investigation procedures that include area practice surveys, where appropriate.

Such an approach is currently followed with respect to all other classifications. We do not presently conduct detailed area practice surveys to determine the precise duties of every classification when issuing wage determinations. Only when a question of fact arises as to which craft performs a particular duty (i.e., work which may have been traditionally performed by employees in one classification is also performed by workers in another classification *and at a different wage rate*), is the need for an area practice survey indicated. For example, carpentry work may include the installation of drywall. A wage survey may disclose that a classification of "drywall hanger" is also performing a *significant portion* of the drywall work in the area. To accurately determine the prevailing wage for drywall work, an area practice survey is conducted in conjunction with the wage survey. "This may take the form of *simply analyzing the list of subcontractors submitted along with the classification and wage data provided by each, or it may involve a telephone or mail survey to clarify the duties of each carpenter.* Once this additional information is gathered, wage rates for all those doing drywall work, whether classified as carpenter or drywall hanger, may be used in the usual way to compute the prevailing rate." (DB Wage Determinations Manual of Operations, pp. 40–41; emphasis added.)

Conducting routine, detailed area practice surveys as suggested would also be impractical and precluded by limited available program resources. Finally, in our efforts to achieve practical implementation of the helper regulations, we have also had to consider the responsibilities imposed upon federal agencies under the Paperwork Reduction Act, and have given necessary weight to the conern that a significant increase in the response burdens for collecting information that details the particular duties performed by helpers during wage and area practice surveys would likely produce an adverse chilling effect on voluntary participation in future wage surveys.

With respect to the union comments that the helper definition overlaps the duties of laborers, the current proposal, as envisioned in the earlier rulemaking, was never intended to disrupt existing established local practices, long recognized by the Department, concerning the use of laborers in the construction industry, and on DBRA projects, nor was it intended to disrupt the apprenticeship system. Rather, the proposal was intended to respond to a real problem, documented by industry representatives, that federal construction practices under DBRA did not permit the widespread practice of using semiskilled helpers to do craft work, with the result that federally required wages were significantly higher than the wages actually being paid in the private sector for some construction work (*see,* 712 F.2d at 628; 629–630). As SBA noted in its comments, the general prohibition against the use of helpers on DBRA work often meant that contractors on federal projects were forced to classify and pay their helpers at higher journeyman rates in order to continue using their customary labor force, or use their higher paid journeymen to perform lesser-skilled tasks normally performed by their helpers, either of which proposition increased the contractor's cost on DBRA work above what would have been incurred on private, non-DBRA work. DOL's Preliminary Regulatory Impact Analysis estimated that these increased costs range from $422 million to $610 million per year. Once the existing restrictions prohibiting the use of helpers are lifted and the new helper regulations are implemented, contractors will be provided the flexibility to restructure their workforces *on DBRA* projects in a manner (as currently done in the private sector) that will allow semiskilled employees formerly prohibited under DBRA from performing any work of a trade to perform duties that overlap those of journeymen in the craft, including the use of tools of the trade under the direction and supervision of the journeymen.

However, upon review, we have determined that it is highly unlikely that helpers will substitute for laborers as the Preliminary Regulatory Impact Analysis suggested may occur. (See the related discussion below on the Regulatory Impact and Flexibility Analyses.) We view, both in the context of traditional Davis-Bacon administration as well as in the current rulemaking, the laborer classification to be distinctly different from the helper category. It has been our experience that laborers, by and large, are not semiskilled workers, do not typically perform tasks using the tools of the trade that overlap those performed by workers in the skilled trades, and do not typically *directly assist* such workers in the skilled trades under a journeyman's direct supervision within the meaning intended by the helper definition. Nor have any of the commenters submitted evidence that laborers do meet these aspects of the helper definition. The fact that many of the union laborer classifications are presently recognized by DOL as prevailing under current practices to perform duties that are separate and distinct from journeymen in the skilled trades is not directly relevant to the prospective determinations that will be made, under the revised regulations, of whether there is a prevailing practice to utilize helpers whose duties overlap those of journeymen in performing semiskilled tasks in the skilled trades under the journeymen's direction and supervision. It is the problem with respect to these workers, and not laborers, which the regulation was intended to address. The so-called "helper" and "tender" classifications contained in union laborer agreements are not intermediate classifications within the skilled trades; i.e., a "carpenter tender," for example, is normally an unskilled employee whose duties are prescribed in the *laborers'* union agreement, rather than an *intermediate* (semiskilled) classification of *carpenter.*

While there may be some overlap between *a portion* of the duties contained in the helper definition and those to be performed by laborers in some areas with respect to certain "set-

up," material handling, and other tasks that do not involve the performance of semiskilled tasks of the trade under a journeyman's direct supervision, it is DOL's view that, for the most part, laborer classifications will not generally meet the definition set forth for the helper classification. Accordingly, extensive studies and detailed analyses of locally-prevailing, fine distinctions between the particular duties performed by laborers and those performed by helpers, as suggested by the BCTD and Laborers Union, should not generally be required.

The BCTD's recommended alternative approach would compare all those workers found to be *classified* as "helper" to all other semiskilled classifications (with other titles) that perform the same helper-type duties (e.g., laborers (if appropriate), "tenders," apprentices, trainees, etc.), and the predominant classification practice, covering the specified helper duties determined through area practice surveys, would determine whether to issue a helper classification.

The unions' argument misses the point. As the Court of Appeals recognized, the helper definition abandons the prior DOL practice of focusing on the tasks performed, which did not permit more than one classification to perform the same work. The current definition emphasizes instead that helpers work under the direction and supervision of a journeyman, to assist that journeyman. The definition clearly contemplates, by stating that helpers may (i.e., are permitted to) use the tools of the trade, that there will be more than one classification permitted to perform the same duties. Thus, the question is not what classification prevails with respect to specific duties, but whether the practice of using helpers prevails. This is what the proposal was intended to determine, by counting the number of workers in a craft working on projects with helpers, and comparing that to the number of workers in the craft on projects without helpers.

Furthermore, the approach suggested by the BCTD is not feasible for several reasons. First, conducting the suggested area practice surveys to determine the specified helper duties in each locality would not be practical for the reasons of resource limitations noted earlier. Second, the approach is logically inconsistent. While in the first step the area practice survey would attempt to prescribe the precise prevailing craft content of the helper classification based on actual duties performed, in the second step nomenclature or job title alone would be the determining factor for whether to allow a helper classification. Third, such a practice, if feasible, would logically need to weigh helpers separately against *each* of these groups, with the result that no single job title would comprise a majority. And, fourth, such an approach would be a departure from established practices in DBRA administration which generally link all of the wages paid for certain given work (with the exception of apprentices and trainees), irrespective of the name for the job used by individual contractors. (As noted above in the discussion regarding carpenters versus drywall hangers, ". . . wage rates for all those doing drywall work, *whether classified as carpenter or drywall hanger*, may be used in the usual way to compute the prevailing rate [for drywall *work*]." Manual, pp. 40–41, emphasis added.)

Finally, the concept of counting laborers against helpers to determine which prevails simply does not accomplish the intended purpose of allowing helpers to be utilized to assist journeymen where the practice of using them to perform craft work prevails. The question is not whether workers denominated as helpers prevail in relation to some other classification, such as laborers; the question is whether the practice of using helpers prevails, i.e., is it the predominant practice in the area to use helpers.

To determine whether the practice of using helpers prevails, the proposed statistical formulas in Options A and B utilize a representative weighting mechanism for determining the prevailing practice based on the actual number of workers employed on projects in a particular craft. The formulas link the number of helpers to the number of journeymen with whom the helpers are associated since, under the approved definition, a helper must work under the direction of, and be supervised by, the journeymen. Thus, the proposed formulas will determine if the prevailing *practice* on projects in an area is for helpers to work with and under the supervision of journeymen (according to the definition), by counting the number of workers on those projects who do the work in that craft.

Under the Option A formula, outlined above, where there is a "majority" rate, the practices regarding use of helpers of those contractors who paid the majority rate would prevail. For example, if the majority wage is a collectively bargained wage rate, then the practices of union contractors would prevail, and helpers would not be permitted where they are not permitted under the applicable collective bargaining agreements. If the majority rate is a rate paid by open shop contractors, the open shop practice would prevail. If there is any question regarding whether the use of helpers prevails among contractors who paid the majority rate, then the method in the second step of Option A would be applied to those contractors who paid the majority rate to determine if the use of helpers prevails.

Where there is no "majority" journeyman rate and the weighted average rule controls, then it is likely that the projects surveyed will be predominantly open shop or a mixture of open shop and union projects. While extreme examples can be hypothesized under any decision rule, it is our view that, because of the widespread use of helpers among open shop contractors, it is highly unlikely that this decision rule would result in recognizing helpers as prevailing where they are only "identifiable". BLS data on employment levels within the various construction trade occupations indicated that, in 1984, in the industry as a whole (union and open shop sectors), 15 percent of the workers were helpers and 41 percent were journeymen, with the remainder representing other classifications including laborers (Preliminary Regulatory Impact Analysis, 52 FR 31369). The State of Wisconsin Department of Industry, Labor and Human Resources commented that current employment estimates in Wisconsin indicate that almost all open shop employers, and more than one-half of all unionized employers, utilize helpers in Wisconsin. ABC represented that almost 75 percent of all construction in the United States is performed today by the open shop sector, where a clearly widespread use of helpers exists. Furthermore, DOL's current operating procedures for determining if the survey data are adequate to sustain a calculation of the prevailing *wage* for a classification will ensure that helpers are not recognized as prevailing where they are only "identifiable." (If the number of employees in a classification for whom survey wage data are obtained is limited, DOL will not issue a determination of the prevailing wage unless data on at least six workers is received from three or more contractors, none of which accounts for 60 percent or more of total reported employment, if the overall survey "usable response rate" is less than 50 percent. DB Wage Determinations Manual of Operations, pp. 61–63.)

On the other hand, we agree with some of the commenters' observation

that Option B is more susceptible to the assertion that the rule could allow for the use of helpers where they are only "identifiable," since Option B counts workers in every case and gives no consideration to the practice in areas where union rates clearly dominate by the majority rule for the journeymen in the classification. Moreover, Option B could produce various anomalies in the wage determination process, such as a union-negotiated journeyman rate drawn from a collective bargaining agreement under which helpers are not allowed, coupled with an open shop helper at a wage level which bears no reasonable relationship to the journeyman rate; or a *semiskilled* helper wage rate lower than a union-negotiated wage rate for an *unskilled* laborer on the same wage determination.

Upon consideration of all the relevant comments submitted and the rulings of the courts in the litigation, DOL has determined that Option A should be adopted in lieu of all others for the following reasons. Where a majority of contractors in a geographic area is found to be paying a single rate for given work, the Davis-Bacon prevailing wage process should not alter that practice with respect to work covered by the law. Under well-established DBRA principles, wage determinations should reflect as accurately as possible what is actually being paid in the local area, to satisfy the statutory purpose of ensuring that wages on federal construction projects "mirror" those that are locally prevailing (712 F.2d at 624). Option A will better achieve these results than Option B, by avoiding the potential disruptions of locally prevailing practices that could occur under the anomalies produced by Option B in the circumstances cited above. In those areas where union workers dominate with respect to a particular journeyman classification, Option A diminishes the likelihood of producing results found objectionable by the courts—namely, undercutting the prevailing wage rate by underclassification in union-dominated areas (712 F.2d at 624–626; 630). Since, as the court observed, wage rates and classification practices are two sides of the same coin and "must be fixed in tandem to ensure that a given wage is paid for given work" (712 F.2d at 628), if the prevailing wage rates for particular classifications in an area are derived from collective bargaining agreements, the prevailing wage process must ensure that the corresponding classifications of work to be observed under a DBRA wage determination are consistent with the job classifications upon which the prevailing wage rates were based. (*See, Fry Brothers Corp.*, WAB Case No. 76–6 (June 14, 1977).) Thus, in areas where union workers dominate with respect to a journeyman classification, and the union practice does not permit helpers, the methodology for finding if helpers prevail should not allow for the recognition of helpers in those areas. To quote in pertinent part from the Court of Appeals decision in *Building and Construction Trades Department, AFL–CIO* v. *Donovan*, 712 F.2d 611 (1983):

> To take a simplified example, suppose that unions dominate the construction industry in a certain city and require that any worker using carpenters' tools be a journeyman carpenter or apprentice. Nevertheless, suppose that one or two nonunion firms in the city use lower paid carpenter's helpers to rough-cut beams. In that case, a federal project that permitted workers who rough-cut beams to be termed "carpenter's helpers," because such a classification could be "identified" in the city, would not be paying the wage prevailing for the corresponding class of workers in that city. The prevailing wage for that kind of work would actually be the union wage of journeyman carpenters or apprentices. (712 F.2d at 624–625)
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> We have concluded that the Secretary's identifiable-classification regulation would virtually ensure underclassification in union-dominated areas. At least where the Secretary has not found the use of helpers as provided for in the new rules to be a nearly universal practice, . . . he is barred from allowing work that is "prevailing" categorized in one job classification to be placed in a lower paid classification merely because such a practice can be "identified" in the area. (712 F.2d at 625–626)
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> the new regulation, as modified by the requirement that the classification prevail in an area before it may be used, is an entirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers. The new regulation would lower the current federal wages for the most part in those *nonunion areas* where they are significantly above the wages paid in the area. . . . *In the union areas of the country where helpers are little used, they would not be allowed on federal projects. Thus, the new regulation would be narrowly aimed at correcting the federal practice in areas where it has not worked well, and would not result in a wholesale reduction in journeyman wages.* (712 F.2d at 630; emphasis added)

When there is no singular or majority wage rate (and corresponding practice) found prevailing in an area, the second step, or weighted average rule, of Option A provides an appropriate mechanism for determining whether there is a prevailing practice of using a helper classification on projects by using a weighting factor that is based on the actual number of workers employed in a particular classification.

In addition to their arguments discussed at length above, the unions contend that Options A and B are defective in allowing helpers to prevail where they do not comprise the majority of workers in a classification. To support their views, the unions used the example in which helpers would be found to prevail although they constitute only 20 percent of the total workers in the classification. Again, it must be reiterated that the question is whether there is a prevailing practice of utilizing helpers, *not* whether they prevail in relation to journeymen or laborers or some other classification. For example, if contractors on every project in an area utilized helpers, the practice of utilizing helpers would be universal, even if many more journeymen than helpers were utilized. In fact, these regulations themselves would permit only two helpers to be employed for every three journeymen on Davis-Bacon projects. Under the unions' approach, the Department would be prohibited from finding that helpers prevail, even in an area where there is a universal practice to observe this ratio.

The ABC, on the other hand, suggested counting only the number of helpers, and not journeymen, and permitting helpers wherever there is a "substantial area practice." In our view this approach would be contrary to the Court of Appeals' requirement that helpers be found to prevail before they can be utilized on Davis-Bacon projects. ABC suggested as alternatives, Option C (count projects on which helpers are used) or Option E (count contractors employing helpers). These are not acceptable approaches, however, because they fail to give necessary weight to the size of a project or a contractor's workforce. Option D would weight projects by dollar volume, a factor which is very difficult to determine and may bear little relationship to the size of the workforce. In our view, the number of workers actually employed in a craft is the appropriate weighting factor.

A number of commenters stated that there are other workers who perform similar duties to helpers on a project, and that they should be considered helpers in determining whether helpers prevail. As discussed above, it is our experience that laborers do not normally function as helpers and it is not our intention to upset established practices regarding the use of laborers. In addition, apprentices and trainees, since they are separately defined in the regulations, are not helpers. However,

we have observed that use of other sub-journeymen classifications, such as "improvers" or "learners," sometimes is found in the union sector. Such workers will be counted as helpers in determining whether helpers prevail if they conform to the "helper" definition.

Finally, DOL has determined upon review that in order to obtain a more accurate assessment of total employment in a particular classification, it will be necessary to include, for counting purposes only, *all* workers who work in the classification, including apprentices and trainees. Accordingly, a clarifying revision is added to section 1.7(d)(2) to provide that the total number of workers in the classification employed by contractors utilizing helpers (all journeymen, helpers, apprentices, and trainees) will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen, plus apprentices and trainees, if any), and the practice covering the majority of the workers in such classification will determine whether to issue a helper rate. Since apprentices and trainees are defined separately in the regulations (29 CFR 5.2(n) (1) and (2)), and prevailing wage rates are not determined by DOL for apprentices and trainees (the contractor derives the rates required to be paid on DBRA work by applying the appropriate percentage progression in the approved training programs to the applicable wage determination rate for the journeyman), the wage rates paid to apprentices and trainees will not be included in determining the prevailing wage rate for the helper classification (just as the journeymen rates are similarly not so included). With the added clarification, Option A is adopted as proposed.

Issue: Conformance Procedures

Comments

The BCTD objected to the special criteria in proposed section 5.5(a)(1)(ii)(A) under which helper classifications and wage rates could be "conformed" (i.e., added to a wage determination after the wage determination has been issued) if a particular wage determination did not contain a helper classification. As proposed, this section provided, as did the rule promulgated in 1982, that helper rates could be conformed without regard to the longstanding requirement, applicable to all other conformance actions, that the work of a proposed classification to be conformed not be performed by another classification already listed in the wage determination. In addition, a provision was added as a result of the court of appeals decision to require that helper classifications may be conformed only where they prevail in the area covered by the wage determination. The BCTD argued that the first provision will permit conformance of less-than-prevailing classifications if a helper is allowed to perform work performed by another classification in the wage determination (i.e., the journeyman). Secondly, according to the BCTD, the proviso would grant authority to contracting officers to determine if a helper classification prevails in an area without reference to any guidelines or criteria for making such a determination. Under this scheme, the BCTD suggested that a contracting officer could undercut prevailing wage determinations issued by DOL which, presumably, has already determined that use of the helper classification is not a prevailing practice in the area covered by the wage determination (otherwise DOL would have recognized the helper classification as prevailing in the first place and included it in the wage determination issued).

The AGC objected to the provision in the existing conformance procedures which requires that conformed wage rates bear a "reasonable relationship" to the wage rates contained in the wage determination. As applied to conformance of a proposed helper classification, this requirement may raise helper wage rates beyond what is actually paid. AGC suggested that since the helper classification is a low-skilled, entry-level position, helper wage rates are likely to be much lower and this should be recognized when helper wage rates are conformed.

Discussion

The conformance procedure is intended to provide a practical solution to the need for adding classifications and wage rates in cases where a published wage determination does not contain a particular classification that a contractor and the contracting agency find necessary to perform the government contract. The procedure provides for the Wage and Hour Administrator to review, approve, modify, or disapprove every proposed additional classification action.

The new helper definition contemplates that a helper's duties may overlap to some extent with the duties of journeymen. The conformance procedure, therefore, contains an exception from the normal rule for conformance of helpers, in order to permit adding a helper classification despite the fact that some of the duties to be performed by the helper may also be performed by journeymen in the classification. To do otherwise would mean a helper classification could never be conformed.

This provision will not permit conformance of less-than-prevailing helper classifications as alleged by the BCTD. One of the criteria for approval of helper conformances requires, as a prerequisite, that the helper classification prevail in the area where the work is performed.

The BCTD comment that the procedures grant new authority to contracting officers to enable them to undercut prevailing wage determinations issued by DOL is unfounded. The Wage-Hour Administrator must approve every proposed conformance action. The Administrator will be barred from approving a helper conformance if evidence is not submitted demonstrating that the helper classification prevails, taking into consideration the principles set forth in § 1.7.

The BCTD comment that any wage determination issued by DOL that does not contain a particular helper classification can be presumed to mean that the helper classification does not prevail oversimplifies the issues. Not all wage determinations are the result of extensive wage surveys, and not all counties are surveyed each year. A practical solution is needed for adding prevailing helper classifications to wage determinations, such as through conformance, for the areas that have not recently been surveyed at the time a request is made to add a helper classification to a wage determination. On the other hand, if a survey has recently been conducted and a determination made that helpers do not prevail, conformance of an additional helper classification will not be approved.

With respect to AGC's comments, prevailing pay relationships are generally found to be in direct proportion to the skill levels required and the difficulty of the duties peformed in the various classifications. The helper classification, as defined, is a *semiskilled* classification, as opposed to an *unskilled* classification or a *skilled* mechanic's classification. Thus, as a general statement, prevailing rates for *semiskilled* helpers would be expected in most cases to be between the lowest rate listed on a wage determination for an *unskilled* laborer classification and the higher rate listed for the skilled journeyman mechanic in the classification which the helper is assisting. Absent a contrary prevailing

area practice, it is not likely that we will find helper wage rates lower than rates prevailing in an area for unskilled work (with the exception of rare instances where the union laborer rate prevails in combination with open shop rates prevailing for the skilled trades). Therefore, the requirement that conformed wage rates bear a "reasonable relationship" to the wage rates contained in the wage determination should not, contrary to AGC's assertion, raise helper wage rates to levels above what is actually being paid to helpers in a community. In any event, the requirement that the rates bear a "reasonable relationship" has always been an integral part of the conformance process.

Accordingly, § 5.5(a)(1)(ii)(A) is adopted as proposed.

Issue: Ratio Limitation on the Use of Helpers; Variances.

The enjoined 1982 regulations contained a numerical limitation on the use of helpers: two helpers for every three journeymen, or not more than 40 percent of the total number of helpers and journeymen, in the contractor's work force on the job site. (A one-helper-to-five-journeymen ratio was originally proposed, but was raised to 2:3 in the final rule in response to public comments that 1:5 was too restrictive and would not reflect the actual number of helpers used in the industry.)

Helpers employed in excess of this ratio would be required to be paid the applicable journeyman's (or laborer's, where appropriate) wage rate for the work actually performed. To insure that this ratio did not disrupt existing established local practices in areas where DBRA wage determinations currently contain helper classifications without any limitation on the number permitted, the preamble to the regulations provided that DOL would consider requests for variances from the ratio limitation prior to bid opening on a contract, if supported by a showing that the DBRA wage determination for the type of construction in effect in the area *before* the effective date of the final helper regulations contained a helper classification, and that there was a practice in the area of utilizing such helpers in that classification on DBRA projects in excess of the two-for-three ratio.

The ratio and variance provisions were not open for comment in the current rulemaking. Comments were previously invited on a proposed ratio in 1981, and a final ratio was adopted in 1982 after consideration of the public comments received. In the litigation, the district court enjoined the implementation of all the new regulations governing the use of helpers, including the ratio. However, the appeals court declined to rule on the helper provisions other than the expanded definition of duties and the provision that a helper classification need only be "identifiable" in an area to be used, on the grounds that the district court had not provided any significant discussion of the issues involved. Because the appeals court did not set aside the district court's injunction on the ratio, which had been enjoined as a part of the total helper package which was overturned, the district court's subsequent order, among other things, continued the injunction against the ratio.

The preamble to the 1987 Notice of Proposed Rulemaking (NPRM) included a discussion of the ratio and variance provision, and stated that the Department intended to implement them as final rules, as previously provided in the 1982 regulations, once the related helper provisions in the NPRM were finalized.

While several comments were submitted which took issue with either the mechanical operation of the ratio or variance provisions, and/or suggested the 2:3 ratio be dropped or revised to other numerical limits (which were similar to the comments received during the 1981–1982 rulemaking), DOL cannot at this time implement any of the suggested changes without further notice-and-comment rulemaking. Accordingly, as explained in the preamble to the 1987 NPRM, the 2:3 ratio contained in the enjoined 1982 regulations is being implemented in this final rule. In addition, to assure that the ratio does not disrupt existing established local practices in areas where wage determinations currently contain helper classifications without restriction as to the number permitted, interested parties (which would include contracting agencies), may request, prior to bid opening on a contract, a variance from the ratio provision pursuant to section 5.14 of the regulations. Such variances will be considered for the applicable helper classification(s) upon a showing that the wage determination for the type of construction in effect in the area prior to the effective date of these regulations contains one or more helper classifications, and that there was a practice in the area of utilizing such helpers on Davis-Bacon projects in excess of a ratio of two to every three journeymen in the classification.

Issue: Use of wage data from projects covered by DBRA when determining whether helpers prevail.

Comments

AGC observed that under current policy and practices, projects covered by DBRA constitute most or all of the data base for surveys in heavy and highway construction. (Under 29 CFR 1.3(d)(1985), data from projects subject to DBRA are not used when determining prevailing wages for building or residential wage determinations, unless there is insufficient private construction from which to determine prevailing wages; data from DBRA projects are used in compiling wage rate data for heavy and highway wage determinations, because of the extensive public funds expended, and the limited privately-funded work, in heavy and highway construction.) AGC postulated that if this practice were continued under the new rules for determining if helpers prevail, the prior restrictive helper policy on DBRA work would be perpetuated into future heavy and highway wage determinations. Similarly, where DBRA projects are included for building or residential wage determinations (due to insufficient data from private work), the same results would occur. AGC suggested that where DBRA projects are the source of wage and area practice data, helpers should be permitted for subsequent DBRA construction "where helper type of work has been found to prevail in a classification." However, AGC offered no insight on how that determination could be made.

Discussion

The regulation on use of DBRA projects in wage surveys was not open for comments during the current rulemaking. No valid approach has been suggested which would justify DOL using some separate data base for determining if helpers prevail that differs from the data sources used to establish the prevailing wages in an area. However, if future experience under the new helper rules indicates further rulemaking is needed to adapt the Act's implementation to changing prevailing area practices, DOL would not be precluded from considering further rulemaking initiatives.

Executive Order 12291; Regulatory Flexibility Act

Regulatory Impact and Flexibility Analyses

The Department prepared a preliminary regulatory impact and regulatory flexibility analysis in

connection with the proposed helper regulations published on August 14, 1981 (46 FR 41444; 46 FR 41456). A final regulatory impact and regulatory flexibility analysis was prepared and summarized in the May 28, 1982 publication of the helper regulations (47 FR 23644; 47 FR 23658). The Department updated its analysis of the helper provisions in connection with the proposed rule published on August 19, 1987 (52 FR 31368). The updated analysis estimated that the annual cost savings to be realized from implementing the helper regulations ranged from midpoint estimates of $422 million (helpers substitute for laborers and journeymen) to $610 million (helpers substitute for journeymen only), and projected that the changes would have a substantial beneficial impact on small contractors. Several comments were received regarding the analysis from individuals, labor organizations, contractors, and the Chief Counsel for Advocacy of the Small Business Administration. Some commenters stated their belief that the cost savings estimates were inflated while others suggested they were understated; some questioned whether the estimated savings would be passed through to the end user (owner or government); and others questioned various assumptions in the analysis regarding productivity and the disaggregated approach to the wage bill estimates. SBA's Chief Counsel for advocacy concurred with DOL's views that the regulations would have a significant beneficial impact on small businesses, and would also result in significant savings to the nation's taxpayers.

The Department, as set forth above in the discussion of comments received, has concluded that of the regulatory alternatives available, Option A is the most consistent with the stated objective of the statute.

However, the Department has concluded upon review that the references in the analysis to the effect that helpers may substitute for laborers are not correct. As noted above, laborers would not generally meet the definition for the helper classification. Further, under the Option A method for determining if the use of a helper classification prevails, prevailing pay relationships in the industry will make it highly unlikely that such a substitution effect could occur. For example, where the majority rate prevails for the journeyman and union rates are found prevailing in the area, the decision rule is not likely to produce a finding of prevailing helpers. Furthermore, it has been our experience in the open shop sector as well as in the union sector that prevailing pay relationships in the industry are found to be in direct proportion to skill levels, and semiskilled helper rates are above the unskilled laborer's rate. Thus, we anticipate that this will continue to be the case if there is no majority rate under Option A and the weighted average rule is utilized. As also noted above in the discussion of comments on the conformance procedures, the helper classification, as defined, is a semiskilled classification, as opposed to an unskilled laborer classification or a skilled mechanic's classification. Thus, there will be no economic incentive for contractors to replace laborers with helpers. The economic incentive could only exist if the wage determination issued contained open shop rates for the journeyman and helper classifications, coupled with a union laborer rate that is higher than the helper rate. With rate exceptions, such a situation would not occur, since it is our experience that where there is an open shop journeyman rate it is almost never the case that there is a union laborers rate.

Accordingly, the Department is withdrawing the portion of the analysis which contains estimates of cost savings for where helpers substitute for both laborers and journeymen (Table II and the related discussion, 52 FR 31370). The Department is adopting the primary analysis published with the proposal as the Department's final regulatory impact analysis.

As indicated in the preliminary analysis, the results of the analysis represent the upper limit in potential cost savings from the proposed options. The analysis assumes the determination of whether helpers prevail is, in all cases, determined by the practice covering the majority of the workers reported in the survey (the second half of Option A), rather than the practice of particular contractors whose wage rates establish the prevailing wage (the first half of Option A). Data limitations prevented estimation of the effects on construction cost savings when the practices of contractors whose wage rates establish prevailing wages also determine helper utilization. However, a review of prevailing wage determinations issued under DBRA indicates that roughly 35% of the general wage determinations issued and 20% of the individual project wage determinations issued contain rates based exclusively on collective bargaining agreements. To the extent that such collective bargaining agreements establish the prevailing wages under DBRA, and do not provide for the use of a helper classification, the estimate of cost savings would be reduced accordingly.

Copies of the complete analysis may be obtained from the Wage and Hour Division at the address and telephone number listed above under **FOR FURTHER INFORMATION CONTACT.**

Paperwork Reduction Act

The information collection requirements contained in section 5.5(a)(1)(ii) of Part 5 were previously approved by the Office of Management and Budget under the Paperwork Reduction Act and assigned OMB control number 1215–0140.

Conclusion

The Solicitor of Labor has determined, in accordance with Executive Order 12291, that this regulation is clearly within the authority delegated to the Secretary of Labor by the Davis-Bacon Act (40 U.S.C. 276a et seq.), Reorganization Plan No. 14 of 1950 (5 U.S.C. Appendix), and the Copeland Act (40 U.S.C. 276c) as well as 5 U.S.C. 301, 29 U.S.C. 259, and the laws listed in Appendix A of Part 1 and Section 5.1(a) of Part 5. The Solicitor, as set forth above in the discussion of the major issues, has determined that this regulation is consistent with the Congressional intent of the Davis-Bacon and related Acts that wage determinations issued under those Acts reflect the rates prevailing on similar construction in the locality, that such wage determinations be incorporated in contracts subject to those Acts, and that contractors performing work on Federal and federally assisted construction projects subject to those Acts pay their workers at least the prevailing wages established by the Secretary of Labor in accordance with industry classification and wage practices.

Dates of Applicability

Certain provisions of this regulation are currently under injunction by the U.S. District Court for the District of Columbia. Accordingly, copies of this regulation are being submitted to the Court for review and approval prior to final implementation, pursuant to the Court's decision of December 21, 1984. Once the injunction is lifted, a notice will be published in the **Federal Register** providing an effective date 60 days thereafter. The provisions of the revised rule will then take effect as follows:

The revisions to section 1.7(d) of Part 1 shall be applicable only as to wage determinations issued based on wage surveys completed on or after the date of implementation of this revised rule.

The revisions to sections 5.2 and 5.5 of Part 5 shall be applicable only as to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after the date of implementation of this revised rule. None of the revisions herein shall be applicable to any contract entered into prior to such date.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects

29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

29 CFR Part 5

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

Accordingly, 29 CFR Parts 1 and 5 are amended as set forth below.

Concurrent with the publication of this final rule, the final helper rules previously published in the **Federal Register** on May 28, 1982 (47 FR 23644; 23658) and subsequently deferred (*see* 47 FR 32070, July 26, 1982; 48 FR 19368, April 29, 1983) are hereby withdrawn.

Signed at Washington, DC, on this 24th day of January, 1989.

Dennis E. Whitfield,

Acting Secretary of Labor.

Alan C. McMillan,

Acting Assistant Secretary for Employment Standards.

Paula V. Smith,

Wage and Hour Division.

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

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

Authority: 5 U.S.C. 301: R.S. 161.64 Stat 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259; 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; and the laws listed in Appendix A of this Part.

2. Section 1.7 is amended by adding a new paragraph (d) to read as follows:

§ 1.7 Scope of consideration.

* * * * *

(d) The use of "helpers", "apprentices" and "trainees" is permitted in accordance with Part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraphs (d)(1) and (d)(2) of this section.

(1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen in the classification as defined in § 1.2(a)(1) of this part, then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph (d)(2) of this section with respect to those contractors.

(2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen in the classification as defined in § 1.2(a)(1) of this part, then the total number of workers in the classification employed by contractors utilizing helpers (journeymen plus apprentices, trainees, and helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen plus apprentices and trainees as defined in § 5.2(n)(4) of this chapter), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis Bacon and Related Acts Provisions and Procedures

3. The authority citation for Part 5 continues to read as follows:

Authority: 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part.

4. Section 5.2 is amended by revising paragraph (n) introductory text and by adding paragraph (n)(4) to read as follows:

§ 5.2 Definitions.

* * * * *

(n) The terms apprentice, trainee, and helper are defined as follows:

* * * * *

(4) A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

* * * * *

5. Section 5.5 is amended by revising paragraph (a)(1)(ii)(A) and adding a new paragraph (a)(4)(iv), to read as follows:

§ 5.5 Contract provisions and related matters.

(a) * * *

(1) * * *

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following crieria have been met:

(1) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

* * * * *

(4) * * *

(iv) *Helpers.* Helpers will be permitted to work on a project if the helper classification is specified on an applicable wage determination or is approved pursuant to the conformance procedure set forth in § 5.5(a)(1)(ii). The allowable ratio of helpers to journeymen employed by the contractor or subcontractor on the job site shall not be greater than two helpers for every three journeymen (in other words, not more than 40 percent of the total number of journeymen and helpers in each contractor's or in each subcontractor's own work force employed on the job site). Any worker listed on a payroll at a helper wage rate, who is not a helper as defined in 29 CFR 5.2(n)(4), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any helper performing work on the job site in excess of the ratio permitted shall be paid not less than the applicable journeyman's (or laborer's, where appropriate) wage rate on the wage determination for the work actually performed.

* * * * *

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Friday
January 27, 1989

Part IX

Department of Defense

48 CFR Parts 204, 219, and 252
Federal Acquisition Regulation Supplement; Small Business Competitiveness Demonstration Program; Interim Rule and Request for Comments

DEPARTMENT OF DEFENSE

48 CFR Parts 204, 219, and 252

Federal Acquisition Regulation Supplement; Small Business Competitiveness Demonstration Program

AGENCY: Department of Defense (DoD).

ACTION: Interim rule and request for comments.

SUMMARY: The Defense Acquisition Regulatory Council is revising Department of Defense Federal Acquisition Regulation Supplement (DFARS) Parts 204, 219, and 252 to further implement FAR Subpart 19.10 and the December 22, 1988 joint Office of Federal Procurement Policy (OFPP) and Small Business Administration (SBA) interim policy directive and test plan implementing Title VII of the "Business Opportunity Development Reform Act of 1988", Pub. L. 100-656 (53 FR 52889).

DATES: *Effective:* This rule is effective for all affected solicitations issued on or after January 1, 1989.

Comments: Comments on the interim rule should be submitted to the address shown below not later than February 27, 1989, to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: Defense Acquisition Regulation Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD(P)/DARS, % OASD(P&L) (MRS), Room 3D139, The Pentagon, Washington, DC 20301-3062. Please cite DAR Case 88-322 in all correspondence related to this subject.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, telephone (202) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

Title VII of the "Business Opportunity Development Reform Act of 1988" seeks to test the effectiveness of eliminating set-asides in certain industry groups through the establishment of a new program, entitled the "Small Business Competitiveness Demonstration Program." The program has two primary objectives: (1) To demonstrate whether small business firms in certain industry groups can compete successfully on an unrestricted basis for Federal contracts; and (2) to demonstrate whether targeted goaling and management techniques can expand Federal contract opportunities for small business in industry categories where such opportunities historically have been low despite adequate numbers of small business contractors in the economy. DoD has been identified as a participant in the demonstration.

For purposes of the expansion portion of the demonstration program, DoD has targeted the following industries:

Standard industrial classification (SIC)	SIC code
(1) Pharmaceutical preparations	2834
(2) Ammunition, except for small arms	3483
(3) Ordnance and accessories, not elsewhere classified (NEC)	3489
(4) Turbines and turbine generator sets	3511
(5) Aircraft engines and engine parts	3724
(6) Space vehicle equipment, NEC	3769
(7) Tanks and tank components	3795
(8) Search and navigation equipment	3812
(9) Communication services, NEC	4899
(10) Petroleum products, NEC	5172

B. Regulatory Flexibility Act

As stated in the joint policy directive (53 FR 52889), the Office of Federal Procurement Policy and the Small Business Administration will prepare the appropriate regulatory flexibility analysis upon completion of the first quarterly review under the Program.

C. Paperwork Reduction Act

The necessary approvals are being obtained by the Office of Federal Procurement Policy and the Small Business Administration.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense to issue this coverage. This action is necessary in order to implement Pub. L. 100-658 and the Small Business Competitiveness Demonstration Program.

List of Subjects in 48 CFR Parts 204, 219 and 252

Government procurement, small business procurement.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, 48 CFR Parts 204, 219 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 204, 219 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

PART 204—ADMINISTRATIVE MATTERS

204.670-2 [Amended]

2. Section 204.670-2 is amended by adding between the definition "Contracting Office" and the definition "Nonprofit Institution" the definition reading: " 'Emerging Small Business', as used in this part, is as defined in FAR 19.1002."

3. Section 204.671-5 is amended by adding in paragraph (d) under "Item D4A" following "Code E" a new paragraph reading: "Code Y—Enter this code if the action resulted from an emerging small business set-aside (219.1070-2)."; by removing in paragraph (e) "Item E2 through E8: Reserved"; and by adding in paragraph (e) following "Code N" new paragraphs entitled "Item E2, Item E3, and Item E4"; to read as follows:

204.671-5 Instructions for completion of DD Form 350.

* * * * *

(e) *Part E, DD Form 350.*

* * * * *

Item E2, Small Business Competitiveness Demonstration Program Test. The Small Business Competitiveness Demonstration Program is set forth in FAR 19.10.

Code Y—Enter this code for any action in either the four designated industry groups or the ten targeted industry categories awarded as a result of a solicitation issued on or after January 1, 1989, except when Item B13 is coded 6, 7 or 8.

Code N—Enter this code for actions other than those above.

Item E3, Small Business Size. Complete only when Item E2 is coded Y and the contract action is awarded to a small business. Enter the code of the size range that includes the size of the business as represented by the contractor.

Code	Employees	Code	Annual gross revenues
A	50 or fewer	M	$1 million or less.
B	51- 100	N	Over $1M-thru $2M.
C	101- 250	P	Over $2M-$3.5M.
D	251- 500	R	Over $3.5M-$5M.
E	501- 750	S	Over $5M-$10M.
F	751-1000	T	Over $10M-$17M.
F	Over 1000	U	Over $17 million.

Item E4, Emerging Small Business. Complete this item only if Item E2 is coded Y and the contracting action is for

one of the designated industry groups. Otherwise, leave blank.

Code Y—Enter this code if the contractor is an emerging small business concern.

Code N—Otherwise, enter this code.

Item E5 through E8: Reserved.

* * * * *

204.672-2 [Amended]

4. Section 204.672-2 is amended by adding in paragraph (a) at the end of the second sentence the words "including any actions for which an Individual Contract Action Report (DD Form 350) may have been prepared pursuant to 204.675."

204.672-5 [Amended]

5. Section 204.672-5 is amended by adding in paragraph (e) a new second sentence in the paragraph entitled "Line E1" reading: "If the action is an emerging small business set-aside, use the code which is appropriate for the set-aside method used."

6. Sections 204.675 and 204.675-1 through 204.675-3, are added to read as follows:

204.675 Individual Contract Reporting of Actions $25,000 or Less in the Four Designated Industry Groups Under the Small Business Competitiveness Demonstration Program.

204.675-1 General.

The four designated industry groups in the Small Business Competitiveness Demonstration Program are set forth in FAR 19.1005(a). For the procurement of a service in any of the four designated industry groups, the Small Business Competitiveness Demonstration Act of 1988, Pub. L. 100-656, requires reporting of each award of $25,000 or less in the same manner as if the purchase were in excess of $25,000.

204.675-2 Procedures.

(a) During the term of the Program, each contracting action obligating or deobligating $25,000 or less for services within any of the four designated industry groups shall be reported on an Individual Contract Action Report (DD Form 350) except as indicated in 204.671-3(d).

(b) This requirement is in addition to the reporting requirement at 204.672, Monthly Contracting Summary of Actions $25,000 or Less (DD Form 1057).

204.675-3 Instructions for Completion of the DD Form 350.

(a) Except as noted in (b) and (c) below, complete the DD Form 350 in accordance with the instructions at 204.671-5.

(b) Leave Items B5B, B5E, B5F, B5G, B10, B11, C4, C6, C11, C12, D4E, and D7 blank. Leave Items C-8 and C-9 blank when small purchase procedures are used.

(c) Contracting actions using small purchase procedures shall code the following items as shown below. (These codes do not appear on the DD Form 350).

Item B13, Kind of Contract Action

Code 9—Small Purchase Procedures. Enter this code to report an action using small purchase procedures as defined in FAR Part 13.

Item D4A, Type of Small Business Set-Aside

Code Y—Enter this code if the action resulted from an Emerging Small Business Set-Aside (219.1070-2).

Code Z—Small Business-Small Purchase Set-Aside. Enter this code if the acquisition was reserved exclusively for small business concerns pursuant to FAR 13.105.

PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

7. A new Subpart 219.10, consisting of sections 219.1005 and 219.1070 through 219.1071, is added to read as follows:

Subpart 219.10—Small Business Competitiveness Demonstration Program

Sec.

Subpart 219.10—Small Business Competitiveness Demonstration Program

219.1005 Applicability.

(b) For DoD, the targeted industry categories are:

Standard industrial classification (SIC)	SIC code
(1) Pharmaceutical preparations	2834
(2) Ammunition, except for small arms	3483
(3) Ordnance and accessories, not elsewhere classified (NEC)	3489
(4) Turbines and turbine generator sets	3511
(5) Aircraft engines and engine parts	3724
(6) Space vehicle equipment, NEC	3769
(7) Tanks and tank components	3795
(8) Search and navigation equipment	3812
(9) Communication services, NEC	4899
(10) Petroleum products, NEC	5172

219.1070 Procedures.

219.1070-1 Designated industry groups.

(a) Solicitations for acquisitions in any of the four designated industry groups issued from January 1, 1989 through December 31, 1992 that have an anticipated dollar value greater than $25,000 shall not be considered for small business set-asides under FAR Subpart 19.5 unless otherwise directed. However, acquisitions in the designated industry groups shall continue to be considered for placement under the 8(a) program (see FAR Subpart 19.8) and for small disadvantaged business set-asides (see DFARS 219.502-72).

(b) After periodic review of DoD performance, DoD may direct reinstatement of the use of small business set-asides as necessary to meet prescribed goals. Military departments and defense agencies shall not reinstate small business set-asides unless directed by DoD.

When use of small business set-asides is suspended for the four designated industry groups—

(1) The procedures under 219.501(g), and (g)(70) through (g)(73) are waived;

(2) The exceptions at 219.502-72(b) (1), (2), and (3) do not apply and the acquisitions shall be considered for small disadvantaged business set-asides; and

(3) The evaluation preference at 219.7001 shall not be applied.

(d) The small purchase exception at FAR 19.303(a) does not apply to acquisitions under this program. All written requests for quotations shall include applicable SIC code and size standard.

219.1070-2 Emerging small business set-aside.

(a) Acquisitions in the four designated industry groups with an estimated value of $25,000 or less shall be set aside for emerging small businesses (ESBs), provided that the contracting officer determines that there is a reasonable expectation of obtaining offers from two or more responsible emerging small businesses that will be competitive in terms of market price, quality and delivery. If no such reasonable expectation exists, the contracting officer shall proceed in accordance with FAR 13.105, FAR Subpart 19.5 or FAR Subpart 19.8.

(b) If the contracting officer proceeds with the ESB set-aside and receives a quotation from only one ESB at a reasonable price, the contracting officer shall make the award. If there is no quote from an ESB or the quote is not at a reasonable price, then the contracting

officer shall cancel the ESB set-aside and proceed in accordance with FAR 13.105 of FAR Subpart 19.5.

219.1070-3 Identification and reporting.

(a) The face of each award made pursuant to the program shall contain a statement that the award is being issued pursuant to the Small Business Competitiveness Demonstration Program.

(b) For reporting requirements, see 204.675.

219.1071 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert in full text the clause at 252.219-7012, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program, in all solicitations in the four designated industry groups. Where requests for a quotation are solicited orally, the contracting officer shall obtain the necessary information.

(b)(1) The contracting officer shall insert in full text the clause at 252.219-7013, Notice of Emerging Small Business Set-Aside, in all solicitations and resulting contracts set aside for emerging small businesses in accordance with 219.1070-2.

(2) When using other than small purchase procedures, the contracting officer shall insert the clause at FAR 52.219-14 in all solicitations and resulting contracts set aside for emerging small businesses.

(c) In an unrestricted procurement in the four designated industry groups, the clause at 252.219-7007, "Notice of Evaluation Preference for Small Disadvantaged Business Concerns," shall not be inserted.

(d) The contracting officer shall insert in full text the provision at 252.219-7014, Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program, in all solicitations issued in each of the ten targeted industry categories under the Small Business Competitiveness Demonstration Program that are expected to result in a contract award in excess of $25,000.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Sections 252.219-7012, 252.219-7013, and 252.219-7014 are added to read as follows:

252.219-7012 Small business concern representation for the Small Business Competitiveness Demonstration Program.

As prescribed at 219.1071(a), insert the following provision in full text in all solicitations issued by the participating agencies under the Small Business Competitiveness Demonstration Program for the four designated industry groups.

Small Business Concern Representation for the Small Business Competitiveness Demonstration Program (Jan. 1989)

(a) *Definition.*

"Emerging small business", as used in this solicitation, means a small business concern whose size is no greater than 50 percent of the numerical size standard applicable to the standard industrial classification code assigned to a contracting opportunity.

(b) Complete only if the Offeror is a small business or an emerging small business, indicating its size range.

Offeror's number of employees for the past twelve months *or* Offeror's average annual gross revenue for the last three fiscal years. (Check one of the following.)

No. of employees	Average annual gross revenues
50 or fewer	$1 million or less.
51-100	$1,000,001-$2 million.
101-250	$2,000,001-$3.5 million.
251-500	$3,500,001-$5 million.
501-750	$5,000,001-$10 million.
751-1,000	$10,000,001-$17 million.
Over 1,000	Over $17 million.

(End of provision)

252.219-7013 Notice of Emerging Small Business Set-Aside.

As prescribed at 219.1071(b), insert the following provision in full text in all solicitations restricted to emerging small businesses pursuant to 219.1070-2.

Notice of Emerging Small Business Set-Aside (Jan. 1989)

Offers of quotations under this acquisition are solicited from emerging small business concerns only. Offers that are not from an emerging small business shall not be considered and shall be rejected.

(End of provision)

252.219-7014 Small business size representation for targeted industry categories under the Small Business Competitiveness Demonstration Program.

As prescribed at 219.1071(c), insert the following provision in full text in all solicitations issued in each of the ten targeted industry categories under the Small Business Competitiveness Demonstration Program that is expected to result in a contract award in excess of $25,000.

Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program (Jan. 1989)

Complete only if the Offeror has certified itself under the clause at FAR 52.219-1 to be a small business concern under the size standards of this solicitation.

Offeror represents and certifies as follows:

Offeror's number of employees for the past twelve months or Offeror's average annual gross revenue for the last three fiscal years. (Check one of the following.)

No. of employees	Average annual gross revenues
50 or fewer	$1 million or less.
51-100	$1,000,001-$2 million.
101-250	$2,000,001-$3.5 million.
251-500	$3,500,001-$5 million.
501-750	$5,000,001-$10 million.
751-1,000	$10,000,001-$17 million.
Over 1,000	Over $17 million.

(End of provision)

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