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Problems with Federal agency subscriptions	523–5240

For other telephone numbers, see the Reader Aids section at the end of this issue.

Contents

Federal Register
Vol. 54, No. 244
Thursday, December 21, 1989

Agency for International Development
NOTICES
Agency information collection activities under OMB review, 52469

Agricultural Stabilization and Conservation Service
NOTICES
Feed grain donations:
Cheyenne River Sioux Tribe, SD, 52432
Fort Berthold Indian Reservation, ND, 52432

Agriculture Department
See Agricultural Stabilization and Conservation Service; Forest Service; Rural Electrification Administration

Alcohol, Drug Abuse, and Mental Health Administration
NOTICES
Meetings; advisory committees:
January, 52459

Army Department
NOTICES
Memorandums of agreement:
Environmental Protection Agency; Clean Water Act; guidelines compliance, 52438

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Civil Rights Commission
NOTICES
Meetings; State advisory committees:
Iowa, 52435

Commerce Department
See also International Trade Administration; National Oceanic and Atmospheric Administration
NOTICES
Agency information collection activities under OMB review, 52435
(2 documents)

Committee for the Implementation of Textile Agreements
NOTICES
Cotton, wool, and man-made textiles:
Macau, 52437
Taiwan, 52437

Consumer Product Safety Commission
RULES
Hazardous substances:
Toys and other articles for children under 3 years; small parts presenting choking, aspiration, or ingestion hazards, 52343
PROPOSED RULES
Hazardous substances:
Toys, games, and other articles intended for use by children; test methods for simulating use and abuse, 52418

Customs Service
RULES
Financial and accounting procedures:
Statement processing and automated clearinghouse
Correction, 52506

Defense Department
See also Army Department
NOTICES
Meetings:
Electron Devices Advisory Group, 52438

Energy Department
See also Federal Energy Regulatory Commission
NOTICES
Privacy Act:
Systems of records; correction, 52439

Environmental Protection Agency
RULES
Toxic substances:
Polychlorinated biphenyls (PCBs)—
Disposal and storage of waste; notification requirements, 52716
NOTICES
Memorandums of agreement:
Army Department; Clean Water Act; guidelines compliance, 52438
Toxic and hazardous substances control:
Chemical testing—
Data receipt, 52449
Premanufacture notices receipts, 52449, 52456
(3 documents)

Executive Office of the President
See Management and Budget Office

Federal Aviation Administration
RULES
Terminal control areas, 52678

Federal Communications Commission
RULES
Radio stations; table of assignments:
Alabama, 52397
PROPOSED RULES
Radio stations; table of assignments:
Arkansas, 52421
California, 52422
Georgia, 52422
Louisiana, 52422
Tennessee, 52423
(2 documents)
Texas, 52424
(2 documents)
Vermont, 52424

Federal Deposit Insurance Corporation
PROPOSED RULES
Deposit insurance coverage, 52399

Federal Energy Regulatory Commission
RULES
Natural Gas Policy Act:
Pipelines; interstate transportation of gas for others; effects of partial wellhead decontrol, 52344
NOTICES
Environmental statements; availability, etc.:
Big Sand Wash Dam, UT, 52439
Lower Boulder Creek, UT, 52439
Swan Falls, ID, 52440
Natural gas companies:
Certificates of public convenience and necessity; applications, abandonment of service and petitions to amend, 52440, 52441 (2 documents)
Small producer certificates, applications, 52441
Applications, hearings, determinations, etc.:
Alabama-Tennessee Natural Gas Co., 52444
Algonquin Gas Transmission Co., 52442, 52444 (2 documents)
Boundary Gas, Inc., 52445
Carnegie Natural Gas Co., 52445
CNG Transmission Corp., 52445
Colorado Interstate Gas Co., 52442
Columbia Gas Transmission Corp., 52446
Granite State Gas Transmission Inc., 52446
Kentucky West Virginia Gas Co., 52446, 52447 (2 documents)
Midwestern Gas Transmission Co., 52442
Northern Border Pipeline Co., 52443
Northwest Pipeline Corp., 52447 (2 documents)
Ringwood Gathering Co., 52443
Seagull Interstate Corp., 52443
Stingray Pipeline Co., 52447
Tennessee Gas Pipeline Co., 52447
Transwestern Pipeline Co., 52443, 52444, 52448 (3 documents)
Williams Natural Gas Co., 52448 (2 documents)

Federal Maritime Commission
NOTICES
Agreements filed, etc., 52457
Complaints filed:
Sea-Land Services, Inc., et al., 52458

Federal Reserve System
NOTICES
Agency information collection activities under OMB review, 52458

Financial Management Service
See Fiscal Service

Fiscal Service
NOTICES
Organization, functions, and authority delegations:
Public Debt Accounting Office, 52502
Surety companies acceptable on Federal bonds:
First California Property & Casualty Insurance Co., 52502

Fish and Wildlife Service
PROPOSED RULES
Endangered and threatened species:
Southern pine, undescribed, 52430

Food and Drug Administration
RULES
Medical devices:
Hearing aid devices—
Professional and patient labeling; technical data amendments, 52395
PROPOSED RULES
Animal drugs, feeds, and related products:
Type A medicated articles; current good manufacturing practice; laboratory controls, 52421

Forest Service
NOTICES
Environmental statements; availability, etc.:
Siskiyou National Forest, OR, 52432
Tongass National Forest, AK, 52434

Health and Human Services Department
See Alcohol, Drug Abuse, and Mental Health Administration; Food and Drug Administration; Health Resources and Services Administration

Health Resources and Services Administration
NOTICES
Meetings; advisory committees:
January, 52460

Housing and Urban Development Department
RULES
Community development block grants:
Emergency shelter program—
Reporting and recordkeeping requirements, 52396
Comprehensive homeless assistance plan:
Reporting and recordkeeping requirements, 52396
Facilities to assist homeless; supplemental assistance; guidelines:
Reporting and recordkeeping requirements, 52397
Public and Indian housing:
Public housing comprehensive improvement assistance program, 52686

Indian Affairs Bureau
NOTICES
Grants and cooperative agreements; availability, etc.:
Tribal self-governance demonstration project, 52461

Interior Department
See also Fish and Wildlife Service; Indian Affairs Bureau; Land Management Bureau; Surface Mining Reclamation and Enforcement Office
NOTICES
Senior Executive Service:
Performance Review Board; membership, 52461

International Development Cooperation Agency
See Agency for International Development; Overseas Private Investment Corporation

International Trade Administration
NOTICES
Antidumping and countervailing duties:
Administrative review requests, 52436

Interstate Commerce Commission
NOTICES
Motor and water carriers:
Finance applications, 52470
Rail carriers:
Cost ratio for recyclables; determination, etc., 52470

Railroad operation, acquisition, construction, etc.:
Tongue River Railroad Co., 52470

Justice Department
NOTICES
Pollution control; consent judgments:
Roberson Enterprises, Inc., et al., 52471
Shell Oil Co., 52471

Labor Department
See Mine Safety and Health Administration

Land Management Bureau
NOTICES
Closure of public lands:
California, 52463
Land use plans:
Idaho, 52463
Realty actions; sales, leases, etc.:
Arizona, 52463
Withdrawal and reservation of lands:
Nevada, 52464

Management and Budget Office
NOTICES
Prompt payment (Circular A-125), 52700

Mine Safety and Health Administration
NOTICES
Safety standard petitions:
Arch of Kentucky, Inc., 52472
Hansford Smokeless Collieries, Inc., 52472

National Aeronautics and Space Administration
NOTICES
Meetings:
Aeronautics Advisory Committee, 52472

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Media Arts Advisory Panel, 52473, 52474
(3 documents)
Music Advisory Panel, 52473
Visual Arts Advisory Panel, 52474

National Highway Traffic Safety Administration
PROPOSED RULES
Anthropomorphic test dummies:
Nine-month-old child; design and performance specifications, 52425

National Labor Relations Board
RULES
Unfair labor practice hearing rescheduling; procedure modification
Correction, 52506

National Mediation Board
NOTICES
Meetings; Sunshine Act, 52505

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
Northern anchovy, 52398
Marine sanctuaries:
Cordell Bank National Marine Sanctuary, CA, 52342
PROPOSED RULES
Marine sanctuaries:
Cordell Bank National Marine Sanctuary, CA
Withdrawn, 52418

National Science Foundation
NOTICES
Grants and cooperative agreements; availability, etc.:
Academic research facilities modernization program; draft guidelines, 52758

Nuclear Regulatory Commission
RULES
Nuclear power reactors, standard design certifications, and combined licenses, early site permits; and Region III office commercial telephone number change; correction, 52342
NOTICES
Environmental statements; availability, etc.:
Illinois Power Co. et al., 52474
Meetings:
Reactor Safeguards Advisory Committee, 52475

Office of Management and Budget
See Management and Budget Office

Overseas Private Investment Corporation
NOTICES
Agency information collection activities under OMB review, 52469

Personnel Management Office
RULES
Health benefits, Federal employees:
Temporary continuation of coverage, 52333

Public Health Service
See Alcohol, Drug Abuse, and Mental Health Administration; Food and Drug Administration; Health Resources and Services Administration

Rural Electrification Administration
NOTICES
Environmental statements; availability, etc.:
Jackson Electric Membership Corp., 52434

Securities and Exchange Commission
NOTICES
Self-regulatory organizations; proposed rule changes:
Options Clearing Corp., 52476
Applications, hearings, determinations, etc.:
Jacobs Engineering Group, Inc., 52476

Small Business Administration
RULES
Small business size standards:
Procedural rules; revision, 52634

State Department
NOTICES
International conferences:
Private sector representatives on U.S. delegations, 52476

Surface Mining Reclamation and Enforcement Office
NOTICES
Agency information collection activities under OMB review, 52464, 52465
(2 documents)

Valid existing rights determinations:
Belville Mining Co.; Wayne National Forest, OH, 52465

Textile Agreements Implementation Committee
See Committee for the Implementation of Textile Agreements

Thrift Supervision Office
NOTICES
Agency information collection activities under OMB review, 52503, 52504
(4 documents)

Transportation Department
See Federal Aviation Administration; National Highway Traffic Safety Administration

Treasury Department
See also Customs Service; Fiscal Service; Thrift Supervision Office
NOTICES
Meetings:
Cars and light trucks and crop-bearing vines, etc., 52502

Separate Parts In This Issue

Part II
Small Business Administration, 52634

Part III
Department of Transportation, Federal Aviation Administration, 52678

Part IV
Department of Housing and Urban Development, 52686

Part V
Office of Management and Budget, 52700

Part VI
Environmental Protection Agency, 52716

Part VII
National Science Foundation, 52758

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

5 CFR
890 52333

10 CFR
2 52342
21 52342

12 CFR
Proposed Rules:
330 52399
331 52399

13 CFR
121 52634

14 CFR
71 52678

15 CFR
942 52342
Proposed Rules:
942 52418

16 CFR
1501 52343
Proposed Rules:
1500 52418

18 CFR
2 52344
284 52506

19 CFR
24 52506
132 52506
141 52506
142 52506
143 52506

21 CFR
801 52395
Proposed Rules:
226 52421

24 CFR
90 52396
576 52396
579 52397
968 52686

29 CFR
102 52506

40 CFR
761 52716

47 CFR
73 52397
Proposed Rules:
73 (9 documents) 52421–52424

49 CFR
Proposed Rules:
572 52425

50 CFR
662 52398
Proposed Rules:
17 52430

Rules and Regulations

Federal Register
Vol. 54, No. 244
Thursday, December 21, 1989

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206-AD66

Federal Employees Health Benefits Program—Temporary Continuation of Coverage

AGENCY: Office of Personnel Management.

ACTION: Interim regulations with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to implement title II of Public Law 100–654, the "Federal Employees Health Benefits Amendments Act of 1988." Title II of Public Law 100–654 adds section 8905a to title 5, U.S. Code, which provides for the temporary continuation of coverage under the Federal Employees Health Benefits (FEHB) Program for (1) certain employees who separate from Federal service, (2) children of Federal employees and annuitants who lose their status as family members, and (3) certain former spouses of employees and annuitants who would not otherwise be eligible for continued FEHB coverage.

DATES: Interim regulations are effective January 1, 1990. Comments must be received on or before January 22, 1990.

ADDRESS: Written comments may be sent to Reginald M. Jones, Jr., Assistant Director, Office of Retirement and Insurance Policy, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 57, Washington, DC 20044, or delivered to OPM, room 4351, 1900 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Margaret Sears, (202) 632–4634.

SUPPLEMENTARY INFORMATION: The interim regulations identify the individuals who are eligible to temporarily continue their FEHB coverage and explain the circumstances of the temporary continuation. The interim regulations also revise the current regulations to include this new type of coverage and new type of enrollee in all the appropriate existing provisions.

Individuals Who May Temporarily Continue Coverage

Under the interim regulations, the following individuals can temporarily continue their health benefits coverage:

1. Employees who (1) are separated from service, voluntarily or involuntarily, unless the separation is for "gross misconduct"; and (2) would not otherwise be eligible for continued coverage (not counting the 31-day extension of coverage or conversion right).

2. Children who (1) have been covered under an employee's or annuitant's enrollment because they meet the requirements for unmarried dependent children of the employee or annuitant; (2) stop meeting the requirements for unmarried dependent children of the employee or annuitant; and (3) would not otherwise be eligible for coverage or conversion right.

This group includes children who marry before reaching age 22, children who lose coverage because they reach age 22, children who lose their status as stepchildren or foster children, children who no longer meet coverage requirements as recognized natural children, and disabled children age 22 or older who marry, recover from their disability, or become able to support themselves. Also included are children who receive survivor annuities and whose regular coverage had continued after the death of the employee or annuitant because they had been covered family members of the deceased employee or annuitant.

3. Former spouses who meet the requirement in 5 U.S.C. 8901(10) of having been enrolled in an FEHB plan as a covered family member at some time during the 18 months before the marriage ended, but do not meet one or both of the other two requirements of 5 U.S.C. 8901(10) because they have either remarried before reaching age 55 or are not entitled to a portion of the employee or annuitant's annuity benefit or a survivor benefit based on the employee or annuitant's service.

Note: Public Law 100–654 also provides for temporary continuation of coverage for spouses whose coverage as a family member ends because of a legal separation. Under FEHB, legal separation does not end the coverage of a spouse; therefore, this provision of law has no practical effect.

Determining Gross Misconduct

Under Public Law 100–654, temporary continuation of health benefits coverage is not available to an employee who is involuntarily separated due to "gross misconduct." The law requires OPM to define "gross misconduct" through regulation.

The term "gross misconduct" does not have a specific definition in law; therefore, we are providing a definition that conforms closely with the meaning the term is generally understood to have in the legal community. OPM will provide guidance on how to apply the definition through the Federal Personnel Manual (FPM) issuance system. Generally, an offense punishable as a felony is considered gross misconduct, but lesser offenses may also be gross misconduct depending on the circumstances. There are also elements in the determination of gross misconduct that go beyond the seriousness of the offense itself. For example:

- There must be a nexus between the offense and the employee's job. Also, some individuals, such as judges, are held to a higher standard of conduct than others.
- The employee must have the ability to understand the gravity of his or her conduct.
- The offense must be affirmative and willful, not simply negligent.

The interim regulations also provide administrative procedures similar to those used for adverse actions under chapter 75 of title 5, U.S.C.—written notice of the reason(s) for the denial of the benefit, the right of the employee to reply orally or in writing, and the right of representation. In most cases, these administrative requirements could be merged with the adverse action proceedings that triggered the need for the gross misconduct determination. Under these regulations, the agency is responsible for issuing any final decision, which is not subject to review by OPM. The former employee may file

suit in a district court if he or she wants to challenge the agency directly.

Although these determinations are similar to determinations to remove an employee under adverse action procedures, the gross misconduct standard is more serious than the minimum standards for removal. Some removals under adverse action procedures are not even disciplinary in nature; for example, refusal to transfer with one's function. Therefore, determinations for removal are not synonymous with gross misconduct.

If the Merit Systems Protection Board, an arbitrator, or another third party were to reverse a removal, any determination the agency might have made concerning whether an offense constituted gross misconduct would become void because there would be no involuntary separation causing a loss of health benefits coverage.

Election of Temporary Continuation of Coverage

The interim regulations require employing offices to notify separating employees of their opportunity to elect temporary continuation of coverage within 30 days after their coverage would otherwise end, including the 31-day extension of coverage for conversion. (Regular health benefits coverage ends on the last day of the pay period in which the employee separated. The 31-day extension begins on the next day.) The employee has 60 days after receiving the notice (or after separation, if later) to elect continued coverage.

In the case of children who are eligible to continue coverage under this provision, the employee or annuitant enrollee has the responsibility of notifying the employing office of the change in the child's status within 60 days after the change. The employing office then has 14 days to notify the child of his or her rights. Under the law, if the enrollee does not notify the agency within the time limit, the child's opportunity to elect temporary continuation of coverage ends 60 days after the change in status. The regulations also allow the employing office to notify the child of his or her rights after having learned of the child's change in status by some means other than written notice from the enrollee; however, in this case, the child's opportunity to make the election does not extend beyond 60 days after the change in status.

In the case of former spouses who are eligible to continue coverage under this provision, either the employee or the former spouse may notify the employing office within 60 days after the termination of the marriage. The employing office then has 14 days to notify the former spouse of his or her rights. If neither the employee nor the former spouse notified the employing agency within the 60-day period, the opportunity to elect temporary continuation of coverage ends 60 days after the marriage ended.

Special Eligibility Provision for Former Spouses

These regulations clarify that a former spouse who did not meet the requirement for continuation of health benefits coverage under the spouse equity provisions (5 CFR part 890, subpart H), including the requirement to provide acceptable documentation of a qualifying court order, may continue coverage under the temporary continuation provisions. In this way, the former spouse's continued coverage can begin with no break in coverage as a former spouse under temporary coverage provisions. If he or she later supplies the required documentation, the enrollment can be changed to an enrollment under spouse equity provisions. The spouse equity provisions allow coverage to continue for so long as the former spouse does not marry before reaching age 55. Also, the 2 percent administrative charge does not apply to spouse equity enrollments.

Paying the Premiums

The interim regulations provide that the former employee, child, or former spouse who elects temporary continuation of coverage must pay, on a current basis, both the employee and agency contributions, plus a 2 percent charge for administrative expenses. These payments must be made to the employing office, unless the employing office chooses to use a centralized collection service sponsored by OPM, if available, to collect the payments and provide some of the administrative services.

Coverage and premiums begin on the day after the 31-day extension of coverage ends. If the former employee, child, or former spouse submits the election after that date, coverage and premiums are retroactive.

Enrolling for Temporary Continuation of Coverage

Under the interim regulations, former employees, children, and former spouses who temporarily continue health coverage are not limited to the plan, option, or type of enrollment of the covering enrollment at the time of the qualifying event. They may enroll in any plan in which they are otherwise eligible to enroll. However, children and former spouses may enroll for continued coverage in the employee organization plan that was the covering enrollment at the time of the qualifying event without the requirement for paying membership dues.

Under Public Law 100–654, when a child enrolls for family coverage, covered family members are his or her spouse and children. However, under the interim regulations, covered family members of a former spouse who enrolls for family coverage are limited to those who are children of both the employee and the former spouse. This is consistent with existing regulations regarding family members of former spouses who continue health benefits coverage under the spouse equity provisions.

Length of Temporary Continuation of Coverage

Under the law, a former employee's temporary continuation of coverage ends no later than 18 months after the date of separation from service. The regulations clarify that the coverage can continue the full 18 months unless some other event, such as cancellation causes it to end earlier.

A child is eligible for temporary continuation of coverage for 36 months after the child's change in status if the change in status occurs while the parent is an employee or annuitant. If the child's change in status occurs while the child is covered as a family member during a period of temporary continuation of coverage following an employee's separation, the child's coverage can continue for 36 months after the date of the employee's separation.

A former spouse is eligible for temporary continuation of coverage for 36 months after the marriage ends if it ends while he or she is covered as a family member of an employee or annuitant. If the marriage ends while the former spouse is covered as a family member during a period of temporary continuation of coverage following an employee's separation, the former spouse's coverage can continue for 36 months after the employee's separation.

The temporary continuation of coverage ends earlier if the enrollee does not pay the premiums or cancels. It also ends earlier if the enrollee again acquires coverage under the regular FEHB provisions.

Under the interim regulations, if an enrollee's coverage ends before the period of temporary continuation expires, he or she generally is not allowed to reenroll. However, if temporary enrollment ends because the enrollee acquires other FEHB coverage

(for example, becomes covered as the spouse of an employee), and that coverage ends before the period of temporary continuation expires, the individual may reenroll within 31 days after the other FEHB coverage ends. The period of reenrollment cannot extend beyond the expiration date of the original 18- or 36-month period of temporary continuation of coverage.

Changes in Enrollment

Under Public Law 100–654, former employees, children, and former spouses with temporary continuation of coverage can change their enrollment during open season, within 60 days after a change in family status, or at other times as OPM regulates. The interim regulations provide opportunities for these individuals to change their enrollment, based on the same events as employees and annuitants, except for events that are inappropriate to a nonemployee.

Conversion to a Nongroup Contract

When the temporary continuation of coverage ends (except by cancellation of coverage or nonpayment of premiums) a former employee, child, former spouse, or family member is entitled to a temporary extension of coverage and an opportunity to convert to a nongroup contract just as are other FEHB enrollees.

Effect of Temporary Continuation of Coverage on Future Entitlement During Retirement

Under the FEHB Program, a retiring employee must have been covered under FEHB for the 5 years of Federal service immediately before retirement (or, if less than 5 years, for all periods of service during which he or she was eligible for coverage) in order to continue coverage after retirement. The interim regulations clarify that a former employee's enrollment or eligibility for enrollment under the temporary continuation of coverage provisions is not considered in determining whether the retiring employee meets these participation requirements. This is because the person is not a Federal employee at that time. However, an employee who is covered as a family member under the temporary continuation of coverage of another person is considered to be participating in the FEHB Program.

Notifying Current Employees about Temporary Continuation of Coverage

Public Law 100–654 requires OPM to ensure that all employees eligible to enroll in FEHB (including those not actually enrolled) be informed of the rights afforded under this law. Therefore, the regulations require employing offices to distribute informational material provided by OPM to employees before the regular Fall open season.

Workers' Compensation Cases

For most enrollees, the "employing office" that notifies individuals of their eligibility for temporary continuation of coverage, takes care of administrative matters for the enrollee (such as determining whether an enrollee is eligible to change plans due to an event other than open season), and arranges for collection of premiums is the office having the authority to approve payment of pay or annuity at the time the qualifying event occurs. However, in the case of employees who are receiving recurring benefits from the Office of Workers' Compensation Programs (OWCP) when the qualifying event occurs, the regulations provide that the "employing office" is the office actually employing the individual. Most employees who are receiving recurring benefits from OWCP do so on a temporary basis. When they recover, they return to work and health benefits withholding from pay resumes. On the other hand, most compensationers who have been separated from service are unlikely to return to Federal employment and will continue to receive compensation indefinitely. For these compensationers, the regulations provide that OWCP serves as the employing office for family members who become eligible for temporary continuation of coverage.

Miscellaneous

The interim regulations also revise § 890.301(k) to allow OPM to set a time for enrollees to change plans when a plan terminates at the end of a contract year, but the fact that the termination will occur is not known in time for employees to make changes during the open season.

The interim regulations revise § 890.401 to reflect a policy change published as interim regulations on April 28, 1986, at 51 FR 15744. These interim regulations specify that a change to self only does not act as cancellation for covered family members. This allows the spouse and children of an employee or annuitant who changes to self only coverage to convert to a nongroup contract.

These regulations also clarify that nonpayment of premiums is considered a voluntary cancellation of continued coverage under the spouse equity provisions (5 CFR, subpart H). Therefore, if coverage ends because of nonpayment, there is no premium-free 31-day temporary extension of coverage for conversion and no right to convert because the law excludes those who voluntarily cancel from this provision. Often, people who no longer need FEHB coverage find it easier to simply stop making payments than to write a letter or complete a form to cancel the coverage. This clarification places those whose coverage terminates by inaction to pay premiums on the same footing as those who file a request to cancel.

Waiver of Notice of Proposed Rulemaking

Pursuant to section 553(b)(3)(B) of title 5 of the U.S. Code, I find that good cause exists for waiving the general notice of proposed rulemaking. OPM must issue regulations to implement title II of Public Law 100–654, which is effective on January 1, 1990. In addition, employing offices need a certain amount of lead time in order to implement the regulations by the effective date. These concerns make it impractical to publish proposed regulations.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they primarily affect, for a limited period of time, former Federal employees and former dependents of Federal employees and annuitants.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health insurance, Retirement.

Constance B. Newman,

Director, U.S. Office of Personnel Management.

Accordingly, OPM is amending 5 CFR part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

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

Authority: 5 U.S.C. 8913; § 890.102 also issued under 5 U.S.C. 1104 and Pub.L. 100–654; § 890.803 also issued under sec. 303 of Pub. L. 99–569, 100 Stat. 3190, sec. 188 of Pub. L. 100–204, 101 Stat. 1331, and sec. 204 of Pub. L. 100–238, 101 Stat. 1744; Subpart K also issued under title II of Pub. L. 100–654.

2. Section 890.101(a) is amended as follows:

a. By revising the definitions of "cancellation," "change of enrollment," the introductory text and paragraph (7)

of "employing office," "foster child," and "pay period" as set forth below.

b. By adding alphabetically the definitions of "collection service," "covered family member," and "enrollee" as set forth below.

§ 890.101 Definitions; time computations.

(a) * * *

"Cancellation" means the act of filing a health benefits registration form terminating enrollment in a health benefits plan and electing not to be enrolled for the future by an enrollee who is eligible to continue enrollment.

"Change of enrollment" means the registration of an enrollee to be enrolled for a different plan or option, or for a different type of coverage (self alone or self and family), from that for which then enrolled.

* * * * *

"Collection service" means a service sponsored by OPM for collecting direct health benefits payments from enrollees who are not also employees and for providing limited administrative services.

* * * * *

"Covered family member" means a member of the family of an enrollee with a self and family enrollment who meets the requirements of §§ 890.302, 890.804, or 890.1106(a), as appropriate to the type of enrollee.

* * * * *

"Employing office" means the office of an agency to which jurisdiction and responsibility for health benefits actions for an employee, an annuitant, a former spouse eligible for continued coverage under subpart H of this part, or an individual eligible for temporary continuation of coverage under subpart K of this part, have been delegated. The term "employing office" includes a collection service with regard to those functions that it is performing for an employing office.

* * * * *

(7) For a former employee, child, or former spouse entitled to continued coverage under subpart K of this part, the "employing office" is the agency that employs the employee at the time the qualifying event occurs or the office having the authority to approve payment of the annuity or basic death benefit at the time the qualifying event occurs. In the case of the family members of a compensationer who is not a current employee at the time the qualifying event occurs, the "employing office" is the Office of Workers' Compensation Programs.

"Enrollee" means the individual in whose name the enrollment is carried. The term includes employees, annuitants, former employees, former spouses, or children who are enrolled after completing a valid registration form under the provisions of §§ 890.301, 890.601(c), 890.803, or 890.1103 or have continued an enrollment as an annuitant or survivor annuitant under 5 U.S.C. 8905(b) or § 890.303(c).

"Foster child" means a child who:

(1) Lives with an employee, former employee, or annuitant or with a child enrolled under § 890.1103(a)(2) in a regular parent-child relationship and

(2) Is expected to be raised to adulthood by the enrollee.

* * * * *

"Pay period" means the biweekly pay period established pursuant to section 5504 of title 5, United States Code, for the employees to whom that section applies and the regular pay period for employees not covered by that section. "Pay period," as it relates to a former spouse or annuitant who is not actively receiving an annuity, including surviving spouses receiving a basic employee death benefit, and enrollees temporarily continuing coverage under subpart K of this part, means any regular pay period for employees of the agency to which jurisdiction and responsibility for health benefits actions for the enrollee have been delegated as provided under the definition of "employing office" in this section. "Pay period" for annuitants in active receipt of annuity means the period for which a single installment of annuity is customarily paid. For enrollees who are paying directly to a collection service, the "pay period" is the period specified by the collection service.

* * * * *

3. In § 890.103, paragraph (c) is revised to read as follows:

§ 890.103 Correction of errors.

* * * * *

(c) OPM may order the termination of an enrollment in any comprehensive medical plan described in section 8903(4) of title 5, United States Code, and permit the individual to enroll in another health benefits plan for purposes of this part, upon a showing satisfactory to OPM that the furnishing of adequate medical care is jeopardized by a seriously impaired relationship between a patient and the comprehensive medical plan's affiliated health care providers.

4. In § 890.104, paragraphs (a) and (c) are revised to read as follows:

§ 890.104 Initial decisions and reconsideration.

(a) *Who may file.* Except as provided under § 890.1112, an employee, former employee, annuitant, former spouse, or child may request OPM to reconsider a decision of an employing office that denies coverage or change of enrollment.

* * * * *

(c) *Initial decision.* An OPM decision for an annuitant, former spouse, or child is considered an initial decision when rendered by OPM in writing and stating the right to reconsideration. However, an initial decision rendered at the highest level of review available within OPM is not subject to reconsideration.

* * * * *

5. In § 890.201, paragraphs (a) (2) through (5), paragraph (a)(9) and paragraph (b)(4) are revised to read as follows:

§ 890.201 Minimum standards for health benefits plans.

(a) * * *

(2) Accept the enrollment, in accordance with this part, and without regard to age, race, sex, health status, or hazardous nature of employment, of each eligible employee, annuitant, former spouse, former employee, or child, except that a plan that is sponsored or underwritten by an employee organization may not accept the enrollment of a person who is not a member of the organization, but it may not limit membership in the organization on account of the prohibited factors (age, race, sex, health status, or hazardous nature of employment). The carrier may terminate the enrollment of an enrollee other than a survivor annuitant, a former spouse continuing coverage under § 890.803, or person continuing coverage under § 890.1103(a)(2) or (3), in a health benefits plan sponsored or underwritten by an employee organization on account of termination of membership in the organization. A carrier that wants to terminate the enrollment of an enrollee under this paragraph may do so by notifying the employing office in writing, with a copy of the notice to the enrollee. The termination is effective at the end of the pay period in which the employing office receives the notice. A comprehensive medical plan need not enroll an employee, annuitant, former employee, former spouse, or child residing outside the geographic areas specified by the plan.

(3) Provide health benefits for each enrollee and covered family member wherever they may be.

(4) Provide for conversion to a contract for health benefits regularly offered by the carrier, or an appropriate affiliate, for group conversion purposes, which must be guaranteed renewable, subject to such amendments as apply to

all contracts of this class, except that it may be canceled for fraud, overinsurance, or nonpayment of periodic charges. A carrier must permit conversion within the time allowed by the temporary extension of coverage provided under § 890.401 for each enrollee and covered family member entitled to convert. When an employing office gives an enrollee written notice of his or her privilege of conversion, the carrier must permit conversion at any time before 31 days after the date of notice or 91 days after the enrollment is terminated, whichever is earlier. Belated conversion opportunities as provided in § 890.401(c) must also be permitted by the carrier. When OPM requests an extension of time for conversion because of delayed determination of ineligibility for immediate annuity, the carrier must permit conversion until the date specified by OPM in its request for extension. On conversion, the contract becomes effective as of the day following the last day of the temporary extension, and the enrollee or covered family member, as the case may be, must pay the entire cost thereof directly to the carrier. The nongroup contract may not deny or delay any benefit covered by the contract for a person converting from a plan approved under this part except to the extent that benefits are continued under the health benefits plan from which he or she converts.

(5) Provide that each enrollee receive an identification card or cards or other evidence of enrollment.

* * * * *

(9) Provide for continued enrollment to the end of the current pay period, or termination date, if earlier, of each enrollee enrolled at the effective date of termination of a contract. The carrier is entitled to subscription charges for this continued enrollment.

* * * * *

(b) * * *

(4) Have an initiation, service, enrollment, or other fee or charge in addition to the rate charged for the plan, except that a comprehensive medical plan may impose an additional charge to be paid directly by the enrollee for certain medical supplies and services, if the supplies and services on which additional charges are imposed are clearly set forth in advance and are applicable to all enrollees. This subparagraph does not apply to charges for membership in employee organizations sponsoring or underwriting plans.

* * * * *

6. In § 890.202, paragraphs (e) and (f) are revised to read as follows:

§ 890.202 Minimum standards for health benefits carriers.

* * * * *

(e) It must accept, subject to adjustment for error or fraud, in payment of its charges for health benefits for all enrollees in its plan, the enrollment charges received by the Employees Health Benefits (EHB) Fund less amounts set aside for the administrative and contingency reserves prescribed in § 890.503. OPM makes available or pays the amounts within 30 days of receipt by the EHB Fund.

(f) A carrier that is an employee organization must continue coverage, without requirement of membership, of any eligible survivor annuitants, former spouses continuing coverage with the carrier under § 890.803, children temporarily continuing coverage with the carrier under § 890.1103(a)(2), or former spouses temporarily continuing coverage with the carrier under § 890.1103(a)(3).

7. In § 890.203, the first sentence of paragraph (a)(2) is revised to read as follows:

§ 890.203 Application for approval of, and proposal of amendments to, health benefit plans.

(a) * * *

(2) OPM may approve such comprehensive medical plans as, in the judgment of OPM, may be in the best interest of enrollees in the Program. * * *

* * * * *

8. Section 890.301 is amended as follows:

a. By revising paragraphs (d)(3)(ii), (e), (f)(1), (h), (i), (k), (n), (r), and (u) to read as set forth below.

b. By adding paragraph (g)(5) as set forth below.

§ 890.301 Opportunities to register to enroll and change enrollment.

* * * * *

(d) * * *

(3) * * *

(ii) An enrollee may change to another plan, another option, or from self alone to self and family, or may make any combination of these changes.

(e) *Change in family status.* (1) Other than a former spouse who is continuing coverage under subpart H or subpart K of this part or a remarried survivor annuitant, an enrollee may register to change enrollment from self alone to self and family, or from one plan or option to another, or both; and an employee, if not registered to be enrolled, may register to be enrolled at any time during the period beginning 31 days before a change in marital status and ending 60 days after the change in marital status. Other than a former spouse who is continuing coverage under subpart H or subpart K of this part or a remarried survivor annuitant, an enrollee may change enrollment from self alone to self and family within 60 days after any other change in family status.

(2) A former spouse who is continuing coverage under subpart H or subpart K of this part may register to change enrollment from self alone to self and family, or from one plan or option to another, or both, within 60 days after the birth or acquisition of a child who meets the requirements to be a covered family member under § 890.804(a) or § 890.1106(a)(2) of this part.

(f) *Change to self alone.* (1) An enrollee may register at any time to change enrollment from self and family to self alone.

* * * * *

(g) * * *

(5) A former employee, former spouse, or a child whose continued coverage under subpart K of this part terminates because of the provisions of § 890.1110(a)(3) of this part (termination due to other coverage under this part) may reenroll in the same plan and option within 31 days after the other coverage under this part ends, but not later than the expiration of the period described in § 890.1107. If the individual is not eligible to enroll in the plan from which coverage was lost under § 890.1110(a)(3), he or she may enroll in the same option of any available plan. Coverage does not extend beyond the expiration of the period described in § 890.1107 of this part.

(h) *Move from area served by comprehensive medical plan.* If a comprehensive medical plan limits full service to a geographic area, an enrollee in that plan who moves outside the full service area or, if already living outside the full service area, moves further from the full service area, may register at any time after the move to enroll in another health benefits plan.

(i) *Termination by employee organization plan.* An enrollee in a health benefits plan sponsored or underwritten by an employee organization whose membership in the employee organization is terminated may register to enroll in another plan under the following conditions:

(1) Health benefits enrollment is terminated by the plan; and,

(2) Registration to enroll in another plan is submitted within 31 days after termination of enrollment in the employee organization plan. The enrollee may not change enrollment

from self alone to self and family under this paragraph.

* * * * *

(k) *Termination of plan in which enrolled.* If a plan is discontinued in whole or in part, each enrollee whose enrollment is thereby terminated may enroll in another plan. If the discontinuance is at the end of a contract period that is immediately preceded by an open season, the time for enrollment is the open season, unless OPM establishes a different time for enrollment. If the discontinuance is at a time other than the end of the contract year, OPM must establish a time and effective date for enrollment. Enrollees who fail to change enrollment within the time set are considered to have canceled the plan in which enrolled, except that if one option of a plan is discontinued, enrollees who do not change plans are considered to be enrolled in the remaining option of the plan.

* * * * *

(n) *On becoming eligible for coverage under title XVIII of the Social Security Act.* An enrollee may register, at any time beginning on the 30th day before he or she is eligible for coverage under title XVIII of the Social Security Act (Medicare), to change enrollment to any option of any available plan under this part. A change of enrollment under this paragraph may be made only once.

* * * * *

(r) *Registration by proxy.* In the discretion of the employing office, a representative of an enrollee or individual eligible to enroll under this part, having written authorization to do so, may register for the individual.

* * * * *

(u) *Child's coverage ends.* An enrollee may register to change enrollment from self alone to self and family within 31 days after an eligible child loses coverage under another enrollment under this part.

* * * * *

9. In § 890.302, paragraph (a)(1), the introductory text to (b)(1), paragraphs (b)(1)(iii), (b)(1)(v), (b)(2) introductory text, (b)(2) (ii) and (iii), (c), (d) introductory text, (d)(3), and (e) are revised to read as follows:

§ 890.302 Coverage of family members.

(a)(1) An enrollment for self and family includes all family members who are eligible to be covered by the enrollment. Except as provided in paragraphs (a) (2), (3), and (4) of this section, no employee, former employee, annuitant, child, or former spouse may enroll or be covered as a family member if he or she is covered under another person's self and family enrollment in the FEHB Program.

* * * * *

(b) *Proof of dependency.* (1) A child is considered to be dependent on an enrolled employee or annuitant or a former employee or child enrolled under § 890.1103 of this part if he or she is:

* * * * *

(iii) A stepchild, foster child, or recognized natural child who lives with the enrollee in a regular parent-child relationship.

* * * * *

(v) A recognized natural child to whose support the enrollee makes regular and substantial contributions.

(2) The following are examples of proof of regular and substantial support. More than one of the following proofs may be required to show support of a recognized natural child who does not live with the enrollee in a regular parent-child relationship and for whom a judicial determination of support has not been obtained.

* * * * *

(ii) Proof of inclusion of the child as a dependent on the enrollee's income tax returns;

(iii) Canceled checks, money orders, or receipts for periodic payments from the enrollee for or on behalf of the child.

* * * * *

(c) *Exceptions.* Coverage as a family member may be denied:

(1) If evidence shows that the enrollee did not recognize the child as his or her own, despite a willingness to support the child, or

(2) If evidence calls the child's paternity or maternity into doubt, despite the enrollee's recognition and support of the child.

(d) *Child incapable of self-support.* When an individual enrolls for a family that includes a child who has become 22 years of age and is incapable of self-support, the employing office must require such enrollee to submit a physician's certificate verifying the child's disability. The certificate must—

* * * * *

(3) Be signed by the physician and show the physician's office address. The employing office must require the enrollee to submit the certificate on or before the date the child becomes 22 years of age. However, the employing office may accept otherwise satisfactory evidence of incapacity that is not timely filed.

(e) *Renewal of certificates of incapacity.* The employing office must require an enrollee who has submitted a certificate of incapacity to renew that certificate on the expiration of the minimum period of disability certified.

* * * * *

10. Section 890.303 is revised by adding new paragraphs (a)(4) and (h) to read as follows:

§ 890.303 Continuation of enrollment.

(a) * * *

(4) Enrollment or eligibility for enrollment under subparts H or K of this part of an individual who is not an employee eligible for coverage under other provisions of this part is not considered in determining whether a retiring employee has met the participation requirements of § 8905(b) of title 5, U.S. Code. Coverage under subparts H or K of this part of an individual who is an employee eligible for coverage under other provisions of this part may be considered in determining whether a retiring employee has met the participation requirements.

* * * * *

(h) *Temporary continuation of coverage.* Certain former employees who lose coverage because of a separation from Federal service, certain children who lose coverage because they cease to meet the requirements for coverage as children, and certain former spouses who lose coverage because their marriage to the enrollee ends and who are not eligible for coverage under subpart H of this part may elect temporary continuation of coverage under the provisions of subpart K of this part.

11. Section 890.304 is amended as follows:

a. By revising paragraphs (c) and (d) to read as set forth below.

b. By adding paragraph (e) as set forth below.

§ 890.304 Termination of enrollment.

* * * * *

(c) *Coverage of family members.* The coverage of a family member of an enrollee terminates, subject to the temporary extension of coverage for conversion, at midnight of the earlier of the following dates:

(1) The day on which he or she ceases to be a family member;

(2) The day the enrollee ceases to be enrolled, unless the family member is entitled, as a survivor annuitant, to continued enrollment, or is entitled to continued coverage under the enrollment of another.

(d) *Cancellation.* Except as provided in § 890.807(d) of this part, an enrollee may register to cancel his or her enrollment at any time by filing with the employing office a properly completed health benefits registration form. The

cancellation becomes effective on the last day of the pay period in which the health benefits registration form canceling the enrollment is received by the employing office, except that the cancellation of an enrollee having a monthly or 4-weekly pay period becomes effective at the end of the pay period in which the health benefits registration form is received if the form is received not less than 15 days before the end of the pay period. The enrollee and covered family members are not entitled to the temporary extension of coverage for conversion or to convert to an individual contract for health benefits.

(e) *Temporary continuation of coverage.* Employees and family members are entitled to temporary continuation of coverage only as provided under subpart K of this part.

12. In § 890.401, paragraphs (a) and (c)(1) are revised to read as follows:

§ 890.401 Temporary extension of coverage and conversion.

(a) *Thirty-one day extension and conversion.* (1) An enrollee whose enrollment is terminated other than by cancellation of the enrollment or discontinuance of the plan, in whole or part, and a covered family member whose coverage is terminated other than by cancellation of the enrollment or discontinuance of the plan, in whole or in part, is entitled to a 31-day extension of coverage for self alone or self and family, as the case may be, without contributions by the enrollee or the Government, during which period he or she is entitled to exercise the right of conversion provided for by this part. The 31-day extension of coverage and the right of conversion for any person ends on the effective date of a new enrollment under this part covering the person.

(2) Termination of an enrollment under this subpart for failure to pay premiums is considered a cancellation of the enrollment for the purposes of this section.

* * * * *

(c)(1) The employing agency must notify the enrollee of the termination of the enrollment and of the right to convert to an individual policy within 60 days after the date the enrollment terminates.

* * * * *

13. In § 890.503, paragraph (a) is revised to read as follows:

§ 890.503 Reserves.

(a) The enrollment charge consists of the rate approved by OPM for payment to the plan for each enrollee, plus 4 percent, of which one part is for an administrative reserve and 3 parts are for a contingency reserve for the plan.

* * * * *

14. Section 890.504 is revised to read as follows:

§ 890.504 Disposition of contingency reserves upon reorganization or merger of plans.

Upon reorganization or merger of a plan, OPM must credit to the surviving plan the reserves of the reorganized or merged plan. If more than one plan survives, the reserves must be divided among the surviving plans in proportion to the number of enrollees continuing to subscribe to the surviving plans.

15. In part 890, a new subpart K is added to read as follows:

Subpart K—Temporary Continuation of Coverage

Sec.

890.1101 Purpose.
890.1102 Definitions.
890.1103 Eligibility.
890.1104 Notification by agency.
890.1105 Elections.
890.1106 Coverage.
890.1107 Length of temporary continuation of coverage.
890.1108 Effective date of coverage.
890.1109 Premium payments.
890.1110 Termination of enrollment or coverage.
890.1111 Employing office responsibilities.
890.1112 Denial of continuation of coverage due to involuntary separation for gross misconduct.
890.1113 The administrative charge.

Subpart K—Temporary Continuation of Coverage

§ 890.1101 Purpose.

This subpart identifies the individuals who may temporarily continue coverage after the coverage would otherwise terminate under this part and sets forth the circumstances of their enrollment.

§ 890.1102 Definitions.

In this subpart—

"Gross misconduct" means a flagrant and extreme transgression of law or established rule of action for which an employee is separated and concerning which a judicial or administrative finding of gross misconduct has been made.

"Qualifying event" means any of the following events that qualify an individual for temporary continuation of coverage under subpart K of this part:

(1) A separation from Government service.

(2) A divorce or annulment.

(3) A change in circumstances that causes an individual to become ineligible to be considered an unmarried dependent child under this part.

§ 890.1103 Eligibility.

(a) Except as provided by paragraph (b) of this section, individuals described by this section are eligible to elect temporary continuation of coverage under this subpart. Eligible individuals are as follows:

(1) Former employees whose coverage ends because of a separation from Federal service under any circumstances except an involuntary separation for gross misconduct.

(2) Individuals whose coverage as children under the family enrollment of an employee, former employee, or annuitant ends because they cease meeting the requirements for being considered unmarried dependent children. For the purpose of this section, children who are enrolled under this part as survivors of deceased employees or annuitants are considered to be children under a family enrollment of an employee or annuitant at the time of the qualifying event.

(3) Former spouses of employees, of former employees having continued family coverage under this subpart, or of annuitants, if the former spouse would be eligible for continued coverage under subpart H of this part except for failure to meet the requirement of § 890.803(a)(1) or (3) of this part or the documentation requirements of § 890.806(a) of this part, including former spouses who lose eligibility under subpart H within 36 months after termination of the marriage because they ceased meeting the requirement of § 890.803(a)(1) or (3) of this part.

(b) An individual who is otherwise eligible for benefits under this part (excluding the temporary extension of coverage and conversion privilege set forth in subpart D of this part) is not entitled to continued coverage under this subpart.

§ 890.1104 Notification by agency.

(a) In the case of a former employee who is eligible to elect temporary continuation of coverage under § 890.1103(a)(1), the employing office must notify the former employee concerning his or her rights under this subpart no later than 30 days after the end of the temporary extension of coverage provided under § 890.401.

(b)(1) In the case of a child who is eligible to elect temporary continuation of coverage under § 890.1103(a)(2), the enrollee may, within 60 days after the qualifying event, provide written notice to the employing office of the child's change in status and requesting information about temporary continuation of coverage. The written notice must include the child's name and

address and the date of the terminating event.

(2) If the notice described in paragraph (b)(1) is received by the employing office within 60 days after the date on which the child ceased meeting the requirements for being considered an unmarried dependent child, the employing office must notify the child of his or her rights under this subpart within 14 days after receiving the notice.

(3) This paragraph does not preclude the employing office from notifying the child of his or her rights based on oral or written notification by the child, another family member, or any other source that the child no longer meets the requirements for being considered an unmarried dependent child.

(c)(1) In the case of a former spouse who is eligible to elect temporary continuation of coverage under § 890.1103(a)(3), the employee or the former spouse may, within 60 days after the termination of the marriage or the loss of coverage under subpart H of this part, notify the employing office of the terminating event and request information about temporary continuation of coverage. The notice must include the name and address of the former spouse and the date of the terminating event.

(2) The employing office must notify the former spouse of his or her rights under this subpart within 14 days after receiving the notice described in paragraph (c)(1) of this section.

(d) The employing office may give the notice required by this section directly to the employee, child, or former spouse. If the notice is not given directly to the individual, it must be sent by certified mail, return receipt requested.

§ 890.1105 Elections.

(a) The election of temporary continuation of coverage may be in the form of a Standard Form 2809, letter, or written statement to the employing office.

(b) A former employee's election under this subpart must be submitted to the employing office within 60 days after the later of—

(1) The date of separation; or

(2) The date the former employee received the notice from the agency.

(c) A child's election under this subpart must be submitted to the employing agency within 60 days after the later of—

(1) The date of the qualifying event; or

(2) If the employee notified the employing agency within the 60-day time period specified under § 890.1104(b)(1) of this part, the date the child received the notice from the employing agency. If the employee did not notify the employing agency within the specified time period, the child's opportunity to elect continued coverage ends 60 days after the qualifying event.

(d) A former spouse's election must be received by the employing office within 60 days after the later of—

(1) The date of the qualifying event; or

(2) The date coverage under subpart H of this part was lost because of remarriage or loss of qualifying court order, if the loss of coverage under subpart H occurred before the expiration of the 36-month period specified in § 890.1107(c) of this part; or

(3) If the employee or former spouse notified the agency of the termination of the marriage within the time period specified in § 890.1104(c)(1), the date the former spouse received the notice from the agency described in § 890.1104(c)(2). If neither the employee nor the former spouse notified the agency within the specified time period, the former spouse's opportunity to elect continued coverage ends 60 days after the qualifying event.

(e) If an individual who is eligible for temporary continuation of coverage under this section is unable to file an election on his or her own behalf because of a mental or physical disability, an election may be filed by a court-appointed guardian.

(f) Except as provided in paragraphs (c)(2) and (d)(3), when an employing office determines that an eligible individual was unable, for cause beyond his or her control, to register to be enrolled within the time limits prescribed by this section, that office must accept the registration within 31 days after it advises him or her of that determination.

§ 890.1106 Coverage.

(a) *Type of enrollment.* An individual who enrolls under this subpart may elect coverage for self alone or self and family.

(1) For an enrollee who is eligible for continued coverage under § 890.1103(a)(1) or (2), a covered family member is an individual whose relationship to the enrollee meets the requirements of 5 U.S.C. 8901(5) and who meets any applicable requirements of 5 CFR 890.302 of this part.

(2) For a former spouse who is eligible for continued coverage under § 890.1103(3) of this part, a covered family member is an individual who meets the requirements of § 890.804 of this part.

(b) *Plans and options.* An individual who elects to continue coverage under this subpart may enroll in a plan or option different from the plan or option covering the individual at the time of the qualifying event.

§ 890.1107 Length of temporary continuation of coverage.

(a) In the case of a former employee who is eligible for continued coverage under § 890.1103(a)(1), the temporary continuation of coverage ends on the date that is 18 months after the date of separation, unless it is terminated earlier under the provisions of § 890.1110.

(b)(1) Except as provided in paragraph (b)(2) of this section, in the case of individuals who are eligible for continued coverage under § 890.1103(a)(2) of this part, the temporary continuation of coverage ends on the date that is 36 months after the date the individual first ceases to meet the requirements for being considered an unmarried dependent child, unless it is terminated earlier under the provisions of § 890.1110.

(2) The temporary continuation of coverage ends on the date that is 36 months after the date of the separation from service on which the former employee's continuation of coverage is based, unless it is terminated earlier under the provisions of § 890.1110, in the case of individuals who—

(i) Are eligible for continued coverage under § 890.1103(a)(2); and

(ii) As of the day before ceasing to meet the requirements for being considered unmarried dependent children, were covered family members of a former employee receiving continued coverage under this subpart; and

(iii) Cease meeting the requirements for being considered unmarried dependent children before the end of the 18-month period specified in paragraph (a) of this section.

(c)(1) Except as provided in paragraph (c)(2) of this section, in the case of former spouses who are eligible for continued coverage under § 890.1103(a)(3), the temporary continuation of coverage ends on the date that is 36 months after the former spouse ceased meeting the requirements for coverage as a family member, unless it is terminated earlier under the provisions of § 890.1110.

(2) The temporary continuation of coverage ends on the date that is 36 months after the date of the separation from service on which the former employee's continuation of coverage is based, unless it is terminated earlier under the provisions of § 890.1110, in the case of a former spouse—

(i) Who is eligible for continued coverage under § 890.1103(a)(3); and

(ii) Whose marriage to the former employee terminates after the former employee's separation but before the expiration of the 18-month period specified in paragraph (a) of this section.

§ 890.1108 Effective date of coverage.

The effective date of coverage is the day after other coverage under this part expires, including temporary extension of coverage under § 890.401 of this part. If an individual registers for temporary continuation of coverage before the expiration of the election period under § 890.1105, but after the temporary extension of coverage expires, coverage is restored retroactively, with appropriate contributions and claims, to the same extent and effect as though no break in coverage occurred.

§ 890.1109 Premium payments.

(a) Except as provided in paragraph (b) of this section, the enrollee must pay the full enrollment charge as determined under § 890.503(a), including both the Government contributions and employee withholdings, plus the administrative charge described under § 890.1113, for every pay period during which the enrollment continues, exclusive of the 31-day temporary extension of coverage for conversion provided under § 890.401 of this part.

(b) If the enrollee is not covered under this subpart for the full pay period, he or she pays the premium charge for only the days actually covered. The daily premium rate is an amount equal to the monthly rate (including the administrative charge) multiplied by 12 and divided by 365.

(c) The enrollee must make the payment after the pay period during which he or she is covered in accordance with a schedule established by the employing office. If the employing office does not receive the payment by the date due, the employing office must notify the enrollee by certified mail, return receipt requested, that continuation of coverage depends upon payment being made within 15 days (45 days for enrollees residing overseas) after receipt of the notice, or, if the employing office does not receive certification of the receipt of the notice, 60 days after the date of the notice (90 days for enrollees residing overseas). An enrollee whose coverage terminates because of nonpayment may not reenroll or reinstate coverage under this subchapter, except as provided under paragraph (d) of this section.

(d)(1) If the enrollee was prevented by circumstances beyond his or her control from making payment within the timeframe specified in paragraph (c) of this section, he or she may request reinstatement of coverage by writing to the employing office. The request must be filed within 30 calendar days from the date of termination and must be accompanied by verification that the enrollee was prevented by circumstances beyond his or her control from paying within the time limit.

(2) The employing office determines whether the individual is eligible for reinstatement of coverage. If the determination is affirmative, coverage is reinstated retroactively to the date of termination. If the determination is negative, the individual may request a review of the decision from OPM under the provisions of § 890.104 of this part.

§ 890.1110 Termination of enrollment or coverage.

(a) *General.* An enrollment under this subpart terminates at midnight of the earlier of the following dates:

(1) The date the temporary continuation of coverage expires as set forth in § 890.1107, subject to the temporary extension of coverage for conversion.

(2) The last day of the pay period in which the enrollee dies.

(3) The day before the effective date of coverage under another provision of this part.

(4) The date provided under paragraphs (b) or (c) of this section.

(b) *Failure to pay premiums.* Termination of enrollment for failure to pay premiums within the timeframe established under § 890.1109 of this part is retroactive to the end of the last pay period for which payment was timely received. The enrollee and covered family members, if any, are not entitled to the temporary extension of coverage for conversion or to convert to an individual contract for health benefits.

(c) *Cancellation.* An enrollee may cancel his or her enrollment as provided under § 890.304(d) of this part.

(d) *Family member coverage.* The coverage of a family member terminates under the conditions set forth in § 890.304(c). Covered family members of former employees and former spouses are entitled to temporary continuation of coverage only as set forth under § 890.1103.

§ 890.1111 Employing office responsibilities.

(a) *Providing information to employees.* Employing offices are responsible for providing employees who are eligible to enroll under this part with literature developed by OPM that sets forth their rights under this subpart. This literature must be distributed to employees prior to each open season occurring under § 890.301.

(b) *Administration of the enrollment process.* The employing office must establish procedures for notifying the former employee, child, or former spouse about his or her eligibility to enroll, including what documents are needed to determine eligibility, and for accepting enrollment registrations.

(c) *Collecting premiums.* (1) Collection of the contributions is the responsibility of the employing office of the employee or annuitant at the time of the qualifying event. The employing office may choose to use a collection service, if available, instead of its own payroll office.

(2) The employing office must submit all premium payments collected from enrollees along with its regular health benefits payments to OPM in accordance with procedures established by that Office.

(d) *Health benefits file.* The employing office must maintain a health benefits file for the enrollee as a file separate from the personnel records of the employee or former employee. This file may be destroyed 2 years after the end of the calendar year during which the 18- or 36-month period described in § 890.1107 (a) or (b)(1) expires.

§ 890.1112 Denial of continuation of coverage due to involuntary separation for gross misconduct.

(a) *Notice of denial.* (1) When an employing office determines that the offense for which an employee is being removed constitutes gross misconduct for the purpose of this subpart, the employing office must notify the employee in writing of its intention to deny temporary continuation of coverage. The notice must set forth the reason for the denial and give the employee a reasonable amount of time to respond. The notice must be made no later than the date of separation.

(2) If the employee is being removed under the authority of part 752 of this chapter (or other law, Executive Order, or regulation that prescribes procedures for removing employees because of misconduct), the notification requirement of paragraph (a)(1) of this section may be combined with the notification requirement of such authority.

(b) *Employee's response.* (1) The employee must be allowed a reasonable time for response, but not less than 7 days. The employee may respond orally or in writing and is entitled to be represented by an attorney or other representative.

(2) The agency must designate an official to hear the employee's oral answer who has the authority either to make or recommend a final decision on

the denial. The right to answer orally does not include the right to a formal hearing with examination of witnesses.

(c) *Final decision.* If the employee responds to the notice of denial, the employing office must issue a final decision in writing that fully sets forth its findings and conclusions. The agency's decision is not subject to reconsideration by OPM.

(d) *Resignation in lieu of involuntary separation.* If an employee resigns after receiving the employing office's notification of intent to separate the employee involuntarily but before the scheduled separation date, his or her separation is considered involuntary for the purpose of this subpart.

§ 890.1113 The administrative charge.

(a) OPM has determined that the administrative charge as provided under 5 U.S.C. 8905a(d)(1)(A)(ii) is 2 percent of the enrollment charge described in § 890.503(a).

(b) It is OPM's responsibility to establish procedures for receiving the administrative payment into the Employees Health Benefits Fund and for making this amount available to the employing office or collection service, as appropriate.

[FR Doc. 29563 Filed 12–20–89; 8:45 am]

BILLING CODE 6325–01–M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 21

RINs 3150–AC61 and 3150–AD37

Amendatory Instructions: Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: This document corrects a final rule published April 18, 1989 (54 FR 15372), which provides for issuance of early site permits, standard design certifications, and combined construction permits and operating licenses with conditions for nuclear power reactors. This document also corrects a final rule published on October 16, 1989 (54 FR 42287), which changes the commercial telephone number for the Region III Office. This action is necessary to correct incomplete or erroneous amendatory instructions.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rules Review Section, Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301–492–7758.

SUPPLEMENTARY INFORMATION:

1. In the **Federal Register** of April 18, 1989, in the second column of page 15398, amendatory instruction number 11 is corrected to read as follows:

§ 2.501 [Amended]

11. In the heading and paragraphs (a), (b)(1)(vii), and (b)(3), the references to Appendix M of part 50 are amended to refer to Appendix M of part 52.

2. In the **Federal Register** of October 16, 1989, in the second column of page 42288, amendatory instruction number 4 is corrected to read as follows:

§ 21.2 [Amended]

4. In footnote 1 to § 21.2, the commercial telephone number for the NRC Region III Office (Chicago) is changed from "(312) 790–5500" to "(708) 790–5500".

Dated at Bethesda, Maryland, this 15th day of December 1989.

For the Nuclear Regulatory Commission.

Donnie H. Grimsley,

Director, Division of Freedom of Information and Publications Services, Office of Administration.

[FR Doc. 89–29688 Filed 12–20–1989; 8:45 am]

BILLING CODE 7590–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 942

[Docket No. 90239–9293]

RIN 0648–AB50

Cordell Bank National Marine Sanctuary Regulations

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce (DOC).

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration, by this notice, is revising its regulations governing the conduct of activities in the Cordell Bank National Marine Sanctuary (15 CFR part 942) to prohibit the exploration for, or the development or production of, oil, gas, or minerals in any area of the Sanctuary. The Sanctuary is an area of marine waters encompassing 397.05 square nautical miles surrounding Cordell Bank, which is located approximately 50 nautical miles west-northwest of San Francisco, California. Since August 9, 1989, exploring for, or developing or producing, oil, gas, or minerals in any area of the Sanctuary has been prohibited by federal statute (section 2(a) of H.J. Res. 281; Pub. L. No. 101–74, 103 Stat. 554 (1989)). This regulatory amendment merely conforms the existing Sanctuary regulations to the statutory ban as required by that statute (section 2(b) of H.J. Res. 281).

EFFECTIVE DATE: This regulatory amendment is effective December 21, 1989.

FOR FURTHER INFORMATION CONTACT: Joseph A. Uravitch, Chief, Marine and Estuarine Management Division, OCRM, NOS, NOAA, 1825 Connecticut Avenue NW., Washington, DC 20235, (202/673–5126).

SUPPLEMENTARY INFORMATION: Title III of the Marine Protection, Research, and Sanctuaries Act, as amended (16 U.S.C. 1431 *et seq.*) ("Act") authorizes the Secretary of Commerce ("Secretary") to designate discrete areas of the marine environment possessing conservation, recreational, ecological, historical, research, educational, or esthetic qualities that give them special national significance as National Marine Sanctuaries. The primary purpose of a designation is to promote comprehensive and coordinated conservation and management of the area.

The authority of the Secretary to designate National Marine Sanctuaries has been delegated to the Under Secretary of Commerce for Oceans and Atmosphere by DOC Organization Order 10–15, § 3.01(z) (Jan. 11, 1988). On May 19, 1989, the Under Secretary signed the designation document for the Cordell Bank National Marine Sanctuary. The notice of designation and the final regulations implementing the designation and regulating the conduct of certain activities were published in the **Federal Register** on May 24, 1989 (54 FR 22417–22425). While Congress attempted to disapprove the part of the designation authorizing but not requiring the Secretary to regulate oil and gas activities in the Sanctuary by passing H.J. Res. 281, the joint resolution was not presented by Congress to the President for approval until after the 45 day period of continuous session allowed by the Act. Thus, although the joint resolution was approved by the President on August 9, 1989 (Pub. L. No. 101–74, 103 Stat. 554), section 1, the disapproval provision, has no effect (President's Statement on Signing a Joint Resolution Concerning the Cordell Bank

National Marine Sanctuary, 25 Weekly Comp. Pres. Doc. 1230 (Aug. 14, 1989)). Accordingly, the self-executing designation became final at the end of the 45-day period and the Sanctuary regulations became final. Section 2 of the joint resolution, however, which did take effect upon Presidential approval of the joint resolution, accomplished essentially the same objective of section 1. Section 2(a) prohibits the exploration for, or the development or production of, oil, gas, or minerals in any area of the Sanctuary and section 2(b) requires the Secretary to revise the Sanctuary regulations to conform within 120 days of enactment.

The regulatory amendment issued today revises section 942.6(a)(3) of the Sanctuary regulations to prohibit the exploration for, or the development or production of, oil, gas, or minerals in any area of the Sanctuary. This prohibition is identical to the one imposed statutorily by section 2(a) of H.J. Res. 281 effective August 9, 1989 and is required by section 2(b) of H.J. Res. 281.

The authority for regulating oil and gas activities within the Sanctuary is title III of the Act and paragraph (c) of section 1 of Article 4 of the Designation Document for the Cordell Bank National Marine Sanctuary, 54 FR 22417, 22420 (1989). Because the Designation Document did not authorize the regulation of mineral activities, the authority for regulating mineral activities is title III of the Act and section 2(a) of H.J. Res. 281, Pub. L. No. 101–74, 103 Stat. 554 (1989). The regulatory amendment issued today amends the authority section for 15 CFR part 942 accordingly.

Additional Information

Executive Order 12291

NOAA has concluded that this regulatory amendment is not a "major rule" within the meaning of section 1(b) of Executive Order 12291 because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions; or,

(3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Administrative Procedure Act

Section 2(a) of H.J. Res. 281 placed a ban on all activities related to the exploration for, or the development or production of, oil, gas, or minerals within the Sanctuary effective August 9, 1989. Section 2(b) is a directive to the Secretary to amend the Sanctuary regulations to conform to the ban. As stated by the Committee on Merchant Marine and Fisheries of the United States House of Representatives,

> [T]his subsection does not provide the Secretary any discretion with regard to a prohibition and is intended simply as a directive to promulgate conforming regulations. Since the Secretary is afforded no discretion in this matter, the Committee intends that the normal notice and comment rulemaking procedures [of section 553 of the Administrative Procedure Act] will be waived. In addition, no [Environmental Impact Statement] or environmental assessment is necessary. The Committee expects the Secretary to proceed directly with issuance of a final rule within 120 days of enactment. H.R. Rep. No. 110, 101st Cong., 1st Sess. 11 (1989).

Since section 2(b) of H.J. Res. 281 affords the Secretary no discretion regarding imposition of the ban, the Under Secretary of Commerce for Oceans and Atmosphere, pursuant to section 553(b)(B) of the Administrative Procedure Act (APA), for good cause found that it is unnecessary to provide notice of and opportunity for comment on this regulatory amendment. Since the ban imposed by this regulatory amendment has been imposed by statute since August 9, 1989, the Under Secretary, pursuant to section 553(d)(3) of the APA, found that good cause exists for making this regulatory amendment immediately effective.

Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this regulatory amendment because it was not required to be published as a proposed rule before issuance as a final rule by section 553 of the APA or by any other law. As a result, neither an initial nor final Regulatory Flexibility Analysis was prepared.

Paperwork Reduction Act

This amendment does not contain a collection of information requirement subject to the requirements of the Paperwork Reduction Act.

National Environmental Policy Act

Because the activities prohibited by this amendment are already prohibited by statute, the Department of Commerce has determined that this amendment will not significantly affect the quality of the human environment. (See discussion under Administrative Procedure Act, above). Therefore, no draft or final Environmental Impact Statement was prepared for this amendment.

Executive Order 12612

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

Executive Order 12630

This rule does not have takings implications sufficient to require preparation of a Takings Implications Assessment under Executive Order 12630.

List of Subjects in 15 CFR Part 942

Environmental protection, marine resources, natural resources.

Dated: December 6, 1989.

Virginia K. Tippie,

Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, for the reasons set forth in the preamble, 15 CFR part 942 is amended by:

PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY

1. Revising the authority section for 15 CFR part 942 to read as follows:

Authority: Sections 303, 304, 305, and 307 of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1433, 1434, 1435, and 1437; section 2 of Pub. L. No. 101–74, 103 Stat. 554; Designation Document for the Cordell Bank National Marine Sanctuary, Article 4, § 1(c).

2. Revising § 942.6(a)(3) to read:

§ 942.6 Prohibited activities.

(a) * * *

(3) *Exploring for, or developing or producing, oil, gas, or minerals.* Exploration for, or development or production of, oil, gas, or minerals in any area of the Sanctuary.

* * * * *

[FR Doc. 89–29664 Filed 12–20–89; 8:45 am]

BILLING CODE 3510–08–M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1501

Method for Identifying Toys and Other Articles Intended for Use by Children Under 3 Years of Age Which Present Choking, Aspiration, or Ingestion Hazards Because of Small Parts; Interpretation

AGENCY: Consumer Product Safety Commission.

ACTION: Revocation of Statement of Interpretation.

SUMMARY: On May 27, 1988, the Consumer Product Safety Commission issued a Statement of Interpretation clarifying that its "small parts" regulation for children's articles included components made of fabric and certain other materials. On May 9, 1989, the U.S. Court of Appeals set aside that Interpretation. The Commission is therefore revoking it from the Code of Federal Regulations.

EFFECTIVE DATE: The revocation is effective December 21, 1989.

FOR FURTHER INFORMATION CONTACT: *On the court case:* Alan Shakin, Assistant General Counsel, CPSC, Washington, D.C. 20207; telephone (301) 492–6980. On enforcement of the small parts regulation: Christine Nelson, Compliance Directorate, CPSC, Washington, DC 20207; telephone (301) 492–6400.

SUPPLEMENTARY INFORMATION: In 1979 the Commission issued a regulation classifying as a banned hazardous substance any toy or other article intended for use by children under three years of age that presents a choking, aspiration, or ingestion hazard because of small parts. 16 CFR part 1501. This regulation states that "[a]ny components or pieces (excluding paper, fabric, yarn, fuzz, elastic, and string) which have become detached from the article as a result of the use and abuse testing shall be placed into the [small parts test] cylinder, one at a time. If any such components or pieces fit entirely within the cylinder, in any orientation and without being compressed, the article fails to comply with the test procedure." 16 CFR 1501.4(b)(2).

On May 27, 1988, the Commission issued a Statement of Interpretation which concluded that the parenthetical exclusion applied only to "pieces" and not to "components." Because this Interpretation represented a change in enforcement policy from an earlier staff interpretation, the Commission decided to stay enforcement of the Interpretation until November 23, 1989.

A number of industry representatives challenged the Commission's Interpretation in the U.S. Court of Appeals for the Fourth Circuit. On May 9, 1989, the Court issued an opinion ordering that the Interpretation be set aside. *Jerri's Ceramic Arts, Inc., et al.* v. *Consumer Product Safety Commission*, 874 F.2d 205 (4th Cir. 1989). The Court held that the Commission had improperly issued a legislative rule without complying with the applicable procedural requirements.

In accordance with the Court's decision, the Commission is revoking its May 1988 Interpretation. Accordingly, pursuant to the Federal Hazardous Substances Act, 74 Stat. 372, 378, 80 Stat. 1303–1304, 83 Stat. 187, 189; 15 U.S.C. 1261, 1262, 1269; and under authority vested in the Commission by the Consumer Product Safety Act (Pub. L. 573, 30(a), 86 Stat. 1231, 15 U.S.C. 2079(a)), 16 CFR part 1501 is amended as follows:

PART 1501—[AMENDED]

1. The authority citation for part 1501 continues to read as follows:

Authority: Secs. 2(f)(1)(D), (q)(1)(A), (s), 3(e)(1), and 10; 74 Stat. 372, 374, 375 as amended; 80 Stat. 1304–05, 83 Stat. 187–89 (15 U.S.C. 1261, 1262, 1269).

Subpart A—[Amended]

2. Remove subpart A heading immediately preceding § 1501.1.

Subpart B—[Removed]

3. Remove subpart B.

Dated: December 12, 1989.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 89–29370 Filed 12–20–89; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2 and 284

[Docket No. RM87–34–000]

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol

Issued December 13, 1989.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission is issuing a final rule responding to the decisions of the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), and *American Gas Association* v. *FERC*, (issued October 16, 1989). The final rule continues in effect the take-or-pay crediting regulations adopted by Order No. 500, with two modifications. First, the final rule establishes a new sunset date for crediting of the earlier of December 31, 1990, or the date a pipeline accepts a certificate for a gas inventory charge. Second, the final rule modifies the crediting rules prospectively to provide that a pipeline may, upon 30 days notice, apply credits against any must-take obligation, including for casinghead gas, but must release the gas not purchased.

The final rule states that the Commission will not take action under NGA section 5 to modify producer-pipeline contracts. Since the Commission lacks authority to modify contracts for the sale of non-jurisdictional gas, section 5 action would be ineffective or inequitable or both, and, in any event, pipelines are resolving their take-or-pay problems through settlements.

The final rule establishes a new sunset date for the Order No. 500 alternative passthrough mechanism of December 31, 1990. The final rule also states that, if the U.S. Court of Appeals for the D.C. Circuit has not completed judicial review of this final rule by that date, the Commission will extend the sunset dates for both the alternative passthrough mechanism and crediting until 30 days after the date of issuance of the court's mandate upon completion of judicial review.

The final rule states that the Commission has decided not to restore the contract demand option on a generic basis but will require parties to address this issue in individual rate cases. The final rule does, however, amend the Commission's regulations to provide for automatic abandonment of pipeline sales obligations upon a customer's conversion to transportation.

Finally, the final rule seeks information from Tennessee and its customers necessary to address the AGA court's concerns regarding the Commission's failure to retroactively eliminate the contract demand reduction provision.

EFFECTIVE DATE: January 22, 1990.

FOR FURTHER INFORMATION CONTACT: Richard Howe, Jr., Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357–8274.

SUPPLEMENTARY INFORMATION:

[Order No. 500–H]

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is adopting this final rule, superseding the Order No.

500 interim rule,[1] in response to the mandates of the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors* v. *FERC (AGD)*,[2] and *American Gas Association* v. *FERC (AGA)*.[3] The final rule continues, with certain modifications, the open access transportation program originally adopted in Order No. 436[4] and kept in place on an interim basis by Order No. 500.

The *AGD* decision generally upheld the substance of Order No. 436. The court, however, vacated and remanded Order No. 436 to the Commission for it to, among other things, "more convincingly address" the effects of various provisions of Order No. 436 on pipeline take-or-pay problems.[5] The *AGA* decision held that the Order No. 500 interim rule, issued in response to the *AGD* decision, did not comply with the court's mandate in that decision. The court identified a number of areas where the Commission had not adequately explained its actions, including its failure to take action under section 5 of the Natural Gas Act (NGA)[6] to modify producer-pipeline take-or-pay contracts. The court also held that the Commission improperly established a sunset date for proposals to pass through take-or-pay settlement costs under the alternative passthrough mechanism established in Order No. 500 which took place before the Commission had taken a final, reasoned position on how this should be done.

The final rule continues in effect, with two modifications, the provisions of Order No. 500 requiring that a producer offer to credit gas transported by a pipeline against that pipeline's take-or-pay liability to the producer accruing under certain pre-June 23, 1987 gas purchase contracts. The final rule provides that crediting will cease on the earlier of December 31, 1990,[7] or the date on which a pipeline accepts a gas inventory charge certificate (GIC). The final rule eliminates prospectively the provision that pipelines may not apply credits against minimum take obligations for casinghead gas, but provides that a pipeline must release the casinghead gas not taken so that it can be marketed to another purchaser. Similarly, the final rule provides that a pipeline must release any other gas not taken as a result of applying credits against a must-take obligation.

In response to the court's concern about the sunset date for the Order No. 500 alternative passthrough mechanism, the final rule extends the sunset deadline until December 31, 1990, the same date as crediting will terminate. If the United States Court of Appeals for the District of Columbia Circuit has not completed judicial review of this final rule by that date, the Commission will further extend the sunset date for the alternative passthrough mechanism until 30 days after the date of issuance of the court's mandate upon completion of judicial review. The final rule makes no other changes in the Order No. 500 policy statement concerning pipelines' passthrough of take-or-pay settlement costs. The Commission will continue to develop its policies on the passthrough of these costs in individual cases.

The final rule does not take action under NGA section 5 to modify producer-pipeline take-or-pay contracts. After a full review of the record in this case, including the data obtained through the Commissions's Order No. 500 take-or-pay data request, the Commission concludes that section 5 action would be ineffective or inequitable or both. Because the Commission's section 5 authority is limited, section 5 action could not bring about, and could discourage, the complete restructuring of all pipeline-producer contracts necessary to resolve fully the pipeline's take-or-pay problems and complete the transition to a competitive wellhead market. The Commission also believes that section 5 action would improperly interfere with the ability of parties to rely on private contracts as a tool for structuring basic economic relationships. Accordingly, since pipelines have substantially resolved the bulk of their take-or-pay problems through individually negotiated settlements and since the provisions of the final rule discussed above should enable pipelines to settle the remainder of their take-or-pay problems, the Commission will not take section 5 action.

The Commission is also continuing in effect, unchanged, the policy statement on GICs as a means of avoiding a future recurrence of the pipeline take-or-pay problems of the 1980s. The Commission intends to develop further its GIC policy in individual cases addressing pipeline proposals to institute GICs.

The Commission has decided not to restore contract demand reduction on a generic basis. However, restructuring of the pipelines' relationship with their customers continues to be an essential element of the Commission's attempt to foster competition in the natural gas industry. Therefore, although the Commission will not restore the contract demand reduction option here, the Commission will require parties to address contract demand reduction mechanisms in conjunction with rate design proposals to implement pricing schemes to ration capacity (including seasonal rates and one-part demand rates) in individual rate cases,[8] and in conjunction with pipeline proposals for GICs. The Commission will, however, amend its regulations to provide for automatic abandonment of pipeline sales obligations upon a customer's conversion to transportation.

The final rule also seeks information from Tennessee Gas Pipeline Company and its customers in order to enable the Commission to address the *AGA* court's concerns regarding the Commission's decision in the Order No. 500 interim rule not to eliminate retroactively the contract demand reduction provision.

II. The Record Upon Which the Final Rule is Based

A voluminous record of comments and data submissions by parties representing all segments of the natural gas industry has been compiled in this proceeding. Comments were filed by numerous parties in connection with all issues arising under Order No. 500 and

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[1] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 52 Fed. Reg. 30,334 (Aug. 14, 1987), FERC Stats. & Regs., Regulations Preambles ¶30,761, *extension granted*, Order No. 500–A, FERC Stats. & Regs., Regulations Preambles ¶30,770, *modified*, Order No. 500–B, FERC Stats. & Regs., Regulations Preambles ¶30,772, *modified further*, Order No. 500–C, FERC Stats. & Regs., Regulations Preambles ¶30,786 (1987), *modified further*, Order No. 500–D, FERC Stats. & Regs., Regulations Preambles ¶30,800, *reh'g denied*, Order No. 500–E, 43 FERC ¶61,234, *modified further*, Order No. 500–F, FERC Stats. & Regs., Regulations Preambles ¶30,841 (1988), *reh'g denied*, Order No. 500–G, 46 FERC ¶61,148 (1989).

[2] 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom.* Southern California Gas Co. v. FERC, 108 S. Ct. 1468 (1988).

[3] No. 87–1588, *et al.*, (D.C. Cir. , Oct. 16, 1989).

[4] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol (Order No. 436), 50 Fed. Reg. 42,408 (Oct. 18, 1985), FERC Stats. & Regs., Regulations Preambles 1982–1985 ¶30,665 (Oct. 9, 1985), *modified*, Order No. 436–A, 50 Fed. Reg. 52,217 (Dec. 23, 1985), FERC Stats. & Regs., Regulations Preambles 1982–1985 ¶30,675 (Dec. 12, 1985), *modified further*, Order No. 436–B, 51 Fed. Reg. 6398 (Feb. 14, 1986), *reh'g denied*, Order No. 436–C, 34 FERC ¶61,404 (Mar. 28, 1986), *reh'g denied*, Order No. 436–D, 34 FERC ¶ 61,405 (Mar. 28, 1986), *reconsideration denied*, Order No. 436–E, 34 FERC ¶61,403 (Mar. 28, 1986).

[5] 824 F.2d at 1044.

[6] 15 U.S.C. 717 (1988).

[7] If the United States Court of Appeals for the District of Columbia has not completed judicial review of this final rule by that date, the Commission will further extend the December 31, 1990, deadline until 30 days after the date of issuance of the court's mandate upon completion of judicial review.

[8] *See* Interstate Natural Gas Pipeline Rate Design, 47 FERC ¶ 61,295, *order on reh'g*, 48 FERC ¶ 61,122 (1989).

its several orders on rehearing and modifications.[9] In Order No. 500–C, the Commission specifically requested that the parties file, among other things, information concerning the effects on pipeline crediting rights of the various provisions adopted in that order. The comments filed in response to these requests have provided the Commission useful information. The parties have also provided some additional information in their rehearing requests of Order Nos. 500 and 500–C and in various other miscellaneous filings.

Additional information available to the Commission with respect to the status of the take-or-pay problem and the pipelines' outstanding take-or-pay exposure consists of a large amount of data compiled from a variety of sources. First, as indicated in Order No. 500, the Commission, on August 26, 1987, issued a Take-or-Pay Data Request (FERC Form No. 593) to 43 interstate natural gas pipelines regarding their contracts with producers. Producers were invited to file similar data. In response, 31 pipelines submitted data on about 10,500 individual contracts. Seven producers also voluntarily filed data. For the reporting period covered by the data requests, January 1, 1983 through June 30, 1987, the pipelines reported on outstanding take-or-pay exposure, settlements, prepayments, contracts subject to take-or-pay and their categories under the Natural Gas Policy Act of 1978 (NGPA),[10] and other related data. Attached as Appendix A to this rule is a summary of the responses to the Commission's take-or-pay data request. With these data, the Commission has been able to evaluate the developments in the take-or-pay situation through the four and a half year period immediately preceding the issuance of Order No. 500.

On April 11 and 12, 1988, the Commission convened a public hearing on the Order No. 500 final rule. In connection with that hearing both the Interstate Natural Gas Association of America (INGAA) and the Natural Gas Supply Association (NGSA) submitted studies to the Commission concerning pipelines' take-or-pay exposure through 1987. On April 22, 1988, the Commission issued a notice setting forth the questions each Commissioner had asked at the hearing and allowing all interested parties to file written responses by May 27, 1988. Included among the questions were a number concerning the INGAA and NGSA studies. The Commission has used that material in its analysis here as well.

On April 28 and May 19, 1989, in orders addressing the March 31, 1989 filings made under Order No. 500's alternative mechanism for recovery of settlement costs, the Commission requested additional information from 20 of the 22 pipelines passing through take-or-pay settlement costs under the alternative passthrough mechanism. The information was not requested from Southern Natural Gas Company, since it had an already approved settlement concerning its take-or-pay recovery. Also, because Valero Transmission Company did not make a March 31, 1989 filing to recover take-or-pay costs, no information was requested from it at that time. Specifically, the Commission ordered each pipeline to file:

> supporting documentation of its claimed take-or-pay buyout and buydown costs and interest calculation, including copies of all its settlements with its producer suppliers with an explanation of the take-or-pay exposure for each year settled and the amount of exposure that was eliminated through the settlements.[11]

In response, the 20 pipelines provided the Commission substantial information concerning their settlements and the amount of relief obtained under them. That information has been used in the analysis here. The two pipelines not subject to this data request had filed similar information earlier.

Additional data have also been obtained in pleadings, at technical conferences, and in formal testimony in a variety of individual cases for specific pipelines involving Order No. 500 prudence reviews and reviews of buyouts and buydowns alleged to be eligible for Order No. 500 direct billing treatment.

The Commission has also reviewed 10–K and 10–Q forms filed by interstate pipelines with the Securities and Exchange Commission concerning their financial situations. Finally, the Commission has had available to it significant information concerning take-or-pay contained in various trade and financial publications, including a September 1989 update by INGAA of its take-or-pay study.

III. The Factual Background

A. The Development of the Take-or-Pay Issue

The interstate pipelines' take-or-pay problems of the 1980's arose from the market distortions originally set in motion by various policies of the 1960's and early to mid-1970's. The artificially low controlled gas prices of those years encouraged consumers to use natural gas, thereby increasing demand, while at the same time discouraging producers from exploring and drilling for new supplies, thereby reducing supply. The resulting severe gas shortages in the interstate market led to enactment of the NGPA in 1978, in which Congress determined "that a new system of natural gas pricing was needed to balance supply and demand. . . ."[12] Accordingly, the NGPA provided for a phased, partial decontrol of most new gas prices. The NGPA also established increased (and increasing) ceiling prices for first sales of new gas that remained controlled and for some categories of old gas.

However, while the NGPA provided needed market incentives for new gas production and deliveries to the interstate market, it also caused, at least in the short-term, artificially high prices for new gas supplies. Because it took time for producers to find and to produce new gas supplies in response to the higher natural gas prices, and for consumers also to respond to higher gas prices by, for example, installing equipment in order to switch to lower priced alternative supplies, the increased prices could not immediately bring supply and demand into balance. As a result, prices were bid to higher levels than they would have reached had prices not been kept artificially low in the first place. This was exacerbated by the fact that the NGPA continued low ceiling prices on most old gas supplies, so that only new gas prices could respond to the market. As a result, the overall wellhead price of natural gas increased from 91 cents in 1978 to $2.43 in 1982, with new gas prices going even higher.[13]

The artificially high prices of the late 1970's and early 1980's caused producers to increase greatly their exploration and drilling for new gas supplies.[14] By 1981,

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[9] *See* n. 1, *supra*.

[10] 15 U.S.C. § 3301 (1988).

[11] *See, e.g.*, United Gas Pipe Line Co., 47 FERC ¶ 61,153 at 61,491 (1989); Williams Natural Gas Co., 47 FERC ¶ 61,155 at 61,508 (1989).

[12] Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi, 474 U.S. 409, 417 (1986).

[13] United States Energy Information Administration (EIA), Natural Gas Monthly, July 1983, Table 10 at 23.

[14] Gas well completions jumped from 12,120 in 1977 to 19,910 in 1981. EIA, Monthly Energy Review, Table 5.2 (May 1989). As a result, while reserve additions in the lower-48 states averaged only 46 percent of annual production during the 10 years before the NGPA, they increased to 90 percent of production in the period 1978–1984. *See* Ceiling Prices; Old Gas Pricing Structure (Order No. 451), 51 Fed. Reg. 22,168 (June 18, 1986), FERC Stats. & Regs., Regulations Preambles ¶ 30,701 at 30,205–30,206.

new additions to gas reserves actually exceeded current production, having averaged only 46 percent of current production during the 10 years preceding enactment of the NGPA. At the same time, pipelines, expecting demand to continue at high levels and even increase, and recalling their recent experience with curtailments, continued to enter into long-term contracts to purchase additional gas supplies at high prices and subject to high take-or-pay requirements.

However, by 1982, demand for gas was falling. High natural gas prices, combined with decreasing oil prices, led to increased fuel switching, particularly as customers who did not already have the necessary equipment to burn alternative fuels installed it. The recession of the early 1980's and warmer than normal weather further decreased demand. These factors combined to create an excess of the supply of natural gas (i.e.. current deliverability from the nation's gas wells) over the demand for natural gas. The deliverability surplus persisted for the remainder of the 1980's. In 1982 the deliverability surplus was about 1.5 Tcf, or 8.3 percent of total deliverability. By 1983, with the demand for natural gas 17 percent below its 1979 level,[15] the deliverability surplus was about 4 Tcf, or nearly 20 percent of total deliverability.[16]

As a result of the reduced demand for gas, pipelines began to incur significant take-or-pay liabilities under the contracts entered into with the expectation of continued high demand. The responses to the Commission's 1987 take-or-pay data request indicate that, by year-end 1983, pipeline take-or-pay exposure was $5.15 billion. Take-or-pay exposure increased to $6.04 billion by year-end 1984, and $9.34 billion by year-end 1985.[17]

However, in spite of the deliverability surplus, the average price paid at the wellhead continued to increase, rising from $1.98 in 1981, to $2.43 in 1982, $2.59 in 1983 and $2.66 in 1984.[18] The pipelines' weighted average cost of gas (WACOGs) also continued to increase, averaging $2.01 in 1981, $2.46 in 1982, $2.76 in 1983, and $2.78 in 1984.[19]

Similarly, the average residential cost of gas rose from $5.17 in 1982 to $6.06 in 1983 to $6.12 in 1984.[20] While these price increases during a time of oversupply were partly due to the automatic escalations in NGPA ceiling prices, the more fundamental cause was the inflexible supply arrangements between producers, pipelines, LDCs, and consumers which had arisen in the earlier era of a tightly price-controlled wellhead market.

Under these arrangements, most users of natural gas could obtain gas only through purchases from a pipeline. The pipelines generally exercised their monopoly power over transportation by refusing to transport gas in competition with their own sales (except where the customer desiring the transportation could switch to alternative fuels at little or no cost). Local distribution companies (LDCs) were further discouraged from purchasing from sellers other than the pipeline by minimum bills which required them to pay a part of the pipeline's demand and commodity costs, including its gas costs, even if they did not purchase gas from the pipeline. These practices frustrated the move toward a competitive wellhead market initiated by Congress in the NGPA, since purchasers could not obtain access to cheaper sources of supply than those provided by the pipelines, for example, by purchasing directly from the producer. The result was unnecessarily high costs for consumers of natural gas.

The Commission's first major action to address these supply arrangements was the issuance of Order No. 380 on May 25, 1984, requiring pipelines to eliminate commodity costs from their minimum bills.[21] The Commission has subsequently, on a case-by-case basis, eliminated pipeline minimum bills altogether.[22]

During 1985, with a deliverability surplus of about 2 Tcf, or 16.5 percent of total deliverability,[23] the average wellhead price of gas fell for the first time since the gas shortages of the 1970's began, decreasing from $2.66 to $2.51.[24] However, pipelines' WACOGs averaged only slightly less in 1985 than in 1984 ($2.75, instead of $2.78),[25] and average residential prices remained at the same level as in 1984, $6.12.[26]

Furthermore, even though many gas purchasers were seeking to purchase gas directly in the field at prices lower than the pipelines' WACOGs, pipelines continued to refuse to transport gas where such transportation might displace the pipelines' own sales. This displacement, the pipelines reasoned, could cause them to incur even greater take-or-pay liability, under the take-or-pay contracts entered into during the 1970's and early 1980's, than they were already incurring.

In addition, while the Commission authorized special programs under which pipelines were given blanket certificates to transport gas, the Commission limited the purchasers to whom this gas could be transported to fuel switchable, non-high priority end-users. The U.S. Court of Appeals for the D.C. Circuit vacated the Commission orders authorizing these programs, on the ground that the Commission had failed to explain why requiring pipelines to extend the benefits of these services to LDCs and captive customers would not increase the benefits to these customers.[27]

B. Order No. 436

In response to these events, the Commission, on October 9, 1985, issued Order No. 436, taking even more fundamental action to address the pipelines' continued exercise of their market power over transportation than the Commission had taken in Order No. 380. In Order No. 436, the Commission found that the pipelines' refusal to transport gas in displacement of their own sales was unduly discriminatory because it caused increased costs to consumers by denying them access to gas at the lowest reasonable prices. The

[15] Order No. 451, FERC Stats. & Regs., Regulations Preambles at 30,206.

[16] Executive Enterprises Publications Co., Inc., The 1988 Natural Gas Yearbook, Figure XI.

[17] INGAA, based on a study published in September 1989, reports that pipelines' outstanding take-or-pay exposure was $4.7 billion at year-end 1984, $6.1 billion at year-end 1985, and $10.0 billion at year-end 1988.

[18] EIA, Natural Gas Monthly, July 1983, Table 10 at 23; June 1989, Table 4, at 14.

[19] EIA, Natural Gas Monthly, June 1989, Table 5 at 18; EIA, Natural Gas Monthly, December 1983, Taole 24 at 44

[20] EIA, Natural Gas Monthly, April 1988, Table 4 at 20.

[21] Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, 49 Fed. Reg. 22,778 (June 1, 1984), FERC Stats. & Regs., Regulations Preambles 1982–1985 ¶ 30,571; *reh'g denied and stay granted in part*, Order No. 380–A, 49 Fed. Reg. 31,259 (Aug. 6, 1984), FERC Stats. & Regs., Regulations Preambles 1982–1985 ¶ 30,584; *reh'g denied and order clarified*, Order No. 380–B, 29 FERC ¶ 61,076; *reh'g denied*, Order No. 380–C, 49 Fed. Reg. 43,625 (Oct. 31, 1984), FERC Stats. & Regs., Regulations Preambles 1982–1985 ¶ 30,607; *reh'g denied*, Order No. 380–D, 29 FERC ¶ 61,332 (1984); *aff'd in part, remanded in part sub nom.* Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied sub nom.* Transwestern Pipeline Co. v. FERC, 476 U.S. 1114 (1986); *order on remand*, Order No. 380–E, 35 FERC ¶ 61,384 (1986); *reh'g denied*, Order No. 380–F, 40 FERC ¶ 61,190 (1987).

[22] *E.g.*, East Tennessee Natural Gas Co., 40 FERC ¶ 61,201, *reh'g denied*, 41 FERC ¶ 61,271 (1987), *aff'd in part and rev'd in part*, 863 F.2d 932 (D.C. Cir. 1988); Transwestern Pipeline Co., 32 FERC ¶ 61,009 (1985), *reh'g denied*, 36 FERC ¶ 61,175 (1986), *aff'd*, 820 F.2d 733 (5th Cir. 1987), *cert. denied*, 108 Sup. Ct. 696 (1988).

[23] 1988 Natural Gas Yearbook, Figure XI.

[24] EIA, Natural Gas Monthly, June 1989, Table 4 at 14.

[25] EIA, Natural Gas Monthly, June 1989, Table 5 at 18.

[26] EIA, Natural Gas Monthly, June 1989, Table 4 at 14.

[27] Maryland People's Counsel v. FERC, 761 F.2d 780 and 768 F.2d 450 (D.C. Cir. 1985).

Commission found that the refusal to transport was adversely affecting the economy and the nation. The refusal to transport was also frustrating the goal of the NGPA of relying on a competitive wellhead market.

In light of these findings, the Commission exercised its broad jurisdiction over transportation of natural gas under the NGA and the NGPA to revise its regulations governing the interstate transportation of natural gas. First, the Commission required that all pipelines performing self-implementing transportation, either pursuant to blanket NGA section 7(c) certificates or NGPA section 311 (other than certain transportation under grandfathered authorizations), provide such transportation on a nondiscriminatory basis, and thereby become open-access transporters. Second, the Commission held that a pipeline's refusal to transport gas, because it would displace its own sales or because it had not obtained relief from its take-or-pay contracts with producers, would be unduly discriminatory.

Third, the Commission required open-access pipelines to agree to allow their firm sales customers to adjust their "contract demand" (CD) (the maximum amount of gas the customer is contractually entitled to purchase on any day), either to reduce the level or convert it from firm sales to a right to firm transportation. These options were intended to allow full requirements and other customers of a pipeline to take advantage of transportation by purchasing gas from another supplier and have it transported either over that or another pipeline. The CD reduction option was also intended to reduce the pipeline's presently contracted firm capacity so that the transmission capacity could be available to other shippers.

Fourth, the Commission adopted optional procedures in Order No. 436 for granting certificates for new facilities, services, and operations intended to facilitate a pipeline's entry into and exit from new markets to compete with existing suppliers and thereby give local distribution companies and other customers, previously limited to one supplier, access to other suppliers. The Commission also provided for expedited abandonment of gas supplies (*i.e.*, producer supplies), subject to reduced takes, in order that those supplies could be made available to different customers.

Last, the Commission did not take specific new action in Order No. 436 to relieve pipelines from their take-or-pay contracts. The Commission did not take action to modify producer-pipeline contracts largely because it believed that such action "would raise extremely serious questions regarding the ability of private parties in the gas production industry to rely on private contracts as a tool for structuring basic economic relationships" [28] and thus could adversely affect the move toward a deregulated gas commodity market started by the NGPA. The Commission did, however, reaffirm its April 1985 policy statement and interpretative rule on payments to settle the take-or-pay liabilities under those contracts. In that policy statement and interpretative rule, the Commission held, among other things, that settlement payments do not violate NGPA Title I ceiling prices and that the Commission would evaluate the pipeline's recovery of settlement costs in individual rate filings. The Commission stated that, pursuant to these policies, pipelines had "made progress in renegotiating their contracts and substantial liabilities have been settled." [29] The Commission also stated that it would consider any requests for abandonment necessary to carry out a settlement of a take-or-pay obligation on an expedited basis.[30] Finally, the Commission stated that it lacked authority to modify contracts for the sale of non-jurisdictional gas and that it would be inequitable to modify only the contracts still subject to the Commission's NGA jurisdiction.

C. Economic Developments After Order No. 436

In 1986, the first full year following issuance of Order No. 436, pipelines for the first time transported for others more gas than they sold. *See* Table 3. Pipeline sales decreased from about 11 Tcf to under 8 Tcf, while transportation increased from 8.6 Tcf to 9.6 Tcf.[31] With the deliverability surplus continuing and, indeed, increasing from 16.5 percent of total deliverability in 1985 to 19.5 percent in 1986,[32] wellhead prices declined even more sharply than they had in 1985, decreasing from an average of $2.51 to $1.94.[33] Furthermore, *for the first time*, the decrease in wellhead prices began to flow through to residential consumers, with residential prices finally dropping from an average of $6.12 during 1985 to an average of $5.83 during 1986.[34] Prices to commercial and industrial users fell even more steeply, from an average of $5.50 during 1985 to $5.08 during 1986 for commercials and an average of $3.95 to $3.23 for industrials.[35] Thus, in 1986, consumers and other users began to realize the benefits of competition in the natural gas industry.

During 1986, pipelines also continued to accrue take-or-pay liabilities. With pipeline sales decreasing by even more than they had in 1985, pipelines' outstanding take-or-pay obligations continued to increase, although at a slower pace than in 1985. While pipeline take-or-pay exposure had increased from $6 billion to $9.34 billion in 1985, it increased to $10.7 billion in 1986. Although pipelines' take-or-pay exposure was increasing, pipelines were also entering into significant take-or-pay settlements with producers. In fact, according to the responses to the Commission's 1987 take-or-pay data request, by mid-1987, pipelines had resolved nearly $14 billion of take-or-pay exposure through settlements which in no year averaged more than 17 cents on the dollar. *See* Table 1.[36] The take-or-pay exposure so resolved was about 56 percent of the over $24 billion take-or-pay liability incurred by pipelines through the middle of 1987. Pipelines received additional take-or-pay relief through release agreement credits. By mid-1987 pipelines had released 1,831 TBtu of gas in return for such credits.

[28] Order No. 436-A, FERC Stats & Regs., Regulations Preambles 1982-85 ¶ 30,665 at 31,492-8 (1985).

[29] Order No. 436-A, *Id.* at 31,661. The Commission included in Order No. 436-A a table showing that pipelines had filed with the Commission to recover about $80 million in settlement payments. In return for those payments, the producers had given the pipelines over $470 million of take-or-pay relief.

[30] 18 C.F.R. § 2.76, 50 Fed. Reg. 16,076 (Apr. 24, 1985), FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,637.

[31] EIA, Statistics of Interstate Natural Gas Pipeline Companies 1987, Table 12 at 46.

[32] 1988 Natural Gas Yearbook, Figure XI.

[33] EIA, Natural Gas Monthly, June 1989, Table 4 at 14.

[34] EIA, Natural Gas Monthly, June 1989, Table 4 at 14.

[35] EIA, Natural Gas Monthly, June 1989, Table 4 at 14.

[36] The data set forth in Tables 1 and 5 and in Appendices A and B are based on information supplied to the Commission by the pipelines in response to Commission data requests. The reported dollar amounts were derived according to the format and methodology specified by the Commission in the data request for standardizing the data or were estimates and may not reflect the actual take-or-pay liability or benefit obtained by a pipeline under a particular take-or-pay contract.

TABLE 1.—RESOLUTION OF REPORTED TAKE-OR-PAY—ALL PIPELINES

Year	Prepayments [1]			Released gas volumes [2]	Take-or-pay settlements					Amount paid per dollar of relief
					Take-or-pay relief received for each year			Settlement payments		
	TBTU [3]	$ bill	$/MMBTU	TBTU	TBTU	$ bill	$/MMBTU	$ bill	$/MMBTU	
1983	25	0.08	3.01	63	222	0.70	3.14	0.01	0.05	0.02
1984	66	0.18	2.73	295	1039	3.19	3.07	0.30	0.28	0.09
1985	72	0.21	2.89	401	585	1.95	3.34	0.20	0.34	0.10
1986	36	0.12	3.47	541	1680	5.09	3.03	0.61	0.36	0.12
1987	33	0.12	3.50	541	1077	3.00	2.79	0.51	0.47	0.17
		0.71		1,841		13.93		1.63		0.12

[1] Prepayments are payments made to producers in the expectation of the pipeline receiving at some future time a volume of gas associated with the prepayment.

[2] Released gas volumes are volumes released in return for a take-or-pay credit attributable to the released volumes.

[3] 1 TBTU=1,000,000 MMBTU.

Some of the data provided in this table are based on information supplied to the Commission by the pipelines in response to Commission data requests. The reported dollar amounts were derived according to the format and methodology specified by the Commission in the data requests for standardizing the data, or were estimates and may not reflect the actual take-or-pay liability or benefit obtained by a pipeline under a particular take-or-pay contract.

Source: FERC Form No. 593 (Also see attached Appendix A and discussion therein of qualifications of data displayed above.)

During 1986 and the first half of 1987 the amount of take-or-pay exposure pipelines were able to resolve through settlements and credits increased dramatically over the amount similarly resolved in 1985, although the cents on the dollar paid for these settlements also increased. In 1986 pipelines settled $5.09 billion in take-or-pay exposure compared to $1.95 billion in 1985. During the first half of 1987, pipelines settled another $3 billion in take-or-pay exposure. The cents on the dollar paid for these settlements increased from 10 cents in 1985 to 12 cents in 1986 and 17 cents in the first half of 1987. As was the case with take-or-pay relief through settlements, take-or-pay relief through release agreement credits also increased. Volumes released with credits increased from 401 TBtu in 1985 to 541 TBtu in 1986 and 541 TBtu in just the first half of 1987.

While the deliverability surplus resulting from the market distortions of the 1970's and early 1980's continued to cause pipelines to incur take-or-pay liabilities under their contracts, by 1985 and 1986 it was also causing many producers significant problems. The average wellhead price for gas, which had decreased from its $2.66 peak in 1984 to $2.51 in 1985, decreased even more to $1.94 in 1986.[37] Total consumption, which had fallen in 1985, continued to fall in 1986; consumption in 1986 was about 16 Tcf as compared to about 18 Tcf in 1984.[38] After 1983, pipelines reduced their take levels substantially below take-or-pay requirements in their contracts,[39] and did not honor the bulk of their resulting take-or-pay claims. The responses to the Commission's 1987 take-or-pay data request indicate that although pipelines had incurred total take-or-pay exposure of over $24 billion or more during the period January 1, 1983 through June 30, 1987, during the same period they made take-or-pay payments for gas totalling only $700 million or $.7 billion.[40]

Perhaps the primary purpose of take-or-pay clauses is to guarantee producers a minimum level of income in order to pay off loans and cover current operating expenses.[41] Producers must make substantial investments in order to explore for, and produce, natural gas. Often, the necessary private financing would be unavailable in the absence of a take-or-pay or similar clause providing for revenue to pay off loans. The take-or-pay clause thus serves as a legitimate, bargained-for risk allocation mechanism and requires pipelines and their customers to compensate the producer in part for the risks the producer incurs in making substantial investments in order to meet the supply needs of these pipelines and their customers. Producers thus made substantial investments and banks and others made substantial loans in reliance on the take-or-pay clauses in their contracts with pipelines. Pipeline failure to make prepayments meant that producers were not receiving the revenue they had anticipated.

The loss of revenue to producers during the mid- and late 1980's as a result of falling gas prices, falling sales, and few take-or-pay payments, combined with a simultaneous decrease in oil prices, has had serious adverse effects not only on producers, but on the entire economies of the producing regions of the nation. Many producers, particularly small producers, went bankrupt, defaulting on loans from banks secured in part on the basis of minimum revenue levels provided for by the take-or-pay clauses in their sales contracts. This in turn caused numerous banks in the producing regions to fail, with the result that the Federal Deposit Insurance Corporation (FDIC), through foreclosures of producer properties, is now a substantial oil and gas lease owner.[42] As the effects of producers' loss of revenue spread through the economies of the producing regions of the nation, the unemployment levels in those regions rose significantly above the national average.[43]

While these adverse effects have for the most part been limited to producing states, the collapse in exploration for new gas supplies, if continued, could create the potential over the long term

[37] EIA, Natural Gas Monthly, June 1989, Table 4 at 14.

[38] 1988 Natural Gas Yearbook, Table XI.

[39] The responses to the Commission's take-or-pay data request show that, in the aggregate, during the period 1983 through 1986 pipelines took about 44 percent of deliverability while their take-or-pay obligations were about 66 percent of deliverability.

[40] Another $14 billion of exposure was settled by payments of 17 cents on the dollar during 1987 and lesser amounts during earlier years.

[41] Take-or-pay clauses have also been included in producer-pipeline contracts for other purposes. For example, the ultimate amount of natural gas recoverable from some reservoirs is greater if the gas is produced at a high rate. This is true of the large number of water-drive reservoirs in the Outer Continental Shelf (OCS). In many of those reservoirs, unless the gas is produced at a rapid and relatively constant rate, water can entrap a part of the gas in the reservoir, making it impossible to produce the entrapped gas. A take-or-pay clause serves to encourage the necessary takes of gas.

[42] *See* Petition of FDIC, filed December 31, 1987.

[43] *See* Table 2 comparing the unemployment rates in Texas and Louisiana from 1975 to 1989 to the national average unemployment rates during the same period.

for new gas shortages, with all the same adverse effects for the nation as the shortage of the 1970s.

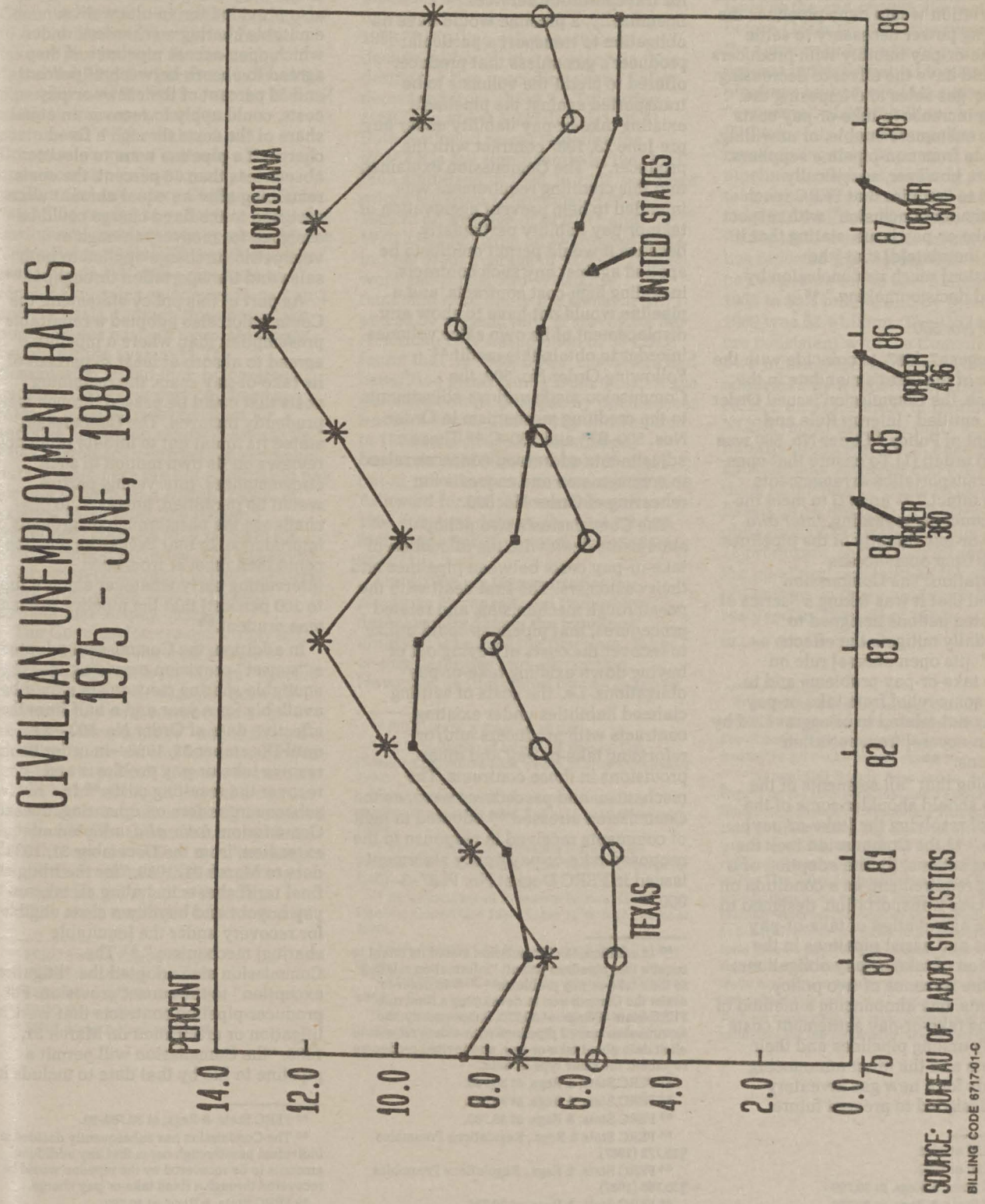
D. The AGD Decision

Numerous parties appealed Order No. 436 to the United States Court of Appeals for the District of Columbia Circuit. On June 23, 1987, the court issued its decision in *Associated Gas Distributors* v. *FERC (AGD)*. The court generally upheld the substance of Order No. 436. The court observed that the Commission had found: "(a) that pipelines continue to possess substantial market power; (b) that they have exercised that power to deny their own sales customers, and others without fuelswitching capability, access to competitively priced gas; and (c) that this practice has denied consumers access to gas at the lowest reasonable rates." [44] The court found that these findings were basically unchallenged by the parties seeking to overturn the Commission's order. The court upheld the Commission's authority under the NGA and the NGPA to require that all pipelines performing self-implementing transportation must do so on a not unduly discriminatory basis. The court also upheld the rate provisions of Order No. 436, the optional certificate procedures, and the Commission's earlier policy statement relating to buyouts of take-or-pay obligations.

[44] 824 F.2d at 999.

BILLING CODE 6717-01-M

TABLE 2


CIVILIAN UNEMPLOYMENT RATES
1975 - JUNE, 1989
PERCENT
14.0
12.0
10.0
8.0
6.0
4.0
2.0
0.0
75
80
81
82
83
84
85
86
87
88
89
LOUISIANA
UNITED STATES
TEXAS
ORDER 380
ORDER 436
ORDER 500
SOURCE: BUREAU OF LABOR STATISTICS
BILLING CODE 6717-01-C

The court, however, remanded Order No. 436 to the Commission for it, among other things, to "more convincingly address" the take-or-pay issue.[45] The court concluded that the Commission had failed to give reasoned consideration to claims that open-access transportation would deny pipelines the bargaining power necessary to settle their take-or-pay liability with producers and would have the effect of decreasing pipelines' gas sales and imposing the resulting increase in take-or-pay costs on those customers unable, or unwilling, to buy gas from non-pipeline suppliers. The court, however, specifically declined to "require that FERC reach any particular conclusion" with respect to the take-or-pay issue, stating that it "merely mandate[d] that [the Commission] reach its conclusion by reasoned decisionmaking." [46]

E. Order No. 500

On August 7, 1987, to coincide with the issuance of the court's mandate in the *AGD* case, the Commission issued Order No. 500, entitled "Interim Rule and Statement of Policy." Order No. 500 was issued in order: (1) To ensure that open-access transportation arrangements "remain intact," [47] and (2) to meet the court's concerns regarding, *inter alia*, the take-or-pay liability of the pipelines resulting from open-access transportation. The Commission explained that it was taking a "series of interrelated actions designed to substantially mitigate the effects of * * * [its open-access] rule on pipeline take-or-pay problems and to provide some relief from take-or-pay problems not related to or aggravated by the [open-access] transportation regulations." [48]

Stressing that "all segments of the industry should shoulder some of the burden of resolving the [take-or-pay] problem," [49] the Commission took the following actions: (1) The adoption of a crediting requirement, as a condition on open-access transportation, designed to minimize aggravation of take-or-pay problems and assist pipelines in the negotiation of take-or-pay obligations; and (2) the issuance of two policy statements, one announcing a method of allocating take-or-pay settlement costs equitably among pipelines and their customers and the other announcing standards for a new gas inventory charge designed to prevent future accumulation of unfunded take-or-pay costs.[50]

The Commission's crediting rule required producers to make an offer of credits for transported volumes against take-or-pay liability as part of a request for transportation services.[51] Specifically, a pipeline would have no obligation to transport a particular producer's gas unless that producer offered to credit the volumes to be transported against the pipeline's existing take-or-pay liability under any pre-June 23, 1987 contract with the producer.[52] The Commission explained that this crediting requirement was intended to help prevent aggravation of take-or-pay liability particularly because it would permit credits to be applied against any such contracts, including high-cost contracts, and a pipeline would not have to show any displacement of its own sales volumes in order to obtain this credit.[53] Following Order No. 500, the Commission made various adjustments to the crediting mechanism in Order Nos. 500-B[54] and 500-C.[55] These adjustments addressed concerns raised in comments on and requests for rehearing of Order No. 500.

The Commission's two policy statements dealt with the allocation of take-or-pay costs between pipelines and their customers. The first dealt with the passthrough mechanisms, and related procedures, that pipelines could utilize to recover the costs of buying out or buying down existing take-or-pay obligations, *i.e.*, the costs of settling claimed liabilities under existing contracts with producers and/or reforming take-or-pay and other provisions in those contracts. The mechanism and procedures were, as the Commission stressed,[56] adopted in light of comments received in response to the proposed take-or-pay policy statement issued in FERC Docket No. PL87-3-000.[57]

The buyout, buydown policy statement reiterated that all pipelines—whether or not they agreed to open-access transportation—would be permitted to pass through all prudently incurred settlement costs in their sales commodity charge. The Commission also provided for an alternative, equitable sharing mechanism, under which open-access pipelines, if they agreed to absorb between 25 percent and 50 percent of their take-or-pay costs, could apply to recover an equal share of the costs through a fixed charge. If a pipeline were to elect to absorb less than 50 percent, the costs remaining after an equal amount were assigned to the fixed charge could be assigned for recovery through a volumetric surcharge applied to both sales and transportation throughput.[58]

As part of this policy statement, the Commission also adopted a rebuttable presumption that, where a pipeline agreed to absorb at least 25 percent of its take-or-pay costs, the remaining costs that could be passed through were prudently incurred. The Commission stated its intent not to initiate prudence reviews on its own motion in such circumstances. Intervening parties would be permitted, however, to challenge the passthrough on grounds of imprudence. In that event, the pipeline could then recover from such intervening party whatever amount (up to 100 percent) that the pipeline proved was prudent.[59]

In addition, the Commission adopted a "sunset" provision providing that the equitable sharing mechanism would be available for a year and a half from the effective date of Order No. 500—*i.e.*, until December 31, 1988—in order to resolve take-or-pay problems and recover the resulting costs.[60] In subsequent orders on rehearing, the Commission, *inter alia*, adopted an extension, from the December 31, 1988 date to March 31, 1989, "for the filing of final tariff sheets including all take-or-pay buyout and buydown costs eligible for recovery under the [equitable sharing] mechanism." [61] The Commission also adopted the "litigation exception" to the sunset provision. For producer-pipeline contracts that were in litigation or arbitration on March 31, 1989, "the Commission will permit a pipeline to file by that date to include in

[45] 824 F.2d at 1044.
[46] 824 F.2d at 1030.
[47] FERC Stats. & Regs. at 30,799.
[48] FERC Stats. & Regs. at 30,779.
[49] FERC Stats. & Regs. at 30,779.

[50] In addition, the Commission stated its intent to require that pipelines submit "information relating to their take-or-pay problems * * * in order to assist the Commission in developing a final rule." FERC Stats. & Regs. at 30,779. Subsequently, the Commission served pipelines with a data request to elicit data about take-or-pay, and invited producers to submit the same type of data.
[51] FERC Stats. & Regs. at 30,780.
[52] FERC Stats. & Regs. at 30,847.
[53] FERC Stats. & Regs. at 30,760.
[54] FERC Stats & Regs., Regulations Preambles ¶30,772 (1987).
[55] FERC Stats. & Regs., Regulations Preambles ¶30,786 (1987).
[56] FERC Stats. & Regs. at 30,764.
[57] Fed. Reg. 7478 (1987), 38 FERC ¶61,230.

[58] FERC Stats. & Regs. at 30,789-90.
[59] The Commission has subsequently decided in individual passthrough cases that any additional amounts to be recovered by the pipeline would be recovered through a fixed take-or-pay charge.
[60] FERC Stats. & Regs. at 30,792.
[61] FERC Stats. & Regs. at 31,267.

its tariff language permitting the pipeline to pursue the litigation to its natural end of judgment and final appeal or settlement and then to file to recover eligible costs resulting from these contracts under the equitable sharing mechanism." [62]

In its second policy statement, the Commission adopted certain principles to avoid the recurrence of unfunded take-or-pay costs in the future, by "establish[ing] the parameters in which pipelines may file to recover the costs of maintaining supply for their customers." [63] To that end, the Commission stated it would allow any open-access pipeline to adopt, in its tariff, a Gas Inventory Charge (GIC) for "standing ready" to satisfy its firm sales customers' contract requirements.[64] The Commission explained that this policy was intended to allow pipelines to require firm sales customers to pay on a current basis, through this charge, the non-facilities costs of maintaining gas supply for the system.[65] The Commission stated that, by contrast, under existing one-part purchase gas rates, a pipeline must contract for supplies and stand ready to satisfy its sales customers' contract requirements, but its customers are not required to pay for this service on a current basis. In existing sales rates, the demand component consists only of costs for transportation facilities. The gas sales reservation component is paid, perhaps years later, in the form of passed-through take-or-pay charges.

The Commission reasoned that the GIC would have the dual effects of making a pipeline's customers "careful in nominating their demand because they will pay on a current basis for excessive nominations" and making a pipeline "more careful in contracting for long-term supplies" because customers would be unwilling to pay on a current basis the costs of maintaining excessive supplies.[66] The Commission explained that, through the GIC, it was "seeking to establish a rational, efficient pricing structure for the pipeline merchant function with emphasis on reciprocity and consideration of service obligations under the increased options available to a pipeline's sales customers." [67]

F. Economic Developments after Order No. 500

In 1987 and 1988, transportation by pipelines increased from about 9.6 Tcf during 1986 [68] to over 15 Tcf during 1988.[69] Pipeline sales continued to decline, although at a slower rate than during the two preceding years. Sales decreased from about 7.8 Tcf during 1986 [70] to about 5 Tcf during 1988.[71] Both wellhead prices and pipeline WACOGs fell significantly in 1987 and then stabilized in 1988. In 1987, wellhead prices fell from an average of $1.94 in 1986 to an average of $1.67,[72] and WACOGs fell from an average of $2.32 in 1986 to an average of $2.05.[73] In 1988, wellhead prices and WACOGs remained essentially the same, at $1.71 and $2.04 respectively. A survey by the American Gas Association of 55 LDCs found that by 1988, LDCs' customers had benefitted significantly from the spot gas purchases made possible by open access transportation. The survey showed that in 1984 an average residential gas customer paid $594 for 100 Mcf of gas, but in 1988 the same customer paid $530. Adjusted for inflation, and shown in 1984 constant dollars, the cost for 100 Mcf of gas fell 21 percent, from $594 to $471.[74]

Until 1987, as transportation by pipelines increased and their sales decreased (reducing the pipelines' ability to take gas) the pipelines' take-or-pay liabilities had also grown. However, as illustrated by the graph in Table 3,[75] this pattern reversed dramatically beginning in 1987. Although pipeline sales continued to decline, outstanding take-or-pay exposure fell at an increasing rate. By March 1989, pipeline take-or-pay exposure was less than 25 percent of its level at the end of 1986, the last full year before Order No. 500. The responses to the Commission's take-or-pay data request indicate that, at the end of 1986, pipelines had accrued take-or-pay "exposure" of $10.7 billion. A survey by INGAA of its member pipelines representing over 90 percent of total pipeline throughput similarly showed take-or-pay exposure at the end of 1986 to be $10.0 billion. However, INGAA, in its September 1989 take-or-pay study, has reported that during 1987 take-or-pay exposure fell to $8.2 billion, during 1988 to $3.8 billion, and by March 31, 1989 was $2.4 billion. The INGAA data are consistent with the Commission's own information, and are further confirmed by a report prepared by NGSA, an association of producers. The NGSA report declared that "take-or-pay liability problems * * * have been substantially resolved and are now a thing of the past." [76] The NGSA study, based on an analysis of take-or-pay obligations of 23 interstate pipelines to 18 producers, shows that 95 percent of the pipelines' outstanding take-or-pay obligations to those producers had been resolved by the end of 1988.

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[62] FERC Stats. & Regs. at 31,268.
[63] FERC Stats. & Regs. at 30,792.
[64] FERC Stats. & Regs. at 30,792.
[65] FERC Stats. & Regs. at 30,793.
[66] FERC Stats. & Regs. at 30,793.
[67] FERC Stats. & Regs. at 30,794.
[68] EIA, Statistics of Interstate Natural Gas Pipeline Companies 1988, Table 12 at 46 (November 1989).
[69] EIA, Statistics of Interstate Natural Gas Pipeline Companies 1988, Table 12 at 46 (November 1989).
[70] EIA, Statistics of Interstate Natural Gas Pipeline Companies 1988, Table 12 at 46 (November 1989).
[71] EIA, Statistics of Interstate Natural Gas Pipeline Companies 1988, Table 12 at 46 (November 1989).
[72] EIA, Natural Gas Monthly, June 1989, Table 4 at 14.
[73] EIA, Natural Gas Monthly, June 1989, Table 5 at 18.
[74] State Treatment of Take-or-Pay Settlement Costs, 17 Gas Energy Review 2, 3 (September 1989).
[75] In Tables 3 and 4, year-end data for one year is attributed to the beginning of the subsequent year. For example, 1986 year-end take-or-pay exposure is treated as 1/87 take-or-pay exposure.
[76] Natural Gas Supply Association, A Status Report on the Interstate Pipeline Take-or-Pay Situation: Substantial Resolution Through Year-End 1988, at 1 (May 1989). *See also* a report recently issued by NGSA, Natural Gas Supply Association, A Status Report on Current Interstate Pipeline Take-or-Pay Liabilities for Jurisdictional and Non-Jurisdictional Gas and the Prospects for Future Liability Accrual Associated with Jurisdictional Gas at 8–9 (November 30, 1989). NGSA reports that the total take-or-pay liability to these producers as of August 1, 1989 was $808 million. Similar to the other trade association take-or-pay surveys mentioned throughout this order, the Commission notes, without endorsing, the wide disparity in the various estimates for the remaining take-or-pay problem.

TABLE 3

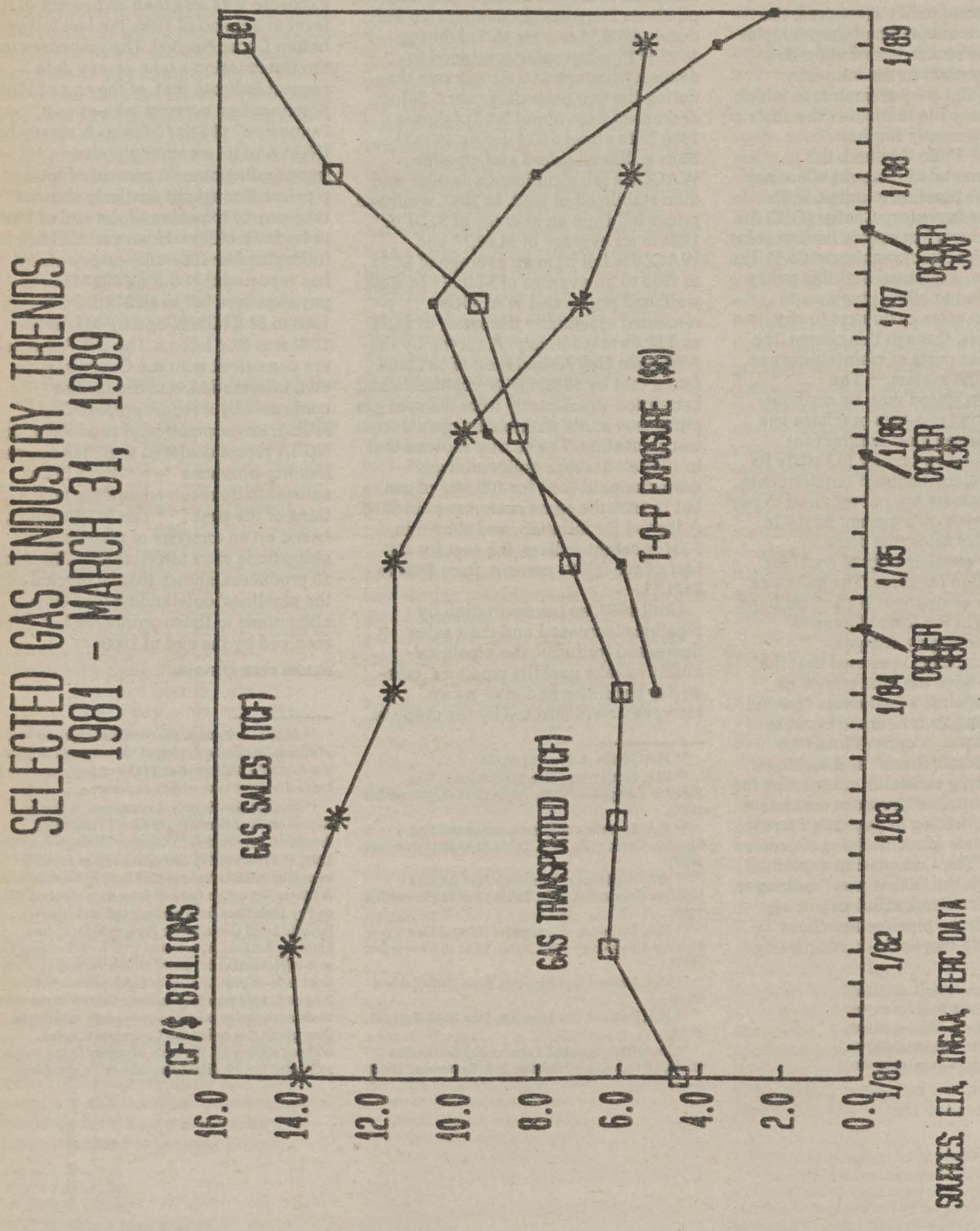
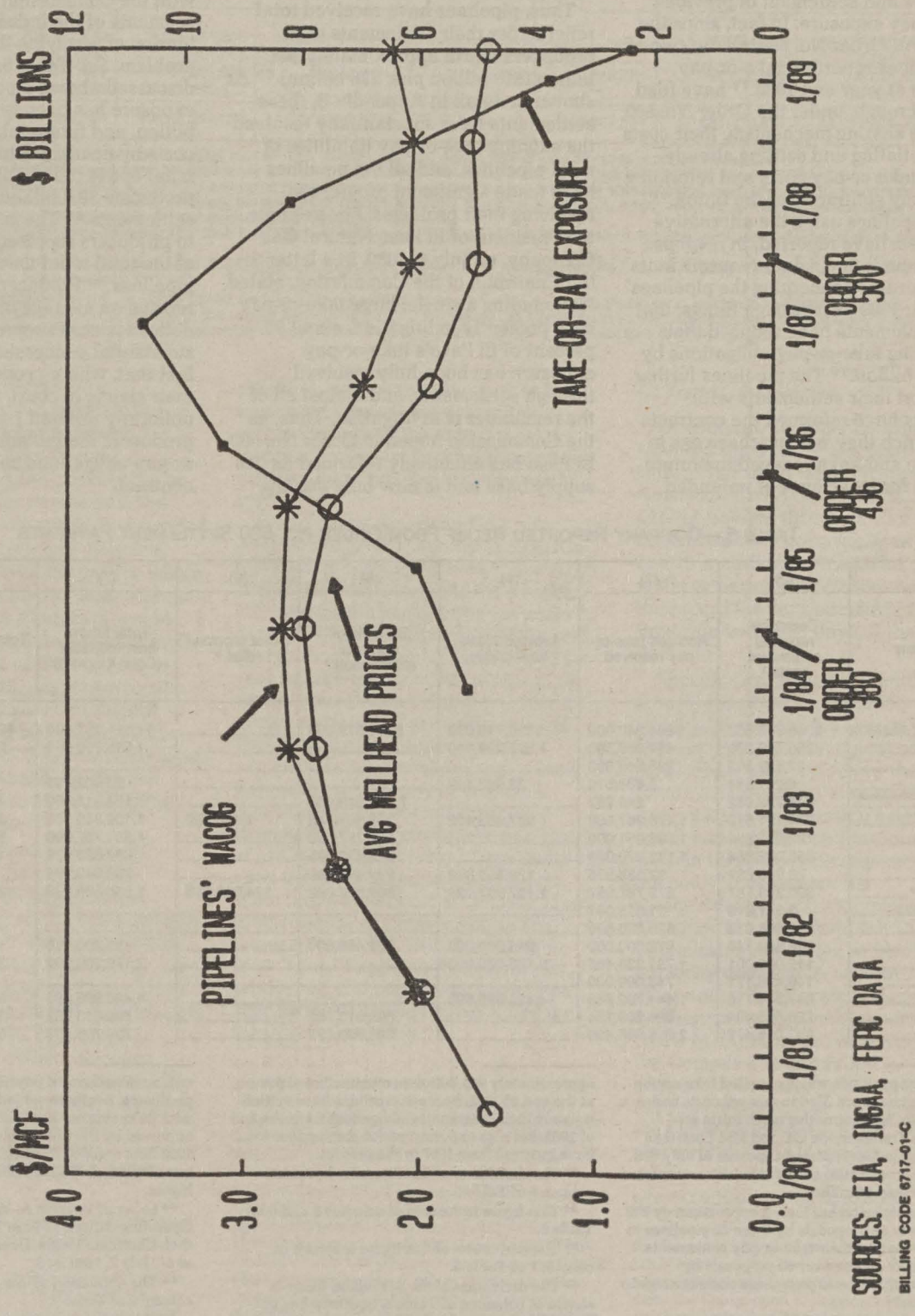

SELECTED GAS INDUSTRY TRENDS
1981 - MARCH 31, 1989
TCF/$ BILLIONS
16.0
14.0
12.0
10.0
8.0
6.0
4.0
2.0
0.0
GAS SALES (TCF)
GAS TRANSPORTED (TCF)
T-O-P EXPOSURE ($B)
1/81
1/82
1/83
1/84
1/85
1/86
1/87
1/88
1/89
ORDER 380
ORDER 436
ORDER 500
SOURCES: EIA, INGAA, FERC DATA

TABLE 4


GAS PRICES AND TAKE-OR-PAY EXPOSURE
1980 - MARCH 31, 1989
$/MCF
$ BILLIONS
4.0
3.0
2.0
1.0
0.0
12
10
8
6
4
2
0
1/80
1/81
1/82
1/83
1/84
1/85
1/86
1/87
1/88
1/89
ORDER 380
ORDER 436
ORDER 500
PIPELINES' WACOG
AVG WELLHEAD PRICES
TAKE-OR-PAY EXPOSURE
SOURCES: EIA, INGAA, FERC DATA
BILLING CODE 6717-01-C

Given pipelines' continued loss of sales and resultant lower takes of gas, the simultaneous dramatic decrease in their take-or-pay exposure could only have occurred as a result of a fundamental restructuring of pipelines' contractual arrangements with producers and settlement of previous take-or-pay exposure. In fact, since the issuance of Order No. 500, all but two of the pipelines reporting take-or-pay exposure at year-end 1986 [77] have filed to pass through, under the Order No. 500 equitable sharing mechanism, their costs of renegotiating and settling already accrued take-or-pay costs and reforming take-or-pay contracts for the future.[78] The 22 pipelines using the alternative mechanism have reported, in response to the Commission's data requests in its April 28 orders concerning the pipelines' March 31, 1989 passthrough filings, that these settlements have reduced their outstanding take-or-pay obligations by over $16 billion.[79] The pipelines further stated that their settlements with producers have reformed the contracts under which they will purchase gas in the future and have reduced the future potential for incurrence of unfunded take-or-pay costs. According to the pipelines, these features of their settlements with producers will reduce their future take-or-pay costs by about $12.2 billion[80] and reduce other future costs by about $15.4 billion,[81] for total future relief of nearly $28 billion.[82]

Thus, pipelines have received total relief under their settlements with producers worth approximately $44 billion ($16 billion plus $28 billion).[83] As shown in detail in Appendix B, these settlements have substantially resolved the existing take-or-pay liabilities of most pipelines, and all the pipelines have made significant progress in resolving their problems. For example, the President of El Paso Natural Gas Company, on July 6, 1989, in a letter to the Chairman of the Commission, stated, "[e]xcluding a single, large take-or-pay case presently in litigation, about 95 percent of El Paso's take-or-pay exposure has been fully resolved through settlements, and almost all of the remainder is in litigation. Thus, as the Commission hoped in Order No. 500, El Paso has effectively reformed its gas supply base and is now only dealing with those relatively few residual matters that remain in the courts." [84]

The substantial progress described above in resolving both past and potential future take-or-pay exposure appears to have been accomplished, for the most part, in a manner consistent with the Commission's goal that all segments of the industry shoulder the burden of resolving the take-or-pay problem. *See* Table 5. While, as discussed above, pipelines' past exposure has been reduced by over $16 billion, and future take-or-pay and other costs by nearly $28 billion, for total relief of $44 billion, pipelines have paid producers $8.2 billion under the settlements.[85] The settlement payments to producers represent only 18.6 percent of the total relief they have given pipelines.[86] Producers' agreements to receive an average of 18.6 cents on the dollar appear to represent real and substantial concessions in light of the fact that, where producers have pursued their claims in court, courts have almost uniformly ordered pipelines to pay producers the full amount of their take-or-pay obligations under the applicable contract.

TABLE 5.—COMPANY REPORTED RELIEF FROM ORDER NO. 500 SETTLEMENT PAYMENTS

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Company	Company reported settlement costs [1]	Accrued take-or-pay resolved	Avoided future take-or-pay	Benefits of contract reformation [2]	Other reported relief [3]	Total future-oriented relief (Cols. 4+5+6)	Total relief (Cols. 3+7)	Costs as a percent of total relief (Col. 3/8) (percent)
AnR	$266,688,583	$884,340,000	$326,718,000	$794,379,000		$1,121,097,000	$2,005,437,000	13.3
ArKLA	350,929,260	627,855,500	1,595,299,000			1,595,299,000	2,223,154,500	15.8
CIG	27,422,303	288,948,000					288,948,000	9.5
CnG	8,221,544	8,605,570	23,992,499			23,992,499	32,598,069	25.2
Columbia	846,733,962	249,257		7,194,313,000		7,194,313,000	7,194,562,257	11.8
El Paso	774,191,512	1,170,267,569	927,883,412	209,861,148	1,590,595	1,139,335,155	2,309,602,724	33.5
Natural	1,192,277,294	1,336,051,000		4,361,757,000		4,361,757,000	5,697,808,000	20.9
Northern	355,032,564	1,180,070,079		632,633,575		632,633,575	1,812,703,654	19.6
Northwest	76,930,232	92,555,055	129,550,802	203,492,489		333,043,291	425,598,346	18.1
Panhandle [4]	390,373,187	572,787,957	1,107,007,029	305,820,092	124,068,218	1,536,895,339	2,109,683,296	18.5
Questar	3,331,315	11,615,091					11,615,091	28.7
Sea Robin	161,598,813	623,620,698					623,620,698	25.9
Southern [5]	119,524,118	572,500,000	213,900,000	271,400,000		485,300,000	1,057,800,000	11.3
Tennessee	1,112,056,001	1,731,238,465	2,175,100,000			2,175,100,000	3,906,338,465	28.5
Texas Gas	146,416,171	743,000,000					743,000,000	19.7
Transco	947,544,715	1,441,702,683	4,420,895,595			4,420,895,595	5,862,598,278	16.2
Transwestern	220,695,494	528,509,754		595,613,762		595,613,762	1,124,123,516	19.6
Trunkline [4]	397,015,477	2,318,955,439		706,793,137		706,793,137	3,025,748,576	13.1

[77] The two pipelines which reported take-or-pay exposure but have not filed to recover costs under the Order No. 500 alternative mechanism are Florida Gas Transmission Co. and Mid-Louisiana Gas Co. Florida Gas reported exposure of only $26 million at year-end 1986 and Mid-Louisiana reported exposure of only $2 million.

[78] The Commission has issued approximately 300 orders on over 50 proposals by these 22 pipelines to recover the costs of their take-or-pay settlements with producers and on over 60 proposals by downstream pipelines to pass those costs through to their customers.

[79] The derivation of this figure is shown in column 3 of Table 5. This figure is greater than the approximately $10 billion in outstanding exposure at the end of 1986, because pipelines have settled not only their outstanding obligations as of the end of 1986, but also exposure which they appear to have incurred from 1987 to the present.

[80] The derivation of this figure is shown in column 4 of Table 5.

[81] This figure is the sum of columns 5 and 6 in Table 5.

[82] The derivation of this figure is shown in column 7 of Table 5.

[83] The derivation of the $44 billion figure is shown in column 8 of Table 5. Southern has not filed information with the Commission concerning the relief it obtained in exchange for the $700 million in settlement payments it has made to producers. Southern settled all take-or-pay issues with its customers and that settlement was approved by the Commission prior to the April 28, 1989 data request. If the relief obtained by Southern were included, the $44 billion figure would be higher.

[84] Letter of William A. Wise, President and Chief Operating Officer, El Paso Natural Gas Company to then-Chairman Hesse, Docket No. TA89-1-33-000, *et al.*, July 7, 1989, at 3.

[85] The derivation of this figure is shown in column 2 of Table 5.

[86] The derivation of these figures is shown in column 9 of Table 5.

TABLE 5.—COMPANY REPORTED RELIEF FROM ORDER NO. 500 SETLEMENT PAYMENTS—Continued

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Company	Company reported settlement costs [1]	Accrued take-or-pay resolved	Avoided future take-or-pay	Benefits of contract reformation [2]	Other reported relief [3]	Total future-oriented relief (Cols. 4+5+6)	Total relief (Cols. 3+7)	Costs as a percent of total relief (Col. 3/8) (percent)
United	780,422,270	2,468,361,368	1,266,764,299			1,266,764,299	3,735,125,667	20.9
Valero	2,650,000	8,491,251					8,491,251	31.2
Williams	43,877,935	36,003,599	41,357,241	28,400,964	2,848,764	72,606,969	108,610,568	40.4
W. Texas Gath.	3,433,376	30,633,677					30,633,677	11.2
	8,227,568,126	16,876,362,032	12,228,467,877	15,304,464,167	128,507,577	27,661,439,621	44,337,801,653	18.8

[1] Indicates the amount to which the reported relief relates. This amount may not match take-or-pay amounts reported elsewhere.
[2] Where contract reformation could not be separately identified from future take-or-pay relief, the total amount was shown in the future take-or-pay column.
[3] Other relief, as reported, consists of the following items (listed in order by dollar amount): Third party transportation costs, avoided transportation costs, royalty idemnification, cost of service net of transport revenue, termination of construction and operating agreement, system operation, well connection requirements, loss of reserves, production related costs, diversion to spot market, gas processing obligations.
[4] Panhandle and Trunkline have indicated that their total reported take-or-pay relief, as shown on this chart, may be understated by as much as $500 million and $1.1 billion, respectively.
[5] Southern filed data for only $119 million of $802 million in settlement payments; it was not required to file additional information as it settled before the informational requirement was generically imposed.

Some of the data provided in this table are based on information supplied to the Commission by the pipelines in response to Commission data requests. The reported dollar amounts were derived according to the format and methodology specified by the Commission in the data requests for standardizing the data, or were estimates and may not reflect the actual take-or-pay liability or benefit obtained by a pipeline under a particular take-or-pay contract.

Although under most of the settlements the producers retain the gas for which the pipelines had been obligated to make take-or-pay payments, and thus the producers can sell that gas to other purchasers, the take-or-pay contracts generally provided that the pipelines forfeited after five years any right to take the gas for which prepayments were made. Thus, without the settlements, the producers would have been able to sell any gas not made up upon expiration of the contract in addition to retaining the prepayments. In light of the producers' significant concessions in their settlements with pipelines, it appears that producers have continued to shoulder a substantial portion of the burden of resolving the take-or-pay problems.

Pipelines have also shouldered a significant part of the burden of resolving the take-or-pay problem, rather than passing all the costs through to their customers.[87] Under Order No. 500's equitable sharing mechanism, the pipelines are absorbing 39.3 percent of the $8.6 billion in payments to producers included in Order No. 500 filings or about $3.4 billion, while recovering through a fixed take-or-pay charge another 39.3 percent, and assessing the remainder through volumetric surcharges to both sales and transportation customers.[88] In addition, pipelines may recover the part to be recovered through the volumetric surcharge only to the extent market forces permit them to raise their prices sufficiently to recover the volumetric surcharge.

Based on an American Gas Association (AGA) survey of 55 LDCs reported in September 1989,[89] the AGA concluded that, assuming the average U.S. residential gas heating customer uses 100 Mcf annually, most LDCs will charge those customers less than $11 a year in take-or-pay costs, although of course households using more than an average amount of gas will pay more. The AGA survey observes that residential customers' average annual payments of take-or-pay costs are significantly less than the benefits received by those customers as a result of LDCs' spot purchases of gas under the open access transportation program, since the average cost of 100 Mcf of gas to residential customers fell by $64 between 1984 and 1988, from $594 to $530. Thus, it appears that pipelines, producers, and consumers have been sharing in the burden of resolving the take-or-pay problem.[90]

G. The AGA Decision

On October 16, 1989, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *American Gas Association* v. *FERC (AGA)*, holding that the Order No. 500 interim rule did not comply with the court's mandate in *AGD*. The court, while retaining jurisdiction, remanded the record for the Commission to issue a final rule within 60 days of the court's decision.

Specifically, the court identified several areas in the Order No. 500 interim rule where the Commission had failed to comply with the mandate of *AGD*. First, the court found that the Commission had yet to reassess in a final rule the Commission's decision not to act under NGA section 5 and to explain its reasons clearly enough for the court to determine the reasonableness of the Commission's decision. The court held further that the Commission had failed to identify its authority under NGA section 7 or any other authority to apply the crediting mechanism to contracts governed by the NGA. In addition, the court found that the Commission had failed to adequately support its authority to require credits for gas transported on the Outer Continental Shelf. The court also held that the Commission had not adequately supported the casinghead gas exception to the crediting

[87] The AGD court admonished against pipelines "simply moving costs downstream to customers." *See* 824 F.2d at 1025.

[88] Thus, to the extent producers ship gas over a pipeline charging a volumetric surcharge, the producers are assessed a portion of the pipelines' take-or-pay settlement costs.

[89] 17 Gas Energy Review at 3.

[90] It is not clear, however, whether LDCs, as distinguished from consumers, have been sharing in the burden of resolving the take-or-pay problem. The AGA survey shows that most of the LDCs surveyed are passing through the take-or-pay settlement costs billed to them in volumetric surcharges (which apparently are designed to recover 100 percent of the costs paid by the LDCs). These surcharges are usually assessed against both the LDCs' sales and transportation customers, but in some cases are assessed only against their sales customers. Eighty percent of the LDCs reported recovering the costs through a volumetric surcharge on both sales and transportation. The average surcharge is under $0.11 per Mcf. Only two of the LDCs surveyed reported recovering the take-or-pay costs in deficiency-based fixed charges similar to those the Commission has approved for interstate pipelines under the alternative passthrough mechanism.

mechanism. Finally, with respect to crediting, the court noted that it was not deciding whether the crediting "mechanism as a whole, given its exceptions and limitations, adequately responds to the mandate of *AGD*." [91] With respect to the elimination of the contract demand reduction provision, the court held that the Commission had failed to overcome the legal presumption that the court's *vacatur* in *AGD*, of the contract demand reduction provision should be applied retroactively.

With respect to Order No. 500's alternative passthrough mechanism, the court set aside the March 31, 1989 sunset provision and held that the Commission may not impose any deadline upon applications to use the alternative passthrough mechanism at least until judicial review of this final rule has been completed. On the basis of its action with respect to the sunset provision, the court found that challenges to the substantive aspects of the alternative passthrough mechanism were not ripe for judicial review. It likewise held that the GIC policy in Order No. 500 was not ripe for judicial review.

IV. The Rationale for the Final Rule

A. Actions with respect to Producer-Pipeline Contracts

In the Commission's judgment, the actions taken in Order No. 500 have worked well to enable the natural gas industry to resolve, in an equitable manner, the take-or-pay problems arising under the gas purchase contracts entered into by pipelines in the late 1970's and early 1980's. As discussed above, since the issuance of Order No. 500, pipelines have reduced their outstanding take-or-pay exposure to less than a quarter of its level as of year-end 1986 despite a continued loss of sales; they have done this by settling the bulk of their outstanding take-or-pay exposure and significantly reforming the contracts under which they purchase gas. Furthermore, the settlements have resulted in producers, pipelines, and consumers sharing in the burden of resolving this problem.

Based upon these facts and the Commission's view of the current state of the natural gas industry, the Commission has determined to take the following actions in order to address what remains of the take-or-pay problems faced by pipelines. The Commission will continue in effect the Order No. 500 crediting provisions (with one modification concerning casinghead and other must-take gas) until the earlier of December 31, 1990, or the date on which a pipeline accepts a GIC certificate. The Commission will also extend the sunset provision for the Order No. 500 alternative passthrough mechanism until December 31, 1990. The Commission will otherwise continue in effect unchanged the policy statement concerning the passthrough of take-or-pay settlement costs. If on December 31, 1990, the D.C. Circuit has not completed judicial review of this final rule, the Commission will further extend the final sunset date for crediting and the sunset date for the alternative passthrough mechanism until 30 days after the date of issuance of the court's mandate upon completion of judicial review.

The Commission will not take action under NGA section 5 to modify producer-pipeline take-or-pay contracts, since pipelines are able to resolve their take-or-pay problems through settlements. Resolution through settlements is more compatible with Congress' decision to rely on competitive markets and provides a more complete resolution than is possible under section 5, under which the Commission cannot modify take-or-pay provisions covering non-jurisdictional gas.

1. Continuation of Crediting

The continuation of crediting, until the newly established sunset date, should maintain pipeline bargaining power in negotiations to settle whatever remaining take-or-pay problems exist without disrupting transportation. (Transportation as a percentage of total throughput has continued to increase after the implementation of crediting. *See* Table 3.) In designing the crediting requirement, the Commission has sought to achieve a balance: on the one hand, it has taken account of the need to offset the potential, discussed in *AGD*, for open-access transportation to aggravate pipelines' take-or-pay problems; and, on the other hand, the Commission, by crafting exceptions to the crediting requirement, has placed appropriate limits on the pipelines' exercise of their monopoly power resulting from their control of transportation facilities so as to avoid undue disruption in the transportation of gas to market. Otherwise, the consumer benefits brought about by competitive wellhead markets and open-access transportation could not have been realized.

While producers contend that the Commission granted the pipelines overly broad power to deny transportation to producers, and pipeline and LDC petitioners argue that crediting is not extensive enough, the fair balance, as the Commission found (and as the evidence summarized above shows) lies somewhere in between.

The court in *AGD* was concerned that open-access transportation may adversely affect pipelines' take-or-pay problems in two ways. First, the court expressed concern that producers may be less likely to be willing to compromise on pipelines' take-or-pay obligations because the pipelines cannot validly deny them transportation if they refuse to compromise.[92] Second, existing customers may be able to reduce their purchases from the pipelines by converting from sales to transportation service and purchasing from other suppliers. With declining sales to existing customers, a pipeline is less likely to be able to sell the volumes that it must take or pay for under contracts with producers.[93]

The primary purpose of crediting was to give pipelines additional bargaining power to negotiate reasonable settlements of their take-or-pay contracts. Order No. 500 specifically provided that pipelines could agree to transport gas without an offer of credits so that pipelines could give up their crediting rights as part of a take-or-pay settlement, and in Order No. 500–C the Commission "emphasize[d] that the pipeline and the shipper or producer may agree that the pipeline will transport the gas without the submission of an offer of credits. This enables pipelines and producers to settle take-or-pay liabilities outside the Order No. 500 crediting procedures." [94]

The evidence summarized above clearly demonstrates that pipelines do have sufficient bargaining power to negotiate reasonable settlements resolving their take-or-pay problems. As discussed above, pipelines have entered settlements which have reduced their past take-or-pay exposure by over $16 billion and reduced future take-or-pay and other costs by nearly $28 billion, for total relief of $44 billion. In return for this relief, pipelines have paid producers about $8.2 billion, or 18.6 cents on the dollar. As shown in detail in Appendix B, these settlements have substantially resolved the take-or-pay liabilities of most major interstate pipelines, and all pipelines have made significant progress in settling their take-or-pay problems. Much of this could not have happened if pipelines lacked bargaining power in their negotiations with producers.

The evidence summarized above indicates that, even before Order No. 500 was issued, pipelines were

[91] Slip op at 27.

[92] 824 F.2d at 1023.

[93] 824 F.2d at 1023.

[94] FERC Stats. & Regs. at 30,964.

negotiating increasingly significant settlements with producers, and suggests that pipelines had a certain amount of bargaining power even without crediting. It stands to reason that, with pipelines for the most part refusing to make payments under their contracts, many producers, particularly those having financial difficulties, preferred receiving some money immediately in a settlement rather than waiting for the potentially greater rewards of pursuing litigation.[95]

After Order No. 500, pipelines have been even more successful at resolving their take-or-pay problems, reducing outstanding take-or-pay exposure to less than a quarter of its level at year-end 1986, the last full year before issuance of Order No. 500. While the Commission cannot know the producers' motivations in agreeing to these post-Order No. 500 settlements, the Commission believes that it is a reasonable inference that the pipelines' ability to demand offers of credits in the absence of a settlement was a significant factor in producers' willingness to settle take-or-pay. In any event, since pipelines are resolving their take-or-pay problems through settlements, the Commission does not believe more intrusive action by the Commission to resolve take-or-pay, such as action under NGA section 5, is justified regardless of the reasons for producers to have agreed to those settlements. (The Commission's reasons for declining to take section 5 action are discussed in detail below.)

The Commission believes it reasonable to infer that crediting has provided pipelines additional bargaining power for a number of reasons. First, contrary to pipeline contentions that crediting gives them no significant rights beyond those they received under pre-Order No. 500 release agreements, crediting does give pipelines substantially greater rights than they generally received under release agreements negotiated before Order No. 500. Furthermore, there are substantial advantages to producers in obtaining a pipeline's agreement to transport gas without credits.

Under pre-Order No. 500 release agreements, pipelines were generally entitled to credits only when they transported gas that had been released, and pipelines could apply those credits only against take-or-pay obligations under the contract from which the gas was released. Under Order No. 500, however, pipelines may receive credits when they transport non-released gas as well as released gas and may, at their sole discretion, apply those credits against their take-or-pay obligations under any contract with the producer whose gas is being transported. Thus, pipelines are entitled to credits in more situations under Order No. 500, and the credits are significantly more valuable since they may be applied against the pipeline's highest priced contract with the producer.

Experience has shown that these provisions make producers reluctant to offer credits to the pipeline. Even apart from the fact that pipelines may apply credits against higher-priced contracts with the producer under cross-crediting, there are other reasons why these provisions make it advantageous for the producers to obtain the pipelines' agreement to transport the gas without an offer of credits. Order No. 500 does not require pipelines to inform producers before gas is transported which contract the pipeline intends to apply the credits against. Rather, the pipeline can wait until the end of the contract year under the contract against which it intends to apply the credits before informing the producer that it is applying the credits against the pipeline's take-or-pay obligations under that contract. While the producer can assume that the pipeline will apply the credits against. one of its highest priced contracts, this can still leave the producer somewhat uncertain about the revenue it will receive under its various contracts and thereby make planning difficult. Also, the producer may be concerned that, since the pipeline may apply the credits against a contract covering leases other than those from which the gas to be transported is produced, the pipeline's use of credits will subject the producer to suits by royalty owners whose royalty payments are reduced but who receive no benefit from the sale of the gas transported.

Another reason that producers prefer to have their gas transported without an offer of credits is that crediting may make property transfers more difficult. This is because pipelines' rights to credits are based on producer ownership of leases as of June 23, 1987, regardless of subsequent assignments or other property transfers. The assignee is unlikely to take the assignment unless it can obtain transportation of any gas it produces. But, under the crediting rules, the assignee can only obtain transportation if the assignor offers the pipeline credits against its take-or-pay obligations to the assignor. This the assignor may be reluctant to do since it receives no benefit from the sale of gas produced by the assignee. However, the ability to freely purchase and sell leases is an important part of a producer's business.[96]

Finally, a substantial amount of gas is transported in large packages which include the gas of many producers. Under the crediting rules, 85 percent of this gas must be covered by offers of credits from the actual working interest owners of the leases in question or the pipeline can refuse to transport the gas. Since many leases have multiple working interest owners and gas from a number of leases may be transported in a single package, obtaining the pipeline's agreement to transport the gas without an offer of credits enables the producers to avoid the administrative difficulties of obtaining signed offers of credits from all the interest owners. It may also be the only way to obtain transportation of the gas where the owners of more than 15 percent of the gas are unwilling to provide offers of credits.

Because of these aspects of crediting and others, there are substantial advantages to producers in not having to provide the pipeline offers of credits. However, unless a pipeline agrees to transport gas without an offer of credits, producers cannot have their gas transported to market in the absence of an offer of credits.[97] Thus, producers have a substantial incentive to settle their take-or-pay claims with pipelines so that they can obtain the pipeline's agreement to transport their gas without credits. As discussed above, producers have in fact entered into many such settlements.

Pipelines point to the various situations in which they must transport gas without receiving credits and contend that these exceptions have impeded the crediting mechanism's

[95] During the Senate debate on the Natural Gas Wellhead Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989) (Wellhead Decontrol Act), Senator Johnston, the floor manager of the bill, stated, in explaining why the bill did not take action with respect to take-or-pay, 135 Cong. Rec. S6385 (daily ed. June 8, 1989),

> The process of the market started working. Tenneco, for example, said to all of their producers with whom they had take-or-pay contracts, we are not going to take your gas. If you will not renegotiate, we are just not going to take your gas and you can sue us. In the meantime, the producers do not have any cash flow. In the meantime we have all of these lawyers, and we are going into this discovery. You might win but it is going to take 2, 3 years or something to win.

[96] While the Commission recognizes the difficulties for property transfers caused by this aspect of crediting, the Commission in this rule denies the producers' request to modify this provision since it is necessary to avoid circumvention of crediting. *See* discussion in section IV(A)(6)(a)(xx), *infra*.

[97] This is true even if the transportation will not actually generate credits because of an exception to crediting.

effectiveness to provide take-or-pay relief.[98] For example, INGAA, in its September 1989 report, has stated that 15 pipelines representing 71 percent of the market reported that less than three percent of the volumes they transported in 1988 resulted in identified credits under Order No. 500. This data, even assuming its validity, does not contradict the Commission's belief that crediting has increased pipelines' bargaining power to obtain settlements. For the reasons discussed above, it appears that producers have preferred to enter into settlements in order to obtain transportation without an offer of credits, rather than to actually give the pipeline an offer of credits. This is vividly demonstrated by the case of Texas Gas Transmission Corporation. As discussed below, Texas Gas asserted in its Order No. 500–C comments that it anticipated earning credits in the first quarter of 1988 that would cover only four percent of the take-or-pay obligations it expected to incur during that period. However, Texas Gas has since reported to the Commission that it has settled accrued take-or-pay liability of $743 million through payments to producers of $146 million, or 19.7 cents on the dollar and it withdrew its judicial appeal of Order No. 500.

Because pipelines are resolving their take-or-pay problems, the Commission rejects commenters' proposals (discussed *infra*) to give pipelines a broader right to condition access to transportation than that contained in the crediting regulations. Specifically, pipelines and LDCs have proposed that the Commission give pipelines the discretion to refuse to transport a producer's gas unless the producer offers to settle the pipeline's take-or-pay liability to it in a manner acceptable to the pipeline. Granting pipelines such a broad right to refuse to transport gas would vitiate the open access condition in the Commission's regulations. Since the pipeline would have sole discretion to determine whether the producer had offered adequate take-or-pay relief, the pipeline would, for all practical purposes, have an unlimited opportunity to exercise its monopoly power over transportation to refuse to transport gas. This would be inconsistent with Congress' intent, expressed in connection with the adoption of the Wellhead Decontrol Act, that the Commission continue to encourage and broaden open access transportation. The increased competition in the interstate pipeline industry resulting from open access transportation "has brought lower prices to all consumers, including captive residential customers." [99] These benefits could be lost if pipelines are now given an unconstrained right to refuse transportation of gas which competes with their sales. Such a right could have particularly adverse consequences in today's market in which two-thirds, or more, of gas sold in the interstate market is transported by pipelines, rather than purchased and sold by them.

By contrast, under the crediting rules, pipelines' ability to refuse transportation is carefully circumscribed. This is because the crediting rules require the pipeline to transport a producer's gas if the producer offers credits as provided in Order No. 500. Since pipelines have been resolving their take-or-pay problems under the present rule while all consumers receive the benefits of lower prices brought about by open access transportation, the Commission sees no reason to amend the rule to give pipelines additional rights to refuse transportation.

2. Changes to Crediting Provisions

The final rule makes two changes to the crediting provisions adopted in Order No. 500. First, the final rule provides for the elimination of the crediting provisions by the earlier of December 31, 1990,[100] or the date a pipeline accepts a GIC certificate. The downward trend in take-or-pay exposure under Order No. 500 indicates that by the end of 1990 pipeline take-or-pay problems should be reduced to the point that the advantages of any further continuation of crediting will be outweighed by the burdens of crediting on the transportation and production of gas. As discussed above, in the two and one quarter years from year-end 1986 to March 31, 1989, pipelines were able to reduce their outstanding take-or-pay liability by more than three-quarters. Accordingly, the Commission believes that the year and three-quarters, from March 31, 1989 to December 31, 1990, is sufficient time for pipelines to substantially resolve the remainder of their take-or-pay problems. Indeed, it appears that since March 31, 1989, pipelines have already made significant progress in settling their remaining take-or-pay problems. Since that date, pipelines have filed with the Commission to recover about $250 million in settlement costs under the litigation exception.[101]

Acceptance of a GIC certificate would also terminate crediting, since continued crediting after implementation of a GIC would be inconsistent with the Commission's policy that a GIC should be the pipeline's only mechanism for the recovery of take-or-pay costs.[102] Any take-or-pay or similar costs incurred by the pipeline would be recoverable in the GIC itself, thereby eliminating the need for crediting. By the final December 31, 1990 sunset date for crediting, the Commission expects that a significant number of pipelines will have GICs. Nearly half of the pipelines reporting significant take-or-pay costs at year-end 1986 have applied to the Commission for GICs. Two of those pipelines have been issued and accepted GIC certificates.[103] Another has been issued a certificate and acceptance is pending.[104]

In addition, the Commission has approved an interim GIC for Transco for use until the Commission resolves Transco's permanent GIC application, which is currently being considered in a paper hearing.[105] Finally, the Commission has established formal or paper hearings on the GIC applications of another four of the pipelines that reported significant take-or-pay problems at year-end 1986 (Natural,[106] Northern,[107] Southern,[108] and Tennessee [109]).

In addition to creating a sunset provision for crediting, the Commission is making another change to the regulations concerning take-or-pay crediting. In Order No. 500, the Commission provided that pipelines may apply credits against their take-*and*-pay obligations to producers, as

[98] The Commission will discuss each of these exceptions below when it addresses the specific comments of the parties.

[99] H. R. Rep. No. 101, 101st Cong. 1st Sess. at 3 (1989).

[100] If on December 31, 1990, the D.C. Circuit has not completed judicial review of this final rule, the Commission will further extend the December 31, 1990 deadline until the date of issuance of the court's mandate upon completion of judicial review.

[101] *See* ANR Pipeline Co., 48 FERC ¶ 61,013 (1989); Natural Gas Pipeline Co. of America, 48 FERC ¶ 61,010 (1989); Northwest Pipeline Co., 49 FERC ¶ 61,056 (1989); Texas Gas Transmission Corp., 48 FERC ¶ 61,246 (1989); Transcontinental Gas Pipeline Co., 47 FERC ¶ 61,300 (1989); Williams Natural Gas Co., 48 FERC ¶ 61,046 (1989); Williams Natural Gas Co., 48 FERC ¶ 61,395 (1989); ANR Pipeline Co., 49 FERC ¶ 61,229 (1989); Natural Gas Pipeline Co. of America, 49 FERC ¶ 61,265 (1989). In addition, proposals to recover costs under the litigation exception by ANR and Transwestern are currently pending in Docket Nos. RP90–46–000 and RP90–25–000.

[102] Transcontinental Gas Pipe Line Corp., 47 FERC ¶ 61,244 at 61,852 (1989).

[103] Transwestern Pipeline Co., 43 FERC ¶ 61,240 (1988), *order on reh'g*, 44 FERC ¶ 61,164 (1988); Columbia Gas Transmission Corp., 49 FERC ¶ 61,071 (1989).

[104] El Paso Natural Gas Co., 49 FERC ¶ 61,262 (order issued November 29, 1989).

[105] 48 FERC ¶ 61,399 (1989).

[106] 49 FERC ¶ 61,137 (1989).

[107] 49 FERC ¶ 61,027 (1989).

[108] 49 FERC ¶ 61,131 (1989).

[109] 47 FERC ¶ 61,108 (1989).

well as against their take-or-pay obligations. Under a take-*and*-pay clause, unlike a take-or-pay clause, a pipeline must not only pay for a minimum quantity of gas, it must actually take that gas. These must-take provisions are generally negotiated because of special production needs of producers. For example, where a contract covers casinghead gas, a must-take clause may be included in order to assure that the pipeline takes enough of the casinghead gas so that the producer does not have to shut in the accompanying oil production or flare the casinghead gas. Must-take provisions also serve to assure that the pipeline takes a sufficient quantity of gas to avoid loss of the lease under lease forfeiture clauses, drainage of the reservoir by other producers, or reduction in ultimate recoverable gas reserves recoverable through damage to the reservoir.

In Order No. 500–C, the Commission expressed concern that pipelines' application of credits against their must-take obligations for casinghead gas could require producers to shut in oil production or flare gas, thereby either increasing U.S. dependence on foreign oil or wasting natural gas. Accordingly, the Commission provided that pipelines could not apply credits against their must-take obligations for casinghead gas [110] until the Commission could further consider the effect of this crediting on the public interest and the Commission requested comment on this issue. The Commission did not, however, limit the pipelines' right to apply credits against other must-take provisions, but requested comment on the effect of such crediting. In its *AGA* decision, the court held that the Commission had not sufficiently addressed contentions by some parties that applying credits against minimum take obligations for casinghead gas would not have the adverse effects discussed in Order No. 500–C, because the producer could sell on the open market whatever casinghead gas is not purchased by the pipeline.[111]

In determining the treatment of casinghead and other must-take gas under the Order No. 500 crediting provisions, the Commission must balance the pipelines' need for take-or-pay relief against the possible adverse effects of applying credits against must-take obligations for casinghead or other gas. It appears from pipeline comments in response to Order No. 500–C that applying credits against must-take obligations for casinghead gas could give at least some pipelines significant take-or-pay relief. A number of pipelines [112] stated that casinghead gas represents a significant proportion of their system supply, particularly with regard to take-or-pay obligations.

However, when the Commission issued Order No. 500–C, producers' opportunities to market any casinghead gas not taken because of credits were more limited than they are today. This is primarily true because at that time the ability of producers to obtain transportation of the casinghead gas to alternative purchasers was more limited. In early 1988, over half the pipelines performing transportation under part 284, and therefore eligible to require offers of credits, were performing transportation only under NGPA section 311 and did not have blanket certificates.[113] The purchasers to whom a producer could obtain access over such a pipeline are limited by the fact that section 311 transportation by interstate pipelines must be on behalf of intrastate pipelines or LDCs. Furthermore, a significant number of pipelines were not performing any form of open-access transportation.[114] Thus, to the extent reaching an alternative purchaser required transportation over such a pipeline in addition to, or instead of, the transportation over the pipeline taking the credit against the casinghead gas, the producer might not have been able to sell to that purchaser. Given the uncertainty of the producer's ability to market casinghead gas to a purchaser other than the pipeline when Order No. 500–C was issued, there appeared to be a significant risk that any casinghead gas not taken by a pipeline could not be marketed to an alternative purchaser and thus could be shut in.[115]

By contrast, today open-access transportation is much more widely available. Twenty-two of 23 major pipelines have accepted blanket certificates.[116] Accordingly, with open-access transportation widely available, it appears most producers could market to other purchasers casinghead gas not taken by the pipeline, thus limiting the adverse effects of allowing crediting against must-take obligations for casinghead gas. However, since casinghead gas is contractually committed to the pipeline, the producer can only market it to others if the pipeline releases the gas not taken.

In these circumstances, the Commission has decided to modify the crediting regulations prospectively to provide that the pipeline may apply credits against its must-take obligations for casinghead gas, as long as the pipeline releases the gas not taken as a result of the application of credits. In addition, to the extent the gas is subject to the Commission's NGA jurisdiction, this rule provides the necessary blanket abandonment and certificate authority to permit the release and resale of the gas to others. The change in the crediting regulations adopted here should enhance the take-or-pay relief afforded to pipelines through crediting by allowing credits to be applied against burdensome must-take obligations for casinghead gas, while minimizing the adverse effects of so applying these credits.

In light of the fact that pipelines will now be entitled to apply credits against all must-take obligations, including those for casinghead gas,[117] the Commission believes that balance requires that the new release requirement also apply when credits are applied against any must-take obligations, not just those for casinghead gas. Allowing the pipeline to apply credits against must-take gas other than casinghead gas without releasing the gas enables the pipeline to shut in that gas, since the gas is contractually committed to the pipeline. As producers have argued,[118] this could

[110] However, the Commission emphasized that, to the extent pipelines transport casinghead gas, transportation of that gas would still generate credits under Order No. 500. Thus, the pipeline would continue to receive the same number of credits it would have received in the absence of the casinghead gas provision. Only the contractual obligations against which those credits could be applied were affected.

[111] Slip op. at 26.

[112] Colorado Interstate Gas Company, Consolidated Gas Transmission Corporation, Columbia Gas Transmission Corporation, El Paso, Enron Interstate Pipeline Group, Natural Gas Pipeline Company of America, Panhandle Eastern Pipe Line Company, Tennessee, Texas Eastern Transmission Corporation, Texas Gas, Transcontinental Gas Pipe Line Company, United Gas Pipe Line Company, Williston Basin Interstate Pipeline Company and INGAA.

[113] For example, in March 1988, 10 of the 18 major pipelines performing open-access transportation were performing only section 311 transportation. (Of these 10, three had been issued blanket certificates but had not yet accepted them.)

[114] In March 1988, five of the 23 major pipelines were performing no open-access transportation.

[115] The alternative of flaring the gas appears in most cases to be prohibited by resource conservation laws.

[116] The one major pipeline without a blanket certificate, Florida Gas Transmission Company, is performing no Part 284 transportation and thus would not be eligible to require offers of credits in any event.

[117] As discussed above, Order No. 500–C only prohibited application of credits against must-take obligations for casinghead gas and not against other must-take obligations.

[118] *See* section IV (A)(6)(a)(xiv), *infra*.

cause the producer serious adverse consequences such as loss of its lease under a lease forfeiture clause or loss of gas through drainage of the reservoir by other producers. Loss of the lease could cause the producer to lose its entire investment in drilling for and producing gas from the lease and could subject the producer to damage suits from the lease owner. Shutting in of the well could also cause loss of associated natural gas liquids production and have adverse downstream consequences by preventing the producer from meeting its commitment to supply gas to processing plants and gas products (*e.g.*, liquified natural gas products such as ethane, propane, butanes, etc.) to petrochemical plants and refineries.

Furthermore, shutting in of gas production is not in the public interest, since it reduces the amount of gas available on the open market, thereby reducing competitive pressures holding down the price of gas. In addition, shutting in of gas production may result in violation of state or Federal conservation regulations requiring particular levels of production in order, among other things, to maximize the amount of gas recoverable from a reservoir.

Requiring the pipeline to release any must-take gas not taken because of the application of credits should avoid these adverse consequences by enabling the producer to market the gas to other purchasers. At the same time, however, since the pipeline can continue to apply credits against any must-take obligation to a producer, this change in the regulations should not significantly reduce the take-or-pay relief afforded pipelines by the crediting mechanism. Accordingly, the Commission will amend the crediting regulations to require that a pipeline applying credits against a must-take obligation release the gas which, as a result, it does not take. In order to assure that the producer will have sufficient time to find an alternative purchaser for the released gas, the Commission will require that the pipeline give the producer 30 days notice (or such other notice as the parties may agree to) of its intent to apply credits against a must-take obligation.

In some cases the must-take obligation may arise from a state or Federal regulation, rather than a take-and-pay provision in the producer-pipeline contract. Since, as discussed above, these regulations are adopted for purposes such as resource conservation, the release requirement will apply when a pipeline applies credits against a take-*and*-pay provision in its contract, and also when it applies credits against a contractual obligation to take *or* pay for gas required to be produced by a rule or regulation promulgated by a state or Federal conservation agency on or before December 15, 1989.

The Commission recognizes that requiring the pipeline to release the casinghead or other must-take gas against which the credit is applied may result in the producer selling that gas to a purchaser that otherwise might have purchased from the pipeline. However, the pipeline's transportation of the released gas will generate additional credits for the pipeline to apply against its take-or-pay obligations to the producer, thereby mitigating any adverse effect on the pipeline's take-or-pay liability by the possible displacement of its sale. These additional credits obtained by the pipeline do not result in the pipeline receiving unfair "double" credits. The pipeline is simply receiving one credit for each unit of gas transported for the producer. The producer having obtained transportation of both (1) the gas which generated the credit applied against the released gas, and (2) the released gas against which the original credits were applied, it is appropriate that the pipeline also receive credits from both transportation transactions.

The Commission is making the changes to the crediting rules concerning casinghead and other must-take gas effective prospectively only. Thus, these changes will apply only with respect to credits generated by transportation occurring after the effective date of this rule. Retroactive application would be inappropriate for several reasons.

First, these changes to the crediting regulations have been made possible only by the increased availability of transportation since the issuance of Order No. 500–C. As discussed above, when the Commission adopted, in Order No. 500–C, the provision that credits could not be applied against must-take obligations for casinghead gas, open access transportation was not sufficiently available to assure that producers could market the casinghead gas to alternative purchasers. Since the provision was therefore necessary when adopted to minimize the possibility that the producer could be required to shut in oil production, it would not be appropriate to give retroactive effect to this change in the crediting regulations.

Second, producers may have relied on the provision that pipelines may not apply credits against must-take obligations for casinghead gas in allowing their gas to be transported subject to an offer of credits. The producer might prefer not to have its gas transported rather than allow the pipeline to take a credit against a must-take obligation for casinghead gas, thus requiring the producer to find an alternative purchaser for that gas. Furthermore, pipelines have presumably already applied most credits which they have received from transportation previously performed in accordance with the crediting regulations under the interim rule, and producers have made production decisions in reliance on that application of credits. In these circumstances, it would be inequitable now to allow the pipeline to apply credits generated by past transportation against must-take obligations for casinghead gas.

Third, the Commission does not believe that retroactive application of these changes is necessary to achieve the primary purpose of crediting—giving pipelines additional bargaining power to negotiate reasonable settlements of their take-or-pay contracts. As discussed in the previous section, pipelines have had sufficient bargaining power to negotiate reasonable settlements under the crediting regulations in effect before the amendments adopted here.

Finally, the Commission observes that it does not intend that these changes in the crediting regulations shall, in any way, affect settlements which producers and pipelines have already entered into, unless the parties expressly reserved in the settlement the right to modify that settlement to reflect subsequent changes in the regulations adopted in Order No. 500.

3. Extension of Sunset Provision

The court, in *AGA*, held that the Commission may not impose a sunset date for the alternative passthrough mechanism that is effective before completion of its judicial review of the final rule.[119] The court held that any earlier sunset date could pressure the participants in the natural gas industry to dispose of much of the take-or-pay problem without the Commission having taken a final, reasoned position on how this should be done. The court also expressed concern that the March 31, 1989 sunset date "may have been highly prejudicial to the bargaining power of pipelines which, unlike the producers, were facing the deadline." [120]

In view of the court's decision, the Commission is extending until December 31, 1990, the March 31, 1989 sunset date for the Order No. 500 alternative passthrough mechanism.

[119] Slip op. at 30.

[120] Slip op. at 29.

Given the court's statement in *AGA* that it will consider expediting the briefing and argument on any petitions for review of the final rule,[121] the Commission expects that the D.C. Circuit will have completed judicial review of this final rule by December 31, 1990. If, however, judicial review of this final rule is still pending in the U.S. Court of Appeals for the D.C. Circuit on that date, the Commission will further extend the sunset date until 30 days after the date of issuance of the court's mandate upon completion of judicial review. Until the new sunset date, pipelines will be able to use the alternative mechanism to pass through all eligible take-or-pay settlement costs, not just those arising under contracts in litigation on March 31, 1989.[122] However, for the reasons discussed below, the Commission is not expanding the litigation exception to the sunset date permitted in Order No. 500–F. Thus, after December 31, 1990, pipelines will be permitted to use the alternative mechanism to recover only eligible costs arising under contracts which were in litigation on March 31, 1989.

In *AGA*, the court also expressed concern that, if the Commission decides to impose a deadline calculated to fall sometime after judicial review, "pipelines will still be unable to appeal Commission decisions rejecting their take-or-pay passthrough proposals because review will come after the new filing deadline." [123] A sunset date after judicial review of the final rule would only affect a pipeline's ability to appeal the rejection of a take-or-pay filing if: (1) The Commission rejects a pipeline's filing to recover take-or-pay settlement costs, (2) the pipeline seeks judicial review of the rejection and does not make a new filing consistent with the Commission's policies,[124] and (3) following the sunset date the court upholds the Commission's rejection of the filing.

To date, every pipeline that has had a proposal to recover take-or-pay costs rejected has made a subsequent filing which the Commission has accepted.[125] Thus, the circumstances about which the court expressed concern have not yet arisen. However, if the circumstance arises that was of concern to the court, the Commission will then consider what steps, if any, to take in light of the concerns expressed by the court.

The Commission believes that it is important to maintain a sunset date and that the extension of the March 31, 1989 sunset provision to December 31, 1990 preserves as much as possible the important benefits of the original sunset provision, while at the same time being responsive to the court's concern that pipelines should not be pressured into resolving their take-or-pay problems before issuance of a final rule and judicial review thereof. When Order No. 500 was originally issued on August 7, 1987, it established a sunset of December 31, 1988 for the passthrough mechanism in order to encourage pipelines and producers to resolve their take-or-pay problems without unnecessary or undue delay. The Commission observed that take-or-pay represents the last and most significant deterrent to the realization of the Commission's goal of establishing orderly competitive markets for natural gas sales and services, and that "it goes almost without saying that it is desirable that the take-or-pay deterrent to competitive natural gas markets be eliminated as quickly as possible." [126]

Perhaps more importantly, the Commission also believes that the sunset date serves to protect consumers, consistent with the court's admonition in *AGD* that passing take-or-pay costs downstream to customers "must at some point conflict with the Commission's duty to adequately attend [ ] to the agency's prime constituency—the consumers whom the [NGA] was designed to protect." [127] The fixed take-or-pay charge, unlike commodity treatment, guarantees the pipelines' recovery of a portion of the costs instead of subjecting recovery to market forces. Thus, a sunset date avoids giving pipelines an indefinite right to a guaranteed recovery of a portion of their take-or-pay settlement costs through a fixed take-or-pay charge, without subjecting that recovery to market forces. It is also important to complete the passthrough of these costs as soon as practicable in order to bring to an end any market distortions resulting from pipelines' continued collection of these costs, particularly through volumetric surcharges. However, while the sunset deadline terminates the pipelines' right to a guaranteed recovery of a portion of these costs, it does not deprive pipelines of the opportunity to seek recovery of all prudently incurred costs. Pipelines can, after the sunset deadline, continue to file for recovery of take-or-pay costs in their commodity rates.

While the Commission is extending the sunset date, the information available to the Commission does not substantiate the pipelines' allegations to the court in *AGA*, that the March 31, 1989 sunset date pressured pipelines into making unfavorable settlements. The Commission has been concerned from the outset that the sunset date not harm consumers by forcing pipelines into unfavorable settlements. When the Commission issued Order No. 500, it believed that the year and a half, approximately, allowed for negotiations was sufficient. However, on June 30, 1988, the Commission held that it would not apply the sunset date to contracts that were in litigation on the sunset date. The Commission explained that "for contracts that are in litigation the Commission is reluctant to press the parties into hasty (and therefore more expensive) settlements and foreclose the parties' abilities to fully pursue their avenues for legal redress." [128]

As the December 31 sunset date for contracts that were not in litigation approached, INGAA and a number of pipelines requested an extension of that date on the ground that the pipelines were still engaged in numerous settlement negotiations, and the December 31 deadline might force them to agree to less favorable settlement terms than they could otherwise obtain. NGSA, an organization of producers, also supported extension of the December 31 deadline, stating that a limited extension was necessary to permit pipelines and producers to

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[121] Slip op. at 33–34.

[122] The September 1989 INGAA study reported that $1.1 billion of pipelines' $2.4 billion take-or-pay liability as of March 31, 1989, did not arise under contracts in litigation on that date.

[123] Slip op. at 30.

[124] The only circumstance in which the Commission has not permitted a pipeline to recover costs while judicial review of the rejection of an earlier filing is pending is where the pipeline has sought to recover 100 percent of its costs through a direct bill and appeals the requirement that it absorb a portion of the costs. *See* Natural Gas Pipeline Co., 43 FERC ¶ 61,194 at 61,515–6 (1988).

[125] The Commission has rejected filings by three pipelines to recover take-or-pay costs where the pipeline has not agreed to absorb a portion of those costs. Natural Gas Pipeline Co., 43 FERC ¶ 61,194 (1988); Texas Gas Transmission Corp., 43 FERC ¶ 61,324 (1988), *reh'g*, 44 FERC ¶ 61,184 (1988); Transwestern Pipeline Co. (letter order issued August 12, 1988 in Docket No. RP88–198–000). However, the Commission accepted subsequent or contemporaneous filings by these pipelines which were consistent with Commission policy. Natural Gas Pipeline Co., 43 FERC ¶ 61,194 (1988); Texas Gas Transmission Corp., 44 FERC ¶ 61,141 (1989); Transwestern Pipeline Co., 45 FERC ¶ 61,427 (1988). The Commission also rejected filings by Columbia Gas Transmission Co. in which some of the settlement costs to be recovered related to contracts which the Commission had previously found abusive, and ineligible for passthrough. Columbia Gas Transmission Co., 42 FERC ¶ 61,121 and ¶ 61,328 (1988). However, the Commission subsequently accepted a filing by Columbia to recover the costs that had not been found ineligible. Columbia Gas Transmission Co., 44 FERC ¶ 61,177 (1988).

[126] FERC Stats. & Regs. ¶ 30,761 at 30,792.

[127] AGD, 824 F.2d at 1025 (*quoting* Maryland People's Counsel, 761 F.2d at 781).

[128] El Paso Natural Gas Co., 43 FERC ¶ 61,576 at 62,437 (1988).

complete their negotiations.[129] The Commission again recognized that this was a legitimate concern and, accordingly, issued Order No. 500–F, granting an extension of the sunset date to March 31, 1989, "to permit pipelines and producers to bring to an orderly conclusion their settlement negotiations." [130] The Commission further provided that the March 31, 1989 sunset date would not apply to contracts in litigation on that date as long as the pipeline filed tariff language before that date providing for a litigation exception.[131]

No pipeline, or any other party, requested rehearing of Order No. 500–F on the ground that the extension to March 31, 1989, together with the litigation exception, gave pipelines insufficient time to negotiate their remaining settlements or would pressure them into agreeing to unfavorable terms. To the contrary, the only rehearing requests received opposed the extension, either for a particular pipeline or generally, on the ground that the pipelines' customers would be harmed by a continued ability of the pipeline to recover settlement costs through a fixed take-or-pay charge.[132] Nor did any party thereafter request an extension of the March 31 date. The Commission believes that the failure of the pipelines who were actually engaged in the negotiations with producers to seek any further extension of the March 31, 1989 sunset date, either by seeking rehearing of Order No. 500–F or by filing a later motion for an extension of time, is particularly significant. It is a reasonable inference from these facts that they did not consider the March 31, 1989 sunset date, combined with the litigation exception, to place them in an unfavorable bargaining position.

The only evidence of which the Commission is aware that even remotely suggests otherwise is INGAA's estimate in its September 1989 study that the cents paid for each dollar of relief increased during the first quarter of 1989 to 39 cents on the dollar, having gradually increased from 11 cents in 1985 to 22 cents in 1988. However, as INGAA concedes in its study, its figures do not take into account any future relief received by the pipelines as a result of contract reformations provided for in the settlements, including future take-or-pay relief. As Table 5 shows, the pipelines' own reports to the Commission show that they have received nearly $28 billion in future benefits. This future relief accounts for over 60 percent of the total relief which the pipelines have reported receiving in all their settlements. In addition, the Commission assumes that contract reformation has become a more significant part of the recent settlements, because when pipelines entered into the earlier settlements they may not have expected the reduced demand for gas to last as long as it has. Therefore, the need for permanent contract reformation was not then as apparent. If future benefits of the magnitude shown in Table 5 were included in the INGAA study, its cents on the dollar figure for January-March 1989 settlements would be reduced to a level comparable to the overall 18.6 cents on the dollar figure that has resulted for all settlements contained in the Order No. 500 filings.

Thus, it appears that the March 31, 1989 sunset date appropriately encouraged pipelines and producers to negotiate seriously and to resolve promptly their take-or-pay problems, without adversely affecting the pipelines' bargaining positions. That the deadline spurred settlement negotiations is demonstrated by INGAA's own statement that during the first three months of 1989 pipeline negotiating teams completed negotiations involving over 3,800 additional take-or-pay contracts. In the absence of the sunset date to spur the parties to agreement, many settlement negotiations likely would have dragged on, the take-or-pay problem would not have been as near to resolution as it is today, and the most significant barrier to an efficient gas market would still remain.

In Order No. 500–F, issued on December 9, 1988, the Commission stated that, for contracts in litigation on March 31, 1989, it would permit pipelines to file by that date to include language in their tariffs permitting them to pursue the litigation to its natural end (of judgment and final appeal or settlement) and then to file to recover eligible costs resulting from these contracts under the alternative passthrough mechanism. All 22 pipelines which have filed to recover take-or-pay settlement costs under the alternative recovery mechanism have filed such tariff language. As stated above, the Commission will not expand the litigation exception to include costs arising under contracts which become subject to litigation during the period April 1, 1989 through December 31, 1990.

As discussed above, the sunset date (1) protects consumers from an indefinite guaranteed right of the pipeline to recover a portion of its take-or-pay costs without subjecting that recovery to market forces, (2) encourages parties to promptly resolve their take-or-pay problems, and (3) helps bring to an end as soon as practicable any market distortions resulting from pipelines' continued collection of these costs. Allowing costs arising under contracts which become subject to litigation during the period April 1, 1989 through December 31, 1990 to qualify for the litigation exception would reduce these benefits by limiting the effectiveness of the sunset date.

Furthermore, pipeline bargaining power should not be adversely affected by not changing the litigation exception adopted in Order No. 500–F. As discussed above, after Order No. 500–F established a litigation exception based on March 31, 1989, no pipeline or any other party claimed, either in a request for rehearing of Order No. 500–F or a subsequent motion, that applying the March 31, 1989 sunset date to all contracts, not just those in litigation as of March 31, 1989, improperly reduced pipeline bargaining power with respect to those contracts. On the contrary, the only parties seeking rehearing of Order No. 500–F were concerned that consumers would be harmed by the extension of the pipelines' guaranteed recovery of a portion of their take-or-pay costs through the extension of the sunset date from December 31, 1988 to March 31, 1989, and the establishment of the March 31, 1989 litigation exception. In any event, the further extension of the sunset date to December 31, 1990 gives pipelines an additional year and nine months to negotiate settlements of contracts not covered by the litigation exception. This should allow the pipelines sufficient time to settle the bulk of their remaining take-or-pay liability under contracts not in litigation on March 31, 1989.

4. Action under NGA Section 5

The court in *AGD* [133] directed the Commission to reassess its decision in

[129] Amoco Production Company, United Distribution Companies (UDC), and, jointly, the Process Gas Consumers Group, the American Iron and Steel Institute and the Association of Business Advocating Tariff Equity opposed any extension on the ground that an extension would delay the prompt resolution of the take-or-pay problem to the detriment of the entire industry.

[130] FERC Stats. & Regs. ¶ 30,842 at 31,268.

[131] *All* pipelines which have filed to pass through costs under Order No. 500 have filed litigation exception tariff language.

[132] UDC and the State of Michigan and the Michigan Public Service Commission contended that the Commission should not have granted any extension. Rochester Gas and Electric Corporation and Connecticut Natural Gas Corporation and CNG Transmission Corporation complained only that the Commission should not have granted any extension to Tennessee, arguing that an extension for Tennessee violated that pipeline's take-or-pay passthrough settlement. *See* Order No. 500–G, 46 FERC ¶ 61,148 (1989).

[133] 824 F.2d at 1028.

Order No. 436 not to invoke its power under NGA section 5 to modify or set aside troublesome take-or-pay provisions in jurisdictional contracts. In *AGA*, the court again emphasized that the Commission must provide a reasoned basis for its decision whether to take action under section 5.

Subsequent to the issuance of Order No. 500, the Commission directed interstate natural gas pipeline companies to file detailed data on their take-or-pay contracts in order to assist the Commission in assessing whether action under NGA section 5, or any other action (such as rescinding the incentive ceiling for tight formation gas established under NGPA section 107(c)(5)), would contribute to solving pipeline take-or-pay problems. The Commission also invited producers to file similar data. In addition, numerous parties have filed comments with respect to both the Commission's legal authority to take such action and the factual necessity of doing so.

The Commission has considered all the comments and evaluated the information received pursuant to its data requests. As it did in Order No. 436, the Commission concludes, based on its evaluation of its statutory responsibilities and its assessment of the current state of the natural gas industry, that it will not take action under NGA section 5 in the final rule to modify producer-pipeline take-or-pay contracts.

a. *Scope of Commission's Jurisdiction.* The Commission's analysis must start with a consideration of its legal authority under NGA section 5 to modify producer-pipeline contracts. As discussed below, the Commission concludes that it cannot take section 5 action to modify producer-pipeline contracts for the sale of gas removed from the Commission's NGA jurisdiction by NGPA section 601. In addition, the Commission concludes that it cannot modify the price terms of contracts for the sale of gas which remains subject to the Commission's NGA jurisdiction.

The statutory provisions relevant to determining the Commission's authority under NGA section 5 are sections 1(b) and 5 of the NGA and section 601 of the NGPA. NGA section 1(b) gives the Commission jurisdiction over three things: (1) Sales for resale of natural gas in interstate commerce, (2) transportation of gas in interstate commerce, and (3) natural gas companies engaged in the above two activities.[134] NGA section 5 gives the Commission authority both (1) with respect to the "rate, charge, or classification" demanded in a sale subject to the Commission's jurisdiction under NGA section 1(b) and (2) with respect to any "rule, regulation, practice, or contract affecting" the rate, charge or classification demanded in a jurisdictional sale.[135]

In 1954, the United States Supreme Court held that all sales for resale by producers in interstate commerce were sales subject to the Commission's jurisdiction under NGA section 1(b) and that the producers making those sales were "natural gas companies" subject to the Commission's NGA jurisdiction. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). This meant that the Commission had authority under NGA section 5 to modify the contracts under which those sales were made, since the contracts both set forth and affected the "rate, charge, or classification" demanded by a "natural gas company" (the producer) in a jurisdictional sale. Accordingly, following the *Phillips* decision, the Commission commenced establishing just and reasonable rates for producer sales in interstate commerce under NGA section 5.

In 1978, Congress enacted the NGPA. "The NGPA reflects a Congressional belief that a new system of natural gas pricing was needed to balance supply and demand." [136] In order to address the gas shortages of the late 1970's, Congress decided "to move toward a less regulated natural gas market" and, with respect to new gas, "to leave determination of supply and first-sale price to the market." [137] The NGPA replaced the then effective producer rates, established generically by the Commission under NGA section 5, with a system of statutorily established ceiling prices, set forth in NGPA Title I, for various categories of gas. The NGPA further provided for the automatic escalation of these ceiling prices and the phased elimination of the ceiling prices for certain categories of gas. Finally, the NGPA provided for the complete removal from the Commission's NGA jurisdiction of producer sales of new gas [138] and certain other high cost gas. The removal of these sales from the Commission's NGA jurisdiction meant that, not only did the Commission no longer establish the price charged in these sales (beyond enforcing any applicable ceiling price), but also the producers no longer needed Commission authorization under NGA section 7 to make or abandon sales of this gas.

The specific provisions of the NGPA removing first sales of new and high cost gas from the Commission's NGA jurisdiction are found in NGPA section 601. NGPA Section 601(a)(1)(A) provides that "for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply" to natural gas which was not committed or dedicated to interstate commerce before enactment of the NGPA "solely by reason of any first sale of such natural gas." NGPA section 601(a)(1)(B), in similar language, removes from NGA jurisdiction first sales of gas committed to interstate commerce upon enactment of the NGPA which qualifies for NGPA sections 102(c), 103(c), and 107(c)(1) through (4) ceiling prices. NGPA section 601(a)(1)(D) provides that "for purposes of the Natural Gas Act, the term 'natural gas company' * * * shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of" NGPA sections 601(a)(1)(A) and (B). For convenience, the gas covered by NGPA sections 601(a)(1)(A) and (B) hereafter will be referred to as "new gas."

NGPA section 601(b) further limited the Commission's authority under the NGA by providing,

> For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if—
>
> (i) Such amount does not exceed the applicable maximum lawful price established under title I of this Act; or

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[134] Section 1(b) of the NGA provides, The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[135] NGA section 5 provides, Whenever the Commission * * * shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any * * * sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed.

[136] Transcontinental Pipe Line Co. v. State Oil & Gas Board, 374 U.S. 409, 421 (1966).

[137] *Id.* at 422, 423.

[138] Gas not committed to interstate commerce on the day before enactment of the NGPA. In the parlance of the NGPA, the producer's sale of natural gas is referred to as a "first sale." Pipeline sales for resale of gas purchased from producers generally are not "first sales."

(ii) There is no applicable maximum lawful price by reason of the elimination of price controls pursuant to subtitle B of title I of this Act.

While NGPA section 601(b) deems any price paid in a first sale to be just and reasonable so long as it does not exceed an applicable ceiling price, the Commission may deny the pipeline the right to pass through its costs under contracts for the purchase of non-jurisdictional and jurisdictional gas. However, NGPA section 601(c)(2) limits the availability of this option by stating that the Commission "may not deny any interstate pipeline recovery of any amount with respect to any purchase of natural gas if" the amount has been deemed just reasonable "except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds."

Various parties argue that, despite the removal of jurisdiction over first sales of new gas, the Commission may continue to take section 5 action to modify take-or-pay clauses in the contracts providing for the sale of the new gas. The Commission, however, concludes that NGPA section 601's removal of first sales of new gas from the Commission's NGA jurisdiction means that the Commission can no longer take section 5 action to modify any provision in the producer-pipeline contract under which those first sales are made, including the take-or-pay clause. Before NGPA section 601, the Commission had authority under NGA section 5 to modify any provision of the producer-pipeline contract, since that contract both set forth and affected the "rate, charge, or classification" demanded in the jurisdictional sale by the producer, a "natural gas company" subject to the Commission's jurisdiction. However, since the sale by the producer is no longer subject to the Commission's NGA jurisdiction and the producer is no longer a "natural gas company" subject to the Commission's jurisdiction (except to the extent it makes sales which remain jurisdictional), the Commission no longer has authority to modify the first sale contract as a contract that sets forth or affects the rate demanded by the producer in its sale to the pipeline.

The fact that section 601 speaks in terms of removing from the Commission's NGA jurisdiction the first sale of the relevant gas does not leave the Commission any residual NGA jurisdiction over those parts of the producer-pipeline contract, such as the take-or-pay provision, which may be considered to relate to something other than a "first sale" of natural gas. Section 601 removes not only the first sale of the gas from Commission jurisdiction, it also provides that the producer shall no longer be a "natural gas company" subject to the Commission's NGA jurisdiction. This indicates Congress' intent that all the producer's activities with respect to the new gas be removed from the Commission's jurisdiction.

Section 1(b) of the NGA gives the Commission jurisdiction only over sales for resale in interstate commerce, the interstate transportation of natural gas, and natural gas companies engaged in these activities. Therefore, prior to the NGPA, the only basis for Commission jurisdiction over any provisions in the producer-pipeline contract, including those which deal with matters other than the sale itself, was the fact that the contract provided for the producer's jurisdictional sale for resale. Once that sale is no longer jurisdictional and the producer is no longer a "natural gas company" subject to the Commission's NGA jurisdiction, there is nothing in NGA sections 1(b) or 5(a) to give the Commission jurisdiction over any provisions in the contract, since either a sale or transportation in interstate commerce by a natural gas company is a necessary prerequisite to a finding of jurisdiction under NGA section 1(b) or the exercise of jurisdiction under section 5(a).

That Congress understood section 601's removal of first sales of new gas from NGA jurisdiction to remove the entire producer-pipeline transaction from Commission jurisdiction is shown by the legislative history of both the NGPA and the Wellhead Decontrol Act of 1989 providing for the phased removal all "those price and non-price controls that remain in place following the partial Wellhead decontrol carried out under the NGPA." The Joint Statement of Managers accompanying the Conference Committee Report on the NGPA states that under the NGPA "new gas is never made subject to the Commission's jurisdiction under sec. 1(b) of the NGA." [139] Furthermore, both the Senate and House Committee reports on the more recent Natural Gas Wellhead Decontrol Act of 1989 (the Wellhead Decontrol Act) describe the NGPA as bringing about the "complete removal of Federal controls on new gas." [140] Any attempt to claim section 5 authority over take-or-pay clauses with respect to new gas would be contrary to these statements. In addition, the Wellhead Decontrol Act uses the same language to remove the Commission's NGA jurisdiction with respect to old gas which NGPA section 601 used to remove the Commission's NGA jurisdiction with respect to new gas.[141] Congress clearly intended by the Wellhead Decontrol Act to remove completely the Commission's authority to regulate producer-pipeline contracts, it must have understood NGPA section 601 to completely remove that authority with respect to new gas. For example, the report of the Senate Committee on Energy and Natural Resources stated,

> Once the "underbrush" of price and non-price regulation (and the resulting impact of such regulation upon gas purchase contracts) is cleared away, natural gas producers will be inclined to maximize profits by producing gas that is the least expensive to drill and produce. . . . Over time, competition among efficient producers will help to keep natural gas commodity prices at the lowest reasonable price necessary to summon forth sufficient gas supplies to meet consumer demand.[142]

Pipelines and LDCs use the fact that pipelines' resale of the gas remains jurisdictional to argue that the Commission retains section 5 authority over the producer-pipeline contract since that contract "affects" the "rate, charge, or classification" demanded by the pipeline in its jurisdictional resale. However, the most natural reading of the NGA is that the statute only conveys jurisdiction over entities that are "natural gas companies" and does not give the Commission authority to modify contracts under which entities that are not "natural gas companies" make sales to natural gas companies.

While the Supreme Court in *FPC* v. *Conway* stated that the rules, practices, or contracts "affecting" a jurisdictional rate are not themselves limited to the jurisdictional context, the Supreme Court has interpreted the Commission's section 5 authority with respect to non-jurisdictional contracts as limited to considering such contracts in establishing the just and reasonable rates and contracts for a jurisdictional transaction. The Supreme Court has expressly stated that the Commission cannot modify a non-jurisdictional contract. Thus, in *Panhandle Pipe Line Co.* v. *FPC*, 324 U.S. 635, 639–649 (1945), the Supreme Court held that a pipeline's contracts for non-jurisdictional direct

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[139] H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess. 123 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 8800, 9040.

[140] H.R. Rep. No. 29, 101st Cong., 1st Sess. 4 (1989); S. Rep. No. 39, 101st Cong., 1st Sess. 7 (1989).

[141] The Wellhead Decontrol Act amends section 601(a)(1)(A) of the NGPA to read as follows:

> For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas.

See 103 Stat. 159.

[142] S. Rep. No. 39, 101st Cong., 1st Sess. 10–11 (1989).

sales of gas are contracts "affecting" the pipeline's jurisdictional sale for resale rates within the meaning of NGA section 5. However, while the court stated that the Commission may therefore "take the direct sales rate into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction," [143] the court stated that the Commission "lacks authority to fix rates for direct industrial sales." [144]

Here, pipelines and LDCs would have the Commission go beyond considering the pipeline-producer contracts in establishing the pipeline's jurisdictional rates, such as the pipeline's sale for resale rates. They would have the Commission exercise its section 5 authority with respect to contracts "affecting" jurisdictional rates to directly modify the contract for the non-jurisdictional first sale from the producer to the pipeline. However, this contract is analogous to the contracts for the non-jurisdictional direct sales involved in *Panhandle.* Just as in *Panhandle,* section 5 did not give the Commission authority to modify directly the contract for the non-jurisdictional direct sale, so also section 5 does not give the Commission authority to modify the contract for the non-jurisdictional new gas sales here involved.

Indeed, there is even less justification for the Commission to claim section 5 authority to modify the producer-pipeline contracts than there would be to claim authority to modify the direct sale contracts involved in *Panhandle.* The direct sale contract in *Panhandle* was at least a contract for a sale by a "natural gas company," the pipeline. Here, however, at least to the extent that the producer makes no jurisdictional sales, the contract is for a sale by an entity that is not a "natural gas company," the producer.

Thus, to hold that section 5's language concerning contracts "affecting" jurisdictional rates allows the Commission to modify contracts for the sale of non-jurisdictional gas, simply because those contracts affect a pipeline's jurisdictional rates, would mean that the Commission could directly modify any non-jurisdictional contract which affected a pipeline's jurisdictional rates, including labor contracts between the pipeline and its employees, contracts for the purchase of office equipment, and leases of office space. The Commission has never claimed, nor has any court suggested, that section 5 gives the Commission authority to directly modify such contracts.

As discussed above, the Commission may, of course, deny the pipeline the right to pass through its costs under its contract with the producer, based upon a finding of fraud and abuse in the case of gas costs or a finding of imprudence in the case of other costs. However, if the Commission does exercise this authority to deny the pipeline passthrough of costs paid to a producer, the denial of passthrough does not modify the contract between the pipeline and the producer. As the Commission stated in Opinion No. 317, *Texas Gas Transmission Corp.*, 45 FERC ¶ 61,004 at 61,018–9,

> Under 601(c)(2), the only consequence of a Commission finding that the amount paid by a pipeline "was excessive due to fraud, abuse, or similar grounds," is that the Commission may "deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas." Section 601(c)(2) does not give the Commission any authority to alter the amounts paid by the pipeline to the producer.

See also Columbia Gas Transmission Corp., 42 FERC ¶ 61,021 at 61,121 (1988).

That the Commission lacks section 5 authority to modify producer-pipeline contracts for the sale of non-jurisdictional gas is consistent with Congress' intent in enacting the NGPA "to move toward a less regulated natural gas market." [145] Congress removed first sales of new gas from the Commission's NGA jurisdiction and further provided for the phased elimination of NGPA price ceilings for this gas in order to permit supply and first sale price of new gas to be determined by the market. However, to the extent the Commission retained its section 5 authority to modify contracts covering non-jurisdictional gas, the Commission rather than the market would be determining aspects of the producer-pipeline transaction.

The purpose of removing only first sales from the Commission's NGA jurisdiction—rather than removing new gas altogether from the Commission's jurisdiction—was not to allow the Commission some continued jurisdiction over non-sale or non-price parts of producer-pipeline transactions with respect to new gas. Rather, the purpose was to ensure that the Commission continued to have jurisdiction over an interstate pipeline's transportation and sale for resale of the new gas. Since these are non-first sales over which NGA section 1(b) previously gave the Commission jurisdiction, removal of only first sales leaves the Commission's preexisting jurisdiction over these transactions in place.

That the Commission lacks authority under section 5 to modify non-jurisdictional producer-pipeline contracts is also consistent with the *AGD* decision and the decision of the 5th Circuit in *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 380-383, (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). In *AGD*, the court stated, "The Commission has no power under section 5 to set aside or modify clauses in producer contracts relating to nonjurisdictional gas." 824 F.2d 981, 1027 n. 30 (D.C. Cir. 1987). The *AGD* decision cites *Pennzoil* for this statement. In *Pennzoil*, the court expressly held that the Commission lacks authority to interpret or modify contracts for the sale of gas removed from its jurisdiction by NGPA section 601(a)(1).

In *Office of Consumers' Counsel, Ohio* v. *FERC*, 826 F.2d 1136, 1139 n. 2 (D.C. Cir. 1987) (*OCC II*), a second panel of the D.C. Circuit refused to be bound by the *AGD* decision's statements concerning the Commission's section 5 authority. The court stated, "The initial panel [in *OCC I*] clearly assumed, without question or objection from any party, that in imposing remedies under section 5 FERC had the power to modify * * * illegal take-or-pay provisions. The * * * footnote in *Associated Gas Distributors* is clearly dictum and it in no way affects the law of this case." However, *OCC II* did not actually reach the issue of whether the Commission has section 5 authority to modify contracts for the sale of non-jurisdictional gas, but simply stated, in effect, that for purposes of that case the court would treat the Commission as having that authority since all parties in their original arguments to the court had assumed that the Commission had that authority. The Commission thus concludes that it has no power under NGA section 5 to set aside, modify, or regulate clauses in producer contracts relating to the first sales removed from NGA jurisdiction by NGPA section 601.

With respect to contracts (for the sale of old gas) that remain subject to Commission jurisdiction under NGA section 5, the Commission may modify a non-price term, including the take-or-pay provision, of such a jurisdictional contract. The Commission may not, however, utilize NGA section 5 to modify the price terms of jurisdictional contracts. The Commission could only

[143] Panhandle, 324 U.S. at 646.

[144] *Id.* Similarly, in FPC v. Conway, *supra*, the Supreme Court held that the Commission may consider a company's non-jurisdictional retail electric rates in establishing jurisdictional wholesale electric rates, but the Commission "has no power to prescribe the rates for retail sales of power companies." 426 U.S. at 276.

[145] Transco, 374 U.S. at 423.

exercise its section 5 authority to modify the price term in a jurisdictional contract upon a finding that the price is unjust and unreasonable. However, under NGPA section 601(b), all prices paid in first sales of natural gas are deemed to be just and reasonable so long as they do not exceed on applicable maximum lawful price.[146] Therefore, the Commission could not make the necessary finding to take section 5 action with respect to the price term in jurisdictional contracts. The *AGD* decision similarly found that the Commission lacked authority to modify the price term of jurisdictional contracts. The court stated, "Even for jurisdictional contracts * * *. Congress has provided that prices at or below the NGPA ceilings are 'just and reasonable.' Thus FERC is clearly barred from setting sub-NGPA ceilings on jurisdictional wellhead sales." *AGD* 824 F.2d at 1028.

Finally, NGA section 5 action can only operate prospectively.[147]

b. *Basis for the Commission's decision.* Pursuant to the *AGD* court's direction,[148] the Commission has accumulated and evaluated data that make clear the extent to which contracts for jurisdictional gas account for the basic problem. As of the end of 1986, approximately $4.2 billion of existing take-or-pay exposure related to NGPA categories of gas subject to the Commission's NGA jurisdiction. This represented 45.5 percent of the total reported contract-by-contract take-or pay exposure of $9.2 billion which the Commission was able to identify as relating to jurisdictional or non-jurisdictional gas. Year-end 1986 take-or-pay exposure for the different jurisdictional NGPA categories of gas, together with the December 1986 price ceilings for these categories, was as follows:

CHART I

NGPA category	Total (milion $)	Percentage of total exposure	Price ceilings
102 (d)	$1,708	18.5	$4.431
104 Pre '73	461	5.0	[149] .527
104 '73–74 Biennium	238	2.6	[150a] 1.685
104 Post '74	1,206	13.0	2.609
104 Other	228	2.5	[150b] .737
106 (a)	188	2.0	.970
108 Juris.	173	1.9	4.746
Totals	$4,202	45.5	

[149] The number shown in the table is the ceiling price for large producers. The ceiling price for small producers is $.627.
[150a] The number shown in the table is the ceiling price for large producers. The ceiling price for small producers is $2.206.
[150b] Or less.

Nearly one-third of pipelines' year-end 1986 take-or-pay obligations for jurisdictional gas were incurred under contracts which also cover non-jurisdictional gas.[151] Since 1986, pipelines have settled a large percentage of their $4.2 billion take-or-pay liability for jurisdictional gas. Between 1986 and March 1989, pipelines reduced their overall take-or-pay liability by over 75 percent. The result is that their total take-or-pay liability, including that for non-jurisdictional gas, was $2.4 billion by March 1989, substantially less than the $4.2 billion year-end 1986 liability for just the jurisdictional gas, albeit not fully resolved.

As the above chart illustrates, action under NGA section 5 could give at least some pipelines some take-or-pay relief. An important difficulty with acting generically under section 5, however, is that such action would only reach take-or-pay obligations for jurisdictional gas and could not reach the price provision in contracts for the sale of jurisdictional gas or any provisions in contracts for the sale of non-jurisdictional gas. Because of these limits on the Commission's authority under section 5, and because pipeline take-or-pay problems result from the combination of high take and high price provisions for both jurisdictional and non-jurisdictional gas, in the Commission's judgment any action it could take under section 5 would be ineffective or inequitable, or both.

Almost all of the proposals made to the Commission for section 5 action involve reducing or eliminating the take requirements in take-or-pay contracts or allowing the pipeline not to take gas under the contract unless the producer agrees to modify the price to a market responsive level (in other words requiring the insertion of a market-out clause).[152] Given the fact that these proposed actions could be taken only with respect to jurisdictional gas, the Commission believes that they would not be effective to bring about, and could discourage, the complete restructuring of all the pipeline-producer contracts necessary to fully resolve the pipelines' take-or-pay problems and complete the transition to a competitive wellhead market.

If the Commission simply reduced pipeline take requirements for jurisdictional gas to a level sufficient to avoid the incurrence of take-or-pay liability for that gas,[153] the high price

[146] The Commission does have authority to increase, but not decrease, NGPA sections 104, 106 and 109 ceiling prices. *See* NGPA sections 104(b)(2), 106(c), and 109(b)(2).

[147] 15 U.S.C. § 717d(a). *See* Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378, 389 (1959) (CATCO). In this regard, some parties have argued that the Commission could make any action under section 5 effective as of the issuance of Order No. 436 in 1985, since the Commission allegedly erred in failing to act under section 5 when it issued Order No. 436. We need no' decide whether we could invoke section 5 as of 1985, since even assuming we could, we will not do so for the reasons stated in this section.

[148] 824 F.2d at 1028.

[151] Of the 4.2 billion of take-or-pay exposure attributable to jurisdictional gas, $3.05 billion, or 33 percent of total take-or-pay exposure of $9.2 billion, arose under contracts covering only jurisdictional gas. The remaining $1.15 billion, or 12.5 percent of total take-or-pay exposure, arose under contracts covering both jurisdictional and non jurisdictional gas. Any section 5 action with respect to these contracts could apply only to the $1.15 billion attributable to jurisdictional gas and not to the additional $1.42 billion in take-or-pay exposure under these contracts attributable to non-jurisdictional gas.

[152] *See* section IV(A)(6)(b) for a more detailed summary of these proposals.

[153] The responses to the Commission's 1987 take-or-pay data request show that between 1983 and mid-1987 pipelines actually took about 44 percent of the deliverability subject to their contracts, while the take requirements in those contracts averaged 66 percent. Assuming subsequent takes of jurisdictional gas continued at about these levels, reduction of the take requirement for this gas to 44 percent of deliverability would presumably allow the pipeline to avoid take-or-pay liability for this gas.

provisions relating to jurisdictional gas still required to be taken would be unaffected and the take-or-pay and price provisions for all non-jurisdictional gas would also be unaffected. As a result, even assuming the Commission's reduction of the take requirements could be applied retroactively so as to eliminate all accrued take-or-pay liability for jurisdictional gas, the pipeline could nonetheless continue to have significant take-or-pay problems. Because the pipeline would be required to continue to pay the high prices in its contracts for both jurisdictional and non-jurisdictional gas and to take high levels of non-jurisdictional gas, and some level of jurisdictional gas, the pipeline could have difficulty competing for sales with lower-priced spot market gas. The resulting continued loss of sales could cause the pipeline renewed take-or pay problems. Furthermore, in order to achieve an equitable balance the Commission would likely need to require the pipeline to release the jurisdictional gas not taken as a result of the reduced take requirements for jurisdictional gas and permit the producer to sell that gas on the market. Otherwise, the producer could not market the gas which the pipeline would not take as a result of Commission action. These actions, however, could merely exacerbate pipeline take-or-pay problems if the producer sells the released gas at market responsive prices to the pipeline's sales customers.

Thus, section 5 action to reduce take requirements for jurisdictional gas, by itself, would not resolve pipeline take or-pay problems. That can only be accomplished by a complete restructuring of the pipeline's contractual relationships with the producers, reforming both the take and price provisions of all the pipeline's gas purchase contracts.

Section 5 action to eliminate altogether the take requirement for jurisdictional gas or insert market-out clauses in contracts for the purchase of such gas could avoid the problem of continued high price requirements for jurisdictional gas. Either action would enable the pipeline to stop taking the gas altogether and thereby make no payments to the producer. However, contractual provisions to ensure producers some minimum level of revenue to cover operating and other expenses are reasonable. Producers make substantial investments in order to drill for and produce gas; in many cases they must borrow the money necessary to make these investments. However, complete elimination of the take requirement in take-or-pay clauses or insertion of a market-out clause would mean that the producer no longer had any contractual assurance of some minimum level of income where the original bargain between the producer and pipeline had contemplated some level of assured income. Accordingly, the Commission cannot make the necessary finding under section 5 that a minimum take provision at any level is unjust and unreasonable to justify adjusting contracts to totally eliminate take provisions or modify the contracts to include a market-out clause such that there would no longer be any minimum level of income assured to the producer.[154]

In any event, complete removal of the take requirements for jurisdictional gas or the addition of market out clauses to all contracts for the sale of such gas would not reach the high price and high take requirements in contracts for the sale of non-jurisdictional gas. As discussed above, these contractual provisions could continue to cause the pipeline take-or-pay problems, yet the more stringent section 5 action with respect to contracts for the sale of jurisdictional gas would likely make the producer even less likely to agree to the voluntary restructuring of the contracts for the sale of the non-jurisdictional gas necessary to avoid a continuation of take-or-pay problems. Having been forced to accept reduced take requirements under its contracts for the sale of jurisdictional gas, the producer might well be less willing to make voluntary concessions with respect to contracts for sale of non-jurisdictional gas and the price provisions in contracts for the sale of jurisdictional gas, which section 5 action cannot reach.

The result of any of the above actions would be an uneven resolution of the take-or-pay problem, with inequitable and market distorting effects. Pipelines with less jurisdictional gas under contract would receive less benefit than pipelines with more under contract. Similarly, producers that sell a greater amount of jurisdictional gas than average would be affected disproportionately. This would be particularly true, if the Commission eliminated altogether take requirements for jurisdictional gas or required market-out clauses with respect to such gas. Such action would put the entire burden of resolving pipeline take-or-pay problems with respect to jurisdictional gas on the producers selling that gas. The contracts covering jurisdictional gas would be modified to resolve the pipeline's take-or-pay problems with respect to such gas without any compensation to the producer. This would be inconsistent with the Commission's goal that all participants in the natural gas industry should share in the burden of resolving the take-or-pay problem, for which no one segment of the industry is at fault. The contracts were generally entered into at a time when all participants in the natural gas industry, including regulators, expected continued high demand for gas at relatively high prices. The contracts became a problem only because that expectation, reasonable at the time, proved incorrect. Furthermore, such a resolution would not recognize the fact, discussed above, that the changed economic conditions which caused these contracts to be uneconomic have affected not only the pipelines but also the producers.

An additional problem with the proposed section 5 actions with respect to jurisdictional gas is that about one quarter of the take-or-pay obligations incurred for jurisdictional gas are for gas that has been priced at or below prevailing market levels.[155] These take-or-pay obligations have, in many cases, been incurred so that the pipeline can take higher cost, non-jurisdictional gas under other contracts and thereby minimize its take-or-pay obligations for the higher cost gas. In such cases, the true problem take-or-pay contract is not the contract covering the low cost jurisdictional gas, but the contract covering the higher cost, non-jurisdictional gas. However, section 5 action would not reach the latter contract, since that contract covers non-jurisdictional gas. While a significant portion of take-or-pay obligations were for jurisdictional gas, all problem take-or-pay contracts must be restructured for a complete and effective resolution of the take-or-pay problem which does

[154] Producers have voluntarily agreed to the inclusion of market-out clauses in some contracts with pipelines, and the Commission encourages such clauses as a means of making prices more market responsive. However, where a producer voluntarily agrees to a market-out clause, the producer may consider its own individual circumstances—including its need for current income, other contracts it may have which do assure a minimum level of income, and its expectation concerning the amount of gas which the purchaser will take regardless of a minimum take provision. Thus, the facts that producers voluntarily agree to market-out clause and the Commission encourages such clauses do not support a Commission requirement under section 5 that all contracts must have such clauses.

[155] These include NGPA section 104 Pre-1973 gas, section 104 1973–74 Biennium gas, section 104 other gas, and section 106(a) gas. As shown in Chart I in this section these categories of gas accounted for 12.1 percent of pipelines' total take-or-pay obligations at year end 1986 or 26.6 percent of the 45.5 percent of total take-or-pay obligations attributable to jurisdictional gas.

not distort the competitive wellhead market.

A further difficulty with section 5 action is that, unless the Commission were to undertake the administratively difficult task of addressing each of the thousands of contracts covering jurisdictional gas individually, section 5 action must be generic and cannot be tailored to fit the varying circumstances of each contract. For example, the parties to the contracts have varying needs and characteristics. Some pipelines may have a greater need for gas than others. Smaller producers with less financial revenues and possibly less ability to sell to purchasers other than the pipeline may have different needs than larger producers with greater financial resources. Some gas reservoirs may require high rates of production to maximize the proportion of reserves recovered, whereas other reservoirs can be produced at lower rates without affecting ultimate levels of recoverability.[156] All these factors may affect what terms are appropriate for any particular producer-pipeline contract. Yet it would not be practicable for the Commission to consider the appropriate section 5 action for each contract individually in light of these factors.

Further, as the Commission stated in Order No. 436, section 5 action to directly modify producer-pipeline contracts would interfere with the ability of parties to rely on private contracts as a tool for structuring basic economic relationships. The ability to rely on contracts for these purposes is particularly significant in light of the move toward a deregulated wellhead market, commenced under the NGPA and to be completed on January 1, 1993 under the Wellhead Decontrol Act of 1989. The Court in *AGD* stated that in Order No. 436 the Commission "rightly we think, placed great weight on the congressional determination that market forces should operate freely at the wellhead." [157]

In an unregulated market, transactions are governed by private contracts. For the market to function properly, the parties need the security of knowing that they can rely on their contracts without unwarranted government intervention. Parties use these contracts to control and decide the allocation of risks between the parties to the contract. If parties believe that the government may upset their private decisions about risk allocation in order to relieve one party from the consequences of its actions, then the parties will be less likely to act in the manner of firms in a competitive industry. Producers might be less willing to take the risks which are always involved in exploring and drilling for gas,[158] and pipelines might be less careful in negotiating for long-term commitments to purchase gas.

By contrast, individually negotiated settlements have none of the disadvantages discussed above inherent in section 5 action. Because they are agreed to by the parties themselves rather than being imposed by a government agency, settlements do not interfere with private contracting and reliance on those contracts in the same way that section 5 action would. Settlements can reach, if the parties choose, take-or-pay obligations for non-jurisdictional, as well as jurisdictional, gas and thus can be used to restructure a pipeline's total contractual arrangements and should not have an uneven effect. In addition, the parties can individually tailor their settlements to fit the varying circumstances and operational considerations underlying each contract.

Furthermore, not taking section 5 action is consistent with Congress' desire in the Wellhead Decontrol Act not to disturb parties' reliance on private contracts—reflected in the transition period to full wellhead decontrol. The Wellhead Decontrol Act provided that deregulation will not take place until January 1, 1993 (or May 15, 1991 in the case of newly spudded wells), unless the contract expires or is voluntarily renegotiated before those dates.[159] The purpose of this transition period was "for equity purposes to permit parties to adapt their gas purchase arrangements to a fully decontrolled environment." [160] Congress was specifically concerned about producers' reliance on their existing contractual arrangements. For example, the report of the Senate Committee on Energy and Natural Resources stated that the House Bill's proposal for immediate decontrol of newly spudded wells would be "unfair" and explained that the transition period "offers some protection to investors who committed capital to natural gas production under the expectation of continued price control." [161] The conference committee report agreed upon a transition period for this gas extending until May 15, 1991, stating that this transition period "provides a period for transition and equity purposes to both sellers and buyers of gas under existing contracts." [162] Accordingly, Commission action under section 5 would be inconsistent with the Congressional desire to allow parties to arrange their own affairs.

Thus, assuming that pipelines have the bargaining power to negotiate reasonable settlements that resolve their take-or-pay problems (and all the evidence suggests that they do), there seems little doubt that settlements are a preferable solution to the take-or-pay problem than action under section 5. As discussed in the preceding section, pipelines have been able to negotiate settlements substantially resolving the bulk of their take-or-pay problems, particularly since Order No. 500 established the crediting program and the alternative passthrough mechanism. Given the success achieved in diminishing take-or-pay exposure under the Order No. 500 interim rule and the disadvantages of section 5 action discussed above, it is the Commission's judgment that its decision not to take action under section 5 is consistent with the court's statement in *AGD* that such action might prove unnecessary if other actions (such as taken in the interim rule) address the problem. Since the implementation of the Order No. 500 crediting mechanism in August 1987, take-or-pay exposure has declined by three-fourths—from $10.7 billion at the end of 1986 [163] to $2.4 billion at the end of March 1989. Based upon what has taken place under Order No. 500, there is every expectation that take-or-pay exposure will continue to decline so that any section 5 action would be unnecessary.

In determining the actions to take with respect to producer-pipeline contracts, the Commission has tried to follow both the mandates of the court in *AGD* and *AGA* and our statutory responsibilities under the NGA, NGPA, and the Wellhead Decontrol Act. When Congress enacted the Wellhead Decontrol Act it stressed the importance of the Commission's open access regulations to making a deregulated wellhead market work. For example, the

[156] *See* n. 41, *supra*.

[157] 824 F.2d at 1028.

[158] When deregulation is completed in 1993 under the Wellhead Decontrol Bill, the Commission will no longer have authority to act under section 5 over wellhead contracts.

[159] Pub. L. No. 101-60, § 2, 103 Stat. 157 (1989).

[160] S. Rep. No. 39, 101st Cong., 1st Sess. 8 (1989).

[161] S. Rep. No. 39, 101st Cong., 1st Sess. 8 (1989).

[162] H.R. Conf. Rep. No. 100, 101st Cong., 1st Sess. 4 (1989), *reprinted* in 1989 U.S. Code Cong. & Admin. News 76, 77.

[163] Of the $9.2 billion of year-end 1986 take-or-pay exposure for which the Commission has data allowing an attribution to NGPA pricing category, $1.7 billion arose in connection with off-shore gas under section 102(d) of the NGPA.

Report of the House Committee on Energy and Commerce on the Wellhead Decontrol Act stated:

> The Committee stresses that these new rules [including Order No. 436], and especially the wide adoption of blanket certificates for non-discriminatory open access interstate transportation of non-pipeline gas, are essential to its decision to complete the decontrol process. A11 sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other supplies. Both the FERC and the courts are strongly urged to retain and improve this competitive structure in order to maximize the benefits of decontrol.[164]

The Commission believes that the adoption of this final rule, repromulgating its open access regulations and providing generally for the continuation of the provisions of Order No. 500, is consistent with both this Congressional direction to retain and improve the competitive structure fostered by the open access program, while at the same time addressing the concerns of the *AGD* and *AGA* Courts, including the concern about the effects of open access transportation on pipeline take-or-pay problems. In the Commission's judgment, section 5 action would interfere with the development of a competitive wellhead market for the reasons discussed above. The Commission recognizes, however, that it has to address the take-or-pay issue before a truly competitive market can mature and to be responsive to the *AGD* and *AGA* mandates. As discussed above, the provisions of Order No. 500 have permitted the industry to resolve its take-or-pay problems in an equitable manner, while open-access transportation as a percentage of total throughput has increased. The resolution of take-or-pay problems and increased open-access transportation have fostered continued maturation of a competitive wellhead market. The Commission expects this process to continue under the final rule.

5. Other Actions

The Commission indicated in Order No. 500 that, upon analysis of the pipelines' responses to the 1987 data requests the Commission would decide whether any action, such as rescinding the incentive ceiling price for tight formation gas established under NGPA section 107(c)(5), other than action under NGA section 5, would contribute to solving pipeline take-or-pay problems. However, subsequently in *Williams Natural Gas Co.* v. *FERC*,[165] the court remanded to the Commission an order in which the Commission had terminated an ongoing rulemaking which would have rescinded the NGPA section 107(c)(5) incentive ceiling price, thus leaving the ceiling price intact. In these circumstances, the Commission has decided that the more appropriate procedural vehicle for carefully considering and resolving this issue is in the *Williams* remand, and so the Commission will take no action here with respect to possible rescission of the NGPA section 107(c)(5) incentive ceiling price. The Commission expects to issue an order on the *Williams* remand within 60 days of the issuance of this order.

6. Comments Received and the Commission's Response

a. *Comments on Crediting.* The Commission will now address the specific comments of the parties on the crediting provisions in Order No. 500. In a nutshell, pipelines and LDCs contend that crediting as adopted by the Commission provides little effective take-or-pay relief. They urge the Commission either to broaden substantially the pipelines' rights to obtain credits or to provide direct take-or-pay relief by taking action under NGA section 5 to modify their take-or-pay contracts. Producers, on the other hand, oppose the continuation of any crediting. They assert that the Commission lacks authority to impose the crediting requirement for pipeline transportation and that, in any event, the crediting requirement in Order No. 500 has no supporting rationale and is overly broad and burdensome.

i. Producer Comments on Legality of Crediting. A number of producers [166] assert that the Commission lacks legal authority to impose crediting. They contend that crediting may not be adopted pursuant to the Commission's NGA section 7(e) conditioning authority. They argue that with respect to jurisdictional gas, crediting modifies the producer's sales contract with the pipeline without the necessary section 5 hearing and finding that the contracts are unjust and unreasonable. With respect to contracts for the sale of non-jurisdictional gas, the producers argue that crediting improperly modifies contracts for the sale of gas which the NGPA removes from the Commission's jurisdiction. In support, they argue that the take-or-pay problem is a price problem, that the Commission cannot directly order reductions in wellhead prices below the price ceilings set by the NGPA, and that, since the crediting requirement is aimed at reducing take-or-pay liability, it represents an unlawful attempt by the Commission to do indirectly what it cannot do directly.

The court in *AGA* found that the Commission had failed to support its legal authority to permit pipelines to require producers to offer credits for (1) transportation service provided pursuant to a pipeline's Order No. 500 blanket certificate and (2) transportation service on the Outer Continental Shelf (OCS) governed by the Outer Continental Shelf Lands Act (OCSLA).[167]

First, the court found that the Commission had failed to answer the argument made by several producers that crediting, as applied to transportation pursuant to a blanket certificate, is an improper exercise of the Commission's conditioning power under section 7(e) of the Natural Gas Act, 15 U.S.C. 717f(e).[168] The producers rely upon *Panhandle Eastern Pipeline Co.* v. *FERC*,[169] which held that the Commission may not exercise its section 7(e) conditioning authority to require adjustments in previously approved rates for services not before it in the relevant certificate proceeding. The producers argue that the Commission cannot lawfully base the crediting mechanism upon NGA section 7 because the take-or-pay contracts are not before the Commission when it grants a blanket certificate to a pipeline under the provisions of Order No. 436.[170] The court held in *AGA* that if the Commission relies on section 7(e) as its legal authority to allow pipelines to require credits for blanket certificate transportation, the Commission must explain why the *Panhandle* doctrine does not apply.

The authority for crediting rests upon the Commission's NGA section 7(e)

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[164] H.R. Rep. No. 29, 101st Cong., 1st Sess. 6 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 51, 56.

[165] 872 F.2d 438 (D.C. Cir. 1989).

[166] Amoco, Apache Corporation, Anadarko Petroleum Corporation, Mobil Oil Corporation and NGSA.

[167] 43 U.S.C. § 1334 (1982).

[168] Section 7(e) provides: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[169] 613 F.2d 1120, 1127, 1133 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980). *See also, Northern Natural Gas Co.* v. *FERC*, 827 F.2d 779 (D.C. Cir. 1987).

[170] The producers made a similar argument with respect to transportation performed under NGPA section 311, contending that the Commission's conditioning authority under that statute is limited in the same way as its conditioning authority under NGA section 7(e). However, the court in *AGA*, quoting its *AGA* opinion, held that "the premises of the *Panhandle* doctrine are absent here." Slip op. at 25 (*quoting* 824 F.2d at 1015).

conditioning authority. NGA section 7 is an essential part of the statutory scheme established by the NGA to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." [171] Under section 7, a natural gas company may not initiate a jurisdictional service until the Commission has determined that the service will be in the "present or future public convenience and necessity." [172] Under section 7(e), the Commission may attach conditions to the issuance of the certificate so as to ensure that the rates and terms under which the service is initially provided are consistent with the public interest.

After the service has been certificated, the natural gas company may file at any time pursuant to section 4, new tariff sheets to revise the rate or terms of service. The changes will become effective upon 30 days notice, unless the Commission acts to suspend the change for up to five months and then the change may take effect subject to a refund obligation if the Commission later determines the rates to be unjust and unreasonable. In addition, under section 5, the Commission may, *sua sponte* or otherwise, initiate an investigation into existing rates, terms, and conditions and order changes so that they will be just and reasonable. However, the Commission may only exercise this authority prospectively.

"In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under section 7(e) of the Act as being required by the public convenience and necessity becomes crucial." [173] This is true because thereafter the Commission can only order changes prospectively under section 5. Thus, as the Supreme Court stated in *CATCO*, the Commission must under section 7(e) evaluate all factors bearing on the public interest in determining whether to issue a certificate and what conditions to attach to the certificate.[174] That is what the Commission has done here in conditioning the issuance of blanket certificates for open access transportation on the crediting provisions of Order No. 500.

The condition established here governs when the pipeline must perform (or may decline to perform) the open access transportation service being certificated. Specifically, the condition requires the pipeline to transport the gas of any producer which has offered the pipeline take-or-pay credits under Order No. 500, but permits the pipeline to refuse to transport the gas of producers who have not offered such credits. The purpose of giving pipelines this limited ability to refuse to transport a producer's gas is to address the Court's concern in *AGD* that requiring pipelines to transport a producer's gas regardless of take-or-pay relief deprives pipelines of the bargaining power necessary to negotiate reasonable settlements of their take-or-pay problems. However, as explained above, the Commission believes that giving pipelines unlimited discretion to refuse to transport gas in the absence of take-or-pay relief acceptable to the pipelines would seriously undermine the purpose of open access transportation to make competitively priced gas available to a wide array of consumers. This is because pipelines would, in effect, be able to exercise their monopoly power over transportation to refuse to transport any gas which displaced their own sales. Crediting avoids this result by requiring pipelines to transport a producer's gas if the producer offers the particular take-or-pay relief set forth in the Commission's crediting regulations.

The *Panhandle* doctrine is inapposite in this context because the condition imposed here does not directly modify any rates which are not before the Commission in the certificate proceeding. The condition is instead a condition on the pipeline's performance of the very transportation service being certificated. In both *Panhandle* and *Northern Natural*, the Commission required the pipeline, through conditions attached to a certificate for a new service to be performed by the pipeline, to modify rates for other services by crediting revenues received for the newly certificated service to the rates paid by customers receiving services performed under other certificates. By contrast, the condition on the blanket certificate involved here does not require the pipeline receiving the certificate to modify its rates for any service, but, as discussed above, determines when the pipeline must perform, or may decline to perform, the very transportation service being certificated.

It is of course true that this limited right to refuse to transport enhances a pipeline's ability to negotiate modifications to its contracts with producers. That, however, is the whole purpose of the crediting mechanism. The issue whether crediting constitutes a legal section 7(e) condition thus revolves around the question whether the Commission may legally authorize a pipeline to exercise its control over transportation to pressure producers to modify contracts which are either deregulated or, if regulated, have been filed with the Commission as rate schedules. The court in *AGD* addressed this issue, at least with respect to deregulated contracts. In response to producer contentions that, by allowing pipelines to condition access, the Commission would be doing indirectly what it is forbidden to do directly—*i.e.*, regulate wellhead prices, the court stated:

> That access-conditioning and wellhead price controls might have somewhat similar effects (lower wellhead prices) does not make them the same thing at all. Order No. 436 mandates access in order to solve unprecedented problems in the natural gas market. That access will give producers entirely new market opportunities not because the statute expressly mandates that producers should enjoy them, but because the Commission believes that such access is a well-designed corrective for practices that it finds unduly discriminatory. If it is appropriate for the Commission to bar refractory producers from the benefits of Order No. 436 in order to fulfill the underlying statutory mandate, then the fact that this constitutes a form of government pressure to reduce prices is itself no barrier.[175]

The Commission does not believe that a different result should be reached where the producer-pipeline contracts remain subject to the Commission's NGA jurisdiction. Since the Commission is simply providing pipelines the bargaining power to negotiate changes to their contracts, rather than directly requiring changes in rates for other services, as in *Panhandle* and *Northern Natural*, the concerns expressed by the court in those cases, about the Commission using its section 7(e) conditioning authority to emasculate NGA section 5, are not applicable here.

The limited right given pipelines to refuse to transport gas is designed, not as a substitute for Commission action under NGA sections 4 or 5 to determine whether new or existing contracts are unjust and unreasonable and to fix just and reasonable contractual provisions, but to assure that pipelines and producers have appropriate bargaining power when they negotiate voluntary modifications to their existing contracts or replacement contracts. The NGA presumes private contracting between producers and pipelines. Thus, the NGA contemplated that parties would continue to negotiate private contracts which would thereafter be subject to Commission review under NGA sections 4 and 5 to determine whether the

[171] CATCO, 360 U.S. at 388.
[172] 15 U.S.C. § 717f(e) (1988).
[173] CATCO, 360 U.S. at 389.
[174] 360 U.S. at 391.
[175] 824 F.2d at 1029–30.

negotiated contracts are just and reasonable and, if not, to fix just and reasonable contractual terms. The condition to the blanket certificate addresses the parties' bargaining power in the private negotiation of contracts which takes place before any Commission review under the NGA. The condition does not itself fix just and reasonable contractual terms as section 5 action would, but requires the pipeline to perform the very transportation service being certificated if the producer offers credits.

On the one hand, the Commission is concerned that pipelines not have an unlimited right to refuse to provide transportation since that would vitiate the benefits of open access transportation. On the other hand, the Commission seeks to avoid depriving pipelines of one of their primary bargaining chips in negotiating take-or-pay relief—the ability to condition access to transportation. Since these concerns arise in connection with the very transportation service being authorized by the blanket certificate, it is appropriate that the Commission address them through its NGA section 7(e) conditioning authority when issuing the blanket certificate.

The producers have also argued that crediting is unduly discriminatory under section 5 of the NGA. The Commission finds that crediting does not violate the undue discrimination provisions of the NGA. Crediting allows pipelines to refuse to transport a producer's gas so as to preserve pipeline bargaining power to resolve take-or-pay problems. The court in *AGD* stated, "It eludes us why pipeline denial of access to producers that stand on the letter of their contract rights should be viewed as unduly discriminatory." [176] Furthermore, the right given pipelines to refuse to transport is carefully circumscribed precisely to assure that no undue discrimination occurs. The crediting regulations set forth a specific offer of credits which any producer may submit to a pipeline in order to require the pipeline to transport gas. There is, of course, a possibility that a pipeline could agree to transport gas without an offer of credits for one producer and not another in an unduly discriminatory manner. However, the Commission believes that such instances of undue discrimination are best addressed on a case-by-case basis as they arise.[177]

Producers also contend that the Commission lacks authority to permit pipelines to implement the crediting mechanism with respect to the transportation of gas on the Outer Continental Shelf.[178] The producers contend that giving pipelines a right to refuse to transport gas in the absence of an offer of credits conflicts with the provisions in sections 5(e) and 5(f)(1) of the OCSLA[179] requiring pipelines on the OCS to transport gas on a nondiscriminatory basis in such proportionate amounts as the Commission may require.[180] The Court in *AGA* specifically directed that the Commission address the producers contentions concerning the OCSLA.

This issue should first be put in its factual context. With one exception, the pipelines which transport gas solely on the OCS are transportation-only pipelines which neither purchase nor sell gas. Such pipelines have no take-or-pay contracts against which to apply credits and thus crediting is irrelevant with respect to them. The one pipeline transporting gas solely on the OCS which also purchases and resells gas is Sea Robin Pipeline Company. Sea Robin's responses to the Commission's 1987 take-or-pay data request show that as of year-end 1986 it had incurred substantial take-or-pay liabilities under its gas purchase contracts. However, it appears that Sea Robin has substantially resolved its take-or-pay problems. *See* Appendix B. Accordingly, Sea Robin may no longer have a significant need for the rights given it by the crediting provisions of Order No. 500.

A number of pipeline companies have transportation facilities both on the OCS and onshore. Where such a pipeline transports gas from the OCS to a point beyond the first onshore interconnection, the onshore transportation would generate credits even if the offshore transportation did not, making credits for the offshore transportation unnecessary. Where the pipeline only transported the gas to the first onshore interconnection,[181] the gas would not reach the pipeline's sales market and thus presumably would not displace its own sales. Again, therefore, the pipeline would have little need for credits with respect to the offshore transportation. The Commission thus believes that the issue whether crediting conflicts with the non-discriminatory access provisions of the OCSLA is of limited practical significance.

In any event, the Commission does not believe that crediting conflicts with those provisions. Section 5(f)(4) of the OCSLA preserves the Commission's NGA section 7 authority with respect to transportation on the OCS.[182] As discussed above, NGA section 7 gives the Commission authority to implement crediting, and the Commission has, in fact, implemented crediting pursuant to that authority. Furthermore, the Commission does not believe that crediting violates the non-discriminatory access provisions of OCSLA sections 5 (e) and (f), but is a reasonable condition to assist pipelines making the transition from being merchant-only pipelines to performing open access transportation to restructure their contractual arrangements and avoid exacerbation of take-or-pay problems.

Section 5(e), in language which appeared in the OCSLA as enacted in 1953, requires that pipelines "transport or purchase without discrimination * * * natural gas produced from" the OCS "in such proportionate amounts" as the Commission may direct. This

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[176] 824 F.2d at 1028.

[177] Since crediting went into effect, no producer has filed a complaint that a pipeline has waived crediting in an unduly discriminatory fashion.

[178] Order No. 500 did not authorize pipelines to require offers of credits in connection with transportation on the OCS. However, when the Commission issued Order No. 509 to implement the OCSLA, it extended the crediting provisions of Order No. 500 to transportation on the OCS. Order No. 509, 53 Fed. Reg. 50,925 (Dec. 19, 1988), FERC Stats. & Regs., Regulations Preambles ¶ 30,842 (1988); *order on reh'g*, Order No. 509–A, 54 Fed. Reg. 8301 (Feb. 28, 1989), FERC Stats. & Regs., Regulations Preambles ¶ 30,848 (1989). Order No. 509 became effective on December 9, 1988.

[179] 43 U.S.C. 1334 (e)(f)(1) (1982).

[180] Section 5(e) of the OCSLA states, in relevant part, that:

> Rights-of-way . . . may be granted . . . for pipeline purposes for the transportation of oil [and] natural gas . . . upon the express condition that oil or gas pipelines shall transport or purchase without discrimination oil and natural gas produced from . . . Outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission . . . may . . . determine to be reasonable. . . .

Section 5(f)(1) of the OCSLA states, in relevant part, that:

> (1) Except as provided in Paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the Outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:
>
> (A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

[181] For example, the gas might enter a processing plant at the first onshore interconnection and then be sold into the intrastate market.

[182] Section (5)(f)(4) of the OCSLA provides that "nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf." This provision makes clear that the OCSLA does not "alter present authority, under any other provision of law, of any agency of the United States with respect to pipelines on or across the OCS." H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 89 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 1674, 1688.

language did not, however, mandate that pipelines provide transportation service, but simply required that, if a pipeline did offer such service, it do so on a non-discriminatory basis. Alternatively, if a pipeline performed a merchant service, it was required to purchase gas from producers on a non-discriminatory basis.[183] Section 5(f), added in 1978, however, added a requirement that pipelines "provide open and nondiscriminatory access to both owner and non-owner shippers." This requirement, mandating the performance of transportation service, was "to prevent 'bottleneck monopolies' and other anticompetitive situations involving OCS pipelines." [184]

The requirement for open access transportation on the OCS did not immediately cause those pipelines operating on the OCS which traditionally performed a merchant function any take-or-pay problems. The increasing demand for gas in the late 1970's prevented that. Furthermore, the lack of open access transportation onshore prevented most pipeline sales customers from obtaining access to alternate sources of supply in any event. However, the changed economic conditions of the mid- to late 1980's caused take-or-pay problems for traditionally merchant pipelines operating on the OCS, and, with the advent of open access transportation onshore, the OCSLA open access transportation provisions may have exacerbated those problems.

In these circumstances, the Commission believes that the carefully limited right given OCS pipelines to refuse to transport gas in the absence of an offer of credits is a reasonable exercise of the Commission's NGA section 7 authority in tandem with its OCSLA section 5(e) and 5(f) authority. The purpose of giving OCS pipelines this right is to assist them in their transition from performing primarily a merchant function to performing the open access transportation mandated by the 1978 amendment to the OCSLA; crediting does this by minimizing exacerbation of take-or-pay problems as a result of sales displacement arising from open access transportation on the OCS combined with open access transportation onshore. The Commission does not believe that Congress intended the non-discriminatory access provisions of OCSLA sections 5 (e) and (f) to prevent the Commission, in implementing those provisions, from taking actions under NGA section 7 reasonably designed, as the crediting provisions are, to facilitate the implementation of these provisions by minimizing potential adverse effects during the transition. Finally, exempting producers on the OCS from the crediting provisions of Order No. 500 while subjecting onshore producers to those provisions would give unduly preferential treatment to OCS producers in violation of NGA section 5. This would be contrary to OCSLA section 5(f)(4), which provides that nothing in the OCSLA abridges or modifies existing provisions of law concerning OCS pipelines.

The Commission concludes that the imposition of the crediting requirement in Order No. 500 and its retention here in this final rule are a reasonable exercise of the Commission's authority under NGA section 7 and NGPA section 311 to condition transportation service and are not in conflict with the provisions of the OCSLA.

ii. *Producer Comments on Crediting in General.* Certain producer commenters (Apache, Amoco, Indicated Producers) and others (Process Gas Consumers Group, Tennessee, and Peoples Gas Light and Coke Company and North Shore Gas Company) assert that crediting has resulted in severe administrative burdens because of the record-keeping complications of crediting. Some commenters (including Apache, NGSA, Bass Enterprises, Chemical Manufacturers Association, Governor Clements of Texas, Sabine Corporation, and the Railroad Commission of Texas) assert that the burdens of crediting have caused disruptions in the transportation, production, and enduser supply of natural gas. Finally, several commenters (Tenneco Oil Company, Chevron U.S.A. Inc., the Texas Railroad Commission, and Producer Associations) argue that crediting, if retained in the final rule, should have a sunset provision.

These comments do not require extended discussion. As discussed above, the Commission is adopting a sunset date for crediting. Given the significant increase in transportation since crediting became effective, it is clear that crediting has not significantly disrupted transportation of natural gas. The Commission recognizes that crediting does involve some administrative burden in that lease owners must execute offers of credits in order to obtain transportation of gas, unless the pipeline agrees to transport without an offer of credits. However, as discussed above, the provisions concerning crediting are necessary to ensure that open access transportation does not adversely affect pipeline bargaining power in resolving take-or-pay problems.

iii. *Pipeline and LDC Comments on the Effectiveness of Crediting.* Pipelines, LDCs, and their associations (including Consolidated, Enron, CIG, Arkla, Inc., Cincinnati Gas and Electric Company and The Union Light, Heat and Power Company, Public Utilities Commission of the State of California, and the American Public Gas Association) generally contend that the crediting mechanism adopted in Order No. 500 fails to give pipelines any significant relief from their take-or-pay obligations. They state that the Commission has failed to present any substantial evidence showing that crediting would provide significant take-or-pay relief, or by how much it would reduce take-or-pay liabilities. Accordingly, the pipelines and LDCs claim that crediting is not responsive to the court's concerns in *AGD* (AGA, CIG, El Paso, INGAA, Natural, Panhandle, Texas Gas, and Williams).

Pipelines and LDCs (*e.g.* AGA, Cincinnati Gas & Electric, Baltimore Gas and Electric Company, Columbia Gas Distribution Companies, INGAA, Natural, UDC, United, Laclede Gas Company, Memphis Light, Gas and Water Division, Michigan Consolidated Gas Company, Northern Illinois Gas Company, Pacific Gas and Electric Company, and Panhandle) contend that the crediting mechanism adopted in Order No. 500 is ineffective in part because of the many situations in which pipelines do not receive credits or are limited in the way they may apply the credits they do receive. The commenters refer to, among other things, the requirements that pipelines transport without credits (1) gas formerly purchased by the pipeline under a terminated contract, (2) gas formerly purchased under a contract containing a market-out clause giving the pipeline discretion to stop purchasing the gas, (3) certain new gas, (4) the up to 15 percent of a package of gas which need not be covered by an offer of credits under the 85 percent rule, and (5) certain gas released by intrastate pipelines. The commenters also point to the provisions that pipelines (1) may not apply credits against must-take obligations for casinghead gas or against pre-1986 take-or-pay liabilities, (2) must apply credits solely against take-or-pay obligations of producers whose gas they transport, (3) must share a single credit with other

[183] The Mineral Leasing Act, upon which the OCSLA was modeled, originally required natural gas pipelines to provide common carriage, but, before passage of the OCSLA, was amended to exempt natural gas pipelines from that requirement. *See* 30 U.S.C. § 185(r) 3(a) (1982). This exemption was not altered when the OCSLA was adopted.

[184] H.R. Conf. Rep. No. 1474 at 87, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 1686.

pipelines which transport the same gas, and (4) are limited in the way in which they may apply credits generated by gas sold under percentage of proceeds contracts to processing plants.

In addition to complaining about the exceptions to crediting and the limitations on the application of credits, pipelines and LDCs argue that crediting gives pipelines little more relief than they previously got under voluntary, pre-Order No. 500 release agreements; several observe that a recent NGSA study showed that 98.5 percent of producer-pipeline release agreements provide for a volume-for-volume credit against take-or-pay liability when the pipeline transports the released gas (AGD, Cincinnati Gas and Electric, Consolidated, El Paso, Texas Gas, Laclede, Memphis Light, National Fuel Gas Supply Corporation, Northern Distributor Group). El Paso notes that the additional gas exempted from crediting under amendments to the crediting provisions adopted in Order No. 500–C, is gas generally not previously subject to take-or-pay contracts between interstate pipelines and producers, including new gas, gas sold to processing plants, and gas released by intrastate pipelines. This newly exempted gas is, El Paso says, the only gas as to which Order No. 500, as originally adopted, gave significant relief, since pipelines already obtain take-or-pay relief when they transport released gas.

A number of pipelines (including CIG, Columbia, El Paso, Enron, Panhandle, Tennessee, Transco, Williams, Natural, and INGAA) assert that, in order to provide meaningful take-or-pay relief, the Commission must provide pipelines a broader right to condition access to transportation than is provided by crediting. Generally, they propose that pipelines be allowed to refuse transportation unless the producer cooperates in resolving both already accrued and future accruing take-or-pay liabilities. Some state that the *AGD* court suggested the Commission consider this type of conditioning program and that Order No. 500 failed to satisfy the requirements of reasoned decision making when it gave no reasons for rejecting this alternative in favor of crediting (Enron, INGAA). Pipelines further urge that the existing limitations on crediting should be cured by such devices as trading of credits, buying and selling of credits, banking of credits for future years, permitting downstream pipelines to get credits against liability to upstream pipelines, and granting credits for transportation performed in the past.

The Commission has already discussed in detail above why it believes that crediting has enhanced pipelines' ability to resolve their take-or-pay problems through settlements. In that discussion, the Commission addressed the pipelines' contentions that crediting under Order No. 500 has not given pipelines significantly greater rights than they received under pre-Order No. 500 release agreements. The Commission also addressed, and rejected, pipeline proposals that the Commission give them unlimited discretion to refuse to transport gas, unless the producer offers take-or-pay relief satisfactory to them. This unlimited right by pipelines to exercise their monopoly power over transportation to refuse to transport gas would be inconsistent with Congress' intent that the Commission continue to encourage and broaden open access transportation.

While pipelines point to the various limits on their crediting rights as rendering crediting ineffective, the Commission does not believe that these limits have impeded the effectiveness of crediting in giving pipelines additional bargaining power. The Commission believes that the evidence summarized above that pipelines have, in fact, settled the bulk of their take-or-pay problems shows that pipelines have sufficient bargaining power to resolve their take-or-pay problems, whether because of crediting or for some other reason. Furthermore, as discussed in detail in subparts (iv) through (xiii) of this section, the Commission believes that all the limits are justified either (1) on the ground that, in the situations in which the limits apply, the pipelines have already received significant take-or-pay relief or (2) on the ground that the limit is necessary to avoid disruptions in the production or transportation of gas which would cause greater adverse effects on consumers than any resultant reduction in the take-or-pay relief afforded pipelines. The Commission also notes that, of the various limits on pipeline crediting rights, only five—the provisions concerning terminated contracts, market-out clauses, new gas, certain gas released by intrastate pipelines and the 85 percent rule—provide that the pipeline's transportation of gas will not generate credits for application against any take-or-pay liability the pipeline may have to the producer in question. The Commission discusses these limits in subparts (iv) through (viii) below. The remaining limits simply limit how the pipeline can apply the credits generated by the transportation. The Commission discusses these limits in subparts (ix) through (xiii) below.

iv. *The Terminated Contract Exception.* Pipelines and LDCs complain that the exception from crediting for gas formerly committed to a pipeline under a terminated contract significantly reduces the effectiveness of crediting. They state that the gas covered by the exception displaces the pipeline's sales and thus adversely affects its take-or-pay problems, just like any other gas. Furthermore, they observe that the Commission's rationale for the exception was that it would encourage producers to settle take-or-pay claims in order to avoid credits. However, they assert that the exception applies in many situations where the producer has not settled any take-or-pay claims. In particular, many rehearing applicants (including AGA, INGAA, El Paso, NI-Gas, Texas Gas, Williams, Columbia Gas, California PUC, Cascade Natural Gas Company, Columbia, and AGD) point out that the Commission has ruled that terminated contracts include: (1) Contracts which have simply expired by their own terms; and (2) contracts terminated under Order No. 451's good faith negotiation procedures.

The Commission believes that the exception from crediting for gas from terminated contracts further encourages settlements, since it assures that if a producer and pipeline agree to terminate a contract as part of a settlement, the gas can be transported to market without credits.[185] Moreover, since a settlement terminating a take-or-pay contract gives the pipeline substantial and permanent take-or-pay relief by releasing the pipeline from all future take-or-pay obligations under the contract, including but not limited to those for the gas being transported, it is appropriate that the producer not be required to give the pipeline additional take-or-pay relief through credits to be applied against take-or-pay obligations under other contracts. Also, to the extent that the settlement terminating the contract was entered into before Order No. 500, the exception avoids the inequity of giving the pipeline a unilateral right to modify that settlement by taking credits not contemplated in the settlement. To the extent the settlement is entered into after Order No. 500, the pipeline can decide whether to enter the settlement in light of the effect on the pipeline's crediting rights.

[185] The Commission notes that the contract must be completely terminated and the gas no longer committed to the pipeline for the exception to apply. Also, the exception only applies where the gas is transported on the pipeline which was party to the terminated contract.

It is true that the terminated contract exception is available not only when the pipeline and the producer enter into a settlement terminating a contract before the end of its term, but also when the contract expires by its own terms. However, that is appropriate since expiration of the contract gives the pipeline take-or-pay relief by releasing it from the take-or-pay obligations contained in the contract. In any event, the data from the Commission's 1987 take-or-pay data request indicates that relatively few take-or-pay contracts terminated by their own terms during the period when pipelines were negotiating the settlements resolving the bulk of take-or-pay problems. Contracts accounting for 9 percent of total take-or-pay exposure as of year-end 1986 expired by June 30, 1988. This increased to 11 percent by the end of 1988. It is true that contracts accounting for an additional portion of the year-end 1986 take-or-pay exposure will expire in the future. However, even by the December 31, 1990 sunset date, these expired contracts will still account for less than a quarter of pipelines' year-end 1986 take-or-pay liability. By the end of 1989, contracts accounting for 20 percent of year-end 1986 take-or-pay exposure will have expired. This will increase somewhat to 23 percent by the end of 1990, the sunset date for crediting.[186] However, expiration of these additional contracts should itself give pipelines take-or-pay relief, reducing their need for credits.

v. *The Market-out Exception.* Second, pipelines and LDCs (United, AGA, Baltimore Gas and Electric, and Natural) complain that the crediting rule requires pipelines to transport without credits gas formerly sold under a contract with a market-out clause giving the pipeline discretion to terminate the contract. These commenters state that transporting gas formerly sold under contracts with the relevant market-out clauses displaces sales, just as does transporting other gas. Accordingly, there allegedly is still a need for credits for transporting that gas. Furthermore, pipelines will allegedly be discouraged from exercising the market-out clause, if they know they must transport without credits (AGA, Columbia Gas), and producers will have less incentive to offer the pipeline a lower price when it exercises the market-out clause, since they know they can obtain transportation without credits (Cincinnati Gas and Electric, Texas Gas).

The exception from crediting for gas from contracts with market-out clauses giving the pipeline discretion to terminate the contract was added in order to give producers a further incentive to agree to such contract terms. Such clauses would enable pipelines to avoid all take-or-pay obligations under such contracts, since the pipeline could at any time exercise its market-out and end its obligations to the producer. In any event, the exception does not significantly reduce pipeline crediting rights, since market-out clauses of the type triggering the exception were virtually non-existent when Order No. 500 was adopted. In order to trigger the exception, a market-out clause must give the pipeline absolute discretion to terminate the contract at any time. Thus, a market-out clause which the pipeline could only exercise at specified intervals or which would require the pipeline to continue to take the gas if the producer offered the pipeline a lower price at some specified level would not qualify. Most market-out clauses at the time included these or some other conditions on the pipelines' ability to cease taking the gas.

vi. *The 85 Percent Rule.* In Order No. 500–B,[187] the Commission provided that if a pipeline receives offers of credits that account for at least 85 percent of the volumes to be transported, the pipeline must transport all the gas tendered. However, if at any time subsequent to the commencement of that transaction, any member of the 15 percent (or less) volumetric minority should tender an offer of credits in order to obtain the transportation of other volumes which they produce, the pipeline will be entitled to credits for the volumes transported for that person in the original transaction as well as the new transaction.[188] The purpose of these provisions was to prevent owners of small minority working interests from preventing the transportation of the majority working interest owners' gas.

Pipelines and LDCs[189] state that the Commission erred in Order No. 500–B when it created the 85 percent rule. These commenters assert that this requirement reduces the take-or-pay relief afforded by Order No. 500 by allowing 15 percent of transported gas to escape crediting. They also state that the 85 percent rule is unnecessary, since owners of a minority working interest allegedly cannot prevent the majority working interest owners from obtaining transportation. These commenters state that an individual working interest owner can tender its gas separately for transportation with an offer of credits, and the rights of the other working interest owners whose gas is not transported could be protected through sale of their gas to a customer not requiring interstate transportation or through a balancing agreement.

Some producers[190] state that Order No. 500–B's 85 percent rule is insufficient to remove the impediments to transportation under Order No. 500 when multiple working interest owners own the gas to be transported. For example, they state that the refusal of a 16 percent working interest owner to offer credits could prevent the owners of the other 84 percent of the gas from obtaining transportation.

The Commission continues to believe that the 85 percent rule is a necessary pragmatic adjustment to the crediting regulations to prevent small minority owners from preventing the transportation of gas. As the Commission stated in Order No. 500–B, many leases are owned by more than one working interest owner, and sometimes there is a multiplicity of working interest owners with extremely small ownership interests. Furthermore, gas from a number of leases is often aggregated, for example by marketers, and transported and sold as a package. In these situations, the number of working interest owners involved can be very large. While it is true that the working interest owners could enter into a balancing agreement permitting the gas of the majority working interest owners to be transported subject to an offer of credits by those owners, such balancing agreements must be voluntarily negotiated among the working interest owners. A minority working interest owner might be unwilling to enter into a balancing agreement which would result in the gas of the other owners being marketed while its gas is not. Furthermore, sale of the minority working interest owner's gas into the intrastate market, without transportation over an interstate pipeline, might not be practicable. For example, the well may be connected only to an interstate pipeline.

Furthermore, the Commission does not believe that the 85 percent rule significantly reduces the take-or-pay relief afforded pipelines by the crediting

[186] *See* Appendix A, Table XII. By 1995, contracts accounting for 47 percent of take-or-pay liability as of year-end 1986 will have expired.

[187] 41 FERC ¶ 61,124 (1987).

[188] In order that the pipeline can know which minority working interest owners have had gas transported without an offer or credits, the 85 percent rule requires that the majority working interest owners obtaining transportation provide the pipeline, with their offer of credits, a list of the minority owners not providing an offer of credits.

[189] AGA, INGAA, ANR, El Paso, Transco, and Texas Eastern.

[190] Tenneco and Union Texas.

mechanism. First, the 85 percent rule only defers the pipeline's right to credits for transporting the minority working interest owner's gas. If that owner owns a greater than 15 percent working interest in a second lease, it cannot obtain transportation of volumes associated with that working interest unless it offers the pipeline credits for the transportation of the gas from both working interests. Since producers who own less than 15 percent working interests in one lease may well own a greater than 15 percent working interest in another lease, such producers continue to be under pressure either to offer the pipeline credits or negotiate a settlement of take-or-pay problems with the pipeline.

Second, as the Commission stressed in Order No. 500–B, a single working interest cannot be split for the purpose of Order No. 500 credit offers. If a producer owns a 100 percent working interest in the volumes to be transported, the producer cannot split that interest and only offer credits on 85 percent of the volumes to be transported. Similarly, the 85 percent rule cannot be used where five owners own equal 20 percent working interests. Thus, the 85 percent rule does not act to defer credits for 15 percent of all gas being transported. Since in many cases 15 percent, or less, of a lease is not owned by a separate working interest owner or group of owners, the 85 percent rule should defer credits for significantly less than 15 percent of all gas transported.

vii. *Gas Released by an Intrastate Pipeline.* In Order No. 500–C, the Commission provided that an interstate pipeline must transport, without credits, gas which an intrastate pipeline has released from its system supply under a release agreement providing the intrastate pipeline credits when it transports the gas. The Commission further provided that this exemption would only apply where both the intrastate and the interstate pipelines transport the gas in transactions which were commenced on or before November 15, 1987, and were reported to the Commission by each pipeline pursuant to 18 CFR 284.126(a) and 284.106. Finally, the Commission stated that the exemption may in no case cover more than the average daily quantities transported by the interstate pipeline in November 1987.

The purpose of this exemption was to minimize the possibility that producers would be required to provide "double" credits where an intrastate pipeline releases and transports gas and an interstate pipeline also transports the gas. This could occur because the intrastate pipeline ordinarily would require the producer to provide credits as part of the release agreement. In addition, the producer would have to provide the interstate pipeline credits under Order No. 500. The Commission stated that such double credits could discourage producers from selling gas released by intrastate pipelines into the interstate market and that this would be contrary to the NGPA's goal of integrating the intrastate and interstate markets. The various limits on the availability of the exemption were designed to limit the exemption to situations where the producer actually would provide double credits and to minimize any opportunity for circumvention of interstate pipelines' crediting rights. Circumvention could occur if gas were contracted to an intrastate pipeline solely for the purpose of having the intrastate pipeline release the gas, thus qualifying the gas for the exemption.

Pipelines and LDCs contend that this exemption improperly reduces the amount of take-or-pay relief afforded by crediting. They assert that, when an interstate pipeline transports to its market gas released by an intrastate pipeline, that transportation displaces the interstate pipeline's own sales, causing it to incur take-or-pay liability.

Producers, marketers, and intrastate pipelines contend that the various limits on the availability of the exemption are too restrictive. They state that the provision limiting the exemption to transactions commenced on or before November 15, 1987 fails to allow for future releases. They also state that limiting the volumes covered by the exemption to those transported during November 1987 fails to recognize monthly fluctuations in volumes transported under any given transaction.

The Commission believes that the exemption from crediting for system supply released by intrastate pipelines properly minimizes disincentives to the achievement of the NGPA's goal of integrating the intrastate and interstate markets without significantly affecting the take-or-pay relief afforded intrastate pipelines by crediting. As discussed in Order No. 500–C, requiring producers to provide "double credits" when an intrastate pipeline releases gas—one to the intrastate pipeline and a second to the interstate pipeline—could discourage producers from selling gas released by intrastate pipelines into the interstate market.

However, the Commission placed strict limits on the availability of the exemption in order to avoid any possibility that the exemption could be used to circumvent Order No. 500's crediting provisions. These limits should assure that the exemption does not significantly affect the take-or-pay relief afforded interstate pipelines by crediting. In particular, the requirements that both the intrastate and interstate pipelines transport the gas in transactions commenced before November 15, 1987 and that the volumes subject to the exemption be limited to the amount of gas transported in November 1987 should mean that the gas covered by the exemption will decrease as the November 1987 transportation transactions expire. Indeed, since many transportation transactions are for relatively short periods, a large proportion of any gas which originally qualified for the exemption should no longer do so.

viii. *New Gas.* Fifth, in Order No. 500–C, the Commission created an exemption from crediting for certain new gas. Under this exemption, pipelines must transport without credits gas produced from wells spudded after June 23, 1987, which are: (1) 2.5 miles or more from the nearest Order No. 500 marker well; (2) at least 1000 feet below the deepest completion location of each marker well within 2.5 miles; or (3) in a reservoir from which natural gas was not produced in commercial quantities before June 23, 1987. In addition, interstate pipelines may not apply credits arising from the transportation of other gas against their take-or-pay obligations for this new gas. The purpose of the new gas exemption was to minimize any adverse effect of crediting on the exploration for, and development of, new gas supplies. The various limits on eligibility of gas for the exemption are designed to assure that eligible gas truly is new gas and avoid exempting from crediting gas from new wells producing from already discovered sources such as infill wells.

In requests for rehearing and comments filed in response to Order No. 500–C, pipelines [191] generally oppose the new gas exemption. The pipelines state that the exemption reduces needed take-or-pay relief, and that transportation of new gas without receiving credits will lead to sales displacement without the mitigating effect of take-or-pay credits. These pipelines also state that the exemption will reduce a producer's incentive to renegotiate its pre-June 23, 1987 take-or-pay contracts covering old gas, by allowing producers to hold pipelines to

[191] Including INGAA, El Paso, Natural, Texas Eastern, Tennessee, and Transco.

those contracts while selling new gas to other purchasers and obtaining transportation of that gas without offering credits. Some pipelines [192] further state that the Commission failed to show, based on substantial evidence, that the exemption is necessary to encourage new production and that the benefits of the exemption outweigh the reduction of take-or-pay relief caused by the exemption. The commenting pipelines assert that the exemption will lead to market distortions and improper price signals to producers. The commenters contend, for example, that the exemption will encourage the exploration for and development of expensive new gas and the shutting in of existing production and discourage the development of proven reserves.

Some pipelines request that, if the Commission does not eliminate the exemption, it should at least narrow it to cover only new gas; which is not subject to a pre-June 23, 1987 take-or-pay contract with the pipeline. This would permit pipelines to continue to apply credits against their pre-June 23, 1987 take-or-pay obligations for new gas, and to receive credits for transporting new gas which they have released from a pre-June 23, 1987 contract. The pipelines contend that if the exemption is not so narrowed, producers will be encouraged to drill for and produce new gas which is subject to existing uneconomic contracts with pipelines, thereby exacerbating their take-or-pay problems.

The commenting producers [193] generally support the exemption from crediting for new gas. Most, however, would expand the exemption to cover all gas produced from wells drilled after June 23, 1987, in order to avoid discouraging new extension or development wells in existing reservoirs. The producers allege that state conservation rules would prevent them from drilling unnecessary in-fill wells solely to circumvent crediting. Arco notes that, since many farm-outs are on acreage near existing production areas, this change is necessary to enable new wells on farmed-out acreage to qualify for the exemption. It alleges this change also would greatly simplify the definition of new gas, since it would not be necessary to define marker wells and new reservoirs. Bass claims that the exemption, as modified, would not exacerbate pipeline take-or-pay problems because new gas replaces existing reserves and does not displace sales. Some producers [194] also suggest that all new gas produced from acreage not subject to an existing contract with a pipeline should be exempt from crediting regardless of whether the marker well test is met, arguing that this gas is not the source of pipeline take-or-pay problems.

The requirement that gas from newly discovered sources must be transported without credits reflects the Commission's concern that producers would have less incentive to explore for and develop new sources of gas if the potential financial reward for finding new reserves were reduced by credits against that producer's take-or-pay for its existing gas reserves. The Commission continues to believe that the new gas exemption is appropriate in order to avoid adversely affecting the level of new gas exploration and development, and consequently reducing the domestic supplies that would otherwise be available. This is particularly true in light of current reduced levels of drilling activity. The Commission realizes that this exemption reduces to some extent the amount of take-or-pay relief afforded by the crediting provisions. However, as the Commission stated in Order No. 500–C, the amount of gas exempted from crediting should be relatively small during the first several years, since only a small proportion of production during that period is likely to be from wells spudded after June 23, 1987, and to otherwise meet the definition of new gas. Given the pipelines' success in settling take-or-pay obligations, the need for credits will be substantially reduced, if not eliminated, by the time significant quantities of gas that qualify for the exemption are sought to be transported. Thus, in balancing the competing goals of affording take-or-pay relief and not restricting the production of domestic energy sources, the Commission finds that the new gas exemption should not be rescinded.

The Commission will, however, reject producer proposals to expand the definition of new gas. The Commission narrowly defined "new gas" to "assure that the gas exempt from crediting * * * truly is new gas" and not gas "from already discovered sources." [195] While the Commission recognizes that the definition adopted in Order No. 500–C may exclude some production that could legitimately be considered new, the Commission believes that the existing definition provides an administratively feasible means of ensuring that gas which is not truly new gas does not qualify for the exemption. The definition thus limits any reduction in take-or-pay relief to only those situations where it is necessary to avoid discouraging exploration and drilling for gas.

The Commission has now considered the commenters concerns about the various provisions in the Order No. 500 crediting rules which prevent transportation from generating credits for application against any take-or-pay liability which the pipeline may have to the producer whose gas is being transported. The Commission will now consider the commenters concerns about the various provisions of the crediting rules which limit the pipeline's discretion in applying those credits.

ix. *Application of Credits Only Against Liability to Producer Whose Gas Is Transported.* Pipelines state that the fact that a pipeline may apply credits only against its take-or-pay obligations under contracts with the producer whose gas is being transported seriously limits the take-or-pay relief afforded by the crediting rule. The commenters state that many producers have access to a number of pipelines. Accordingly, they state, producers will transport their gas over pipelines with whom they have no take-or-pay contracts and avoid pipelines with whom they do. The former pipelines would then have to transport the gas without credits even though their sales are displaced. Some pipelines and LDCs suggest that this problem could be avoided by permitting pipelines to trade credits against one producer's take-or-pay contracts for credits that another pipeline has against another producer's take-or-pay contracts.

However, in many cases producers have access to only one pipeline. More importantly, even if the producer does have the option of transporting gas only over a pipeline which does not owe it take-or-pay, doing so is not without significant costs to the producer. Generally, the different pipelines over which the producer could transport gas lead to different markets. Thus avoiding transportation over a particular pipeline would significantly reduce the buyers to whom the producer could market its gas and might require selling the gas at less advantageous terms than would be available if the producer were free to transport its gas over any pipeline. The ability to obtain access to as many potential purchasers as possible is particularly significant in a natural gas market characterized by excess deliverability and competitive markets such as have existed over the last several years.

[192] Panhandle, El Paso, Texas Eastern, and Transco.

[193] Including NGSA, Arco, Bass Enterprises Production Co., Indicated Producers, Pogo Producing Company, Producer Associations, and Tenneco.

[194] NGSA, Tenneco, and Producer Associations.

[195] FERC Stats. & Regs. at 30,859.

In light of these facts, and in light of pipelines' success in settling their take-or-pay problems under Order No. 500 as presently in effect, the Commission will not amend the Order No. 500 crediting regulations to permit trading of credits. Such increased crediting rights do not appear necessary to enable pipelines to resolve their take-or-pay problems and would increase the administrative burdens of crediting.

x. *Pre-1986 Take-or-pay Liability.* Second, many pipelines and LDCs (including AGA, CIG, Columbia Gas, Consolidated, Enron, INGAA, Natural, NI-Gas, Peoples Gas Light, Arkla, Baltimore Gas and Electric, and Memphis Light) contend that, since credits may not be applied against pre-1986 take-or-pay liability, crediting provides little or no relief from the large amount of already accrued take-or-pay liability which accounts for a large part of the take-or-pay problem. They observe that no credits are given for transportation performed before Order No. 500, and credits for transportation thereafter can at most be applied against past liability accrued after January 1, 1986. In any event, since new take-or-pay obligations continue to accrue, the volume-for-volume credit is allegedly only sufficient at most to cancel out currently accruing liability.

While pipelines cannot apply credits against take-or-pay obligations which accrued before 1986, those take-or-pay obligations accrued before pipelines began transporting gas under Order No. 436. Thus those take-or-pay problems could not have been caused by open access transportation. In any event, pipelines have resolved most of the take-or-pay claims which accrued before 1986.

xi. *Sharing of Credits Where Several Pipelines Transport the Same Gas.* AGA, INGAA, ANR, and CIG criticize the fact that, where several pipelines transport the same gas, the pipelines must share a single credit for each unit of gas transported. They state that this means that the pipeline whose sale was displaced probably will not receive the full credit necessary to compensate it for the lost sale. They express particular concern about the requirement that for released gas only the pipeline which released the gas gets the credit. They observe that it may well be the downstream pipeline whose sale is displaced, yet it will get no credit, while the releasing pipeline may have little or no take-or-pay liability against which to apply the credit. The rehearing applicants and commenters suggest that in the multiple pipeline situation each pipeline should receive a full credit (AGA, El Paso, American Public Gas Association, NI-Gas).

The provision that where more than one pipeline transports gas those pipelines must divide up a single credit for each unit of gas transported was necessary for simple fairness to producers. If the transportation and sale of one unit of gas resulted in more than one credit, the producer would lose far more in the transaction than it would gain. This would make sales requiring transportation over more than one pipeline uneconomic and thereby reduce competition for supplies and markets. This would reduce the consumer benefits of open access transportation.

The provision that, where the gas has been released by one of the transporting pipelines, that pipeline gets the entire Order No. 500 credit is also necessary to avoid the possibility of "double" credits. This is because most release agreements provide for the pipeline releasing the gas to receive credits for each unit of gas transported. Without the provision that only the releasing pipeline can receive credits under Order No. 500, the releasing pipeline could take the credits provided for under the release agreement rather than the Order No. 500 credit, leaving the other pipelines to use the entire Order No. 500 credit. The resulting requirement that the producer give one credit to the releasing pipeline and another credit to the other pipelines could render sales requiring transportation over the releasing pipeline and other pipelines uneconomic for the same reasons described above. Furthermore, the fact that the releasing pipeline has released gas from a contract with the producer suggests that it does have take-or-pay obligations to that producer which the credit would assist in reducing.

xii. *Special Rule for Processing Plants.* Before the issuance of Order No. 500–C, many comments and emergency petitions were filed concerning the treatment of processing plants under the crediting provisions of Order No. 500. The commenters requested that the Commission permit gas which processing plants purchase from behind-the-plant producers and resell, to be transported without any offer of credits. Alternatively, they suggested that the Commission give processing plants which purchase and then resell gas the option of themselves making an offer of credits instead of the behind-the-plant producers.

In Order No. 500–C the Commission provided that gas purchased by a processing plant operator under percentage-of-proceeds contracts entered into on or before-June 23, 1987, and resold at the tailgate of the plant, will be made eligible for transportation under Part 284 by the submission to the pipeline of an offer of credits signed only by the processing plant operator. Although the transportation of that gas will generate take-or-pay credits, the pipeline may apply those credits only against a pre-June 23, 1987 contract with the plant operator from which the pipeline has released that gas. If the gas has not been released from such a contract, the pipeline will not receive any credits. The Commission requested comments on the effect of these modifications on the take-or-pay relief afforded pipelines by the crediting mechanism and whether these changes with respect to processing plants should be continued. The Commission also solicited comments on other ways of treating processing plants under Order No. 500 which would avoid the administrative burden on such plants without exacerbating pipeline take-or-pay problems.

In response to Order No. 500–C, numerous producer commenters [196] ask that these special rules for processing plants be made permanent. Some commenters [197] ask that the special rules be broadened to include all gas purchased and resold by processing plants, not just that gas which the plant purchases under percentage-of-proceeds contracts.

Many interstate pipeline commenters, on the other hand, assert that the special rules for processing plants are arbitrary, capricious, and unnecessary, in that they rest on untested acceptance of the plant operators' allegations of burden. They also contend that the special rules lessen incentives for producers to settle their take-or-pay obligations, and are inconsistent with the treatment of other middlemen. These commenters generally state that the processing plants' arguments of administrative burden do not outweigh the goal of take-or-pay relief; that processors could have taken steps by now to obtain the needed signatures as have other middlemen (e.g., gatherers and marketers); and that, if 16 percent of behind the plant producers will not sign an offer of credits, their gas should not be entitled to transportation.

Some interstate pipelines [198] also object to the requirement that the plant

[196] Including Union Pacific Resources Company, Pogo, Bass, Mesa Operating Limited Partnership, Indicated Producers, and Arco Oil and Gas Company.

[197] Sun Exploration and Production Company, NGSA, Producer Associations, Amoco, Arco, Phillips Petroleum Company.

[198] *E.g.*, El Paso, ANR, CIG, INGAA, United, Panhandle, Texas Gas, Tennessee, Enron.

operator's offer of credits only generates credits against the pre-June 23, 1987 contract with the plant operator from which the pipeline has released the gas. The commenters argue that, if the gas has not been released from such a contract, the pipeline will not receive any credits, and that this exempts plant owners from having credits applied against other contracts they may have with the pipeline. The interstate pipelines also assert that there is no logical justification on administrative burden grounds to shield the operator's own gas from cross-crediting. Some commenters (Transco, Natural) point out that a number of plants have two or more pipelines connected to the plant outlet, and the pipeline which is delivering the gas to market, thereby displacing its own sales, may not have the purchase contract with the operator and will be ineligible for credits under the existing exemption.

UDC opposes anything more than a temporary exemption for processing plant operators. AGA requests that the Commission clarify that the exemption provision was not intended to cover a processing plant operator's own gas, even if that gas is covered by a percentage-of-proceeds contract. One commenter (NI-Gas) contends that processing plants should not be exempted merely because they, like everyone else, will incur administrative expense, and suggests that individual problems should be resolved by negotiation between the processing plant and the transporting pipeline.

Processors, marketers, gatherers and other middlemen (including Citizens Gas Fuel Company, Tejas Power Corporation, and Hadson Gas Systems, Inc.) generally ask that the Commission continue the special rules for processing plants and expand them. Commenting processors (Indicated Plant Operators) request that the exemption be modified to apply to all gas purchased and resold by the plant operator, whether in a percentage-of-proceeds contract or not, resold at the tailgate of the plant or elsewhere, and subject to a pre-June 23, 1987 contract or later. Otherwise, they allege, plant operators will be unable to replace reserves that become depleted over time without the extraordinary burden and expense associated with applying the crediting mechanism to behind-the-plant producers. A processor (Gulf Energy Gathering and Processing Corporation) requests that if the exception cannot be made permanent, there should be an exception system based on pipeline lists of producers with which it has take-or-pay problems so the processor could then compare its working interest population with the pipeline's list and deal with the problem producers accordingly on an exception basis.

The processors [199] stress that the accounting system required for plant owners and operators to track behind-the-plant credits is a burden that far exceeds any potential benefit to be gained in take-or-pay relief. They argue that they are middlemen caught between pipelines and producers, and that the viability of their beneficial operations (which transform low volume or low quality gas, otherwise unmarketable, into saleable components) are at stake, although they have no control over the pipeline and producer actions which affect them. The commenters (Gas Company of New Mexico, Sunterra Gas Gathering Company) suggest that the Commission should eliminate the administrative burden of the 85 percent rule by providing that, where an intrastate pipeline, gatherer, LDC or plant operator acquires gas from multiple suppliers under existing contracts, only the pipeline, gatherer, LDC or plant operator should be required to provide credits.

The Commission has determined to continue in effect the rules adopted in Order No. 500–C concerning the application of crediting in the context of processing plants. As discussed in Order No. 500–C, the Commission believes that the processing plant owners have persuasively demonstrated that it is extremely difficult to secure offers of credits from sufficient behind-the-plant producers with pre-June 23, 1987 percentage-of-proceeds contracts to satisfy the 85 percent rule. There may be thousands of such producers. Even assuming that the plant operator incurs the administrative expense of contacting and requesting offers of credits from all the producers, more than 15 percent may be unwilling to offer credits. However, the processing plant operator may lack contractual authority to stop purchasing and processing the gas of such producers. Thus, requiring offers of credits from producers with pre-June 23, 1987 percentage-of-proceeds contracts with the processing plant operator could seriously disrupt the operation of processing plants across the nation. Those processing plants perform an essential function in improving the quality of natural gas in order to enable it to be transported and sold. Accordingly, the Commission believes that the risk of shutting these plants in outweighs the benefit of take-or-pay relief foregone by this exemption.

Furthermore, the special rules concerning processing plants adopted in Order No. 500–C apply only to gas sold by producers to processing plants under percentage-of-proceeds contracts entered into on or before June 23, 1987. Accordingly, as those contracts expire the special rules apply to less and less gas, thereby reducing any adverse impact on the take-or-pay relief afforded to pipelines by crediting. In this connection, the Commission rejects suggestions that the special rules be expanded to cover gas sold to processing plants under post-June 23, 1987 percentage-of-proceeds contracts. This would enable producers to circumvent the usual requirement that they offer credits by arranging to sell their gas to a processing plant. Such circumvention is not a danger under the pre-June 23, 1987 percentage-of-proceeds contracts since those contracts predated the *AGD* decision and Order No. 500. Additionally, the administrative burdens of complying with the usual Order No. 500 crediting requirements are not as great with respect to post-June 23, 1987 percentage-of-proceeds contracts. At least since the issuance of Order No. 500, the processing plant operators have been able to seek offers of credits from their producers at the time of the execution of new percentage-of-proceeds contracts, and may refuse to enter into such contracts in the absence of an offer of credits.

The Commission also rejects the suggestion that Order No. 500 be amended so that the pipeline may apply credits against take-or-pay obligations under all contracts for the purchase of the plant operators' own gas, and not just the pipelines' contract with the plant operator from which the percentage-of-proceeds gas to be transported has been released. The Commission believes it would be unfair to require the plant operator to offer the pipeline credits against the pipeline's obligation to take or pay for the plant operator's own gas in order to obtain transportation of gas the plant operator purchased under percentage-of-proceeds contracts. When the plant operator sells gas it purchases under percentage-of-proceeds contracts, it must share the proceeds with the behind-the-plant producers. Therefore, the plant operator's revenue from the sale of such gas is less than its revenue from the sale of its own gas, since it may keep the entire proceeds from sales of that gas. Thus, permitting the pipeline to take credits against obligations to take or pay for the plant operator's own gas would

[199] Indicated Plant Operators, Western Gas Processors, and Gulf Energy.

impose a disproportionate burden on the plant operator. The plant operator would incur the entire cost of the credit but receive only part of the benefit from the sale made possible by the credit. As the processor's gas is often commingled with the gas of other producers, the processor would be unfairly forced to offer credits in order to get the plant's gas transported.

xiii. *Casinghead Gas.* As discussed above, in Order No. 500–C the Commission provided that pipelines could not apply credits against their minimum take obligations for casinghead gas because failure to take casinghead gas could result in serious harm to gas and oil production.[200] The Commission requested comments on the effect of prohibiting pipelines from applying credits against must-take obligations for casinghead gas.

The commenting interstate pipelines [201] oppose this limit on the application of credits, and producers, producer associations, end-users, marketers, gatherers, and distributors [202] support it. Of those supporting the limit, most state that the reasons expressed by the Commission in Order No. 500–C, *i.e.*, the possibility of shut-in or flaring of the gas, are compelling reasons for continuing the limit. Some producers also state that reinjection of casinghead gas, as an alternative to shutting in the production or flaring the gas, is generally not technically or economically feasible.[203]

The pipelines, LDCs, and their associations generally contend that the limit in applying credits against obligations to take casinghead gas is an over-reaction to the concerns expressed by producers about the possibility of shut-in or flaring of the gas. They state that application of credits against these obligations does not necessarily lead to shut-in or flaring and that there are intermediate alternatives. Several pipelines also express the view that casinghead gas represents a significant proportion of their system supply, particularly with regard to their take-or-pay liability, and consequently they oppose an extension of the limit.[204]

Consequently, many commenters who oppose the casinghead gas limit on credits propose alternatives to the exemption as set forth in Order No. 500–C. Some [205] would support partial exemption for casinghead gas, if the producers of casinghead gas were compelled to make the contracts market responsive, such as allowing the pipeline to apply credits against casinghead gas if the price of the gas is higher than the pipeline's average cost of gas (CNG), or on the condition that the producer offers to put a market-out clause in the contract (AGA). They add that these contracts are a large source of the take-or-pay problem, and that the Commission should be providing incentives to assure that the contracts are market responsive and competitively priced. These commenters note that exempting casinghead gas from the crediting provisions lessens the producer's incentive to renegotiate these contracts. CIG suggests that casinghead gas contracts should be amended to provide for market responsive prices or to allow the pipeline to abandon the purchase so casinghead gas can compete on the spot market or, alternatively, that two credits be given for transportation of casinghead gas. Consolidated suggests that the rule be modified so that the pipeline, before applying credits against casinghead gas, must offer to temporarily release the gas and transport it without accruing credits. Enron suggests that casinghead gas should not be exempt from crediting in those situations where a producer can reinject the gas.

As discussed above, the Commission has determined to prospectively modify its regulations concerning the application of credits against minimum take obligations for casinghead gas. The Commission will allow a pipeline to apply credits against its minimum take obligation for casinghead gas so long as the pipeline releases the gas not taken from the contract with the producer. This modification to the crediting rules addresses the concerns of pipelines and others that the Order No. 500–C provisions concerning casinghead gas reduced the take-or-pay relief afforded by crediting. At the same time, the release provision minimizes the adverse effects of applying credits against the minimum take obligations for casinghead gas.

The Commission has now discussed all the limits on how pipelines may apply credits. The Commission will now discuss other issues raised concerning crediting, primarily contentions by producers that crediting is unduly burdensome.

xiv. *Other Must-Take Gas.* Take-*and*-pay contracts require pipelines to take minimum quantities of gas. Aside from casinghead gas which must be taken to prevent shut-in of oil wells which also produce gas, must-take contracts also apply, among other things, to gas which must be taken to avoid violations of state conservation laws, well damage, drainage, or loss of leases. While the Commission, in Order No. 500–C, provided that credits may not be applied against minimum take obligations for casinghead gas, it determined that it would not eliminate the pipelines' right to apply credits against their minimum take obligations for gas other than casinghead gas, because it had not been shown that there would be a severe effect on the public interest as a result of this crediting. In Order No. 500–C, the Commission requested comments on the effect of this crediting.

Several producers [206] suggest that the casinghead gas exemption (which the Commission is eliminating in this rule) be expanded to apply to all minimum take requirements. They state that failure of the pipeline to comply with minimum take obligations may cause irreparable harm to the producer whether or not casinghead gas is involved. They note that gas contracts with minimum take provisions were generally negotiated because of the special production needs of the producers and that the crediting provisions of Order No. 500 should not interfere with the previously negotiated solution to the production problem.[207] The Texas Railroad Commission suggests that the Commission allow state commissions to determine the minimum production levels necessary to promote conservation and protect correlative rights, and provide that credits can not be applied to reduce a well's production below that level. Pipelines, LDCs, and their associations, on the other hand, argue that Order No. 500 is not adequately providing them with needed take-or-pay relief, and that

[200] FERC Stats. & Regs. at 30,957.

[201] Including AGD, Consolidated, Columbia, El Paso, Natural, NI-Gas, Pacific Gas & Electric, Tennessee, Texas Gas, Williston, Yankee Gas Company, Panhandle, Northwest Pipeline Company, and INGAA.

[202] Transok, TXO Production Corp., Texas Railroad Commission, AGA, Amoco, Producer Associations, Huffco Petroleum Corporation, McMoRan Oil & Gas Co., NGSA, Phillips Petroleum Company, Pogo, Sun, Industrial Groups (Process Gas Consumers Group, *et al.*), Tejas.

[203] Pogo, Industrial Groups, Sun, and TXO Production.

[204] CIG, AGD, Consolidated, Columbia, El Paso, Enron, INGAA, Natural, NI-Gas, Pacific Gas & Electric, Panhandle, Tennessee, Texas Eastern, Texas Gas, Transco, United, and Williston.

[205] CIG, Consolidated, Natural, PG&E, Panhandle, Tennessee, Transco, United, Williston.

[206] Amoco, Producer Associations, Huffco Petroleum Corporation, Indicated Producers, McMoRan, NGSA, Pogo, Industrial Groups, Tejas, and the Texas Railroad Commission.

[207] McMoRan, Industrial Groups, Tejas, TXO Production.

any additional exception to crediting would create another loophole for producers and offer that much less relief to pipelines.[208]

As discussed above, the Commission will not exempt must-take gas from crediting, but it is modifying its regulations to provide that if a pipeline applies credits against a must-take obligation for any gas, whether or not the gas is casinghead gas, the pipeline must release the gas not taken. This should minimize the possibility that the pipeline's application of credits against must-take obligations could cause such adverse effects for the producer as loss of lease or drainage of the reservoir. The release of the gas should permit the producer to market the gas to another purchaser. At the same time, the take-or-pay relief afforded pipelines by crediting should not be significantly affected. Pipelines can continue to apply credits against all their must-take obligations. Furthermore, if the released gas is transported over the pipeline which applied the credit and released the gas, that transportation will generate credits for the pipeline.

xv. *Limiting Crediting to Pipelines with Blanket Certificates.* The Commission has determined that crediting should not be limited only to those pipelines which have accepted open access blanket certificates. In Order No. 500–C, the Commission stated that it was considering limiting the pipelines which must be offered credits under Order No. 500 to interstate pipelines which have accepted blanket certificates to provide open access transportation and the Commission requested comments on that proposal. The Commission suggested that such a limitation might be necessary in order to discourage pipelines from implementing NGPA section 311 transportation only to discontinue the open access transportation after obtaining the credits needed to eliminate take-or-pay obligations. Requiring a pipeline to obtain a blanket certificate would have eliminated this potential problem because transportation under a blanket certificate may not be terminated by a pipeline prior to receiving abandonment authority from the Commission.

Several producers,[209] marketers,[210] and end users [211] responded in favor of the proposal, arguing that the limitation of crediting to those pipelines that have accepted blanket certificates would encourage more interstate pipelines to accept blanket certificates. We find, however, that because 22 of the 23 major pipelines and a total of 50 jurisdictional pipelines have already accepted blanket certificates, there is little reason to restrict crediting so as to induce pipelines to offer open access transportation.

In addition, even where a pipeline has not accepted a blanket certificate, there is little realistic possibility that it would cease such transportation simply because it had received all the credits it needed. This is because in *Algonquin Gas Transmission Co.*,[212] decided after the issuance of Order No. 500–C, the Commission held that once a pipeline performing section 311 transportation permits customers to exercise their conversion rights, it must continue to provide open-access transportation for all shippers for the duration of the longest contracts. Finally, any form of open access transportation, whether offered pursuant to a blanket certificate or under NGPA section 311, subjects a pipeline to the same risk of incurring take-or-pay liability. This is because either type of transportation can displace the pipeline's own sales of gas, thereby reducing its ability to take gas under its purchase contracts with producers.

Accordingly, the Commission concludes that, on balance, the need to assist those pipelines providing only section 311 transportation in obtaining take-or-pay relief outweighs any benefits of determining that such pipelines are not entitled to credits. Accordingly, the crediting rule will not be modified to limit crediting to pipelines with blanket certificates.

xvi. *Limiting Crediting to Particular Producers or Pipelines.* In Order No. 500–C, the Commission requested comment on two proposals designed to limit offers of credits only to those situations where the pipeline actually needs take-or-pay relief. Under the first proposal, pipelines would be required to publish lists of producers with which they have significant take-or-pay obligations. Only those producers on the list would be required to offer the pipeline credits in order to obtain transportation. Under the second proposal, the Commission would publish a list of pipelines without significant take-or-pay obligations to producers. Pipelines on this list would be required to transport without offers of credits.

Most producers, marketers, and end users [213] favor the use of pipeline and producer lists. They argue that this selective approach to determining onerous take-or-pay obligations is superior to the current mechanism, which considers virtually every contract between producers and pipelines to be a problem. In addition, commenters in favor of the lists argue that targeting crediting relief to only those pipelines that have "significant" take-or-pay obligations would prevent pipelines from using crediting as a means of limiting access to their systems, ensuring open-access transportation, and minimizing disruption to the industry. They contend that it will also let all parties to a transaction know whether crediting is involved and to what extent.

The Commission finds, however, that the requirement of pipeline and producer lists would present serious difficulties in deciding what constitutes a "significant" take-or-pay problem. Due to the varying factual circumstances among pipelines and producers and the differences that led to development of take-or-pay problems on individual pipeline systems, it is unlikely that any one definition of the term "significant take-or-pay problem" would produce equitable results on all pipeline systems. Any fixed dollar amount or other definition applied across the board would result in an arbitrary standard. For example, a particular amount of take-or-pay liability could be a serious problem for a relatively small pipeline with limited financial resources but an insignificant problem for a large pipeline with greater financial resources. In addition, the lists could provide a road map to producers allowing them to reroute gas transactions so as to avoid offering pipelines credits pursuant to the provisions of Order No. 500.

The Commission suggested the option of using lists in an effort to find ways to minimize the disruptions to transportation that appeared possible as a result of crediting. Crediting, however, does not appear to be causing any significant disruption in the transportation of gas.[214] Thus, there is

[208] Natural, Northwest, PG&E, Transco, UDC, United, Panhandle, CIG, AGD.

[209] Amoco, Bass, Huffco, Mesa, NGSA, Producer Associations, Phillips, and Texaco Inc.

[210] Entrade Corporation, Hadson, Natural Gas Clearinghouse, Tejas, and Yankee.

[211] Columbia Nitrogen Corporation, Industrial Groups, and Petrochemical Energy Group.

[212] 44 FERC ¶61,078 at 61,234–36 (1988).

[213] Including American Paper Institute, Amoco, Bass, Citizens, Entrade, Huffco, Indicated Producers, and Industrial Groups.

[214] Pipeline throughput in 1988 increased 11 percent compared to the 1987 total. Moreover, in the fourth quarter of 1988, interstate pipelines transported more gas than in any previous quarter. Transportation on behalf of distributors, end users, and marketers during that quarter increased 18 percent over the final quarter of 1987. *See* Interstate Natural Gas Association of America, *Carriage Through 1988* (May 1989) (report on the extent of contract carriage in the interstate natural gas market).

no need to limit crediting only to those pipelines that have "significant" take-or-pay obligations in order to avoid such disruption.

Finally, the Commission believes that the goal of limiting crediting to pipelines with significant take-or-pay problems and the producers with which they have those problems can be accomplished through settlements between producers and pipelines. The Commission's regulations expressly authorize pipelines to transport gas without credits, and the Commission assumes that producers request such an agreement as part of their take-or-pay settlements.

xvii. *Amending Crediting Rule to Eliminate Cross-Crediting.* Order No. 500 provided that a pipeline may apply credits generated by the transportation of a producer's gas against the pipeline's take-or-pay obligations under any pre-June 23, 1987 contracts with that producer. The take-or-pay obligations must accrue either in the contract year in which the gas was transported or in any previous calendar year commencing on or after January 1, 1986, as long as the pipeline performed open access transportation during some portion of that year.

Order No. 500 provided that where there is more than one pre-June 23, 1987 take-or-pay contract against which credits generated by the transportation of particular gas could be applied, the pipeline may at its sole discretion choose the contract against which the credits will be applied. In addition, the choice of applying credits against present or past liabilities is solely that of the pipeline. Order No. 500 recognized that, as part of an agreement by the pipeline to release gas from a contract with a producer, the parties may have negotiated a crediting arrangement that may, for example, have provided for credits only against take-or-pay obligations under the contract from which the gas was released. Nevertheless, Order No. 500 required the producer to offer the pipeline credits under Order No. 500, including the right to apply credits against any qualifying contract. These features permit the pipeline to apply the credits against its take-or-pay liability under its highest priced contract with the producer in question, regardless of the provisions of any pre-existing release agreements.

Several producers and an industrial group [215] object to the fact that where a pipeline has more than one qualifying contract with the producer, the pipeline may select the qualifying contract to be credited. They argue that when the transported gas is gas which the pipeline has released from a contract with the producer, the pipeline should be required to apply the credits first against the contract from which the transported gas was released. If credits are not exhausted by initial application against take-or-pay obligations under the contract from which the gas is released, producers urge that the pipeline be prohibited from using the excess credits, or that some limitations be placed on the pipeline's decision as to how to allocate surplus credits. Producers argue that these changes in crediting are necessary to avoid interference with settlement agreements already negotiated between the pipeline and producer.

The Commission recognizes that Order No. 500 gives pipelines more generous crediting rights than provided for under typical release agreements. However, the Commission believes that this is necessary to give pipelines meaningful take-or-pay relief, and thereby comply with the mandate of the Court in *AGD.* Where a release agreement limiting the pipeline's application of credits to obligations under the contract from which the gas was released was negotiated before the issuance of Order No. 500, it was negotiated at a time when pipelines may have lacked sufficient bargaining power to obtain effective take-or-pay relief.[216] Accordingly, it is appropriate that the Commission permit the pipeline to refuse to transport the producer's gas in the absence of an offer of more effective credits under Order No. 500 which can be applied against a higher priced contract than the one from which the gas was released. Where a release agreement is negotiated after the issuance of Order No. 500, the parties may negotiate the release agreement in light of the pipeline's rights under Order No. 500 and the pipeline may, in return for appropriate other relief, waive or limit its rights under Order No. 500 to credits which can be applied against higher priced contracts.

xviii. *Amending Crediting Rule to Require Pipelines to Disclose to Producers the Contract against which the Pipeline will Apply Credits.* In response to concern among producers that they must present offers of credits to pipelines without knowing against which of their contracts the credits will be applied, the Commission requested comment on whether pipelines should be required to disclose this information in a timely manner. At least one producer (Arco) argues that uncertainty regarding the contracts against which a pipeline intends to apply accumulated credits adversely affects producer plans for further development of existing fields and for new exploration. Requiring the pipeline to disclose how it intends to apply credits, Arco argues, would reduce this uncertainty, thereby assisting producers in their exploration and drilling activities.

As previously discussed in section IV(A)(2) above, the Commission is modifying its regulations to require that pipelines give producers 30 days notice before applying credits against any obligation to take and pay or take or pay for must-take gas. This should give the producer sufficient time to find an alternative purchaser for must-take gas so as to minimize the possibility that this gas could be shut in, with the various adverse effects described above.

However, the Commission will not require prior notice of the application of credits in situations not involving must-take gas. The Commission recognizes that the pipeline's ability to wait until the end of a contract year before informing the producer how it intends to apply credits can cause producers difficulties in making production plans, even where must-take gas is not involved. However, producers can assume that pipelines will apply credits against their higher priced take-or-pay contracts in order to maximize the dollar benefit of credits. Thus, while producers do not know for certain against which contracts the pipeline will apply credits, they can make an educated guess. Furthermore, it cannot be expected that a pipeline will always predict accurately the credits it will accumulate. Thus, as a practical matter a pipeline may have to wait until the end of each contract year before deciding which contracts to apply the credits against.

To prevent delays in crediting where must-take gas is not involved, the Commission finds that the matter of how to apply credits is best left to the producers and pipelines themselves, rather than imposing a prior notice requirement. For example, while crediting remains in effect, pipelines and producers can agree to a voluntary "prior notice" arrangement as part of an agreement on transportation services, which the Commission would encourage in order to reduce uncertainty and improve operational planning. Accordingly, the Commission will not amend the rule to require pipelines to

[215] Indicated Producers, Fertilizer Institute, Arco, Bass, Sabine, NGSA, Apache, Phillips, and Producer Associations.

[216] *See* AGD v. FERC, 824 F.2d at 1023.

disclose to producers the contract or contracts against which they will apply credits where must-take gas is not involved.

xix. *Interstate and Intrastate Pipeline System Supply Gas Transported on Another Pipeline.* In Order No. 500–C, the Commission stated its concern about the administrative burdens imposed by Order No. 500 on interstate and intrastate pipelines seeking to have their system supply gas transported on another pipeline. Under the crediting rules as currently in effect, a pipeline can refuse to transport another pipeline's system supply unless producers representing at least 85 percent of the gas to be transported have offered it credits. The Commission requested comment on what changes in the crediting provisions it might make to reduce administrative burdens on the transportation of system supply gas caused by these provisions.

Several commenters [217] suggest various exemptions from crediting for system supply. First, some producers and an interstate pipeline propose exempting from crediting an interstate pipeline's downstream transportation of another pipeline's system supply from that pipeline to an off-system purchaser of the system supply. These commenters state that pipelines have performed such downstream transportation for one another for years and that there is no evidence such transportation has contributed to take-or-pay liability. The producers contend that this would eliminate the administrative burden of obtaining offers of credits from the numerous producers and working interest owners who sold gas to the pipeline; prevent double crediting, since otherwise the pipeline purchasing the gas for system supply would receive a credit under the gas purchase contract while the transporting pipeline would receive credits under Order No. 500; and prevent two pipelines from arranging to transport one another's system supply for the sole purpose of obtaining Order No. 500 credits. The pipeline (National Fuel) argues that credits should not be required for its off-system sales since such sales would be discouraged and, while small, those sales help to alleviate both its take-or-pay liability and that of the pipelines from which it purchases its system supply.

Several interstate pipelines also contend that the administrative burden of obtaining offers of credits for system supply would frustrate the benefits of open-access transportation. Intrastate pipelines and LDCs [218] similarly argue that crediting should not be applied to the downstream transportation of intrastate pipeline or LDC system supply to off-system customers under section 311(a) or sales of that gas under section 311(b), claiming that it hinders the intrastate pipelines' or LDCs' ability to serve their markets and creates the need for duplicative facilities. The commenters state that curtailment of such transactions will result, since it is virtually impossible to obtain the required offers of credit from 85 percent of the working interests, and that guarantor status will not help due to the uncertain and large potential liability resulting from such status.

Several commenters (*e.g.*, Transok and Valero Transmission Company) suggest that intrastate pipelines at least should be compensated for the administrative burden of aggregating credits by allowing them to be recipients of credits. They point out that, while the Commission has no jurisdiction over the intrastate pipeline's purchase contracts, it does have general authority to impose the conditions under which the intrastate pipeline's NGPA section 311(a)(2) transportation is carried out. Some producers further suggest that at least gas which is sold to an interstate pipeline for system supply but which must be transported from the wellhead to the purchasing pipeline by another pipeline should be exempted from crediting. These producers [219] state that such transportation cannot exacerbate the take-or-pay liability of the purchasing pipeline or the transporting pipeline since transportation of gas purchased for system supply cannot displace the sales of either pipeline. They contend that such transportation is generally made pursuant to long-term contracts which must be honored by producers, and the producer would have no choice but to offer credits. One commenter (Bass) would limit this exemption to existing purchases for system supply so as to avoid creating an opportunity for circumvention.

Along similar lines, an LDC and gathering company (Gas Company of New Mexico and Sunterra) assert that crediting should not be required where gas which an intrastate pipeline or LDC purchases from producers for system supply is transported to that entity by an interstate pipeline pursuant to section 311 of the NGPA. They argue that these transactions do not aggravate the take-or-pay problem and that crediting in such a situation would penalize those pipelines and LDCs who have worked within the framework of section 311.

One interstate pipeline (Natural) opposes any exemption for system supply, contending that such exemptions could provide an opportunity for circumvention of crediting. This pipeline disputes the claim that there would be an administrative burden in obtaining the necessary offers of credits. Some other commenters, including a consumer state agency (Virginia State Corporation Commission), are also concerned that an exemption for intrastate sales of system supply may allow producers to avoid crediting by simply using the intrastate pipeline network to access the interstate market.

The Commission has determined not to modify the crediting regulations in order to reduce potential burdens on either inter- or intrastate pipelines in obtaining transportation of their system supply over other pipelines either upstream or downstream of them. The Commission recognizes that it may be difficult for a pipeline to obtain the necessary offer of credits covering 85 percent of their system supply in order to have that system supply transported over a downstream pipeline to an off-system sales customer. However, there appears to be no means of reducing this burden short of exempting pipeline system supply from the Order No. 500 crediting requirements. This would significantly dilute the take-or-pay relief afforded interstate pipelines by crediting. An off-system sale of system supply could displace a sale of the downstream pipeline and thereby cause the downstream pipeline to incur take-or-pay costs. Accordingly, in order to avoid an adverse effect on the downstream pipeline, it is necessary that a pipeline receive an offer of credits before it is required to transport the gas.

There is even less reason to exempt from crediting upstream transportation of gas purchased for system supply from the producer to the pipeline. This transportation appears to require offers of credits from relatively few producers since the transportation occurs before the gas has been commingled in the purchasing pipeline's system supply. Thus, unlike the case of downstream transportation of system supply, there appear to be no unusual or additional practical difficulties in obtaining offers of credits. Furthermore, to the extent the upstream pipeline formerly purchased the gas and resold it to the downstream pipeline, the transportation could displace a sale of the upstream pipeline, thereby causing the upstream pipeline to incur take-or-pay costs. It is true that in

[217] Amoco, Bass, National Fuel, Indicated Producers.

[218] Including Texas Intrastate Natural Gas Pipelines, Gas Company of New Mexico, and Sunterra.

[219] Amoco, Bass, and the Indicated Producers.

some cases the transportation would not displace a sale by the upstream pipeline. However, that is equally true in many other situations. The Commission has purposely chosen not to require any showing of sales displacement as a prerequisite to a pipeline's obtaining credits, since that would cause constant disputes concerning the pipeline's entitlement to credits and render the crediting program difficult to administer. There is no more reason to require a showing of sales displacement here than in any other context.

xx. *Determining a Pipeline's Crediting Rights Based on Lease Ownership as of June 23, 1987.* In Order No. 500, the Commission established that the credits received by the pipeline would be determined based on ownership of the gas as of June 23, 1987. Thus the pipeline may apply credits generated by the transportation of particular gas against its take-or-pay obligations to the producer who owned the transported gas on June 23, 1987, even though the transported gas was subsequently transferred to another producer. The crediting mechanism was structured in this way "in order to avoid the possibility that producers could circumvent the credit requirement by transferring the leases to others." [220] In Order No. 500–C, the Commission also requested comments on whether it should take action to reduce impediments to property transfers.

A number of producer and marketer commenters [221] state that this rule was established without a hard look at its potential impact, absent record support of the alleged circumvention danger, and that it will have a "chilling effect" on normal property transfers, and create a substantial administrative burden. They argue that new title searches will be required to evidence changes in ownership so that gatherer/ purchasers may be fully apprised of the working interest owners from whom offers of credit must be obtained, and that this places an unreasonable restraint on the alienation of property. The commenters [222] contend that it is preferable that credits be applied against the pipeline's take-or-pay liabilities to the producer selling the transported gas, rather than the producer who owned it on June 23, 1987, who may have no connection with the gas being transported.

Several commenters [223] request that, if the transfer rule on assignments is retained, the effective date be changed from June 23, 1987 to either August 7, 1987, the date of issuance of Order No. 500, or August 14, 1987, the date Order No. 500 was published in the **Federal Register.** Other commenters ask for certain clarifications or suggest ways to narrow the transfer rule to exempt certain assignments. Some producers (Bass, *et al.*) state that for the time period on or after August 7, 1987, the Commission should establish a presumption of good faith assignment for non-affiliate transactions. Still another commenter (Hadson) suggests an exemption from the credit requirement for a producer who can demonstrate via affidavits or other supporting documents that the post-June 23, 1987 transfer: (a) was substantially commenced prior to June 23, 1987 and (b) was at a fair market value and not designed to circumvent the crediting rule.

Producer commenters [224] argue that Order No. 500 unnecessarily restricts the free and fair exchange of property for *bona fide* business reasons. These commenters claim that the Commission's crediting requirements will impede exploration and development of reserves by discouraging farm-outs and other property transfers which are the basis for much exploration and that impediments to transfers of properties should be removed, not merely reduced. Several commenters (including NGSA and Indicated Producers) assert that the prior owner of any transferred property would have little incentive to offer credits to enable a subsequent owner to transport its gas, but no one would be willing to take an assignment unless the prior owner did offer credits.

Several commenters (including NGSA) note that while assignments of gas contracts by producers have been addressed, Order No. 500 contains no prohibition of assignments of gas contracts by purchasers, who could utilize such assignments to derive take-or-pay credits where there would otherwise be none. Certain producers therefore suggest that the Commission remove from crediting the transportation of any gas sold under any contract assigned by an interstate carrier to another buyer.

Pipeline and LDC commenters [225] assert that the Commission should not modify the anti-circumvention rules of Order No. 500, since it is essential to minimize circumvention through assignments. Otherwise, there could be large losses of credits and an aggravation of the take-or-pay problem. These commenters recognize that the crediting requirement may inhibit the transfer of properties, but they state that crediting is a limited mechanism which will terminate at some point in the future and that any inconvenience attached to property transfers will be of limited duration. These commenters believe that such problems can be resolved by negotiations among the parties.

The Commission recognizes that basing crediting on property ownership as of June 23, 1987, may discourage some lease transfers, and thereby can, in some situations, adversely affect exploration and development of new gas. However, the Commission finds that modification of the interim rule is not warranted. In light of the producers' strong economic incentive to circumvent the application of credits against take-or-pay obligations, the provision as it presently exists is necessary to prevent circumvention of the crediting provisions, thereby reducing the take-or-pay relief afforded to pipelines by crediting. The danger of this circumvention outweighs any claim that crediting will inhibit the assignment of leases.[226]

In addition, there are only speculative arguments that implementation of the current rule is interfering with property transfers. Producers can avoid interference with property transfers by entering into take-or-pay settlements with pipelines under which the pipeline agrees to transport gas without an offer of credits. Given the large number of settlements, the Commission believes that this has in fact occurred and accordingly the crediting rules are not substantially interfering with property transfers. Furthermore, the Commission believes that the producers' concern that the anti-circumvention rules will impede exploration and development of

[220] Order No. 500, FERC Stats. & Regs. at 30,782.

[221] NGSA, Indicated Producers, Sabine, Tenneco, Mobil, Union Oil Company of California, Tejas, and ANG.

[222] ANG, Frank A. Schultz, Sun, Tenneco.

[223] Including Bass, Indicated Producers, and McMoRan.

[224] Natural Gas Clearinghouse, NGSA, Producer Associations, Indicated Producers.

[225] Tennessee, NI-Gas, United, and AGA.

[226] In this connection, the Commission rejects suggestions that it change the governing date from June 23, 1987, the date of issuance of the *AGD* decision, to some later date, such as August 7, 1987, the date of issuance of Order No. 500. That the Commission was considering creating a crediting mechanism became publicly known at least as early as July 28, 1987 when the Commission considered Order No. 500 at a public meeting. In addition, it is possible some producers anticipated this even earlier, since the *AGD* decision expressly discussed the possibility of conditioning producer access to pipeline transportation. Therefore, the Commission believes that use of the date of June 23, 1987 is the best way to ensure that no circumvention took place.

reserves by discouraging farm-outs and similar property transfers is mitigated by the exception from crediting for new gas. To the extent that this exception applies, only the current owner of the lease from which the gas is produced, and not any former owners, need provide an offer of credits. The 85 percent rule and the guarantor provisions of Order No. 500–C should further mitigate impediments to property transfers. Therefore, the Commission will not change the provision that a pipeline's crediting rights are determined based on lease ownership as of June 23, 1987.

Finally, the Commission is not aware of any significant number of assignments by one pipeline to another of take-or-pay contracts with producers. By contrast, assignments of leases by one producer to another are common. Accordingly, the Commission sees no need to remove from crediting the transportation of gas sold under any contract assigned by a pipeline to another buyer.

b. *Comments on Action under NGA Section 5.* Generally, producers vehemently oppose any action by the Commission under NGA section 5 in the final rule, while the pipelines, LDCs, and consumer groups favor it. Indicated Producers and Anadarko have argued that the NGPA limits the Commission's NGA jurisdiction over much gas under NGPA Titles I, V, and VI, and that the NGPA prohibits the Commission from lowering the just and reasonable maximum lawful price directly or indirectly, by condition. Alternatively, Anadarko asserts that no sale or provision of any of its jurisdictional contracts is unjust, unreasonable, unduly discriminatory, or preferential so as to violate section 5 of the NGA, that section 5 sanctions can only be applied prospectively, not retroactively, and that the "fraud, abuse, or similar grounds" standard in NGPA section 601 was mandated by Congress as the new and exclusive remedy for the protection of consumers. Bass, Sabine, Shell Western, Inc., Chevron, NGSA, Phillips, and the Industrial Groups also commented along the same lines against the Commission's invocation of Section 5.

AGD, favoring Commission action under section 5, commented that section 5 remedial authority is extremely broad with respect to both "so-called" jurisdictional and non-jurisdictional contracts. AGD stated that the only limit on NGA section 5 in NGPA section 601 focuses on whether an "amount paid" was just and reasonable, and does not affect the Commission's section 5 power to examine contracts and practices to find other factors unlawful (aside from price) and order relief. AGD also asserted that the use of the term "first sale" evinces the intent to remove NGA price regulation from producers, but not to absolve pipelines' contracting practices from scrutiny. Next, AGD asserted that the argument against section 5 authority over so-called "non-jurisdictional" gas is unfounded because it overlooks the fact that the term "natural gas company" as used in section 5 encompasses all interstate pipelines, as well as some gas producers, and covers all "contract[s] affecting [the] rate[s]" charged by interstate pipelines "in connection with" their transportation and sale of natural gas, in support of which they cite *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976) (Commission may take nonjurisdictional, retail rates into account when setting jurisdictional, wholesale rates). AGD further commented that the producers' argument that NGPA section 601(a) removed certain gas from NGA jurisdiction is misleading because all section 601(a) removes is NGA regulation over the producer's first sale of such "non-jurisdictional" gas, but does not remove NGA regulation over the transportation and sale of that gas. Citing *Wisconsin Gas* v. *FERC*,[227] AGD argued that the Commission's section 5 authority can be invoked either after a hearing on a case-by-case basis or generically through rulemaking proceedings, as long as there is a finding that some existing practice or contract provision is "unjust, unreasonable, unduly discriminatory, or preferential," which they noted was the central finding underlying Order Nos. 436 and 500.

UDC commented that section 5 remedial authority covers any unjust and unreasonable rates and contracts affecting such rates of "any natural gas company in connection with any transportation or sale of natural gas subject to the jurisdiction of the Commission * * *," but the NGPA section 601 exemption from NGA jurisdiction for certain "first sales" does not extend to subsequent pipeline resales, or extinguish section 5 authority over the contracts "affecting" the pipeline's rates and charges. Peoples Gas Light commented that the "sanctity of contract" rationale is no bar to section 5 action because the essence of section 5 is the authority of the Commission to modify contracts when required to protect gas consumers. Moreover, Peoples Gas Light pointed out that once the Commission finds an existing contract term unjust and unreasonable, it must prescribe substitute terms that are just and reasonable.[228] Several other commenters argued generally that the Commission should invoke section 5.

Specific proposals for action under section 5 include the following:

(1) Find that take-or-pay clauses are unjust and unreasonable unless the contract is market-responsive.[229] A market-responsive contract presumably would be one with a market-out clause meeting certain criteria. Make this rule effective six months after issuance, to encourage voluntary renegotiation.[230]

(2) Eliminate take-or-pay clauses from any contract so long as the pipeline offers to terminate that contract. If the producer accepts the offer to terminate, any necessary abandonment authorization would be automatically granted.[231]

(3) Give producers the option of either (a) waiving future take-or-pay liability but retaining current price provisions in their contracts, or (b) retaining take-or-pay requirements but agreeing to annual price redetermination. Where parties could not agree on a new price, the pipeline would have the right of first refusal.[232]

(4) Stay all future accrual of take-or-pay liability; void take-or-pay liabilities where gas cannot be made up; and void minimum physical take requirements.[233] As an alternative to voiding take-or-pay liabilities where gas cannot be made up, require the producer to either repay prepayments or deliver other gas.[234]

(5) Invalidate all take-or-pay provisions in jurisdictional contracts and allow pipelines to condition takes of jurisdictional gas on resolution of take-or-pay and other problems with respect to non-jurisdictional contracts.[235]

(6) Require inclusion in all producer-pipeline contracts of a market-out clause exercisable at the pipeline's option. Under the clause, the pipeline would nominate a price each month that the producer could accept or reject, and if the producer rejected, it could then resell the released volume to others.[236]

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[227] 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

[228] *Citing* Office of Consumers' Counsel, Ohio v. FERC, 783 F.2d 206, 235–36 (D.C. Cir. 1986).

[229] Transco, Tennessee.

[230] Enron.

[231] El Paso, California.

[232] UDC, ICC.

[233] AGA, PGL, UDC, PG&E.

[234] Transco, Texas Gas.

[235] PSCW.

[236] National Fuel.

(7) Reform contract pricing provisions, reduce take-or-pay minimum take provisions, and establish market-out provisions. Make availability of contract reformation contingent upon pipeline becoming an open access transporter.[237]

As discussed in detail above, the Commission will not take any action under NGA section 5 to modify prospectively existing take-or-pay clauses in the producer-pipeline contracts, since such action would be ineffective or inequitable or both in light of the limits on the Commission's section 5 authority. Furthermore, pipelines have substantially resolved the bulk of their take-or-pay problems through individually negotiated settlements, and the provisions of the final rule should enable pipelines to resolve the remainder of their take-or-pay problems without section 5 action.

B. The Passthrough of Settlement Costs

In the Order No. 500 policy statement concerning the passthrough of pipelines' take-or-pay settlement costs, the Commission adopted two acceptable passthrough mechanisms. Under the basic mechanism, permitted for all pipelines, a pipeline may include all prudently incurred settlement costs in its commodity rates. This basic mechanism is consistent with the Commission's longstanding policy that take-or-pay settlement costs are expenses related to the acquisition of gas supplies and should therefore be classified as production-related and recovered through the pipeline's commodity rates.

Recovery through commodity rates exposes the pipeline to the risk of undercollecting its settlement costs due to the effect of market forces. While this provides an incentive for the pipeline to minimize its settlement costs and is consistent with the Commission's finding in Order No. 500 that all segments of the industry should share in the costs of resolving the take-or-pay problem for which no single segment was at fault, the Commission recognized in Order No. 500 that another mechanism may be justified for pipelines transporting under Part 284.[238] The Commission stated that these pipelines, which are making the transition from merchants to transporters, may find it more difficult to recover their take-or-pay settlement costs in their sales commodity rates, because they will be making fewer sales as they transport more gas. Accordingly, the Commission adopted an alternative passthrough mechanism for these pipelines under which they are permitted to recover a portion of their settlement costs through a fixed take-or-pay charge. Under the alternative mechanism, if a pipeline is willing to absorb from 25 to 50 percent of its take-or-pay settlement costs, then it will be allowed to recover, through a fixed charge, an amount equal to the percentage it is willing to absorb. The remainder may be recovered through a volumetric surcharge on all throughput.

Recovery of production-related costs through a fixed charge is an extraordinary mechanism which the Commission has rarely permitted. Because a fixed charge guarantees the pipeline recovery of the costs included in the fixed charge, it is inconsistent with the Commission's general policy that recovery of production-related costs should be subject to market forces. Furthermore, allowing a pipeline to recover 100 percent of its settlement costs through a fixed charge would be inconsistent with the Commission's holding in Order No. 500 that all segments of the natural gas industry should share in the burden of resolving the take-or-pay problem, since no single segment of the industry was to blame for its take-or-pay problems. Accordingly, the Commission believes it appropriate to require pipelines that wish to avail themselves of the alternative, fixed charge mechanism to absorb a portion of the costs as described above. The Commission is not required to guarantee a pipeline's recovery of its costs; the Commission need only provide a pipeline a reasonable opportunity to recover its prudently incurred costs. The basic passthrough mechanism, under which pipelines may include in their commodity rates all prudently incurred settlement costs, gives pipelines this opportunity.

As already discussed, the Commission will, in response to the court's *AGA* decision, modify the policy statement by extending the March 31, 1989 sunset date for the alternative, equitable sharing passthrough mechanism until December 31, 1990. If the D.C. Circuit has not completed judicial review of the final rule by that date, the Commission will further extend the sunset date until 30 days after the D.C. Circuit issues its mandate on review of the final rule. However, the Commission will not, in the final rule, make any other changes in the policy statement or codify the policy and guidelines that have been articulated in the individual passthrough cases.

The primary benefit of codifying these policies would be that all of the Commission's various policies would be assembled in one place. However, after the Commission has reviewed both the positive and negative factors associated with this issue, the Commission finds that it should not codify the policies in the final rule. The Commission's policy on the passthrough of settlements costs, as well as its GIC policy, was announced in a statement of policy. Statements of policy reflect the Commission's position on various issues. They are not binding. Binding precedent is established as the Commission applies its policy in individual cases.[239] In other words, by deciding to act through a policy statement, the Commission contemplated that its policy would be developed and refined on a case-by-case basis, and it has been. All of the pipelines that reported significant take-or-pay exposure at year-end 1986 have already made at least one filing to use the equitable sharing passthrough mechanism of Order No. 500, and the details of their passthrough mechanisms are being resolved in case-specific orders and settlements. Consequently, it is unnecessary to codify the policy developed in the individual cases to date.

On October 3, 1989, Process Gas Consumers Group, American Iron and Steel Institute, and the Georgia Industrial Group (Industrial Groups) requested that the Commission clarify that state and local regulatory agencies may require LDCs to absorb a portion of any take-or-pay settlement costs billed to them by interstate pipelines under the alternative passthrough mechanism. Industrial Groups contend that such absorption is necessary in order to achieve the Commission's goal of requiring all segments of the natural gas industry to share in the costs of resolving the industry's take-or-pay problems. AGA, UDC, and a number of individual LDCs oppose the Industrial Groups' requested clarification. They argue generally that LDCs' passthrough of these costs is beyond the Commission's jurisdiction and therefore the Commission should not address the issue of whether state and local regulatory agencies may require LDCs to absorb a portion of the settlement costs.

The Commission reaffirms its view stated in Order No. 500 that there should be an equitable sharing of take-or-pay

[237] AGD, Baltimore Gas and Electric.

[238] Following issuance of Order No. 500, the Commission limited availability of the alternative mechanism to pipelines which have accepted blanket certificates under Part 284. *See* United Gas Pipe Line Co., 42 FERC ¶61,197 at 61,684 (1988).

[239] *See* AGA, slip op. at 30–32.

costs among *all* segments of the industry. As the Commission stated in Order No. 500, state regulators may consider reclassifying, as commodity costs, take-or-pay costs billed to an LDC as a fixed charge and incorporating such costs into LDC sales or transportation rates, or both, thereby spreading such costs to the maximum extent possible and subjecting them to market forces.[240] Furthermore, state regulatory agencies may implement, as some have,[241] an equitable sharing mechanism similar to that established by the Commission which requires LDCs to absorb a portion of the costs if they desire to assess a fixed charge.

The Commission also reaffirms its conclusion that the Supreme Court's decisions in *Nantahala Power and Light Co.* v. *Thornburg,* [242] or subsequent cases, do not preclude state regulators from reviewing the prudence of LDCs' purchasing decisions insofar as they affect take-or-pay costs. While *Nantahala* held that "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable," [243] the Court did not decide the issue whether a state agency can inquire into an LDC's prudence in choosing to pay the FERC-approved wholesale rate of one supplier, as opposed to the lower rate of another supplier.[244] Subsequently, in *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n.,* [245] the Third Circuit reached this issue and held that a state agency may indeed review the prudence of an LDC's decision to purchase gas from one supplier, rather than another supplier charging a lower price, even though the Commission had approved the rate charged by the first supplier. It follows that a state regulatory agency can also review an LDC's purchasing practices which led to the incurrence of fixed take-or-pay charges assessed by an interstate pipeline. Since these charges are allocated based on purchase deficiencies, the prudence inquiry is essentially the same as in the above cases: whether the LDC prudently chose to purchase from one supplier rather than another.

The Commission believes that this result is consistent with Congress' intent in enacting the NGA to close all gaps in the regulation of the resale and transportation of natural gas.[246] The Commission lacks jurisdiction to review the prudence of LDCs' purchasing practices, and accordingly does not do so. Therefore, if state regulatory agencies also lacked such authority, the LDCs' purchasing practices leading to the incurrence of these fixed take-or-pay charges would escape any prudence review, contrary to Congress' intent.

The above discussion is intended only to express the views of the Commission, the Federal agency entrusted with implementing the NGA and the NGPA, concerning the extent of its jurisdiction under those statutes and the regulatory authority which accordingly remains with the states. The Commission in no way intends to trespass on the states' rights to determine whether, how, and to what extent to exercise the authority which the states retain.

C. Gas Inventory Charges

In Order No. 500, the Commission adopted a permissive policy, codified in § 2.105 of the Commission's regulations, with respect to a new rate design of gas supply or inventory charges (GICs). The Commission believes that in the current economic and regulatory environment, it is in the public interest to implement GICs as soon as possible to prevent a reoccurrence of the take-or-pay problems of the past. At present, pipelines do not reflect the cost of maintaining gas supplies in their rates on a current basis. Speedy implementation of GICs will solve that problem and will benefit both pipelines and their customers by enabling them to plan and coordinate their relationships with each other and their relationships with third parties pursuant to current needs, and to contract for a portfolio of gas supplies within the framework of a rational, efficient pricing system. In this vein, § 2.105 of the Commission's regulations provides that in connection with a gas supply or inventory charge, a pipeline must allow its sales customers to freely nominate levels of service at regular intervals and must announce prior to nominations a firm price or pricing formula for the service. This provision permits pipeline customers to reduce their levels of service in response to pipeline prices. In addition, § 2.105 permits a pipeline to seek abandonment of the difference between a customer's current level of service and the nominated level. Hence, the pipeline will be able to realistically plan its supply needs.

The Commission reaffirms its commitment to implement GICs as speedily as possible. The Commission will retain the principles set forth for GICs in § 2.105 without change. As discussed above, those principles are necessary to ensure that GICs reflect current costs and current needs of both the pipeline and its customers. The Commission believes that further refinements to its GIC policy should be developed on a case-by-case rather than on a generic basis.

First, the Commission is not yet certain what all the necessary elements of a properly structured GIC should be for specific situations beyond the general criteria originally laid out in Order No. 500. The Commission has been learning from each case that has come before it and continually refining its criteria for a properly structured and workable GIC. Further development of the criteria as part of the final rule would delay issuance of this rule unnecessarily. Second, the current record is not adequate for the development of a permanent GIC policy here. Third, the processing and implementation of GICs on a case-by-case basis is going forward without the need for additional generic principles. (*See* discussion *infra*). Fourth, the fashioning of GICs on a case-by-case basis is appropriate because factual circumstances vary from pipeline to pipeline. For example, pipelines will have different sales and transportation markets, customer demand profiles, and gas supply contracts with varying terms and conditions. Accordingly, the Commission believes that case-by-case treatment will afford the flexibility needed to deal with the particular needs of a pipeline and its customers.

At the same time, the Commission recognizes that the establishment of GICs involves an inquiry that can be quite time consuming. Accordingly, the Commission, as part of its effort to implement GICs as quickly as possible,

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[240] It appears that most state regulatory agencies have, in fact, pursued some variant of this option. As discussed above, of 55 LDCs surveyed by the AGA in a recent study of LDC passthrough of take-or-pay costs, 52 reported that they were recovering these costs through some form of volumetric surcharge. Eighty percent of these LDCs were charging this surcharge to transportation, as well as sales, customers. Only two were recovering costs in a deficiency-based fixed charge similar to that allowed for interstate pipelines under Order No. 500.

[241] For example, the Public Service Commission of the State of New York has accepted agreements by three LDCs to absorb 12.5 percent of the take-or-pay settlement costs of interstate pipelines. *See* Foster Report No. 1747 at 28 (Nov. 2, 1989).

[242] 476 U.S. 953 (1986).

[243] 476 U.S. at 966.

[244] Specifically, the Court, at 972, stated,

Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is reasonably available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price.*

[245] 837 F.2d 600 (3rd Cir. 1988), *cert. denied,* 109 S. Ct. 365 (1988). *See also* Pike County Light and Power Co. v. Pennsylvania Public Utility Comm'n., 465 A.2d 735, 737–738 (1983).

[246] FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 28 (1961).

has taken steps to speed up the process wherever possible. For example, the Commission approved a GIC for Transwestern without a hearing because there were no material issues of fact in dispute.[247] In addition, the Commission has established "paper hearings" in five GIC proceedings in lieu of referral of the proposals to formal hearings before administrative law judges. The five proceedings involve El Paso,[248] Tennessee,[249] Transco,[250] Southern,[251] and Natural.[252] The Commission has also phased the five proceedings so that the Commission can decide whether the pipeline's markets are sufficiently competitive to justify a market-based GIC before deciding other issues. If a market-based GIC is justified, this will expedite the processing of the GIC application by reducing the number of issues that need to be considered. On November 29, 1989, the Commission granted El Paso a certificate of public convenience and necessity, subject to its complying with certain conditions, for a permanent GIC.[253] The Commission also strongly supports the use of settlement procedures, where appropriate, to implement GICs expeditiously. For example, the Commission approved GICs for Texas Eastern,[254] Natural,[255] and Columbia [256] through the settlement process.

The GIC program has been moving forward. Twelve interstate pipelines have filed for GICs. As noted, the Commission has already approved GICs for Transwestern, Texas Eastern, and Columbia, and those pipelines have accepted their GIC certificates. In addition, as stated, the Commission has established "paper hearings" to resolve five GIC applications. The other applications for GICs are either being reviewed by the Commission to determine appropriate action [257] or have been set for hearing before an administrative law judge because the "paper hearing" procedure was not appropriate in particular circumstances.[258] Lastly, the Commission has approved an interim GIC for Transco for use until the Commission resolves Transco's permanent GIC application.[259] Several other pipelines have interim GIC proposals before the Commission.[260]

Finally, the Commission reaffirms its determination to implement GICs as quickly as possible. The actions discussed above were motivated by this objective. The Commission will consider additional steps to speed implementation of GICs, if necessary.

D. Contract Demand Reduction

In *AGD*, the court found that the Commission did not adequately support its adoption of the contract demand (CD) reduction option because the Commission did not provide evidence showing that access to transportation through pipelines other than those from which they traditionally purchased was necessary to permit local distribution companies to purchase competitively priced gas. In addition, the court found that the Commission had not adequately supported the broad remedy of giving all firm sales customers of pipelines the CD reduction option in order to free up committed pipeline capacity. Finally, the court held that the Commission had not considered the possibility that cost-shifting resulting from CD reductions might constitute a problem for certain captive customers.

In Order No. 500, the Commission emphasized that it considered the original objectives of the CD reduction option valid but decided not to repromulgate the option in the interim rule, in light of the court's finding that the record as it then existed did not support CD reduction on a generic basis. The record did not contain enough information concerning the amount of cost-shifting to captive customers that might occur from CD reduction to allow the Commission to assess whether the potential gains would outweigh the potential negative impact. The record was also insufficient to demonstrate that implementation of the CD reduction option would ultimately bring about lower rates.

1. Comments on CD Reduction

The Commission has received numerous comments concerning contract demand reductions. Most distribution customers [261] commenting on this issue favor the permanent reinstatement of CD reduction rights. However, APGA argues that CD reductions should not be allowed because the severe harm they would cause to captive customers on certain pipeline systems outweighs the benefits. APGA states that if the Commission nonetheless allows CD reductions it should (1) require exit fees and (2) make those customers who reduce CDs responsible for their allocated share of take-or-pay buyout costs.

Baltimore Gas and Electric and Laclede argue that the Commission has the requisite authority under section 5 of the NGA to require CD reduction. Delta and Great River contend that there is adequate support to justify CD reduction. Delta argues that evidence of market operation and the relative operating efficiencies of different pipeline companies demonstrate that pipeline-to-pipeline competition would be beneficial to consumers. Columbia Gas maintains that CD reduction is needed so that LDCs can have firm transportation to alternate pipelines without having to maintain excess firm entitlements in the aggregate.

A number of distributors contend that CD reduction should be permitted where and to the extent a pipeline customer has sustained load loss attributable to pipeline bypass. AGD contends that a limited CD reduction option can be justified on the basis of conservation alone. In addition, it argues that pipelines' exercise of monopoly power, along with the nonreducible nature of existing sales contracts, has denied LDCs the chance to acquire long-term gas from other suppliers.

Baltimore Gas and Electric reasons that by offering reductions to customers having unused or unwanted capacity, a pipeline gains the opportunity to increase transportation and sales volumes by offering capacity to new customers and additional capacity to existing customers. Similarly, others [262] maintain that the CD reduction option is necessary to promote competition, which will result in lower cost sales and transportation.

[247] Transwestern Pipeline Co., 43 FERC ¶61,240 (1988), *order on reh'g*, 44 FERC ¶61,184 (1988).

[248] 47 FERC ¶61,108 (1989), *order on reh'g*, 48 FERC ¶61,202 (1989).

[249] 47 FERC ¶61,245 (1989), *order on reh'g*, 48 FERC ¶61,198 (1989).

[250] 47 FERC ¶61,244 (1989), *order on reh'g*, 48 FERC ¶61,199 (1989).

[251] 49 FERC ¶61,131 (1989).

[252] 49 FERC ¶61,137 (1989).

[253] 49 FERC ¶61,262 (1989).

[254] 44 FERC ¶61,413 (1988), *reh'g denied*, 47 FERC ¶61,100 (1989).

[255] 44 FERC ¶61,183 (1988) (certificate not accepted and Natural subsequently filed a revised GIC proposal).

[256] 49 FERC ¶61,071 (1989).

[257] The other GIC applications pending before the Commission are those filed by Natural, Northwest, Texas Gas, Southern, and Kentucky West Virginia Gas Company.

[258] National Fuel Gas' and Northern's GIC applications have been set for hearing.

[259] 48 FERC ¶61,399 (1989).

[260] Northern, Texas Gas, Kentucky West Virginia Gas, and Natural.

[261] Including AGD, Baltimore Gas and Electric, Cascade, Delta Natural Gas Company, Iowa-Illinois Gas and Electric Company, Laclede, Memphis Light, NI-Gas, Columbia Gas, Great River Gas Company.

[262] AGD, Cascade, Delta, Iowa-Illinois, Laclede, Memphis Light, and NI-Gas.

UGI Corporation argues that the Commission should issue a final rule proposing CD reduction for local distribution companies which can make a *prima facie* showing that: (a) Reduction would free up capacity which might be utilized by users of a particular pipeline; (b) the LDCs possess unrealistically high CD levels based on certificated levels of service; and (c) the reductions would be unlikely to create an ineqitable cost-shifting on the affected pipeline.

Cascade, Delta, and NI-Gas argue that CD reduction is essential because conversion has the effect of extending the monopoly power of the pipelines. Minnegasco, Inc. and Northern Distributor Group, however, believe that CD reductions can best be handled in individual rate cases. They also state that the Commission must recognize that CD adjustment programs necessitate corresponding demand rate adjustments agreed to by the parties. Delta states that if the Commission cannot justify an industry-wide CD reduction rule, it should tailor the availability of reduction to appropriate circumstances.

Finally, Baltimore Gas and Electric and Iowa-Illinois contend that CD reduction will mitigate any potential for incurring future take-or-pay costs. Southern Union Gas Company argues that retaining outdated CD volumes is inherently inconsistent with the principles of the inventory holding charge by which a customer is entitled to freely nominate its desired level of service. However, if the Commission decides not to restore the CD reduction option, Southern Union suggests that the LDCs be allowed to broker the unwanted excess capacity.

Several pipelines [263] maintain that the reduction option should not be repromulgated. Columbia states that CD reduction rights as part of the rulemaking constitute little more than contract abrogation. These commenters contend that: (1) The Commission should not reinstate CD reduction because first year reductions caused a substantial shift in annual demand revenue (Columbia); (2) CD reductions should be left to negotiations between pipelines and their customers where compensating adjustments involving mutual obligations can be achieved (CIG); (3) CD reductions are unfair to some customers and give others a windfall by allowing those customers which are large and financially strong to walk away and shift costs to the weaker customers and the pipelines (CIG); (4) the Commission should permit pipelines to immediately effectuate all abandonments of service instituted by its customers through reductions by reporting requirements rather than a certificate or abandonment application (Columbia); (5) the Commission should permit pregranted abandonment and levying of exit fees (Northwest); (6) the Commission properly did not reinstate CD reduction but should also restore CDs which were reduced under the remanded provisions of Order No. 436 (Tennessee, Northwest); and (7) the Commission should not adopt the same abandonment procedures as proposed in the rulemaking in Docket No. RM87–16–000, because of the cost allocation issues which will be presented in the context of pipeline-customer abandonment proceedings.

State agencies generally support the adoption of the CD reduction option.[264] The Arizona Corporation Commission states that LDCs should be allowed to utilize their current requirements to establish CD levels, not those existing prior to open-access transportation. To the extent LDCs are not allowed to reduce their CDs, Arizona argues that they should be allowed to broker their excess capacity.

The California commission points out that, in situations where pipeline customers have CD provisions which account for 100 percent of capacity, conversion will not free up capacity for new firm sales or transportation customers. While interruptible transportation may be available, it would still be insufficient because no long term arrangements can be established because of reliability.

The Illinois Commerce Commission contends that the absence of CD reduction will result in cost shifting to captive customers. It contends that it is inequitable to leave an LDC with firm contract demand for which it has no use, while allowing end-users for whom that demand was obtained to use that unneeded and essentially firm capacity at interruptible rates. Similarly, the Pennsylvania Public Utility Commission maintains that linking the CD reduction option to the mitigation of bypass could be used to support the retention of CD reduction.

The Maryland People's Counsel contends that the Commission can easily address the Court's concern by emphasizing the interrelationship between CD reduction and other portions of Order No. 500. In addition, Maryland People's Counsel argues the Commission could: (1) Direct its staff to ascertain whether competitive wellhead prices are subject to important regional variations; (2) discuss the possibility that competition among pipelines might be expected to bring about lower prices; (3) link the asserted obsolescence of CD levels to the broad class of purchasers to be made eligible for open access; and (4) show that reductions in commodity costs due to competitively priced gas will outweigh the cost-shifting which may occur as a result of CD reductions. Finally, it states that the Commission should allow LDCs to receive credits against their CD for volumes transported by their former customers.

The Process Gas Consumers Group was the only end user entity to file comments on this issue. It argues that CD reduction rights are essential to provide access to shippers other than existing firm sales customers, and to permit some LDCs to interconnect economically with additional pipeline suppliers. It suggests that individual customers should be permitted to reduce CDs up to 50 percent over the next three years provided that the aggregate reduction on any system does not exceed 15 percent annually. It contends that CD reduction is supported by the existing record and is the only means for providing reasonable access to firm transportation for shippers other than firm sales customers.

2. CD Reduction in General

The Commission continues to believe that the objectives of the CD reduction option are valid. The reduction option would allow those customers whose CDs were unrealistically high to free up contracted firm capacity that they no longer wish to reserve. This would make firm capacity available to parties who want to purchase that capacity. Sales customers should also be able to adjust their required service levels, allowing them to use other pipelines and giving them more service options.

CD reduction allows those LDCs who want to make arrangements with a new pipeline supplier the opportunity to do so. LDCs can achieve firm entitlements access to alternative pipeline suppliers without being required to maintain excess firm entitlements in the aggregate. If an LDC cannot reduce its CD levels with existing pipeline suppliers, it will continue to pay demand charges even though it may not purchase any gas.

Many LDCs currently have CD levels that are too high. These circumstances have been brought about by a number of factors: conservation, underpricing of pipeline capacity, and other economic

[263] Including Columbia, Enron, Natural, Northwest, and Tennessee.

[264] California, Illinois, Iowa, Michigan, Minnesota, Pennsylvania.

considerations. CD conversion rights alone do not constitute an adequate remedy for an LDC with excess CD. A conversion would do little to relieve an LDC of excess demand charges. Only CD reduction can effectively allow LDCs to reduce costs by reducing service levels to those required to serve customer needs. CD reductions would allow customers to bring their contracts in line with present needs. A conversion of CD to firm transportation entitlements also does not free up capacity for other customers who want to use the capacity. Potential customers are excluded from firm service solely by virtue of existing contracts which may not be fully utilized by current customers.

CD reductions may also be important to the extent that an LDC has sustained loss directly attributable to pipeline bypass. As a result of increased transportation by end users, LDCs no longer may be required to provide system supply gas to those end users. Consequently, an LDC would no longer need the CD associated with that portion of the market that has switched to transportation. CD reductions provide a mechanism to recognize the increase in transportation by end users and corresponding decrease in sales requirements of LDCs.

The option for CD reductions is also a necessary and critical element with respect to the assessment of gas inventory charges. Sales customers must be allowed to renominate levels of service (including reductions) as gas inventory charges are implemented. Pipeline service obligations may be adjusted simultaneously to reflect the newly nominated levels, as authorized by Section 2.105 of the Commission's regulations, if the pipeline seeks such an adjustment.

Despite the continuing importance of CD reduction in the process of rationalizing and negotiating current pipeline/customer relations, the Commission has decided not to restore the CD reduction option generically in the final rule. The issue of CD reduction is being addressed in individual pipeline cases where the Commission has a better opportunity to assess the impact of the CD reductions that concerned the court in *AGD*.

In some cases, pipelines and their customers have been voluntarily renegotiating contracts that have unrealistically high contract demand, particularly as existing sales contracts have expired. In other instances, pipeline customers have been able to get comparable relief through settlements. In Order No. 500, the Commission observed that several pipelines had made filings with the Commission to reallocate to new customers firm capacity previously held by existing customers as part of settlements.[265]

Pipeline customers also will be able to reduce their CDs as pipelines implement GICs. Section 2.105 of the Commission's regulations, which establishes guidelines for GICs, provides that the pipeline must allow its sales customers to nominate levels of service freely within their firm sales entitlements or otherwise employ a mechanism for the renegotiation of levels of service at regular intervals. This is another vehicle by which CDs are being reduced. By nominating a new level of service, the customer consents to any abandonment sought by the pipeline commensurate with the difference between the current level of service and the nominated level.

Finally, in the Commission's Policy Statement Providing Guidance with Respect to the Designing of Rates,[266] parties were directed to pursue the issue of CD adjustment in connection with the implementation of seasonal rates in individual cases. The use of peak and off-peak rates, or a change in cost classification, might result in a shifting of a substantial amount of costs to the charge for peak service. The Commission's goal in any shifting of costs to peak service is to ration capacity to those who value it most. Consequently, participants in those proceedings must explore ways to concurrently provide for CD adjustment (including reductions), especially in connection with increased charges for peak service due to the implementation of seasonal rates or cost classification changes to achieve the capacity rationing goal. The Commission has recently clarified that a contract demand adjustment mechanism is equally appropriate when a pipeline seeks to implement rates with a one-part demand charge.[267] The Commission has also encouraged the parties to explore capacity brokering and capacity assignment as a means of addressing CD cost apportionment.

The Commission believes that a case-by-case approach, rather than the generic approach, is a better manner in which to implement CD reductions. In that way, the Commission will be able to assess the amount of cost shifting to captive customers that may occur from CD reduction, and whether CD reduction will bring about lower rates. Several major rate cases currently involve this issue. These were matters of particular concern to the court in *AGD*. The Commission will be able to assess the impact of reductions on specific pipelines, which will allow it to fashion the most appropriate remedy for a particular pipeline. This process is ongoing as pipelines and their customers negotiate long-term service arrangements and as pipelines continue to file proposals for the implementation of GICs. In addition, with the expiration of many of the firm service agreements approaching, the Commission expects that voluntary renegotiations will increasingly take place.

3. Contract Demand Reductions on Tennessee's System

The Commission decided to apply its decision in Order No. 500 not to repromulgate the contract demand reduction option prospectively only.[268] Thus, the contract demand reductions, for which customers had opted before the *AGD* decision, continued in effect. The subsequent *AGA* opinion, however, found that the Commission had not addressed satisfactorily the claim of Tennessee that the Commission improperly failed to relieve Tennessee of the CD reductions for which its customers had opted prior to the *AGD* decision.[269] The court held that, in order to overcome the legal presumption that the *AGD* court's *vacatur* of the CD reduction provision should be applied retroactively, the Commission must consider the specific standards identified by the Supreme Court in *Chevron* v. *Huson*.[270] Under those standards, the Commission must (1) consider whether the court's decision in *AGD* established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed, (2) weigh the merits and demerits by looking to the prior history of the rule in question, its purpose and effect, and consider whether retrospective operation will further or retard its operation, and (3) weigh the inequity imposed by retroactive application. The court noted specifically that "weighing the equities under the third prong of the *Huson* test will necessarily require the Commission

[265] FERC Stats. & Regs. at 30,795.

[266] 47 FERC ¶61,295 at 62,055–56 (1989).

[267] Alabama-Tennessee Natural Gas Co., 49 FERC ¶61,127 (1989); ANR Pipeline Co., 49 FERC ¶61,123 (1989); Trunkline Gas Company, 49 FERC ¶61,126 (1989).

[268] The Commission first announced that the elimination of the CD reduction provision would be of prospective effect only in Interstate Power Co. v. Natural Gas Pipeline Co. of America, 41 FERC ¶61,096 (1987), *reh'g denied*, 42 FERC ¶61,049 (1988).

[269] Tennessee was the only party to argue the need for retroactive *vacatur* of the CD reduction option.

[270] *See* AGA, slip op. at 27–28 (1989) (*quoting* Chevron Oil Co. v. Huson, 404 U.S. 97, 106–06 (1971).

to consider whether individual customers in fact relied upon Order No. 436 by taking on alternative gas purchase obligations." [271] The court held that, should the facts indicate such reliance, the Commission must then consider "whether there is any reason in equity to bind Tennessee Gas Pipeline to a provision that this court vacated and that the Commission was unable to support on the record before it." [272]

The Commission currently lacks the information necessary to complete the analysis required by the *AGA* decision. When the Commission issued the Order No. 500 interim rule, it requested comments from the public "as to how the [*AGD*] court's concerns [about record support for CD reduction] may be met, including what information may be necessary to support CD reduction." [273] Review of the comments submitted by Tennessee and its customers indicates the presence in the record of legal and policy arguments in support of and against CD reduction generally, but no factual information about specific decisions by Tennessee customers to exercise contract demand reduction rights under Order No. 436, the alternative purchase arrangements entered into by those customers, or the effect of the reductions on Tennessee and its other customers.[274]

Accordingly, the Commission is requesting Tennessee and any of its customers with interests affected by the issue concerning the retroactive elimination of the CD reduction option to submit, within 15 days of this order's issuance, responses to the questions posed in Appendix C. The purpose of the inquiry is to provide facts upon which the *Chevron* analysis of the disputed CD reductions on Tennessee's system can be based. Parties are also requested to state whether they believe a formal hearing is required for the Commission to complete its *Chevron* analysis. Upon submission of responses, the Commission will review them and consider in a separate order, to be issued within 45 days of the filing of the responses, whether the pre-*AGD* CD reductions by Tennessee's customers should have been allowed to stay in effect. The Commission believes this approach to be responsive to the court's directive, which the Commission does not understand to require a review of the factual circumstances surrounding the pre-*AGD* CD reduction decisions made by customers of pipelines other than Tennessee, the sole complaining pipeline.

E. Contract Demand Conversion

Since the CD conversion option has been retained in the final rule, the question arises as to whether the Commission should provide for the automatic abandonment of pipelines' sales obligations upon a customer's conversion and whether the Commission should retain pregranted abandonment of the firm transportation service converted from firm sales service.

The relationship between CD conversion rights and pipeline service obligations will be clarified in two specific respects. First, pipelines should be freed from the obligation to maintain gas supplies to serve customers that convert from sales service to transportation. Under Order No. 436, the effect of a customer's notice of intent to convert under § 284.10(c) was not an automatic abandonment of the pipeline's sales service commensurate with the conversion.[275] Rather, the pipeline was provided the opportunity to file under § 157.18 to abandon sales service to the extent of the conversion.[276] The Commission has recently granted a pipeline the authorization to abandon firm sales service to the extent its customers have elected or elect in the future to convert from firm sales to firm transportation service, and has concluded that the requirements of section 7(b) of the NGA were met even when the pipeline filed for abandonment authority prior to the actual conversion.[277] The key underlying factor—the exercise of conversion rights by the customer—remains the same and thus satisfies the statutory requirements for abandonment [278] while both the pipeline and the Commission face decreased administrative burdens. Upon review, the Commission believes the wiser course is to make automatic the grant of abandonment upon, and to the extent of, the exercise of conversion rights by pipeline customers. This approach involves little change in current policy but relieves pipelines of needless filing burdens and improves their ability to manage their systems and market their services based on a clearer picture of what jurisdictional responsibilities do and do not remain to be fulfilled. The Commission is amending §§ 284.10(d) (1) and (2) to reflect this change.

Second, the impact of customer conversions must be delineated clearly in the context of the firm transportation service provided by the pipeline to the converting customer. Section 284.221(d) provides for the abandonment of transportation services "upon the expiration of the contractual term of each individual transportation arrangement authorized under a [blanket] certificate" granted a pipeline under that section. Despite the language of that provision of Order No. 436, which the court approved in relevant part, local distributors [279] have claimed that only since certain Commission decisions in 1988 [280] have they become aware that § 284.221(d) is properly read to apply to firm transportation service converted from firm sales service. The Commission reaffirms that pre-granted abandonment of firm (converted) transportation service remains appropriate for a number of reasons. First, LDCs are not the only beneficiaries of open-access pipeline operation under Part 284 and, absent the pre-granted, automatic abandonment for converted firm transportation, the capacity needed by other purchasers, including industrial end users, may never practically become available. Further, the Commission's policies underlying Part 284 and encouraging open gas transportation markets in which pipelines and shippers can respond to market signals in a timely, efficient fashion do not support

[271] AGA, slip op. at 28. Section 284.10 of the Commission's regulations, which permitted both reduction and conversion prior to the *AGD* decision, became effective July 1, 1988. The Comission granted certain pipelines, for specified reasons, a waiver from the applicability of that section. Upon issuance of the *AGD* decision on June 23, 1987, the Commission, on July 2, 1987, stayed the effectiveness of section 284.10 pending further Commission action. *See* Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Stats. & Regs., Regulations Preambles ¶30,754 (1987). The universe of pipelines exposed, and the duration of such exposure, to the operation of the contract demand reduction provisions of section 284.10(c) was thus limited.

[272] AGA, slip op. at 28.

[273] FERC Stats. & Regs. at 30,794–95.

[274] On brief before the *AGA* court, three customers of Tennessee—Columbia, National Fuel Gas, and the Inland Gas Company, Inc.—claimed that they and four other unidentified Tennessee customers exercised their rights to reduce their contract demand by 15 percent in January, 1987. The three customers alleged that Tennessee ignored the CD reductions and has overbilled these customers more than $34 million for unused services. However, the Commission has nothing before it to substantiate such claims.

[275] FERC Stats. and Regs. at 31,526–527.

[276] 18 C.F.R § 284.10(d)(1) (1989).

[277] Williston Basin Interstate Pipeline Company, 48 FERC ¶61,068 at 61,330 (1989).

[278] *See* AGD, 824 F.2d at 1015. (Commission properly "identified circumstances under which pipelines are automatically entitled to abandonment of service—namely, when the customer exercises the election provided.")

[279] AGD filed, on November 7, 1988, a motion for clarification of Order No. 500 requesting that the Commission confine the application of § 284.221(d) to interruptible transportation service or firm transportation service to which a pre-grant of abandonment authority was attached when the service began. AGD renewed its motion on November 3, 1989.

unnecessary constraints and protections for only a certain customer class. As the Commission has noted before: [281]

> The terms and conditions of these converted service agreements are not dictated by the Commission. Presumably, the length of the FT [firm transportation] agreement is freely negotiated, although any customer converting its CD would have a right to a term no less than the remaining term of its eligible firm sales service agreement. This should provide the customer opting for conversion the ability to provide itself with any amount of contract stability or protection it wishes.

Further, pipelines should make capacity available to those who value that capacity the most. In order to do so, pipelines should be able, in these circumstances, to market their capacity unencumbered by the need to obtain abandonment approval in order to make desired capacity available. At the same time, firm sales customers converting to firm transportation are protected adequately by the transportation contracts negotiated between the parties and by the Commission's consideration in individual proceedings of the parties' needs both in the growing numbers of proceedings involving GICs and in pipeline rate and service proceedings.

For instance, in *Natural Gas Pipeline Company of America,*[282] the Commission considered and approved a settlement agreement establishing rights to continued transportation service. under a negotiated evergreen contractual provision as long as the customer gave Natural six-months notice of the customer's exercise of the settlement's option to continue firm service. In Transco's GIC proceeding, the Commission determined that the pipeline must provide 100 percent conversion rights from sales to transportation service and set for hearing, by means of written submissions, the issue of whether pregranted abandonment of transportation service upon the expiration of the service agreements should be limited if the pipeline adopts a GIC.[283] The same pipeline agreed, in a settlement approved by the Commission in Docket No. RP88–68, *et al.,* to waive the right to abandon firm transportation resulting from conversions by sales customers. Consequently, while the meaning and propriety of § 284.221(d) remain clear, parties have substantial opportunities to deal with its unwanted application on a case-by-case basis in their individual contracts.

[280] Transcontinental Gas Pipeline Corporation, 43 FERC ¶61,196, *reh'g denied,* 44 FERC ¶61,105 (1988).

[281] Transcontinental Gas Pipeline Corporation, 44 FERC at 61,298.

[282] 48 FERC ¶61,306 (1989).

V. National Environmental Policy Act Review

Under section 102(2)(C) of the National Environmental Policy Act of 1969,[284] (NEPA), Federal agencies must prepare an environmental analysis of "major Federal actions significantly affecting the quality of the human environment." NEPA requires that such an analysis, known as an Environmental Impact Statement (EIS), be made part of any record of decision on such major Federal actions. In order to determine the need for an EIS, agencies prepare an Environmental Assessment (EA). An EA, which is a general overview of the nature and probable effects of the action, provides the basis for a Finding of No Significant Impact (FONSI) when an EIS is not necessary, or facilitates the preparation of an EIS when it is required. In preparing an EA, the agency is also able to identify potential adverse impacts and to recommend or devise mitigating measures that will enable it to make a FONSI.

In its Notice of Proposed Rulemaking for Order No. 436, the Commission directed staff to prepare an EA. The EA concluded that the part of the proposed program regarding a policy for relieving take-or-pay obligations does not provide authorization to construct or abandon facilities. Despite some significant economic effects, these rules and policies have no foreseeable effect on the natural and physical environment. NEPA does not require analysis of exclusively economic or social effects that may arise from a Federal action. Although the Commission has given detailed consideration to the effect of these aspects of the rule, it has not done so in the context of NEPA review. Based upon its review of the EA, the record in this proceeding, and the changes made in this final rule, the Commission concludes that issuance of the final rule is not a major Federal action significantly affecting the quality of the human environment. Therefore, an Environmental Impact Statement for the final rule is not required.

VI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA)[285] generally requires a description and analysis of final rules that will have "a significant economic impact on a substantial number of small entities." [286] Specifically, if an agency promulgates a final rule under the Administrative Procedure Act (APA),[287] a final regulatory flexibility analysis may be appropriate. Each final regulatory flexibility analysis must contain (1) a statement of need for and objective of the rule, (2) a description of significant alternatives to the rule consistent with the stated objectives of the applicable statute that the agency considered and ultimately rejected, and (3) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, and the agency response to those comments. An agency is not required to make an RFA analysis, however, if it certifies that a proposed rule will not have "a significant economic impact on a substantial number of small entities." [288]

In Order No. 436, the Commission certified that the proposed take-or-pay remedies of the rule would not have a "significant economic impact on a substantial number of small entities," since most companies that must comply with this rule do not fall within the RFA's definition of small entity. In light of that certification, the Commission was not required to prepare an initial RFA analysis.

This was equally true in Order No. 500. Although the regulations promulgated in Order No. 500 affect small producers in that all producers seeking to transport in return for credits have to provide an offer of credit to ensure that their gas is transported, the impact of this requirement is not so significant as to require the preparation of a flexibility analysis. The main burden of the offer of credits falls on the aggregators of gas which must solicit those offers from the individual producers. Each producer does no more than agree to provide credits in return for the transportation of gas. There is no lesser level of compliance with the rule that the Commission could make available to small entities without nullifying the effect of the final rule.

For these reasons, the Commission concludes that there is no provision of the RFA that requires an analysis of the impact of this final rule on small producers. Accordingly, the Commission affirms that, pursuant to section 605(b) of the RFA, this rule will not have a "significant economic impact on a

[283] 47 FERC ¶61,244 at 61,849 (1989). *See also* Texas Eastern Transmission Corporation, 48 FERC ¶61,378 (1989) (parties not prohibited from negotiating a waiver of pregranted abandonment of the individual brokering transactions authorized).

[284] 42 U.S.C. 4321, *et seq.*

[285] 5 U.S.C. 601–62 (1988).

[286] 5 U.S.C. 603(a) (1988).

[287] 5 U.S.C. 553 (1988).

substantial number of small entities." [289]

VII. Paperwork Reduction Act Statement

This final rule does not change any reporting requirements in the regulation adopted under the interim rule. The Commission is informing the Office of Management and Budget (OMB) of this fact.

VIII. Further Procedures

In *AGA*, the Court retained jurisdiction of the case and remanded only the record to the Commission for issuance of a "final rule" within 60 days of the court's decision.[290] The issuance of this final rule is intended to comply with the court's requirement that the Commission issue a final rule within 60 days. However, this final rule, like other orders of the Commission, is subject to rehearing under section 19(a) of the NGA. Accordingly, parties may file requests for rehearing of the final rule, and the Commission will file with the court a motion requesting permission to retain the record until the Commission has addressed those requests in a subsequent order.

This procedure is the same as that followed by the Commission in responding to the decision of the U.S. Court of Appeals for the D.C. Circuit in *Mid-Tex*. The Commission addressed requests for rehearing of the final rule in that proceeding, which was also issued after an interim rule.[291] In addition, this order is based on the comments received in this proceeding to date. However, the parties have not had an opportunity to file comments with the Commission since they filed written responses to the Commissioners' questions at the April 1988 hearing. Thus, to the extent parties would make different arguments about the direction that should be taken in the final rule as a result of developments in the industry since that time, rehearing will provide parties with an opportunity to so inform the Commission.

IX. Effective Date

This final rule is effective January 22, 1990.

[288] 5 U.S.C. 605(b) (1988).

[289] Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1984) (Mid-Tex). (No RFA analysis is necessary when the agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.)

[290] Slip op. at 11, 33.

List of Subjects

18 CFR Part 2

Administrative practice and procedure, Electric power, Environmental impact statement, Natural gas, Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 284

Continental shelf, Natural gas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends parts 2 and 284, Chapter I, Title 18 of the *Code of Federal Regulations*, as set forth below.

By the Commission.

Lois D. Cashell,

Secretary.

PART 2—GENERAL POLICY AND INTERPRETATIONS

Sections 2.104 and 2.105, promulgated on an interim basis in 53 FR 30,334 (Aug. 14, 1987), are adopted as final with the following changes:

1. The authority citation for part 2 is revised to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142; Federal Power Act, 16 U.S.C. 792–825r (1988) as amended by Electric Consumers Protection Act of 1986, 100 Stat. 1243 (1986); Natural Gas Act, 15 U.S.C. 717–717w (1988); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645 (1988); and the National Environmental Policy Act, 42 U.S.C. 4321–4361 (1982).

§ 2.104 [Amended]

2. In § 2.104, in the first sentence of paragraph (c), the phrase "on or before March 31, 1989" is removed and the phrase "on or before December 31, 1990" is inserted in its place.

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

3. The authority citation for part 284 is revised to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717–717w (1988), as amended; Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1988); Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331–1356 (1982) as amended; Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142.

4. In § 284.8, paragraph (f), which was adopted on an interim basis in 52 FR 30,334 (Aug. 14, 1987), is adopted as final and paragraph (f)(1) introductory text and paragraph (f)(4)(ii) are revised to read as follows:

§ 284.8 Firm transportation service.

* * * * *

(f)(1) *Transportation credits.* Until the earlier of December 31, 1990, or the date on which an interstate pipeline accepts a gas inventory charge certificate, natural gas is eligible for transportation by interstate pipelines under this part only if:

* * * * *

(4) * * *

(ii)(A) The selection of the contracts against which the credits will apply will be at the discretion of the pipeline. However, the pipeline may not apply credits arising from transportation performed before January 22, 1990 against its obligation under a take-and-pay contract to take gas which under state law in effect on June 23, 1987, was defined as casinghead gas. If the pipeline applies credits arising from transportation performed after January 22, 1990 against its obligation either to take or pay or take and pay for "must-take" gas, the pipeline must release that must-take gas from the contract. The producer and pipeline are granted all necessary abandonment and certificate authority to permit the sale for resale to another purchaser of any must-take gas released pursuant to this subsection.

(B) "Must-take" gas shall include all gas subject to a take-and-pay contract and all categories of gas produced or producible subject to rules and regulations promulgated by a state or Federal conservation agency having jurisdiction, as they existed on December 15, 1989, which establish a priority mechanism requiring the production of these categories of gas in preference to all other gas produced or producible.

(C) The pipeline must give the producer 30 days notice (or such other notice as the parties may agree to) before applying a credit against an obligation either to take or pay or take and pay for "must-take" gas.

* * * * *

5. In § 284.9, paragraph (f), which was adopted on an interim basis in 52 FR 30,334 (Aug. 14, 1987), is adopted as final and paragraph (f)(1) introductory text and paragraph (f)(4)(ii) are revised to read as follows:

§ 284.9 Interruptible transportation service.

* * * * *

(f)(1) *Transportation credits.* Until the earlier of December 31, 1990, or the date on which an interstate pipeline accepts a gas inventory charge certificate,

natural gas is eligible for transportation by interstate pipelines under this part only if:

* * * * *

(4) * * *

(ii)(A) The selection of the contracts against which the credits will apply will be at the discretion of the pipeline. However, the pipeline may not apply credits arising from transportation performed before January 22, 1990 against its obligation under a take-and-pay contract to take gas which under state law in effect on June 23, 1987, was defined as casinghead gas. If the pipeline applies credits arising from transportation performed after January 22, 1990 against its obligation either to take or pay or take and pay for "must-take" gas, the pipeline must release that must-take gas from the contract. The producer and pipeline are granted all necessary abandonment and certificate authority to permit the sale for resale to another purchaser of any must-take gas released pursuant to this subsection.

(B) "Must-take" gas shall include all gas subject to a take-and-pay contract and all categories of gas produced or producible subject to rules and regulations promulgated by a state or federal conservation agency having jurisdiction, as they existed on December 15, 1989, which establish a priority mechanism requiring the production of these categories of gas in preference to all other gas produced or producible.

(C) The pipeline must give the producer 30 days notice (or such other notice as the parties may agree to) before applying credits against an obligation to take or pay or take and pay for "must-take" gas.

* * * * *

6. In § 284.10, paragraph (d)(1) is revised to read as follows:

§ 284.10 Conversion to firm transportation.

* * * * *

(d) * * *

(1) If a firm sales customer exercises a conversion option under paragraph (c) of this section, abandonment of the pipeline's sales service obligation is approved to the extent of the conversion.

* * * * *

7. In § 284.10, paragraph (d)(2) is amended by removing the word "proposed".

Note: Appendix A, B and C will not be published in the **Federal Register**, but are available for inspection and copying in the Commission's Reference and Information Center, 825 North Capitol St., NE., Washington, DC 20426.

[FR Doc. 89-29450 Filed 12-20-89; 3:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 801

[Docket No. 88N-0389]

Medical Devices; Hearing Aid Devices; Technical Data Amendments

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the technical data sections of the agency's regulations on hearing aid devices' professional and patient labeling to incorporate by reference an updated standard. FDA is incorporating the revised standard to introduce technical clarifications.

DATES: The final rule becomes effective on or after June 19, 1990. The Director of the Office of the Federal Register approves the incorporation by reference in accordance with 5 U.S.C. 552(a) of a certain publication in 21 CFR 801.420(c)(4) effective on June 19, 1990.

FOR FURTHER INFORMATION CONTACT: Joseph M. Sheehan, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 22, 1989 (54 FR 11743), FDA proposed to amend the technical data sections of the agency's regulations on hearing aid devices' professional and patient labeling to incorporate by reference an updated standard approved in 1987 by the American National Standards Institute's (ANSI) standards committee.

Interested persons were asked to submit their written comments by May 22, 1989. Two comments were received. One supported the proposal and the other one commented that the tolerance limits in section 6 of the 1987 standard were too lenient.

FDA disagrees with the second comment. FDA believes that the tolerance limits in section 6 are reasonable, especially given the limitations of the measuring equipment available to small manufacturers.

FDA is now updating § 801.420(c)(4) (21 CFR 801.420(c)(4)) by incorporating by reference into the regulation the test procedures established by the Acoustical Society of America (ASA) in the American National Standard "Specification of Hearing Aid Characteristics," ANSI S3.22-1987 (ASA 70-1987) (Revision of S3.22-1982), and thereby requiring, as a minimum, that the User Instructional Brochure or other such hearing aid labeling include the appropriate values or information for the technical data elements specified in § 801.420(c)(4) (i) through (xii) as those elements are defined or used in ANSI S3.22-1987 (ASA 70-1987). The amendment will not affect any other provisions of 21 CFR 801.420 or 21 CFR 801.421. Copies of the revised standard are available from the American National Standards Institute, 1430 Broadway, New York, NY 10018, or are available for inspection at the Office of the Federal Register, 1100 L St. NW., Washington, DC.

In accordance with Executive Order 12291, FDA has carefully analyzed the economic effects of this final rule and has determined that it is a major rule as determined by the Order. Although minor changes in testing will be necessary, manufacturers and distributors will not need to purchase new equipment. New testing equipment would make the testing slightly faster, but all required measurements can be made with existing equipment. Even if all of the approximately 20 major and 30 minor manufacturers purchase new equipment, their total cost is estimated to be about $50,000 ($1,000 each). It is highly unlikely that any of the approximately 1,000 distributors will purchase new equipment. Therefore, the worst-case total cost estimate is slightly over $1 million if all manufacturers and distributors purchase new testing equipment. The final rule will apply to hearing aid devices introduced or delivered for introduction into interstate commerce on or after June 19, 1990. The 180-day phase-in period for the revised User Instructional Brochure should allow the transition to the new labeling to be virtually cost-free. Therefore, a regulatory impact analysis is not required.

FDA, in accordance with the Regulatory Flexibility Act, has considered the effect that this final rule would have on small entities, including small businesses, and has determined that the maximum cost of meeting the revised regulation for a manufacturer or distributor is $1,000. Therefore, FDA certifies in accordance with section 605(b) of the Regulatory Flexibility Act that no significant economic impact on a substantial number of small entities will derive from this action.

List of Subjects in 21 CFR Part 801

Incorporation by reference, Labeling, Medical devices, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 801 is amended as follows:

PART 801—LABELING

1. The authority citation for 21 CFR part 801 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 507, 519, 520, 701, 704 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 357, 360i, 360j, 371, 374).

2. Section 801.420 is amended by revising the second sentence in paragraph (c)(4) to read as follows:

§ 801.420 Hearing aid devices; professional and patient labeling.

* * * * *

(c) * * *

(4) * * * The determination of technical data values for the hearing aid labeling shall be conducted in accordance with the test procedures of the American National Standard "Specification of Hearing Aid Characteristics," ANSI S3.22–1987 (ASA 70–1987) (Revision of S3.22–1982), which is incorporated by reference in accordance with 5 U.S.C. 552(a). * * *

* * * * *

Dated: December 4, 1989.

Ronald G. Chesemore,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89–29666 Filed 12–20–89; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 90

[Docket No. R–89–1455; FR–2386–X–06]

RIN 2506–AA96

Comprehensive Homeless Assistance Plan; Announcement of Effective Date

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of announcement of effective date for final rule.

SUMMARY: This document announces the effective date for a recently published final rule that codified the requirements for the Comprehensive Homeless Assistance Plan, as authorized by subtitle A of title IV of the Stewart B. McKinney Homeless Assistance Act (the McKinney Act). The effective date provision of the published rule stated that the rule would become effective upon expiration of the first period of 30 calendar days of continuous session of Congress after publication, and announced that future notice of the rule's effectiveness would be published in the **Federal Register**. However, under section 7(o) of the Department of Housing and Urban Development Act, as amended by section 123 of the Department of Housing and Urban Development Reform Act of 1989, approved December 15, 1989, the rule's effectiveness is no longer dependent on congressional session days and can become effective at any time after the expiration of thirty calendar days, beginning on the day after the date of the rule's publication.

Thirty calendar days have now expired since this rule was published.

EFFECTIVE DATE: The effective date for the final rule published November 3, 1989 (54 FR 46566), is December 21, 1989.

FOR FURTHER INFORMATION CONTACT: Grady J. Norris, Assistant General Counsel for Regulations, Department of Housing and Urban Development, Room 10276, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 755–7055. (This is not a toll-free number.)

Dated: December 15, 1989.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 89–29720 Filed 12–20–89; 4:25 pm]

BILLING CODE 4210–32–M

Office of the Assistant Secretary for Community Planning and Development

24 CFR Part 576

[Docket No. R–89–1434; FR–2562–X–06]

RIN 2506–AA95

Emergency Shelter Grants Program; Stewart B. McKinney Homeless Assistance Act, Final Rule; Announcement of Effective Date and OMB Control Number

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule; Announcement of effective date and OMB control number.

SUMMARY: This document announces the effective date for a recently published final rule that codified the amendments to the Emergency Shelter Grants (ESG) program contained in the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. 100–628, approved November 7, 1988). In addition, the effective date provision of the rule stated that the rule would become effective upon expiration of the first period of 30 calendar days of continuous session of Congress after publication, and announced that future notice of the rule's effectiveness would be published in the **Federal Register**. However, under section 7(o) of the Department of Housing and Urban Development Act, as amended by section 123 of the Department of Housing and Urban Development Reform Act of 1989, approved December 15, 1989, the rule's effectiveness is no longer dependent on congressional session days and can become effective at any time after the expiration of thirty calendar days, beginning on the date of the rule's publication. Thirty calendar days have now expired since this rule was published.

In addition, certain sections of the rules contained information collection requirements and were submitted to the Office of Management and Budget (OMB), in accordance with the Paperwork Reduction Act of 1989 (Pub. L. 96–511). Therefore, the rule is also being amended to include OMB control numbers at the places where current information collection requirements are described.

EFFECTIVE DATE: The effective date for the final rule published November 7, 1989 (54 FR 46794), is December 21, 1989.

FOR FURTHER INFORMATION CONTACT: Grady J. Norris, Assistant General Counsel for Regulations, Department of Housing and Urban Development, Room 10276, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 755–7055. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The information collection requirements contained in the regulatory sections listed below were approved by the Office of Management and Budget, under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and assigned the control numbers listed.

List of Subjects in 24 CFR Part 576

Reporting and recordkeeping requirements.

Accordingly, 24 CFR part 576 is amended by adding the effective date to the preamble and by adding at the end of §§ 576.21, 576.51, and 576.80, the following statement:

PART 576—EMERGENCY SHELTER GRANTS PROGRAM: STEWART B. McKINNEY HOMELESS ASSISTANCE ACT

1. The authority citation for part 576 continues to read as follows:

Authority: Sec. 416 of the Stewart B. McKinney Homeless Assistance Act (Pub. L. 100–77, approved July 22, 1987); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 576.21, 576.51 and 576.80 [Amended]

2. Sections 576.21, 576.51, and 576.80 are amended by adding at the end of each section, the following statement:

(Approved by the Office of Management and Budget under OMB Control Number 2506–0089).

Dated: December 15, 1989.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 89–29721 Filed 12–20–89; 4:29 pm]

BILLING CODE 4210–29–M

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24 CFR Part 579

[Docket No. R–89–1435; FR–2585–X–04]

RIN 2506–AA97

Supplemental Assistance for Facilities to Assist the Homeless (SAFAH), Final Rule; Announcement of Effective Date and OMB Control Number

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule; announcement of effective date and OMB control number.

SUMMARY: This document announces the effective date for a recently published rule that made final the guidelines for the Supplemental Assistance for Facilities to Assist the Homeless (SAFAH) program, which were published for effect on October 19, 1987 (54 FR 36880), and amended by Notice, for immediate effect, on January 11, 1989 (54 FR 1006). The effective date provision of the published rule affected by this document stated that the rule would become effective upon expiration of the first period of 30 calendar days of continuous session of Congress after publication, and announced that future notice of the rule's effectiveness would be published in the Federal Register. However, under section 7(o) of the Department of Housing and Urban Development Act, as amended by section 123 of the Department of Housing and Urban Development Reform Act of 1989, approved December 15, 1989, the rule's effectiveness is no longer dependent on Congressional session days and can become effective at any time after the expiration of thirty calendar days, beginning on the date of the rule's publication. Thirty calendar days have now expired since this rule was published.

In addition, certain sections of the Department's regulation contained information collection requirements and were submitted to the Office of Management and Budget (OMB), in accordance with the Paperwork Reduction Act of 1989 (Pub. L. 96–511). Therefore, the rule is also being amended to include OMB control numbers at the places where current information collection requirements are described.

EFFECTIVE DATE: The effective date for the final rule published November 7, 1989 (54 FR 46812), is December 21, 1989.

FOR FURTHER INFORMATION CONTACT: Grady J. Norris, Assistant General Counsel for Regulations, Department of Housing and Urban Development, Room 10276, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 755–7055. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The information collection requirements contained in the regulatory sections listed below were approved by the Office of Management and Budget, under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and assigned the control numbers listed.

List of Subjects in 24 CFR Part 579

Grant programs—housing and community development, Housing, Homeless, Reporting and recordkeeping requirements.

Accordingly, part 579 of title 24 of the Code of Federal Regulations is amended as follows:

PART 579—SUPPLEMENTAL ASSISTANCE FOR FACILITIES TO ASSIST THE HOMELESS

1. The authority citation for part 579 continues to read as follows:

Authority: Sec. 485 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (42 U.S.C. 11301 note); sec. 7(d) of the Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 579.210 [Amended]

2. Section 579.210 is amended by adding at the end of the section, the following statement:

(Approved by the Office of Management and Budget under OMB Control Number *2506–0111)*

Dated: December 15, 1989.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 89–29723 Filed 12–20–89; 4:27 pm]

BILLING CODE 4210–29–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 88–591; RM–6467]

Radio Broadcasting Services; Fruithurst, AL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 274A to Fruithurst, Alabama, as that community's first local broadcast service, in response to a petition filed by Steven L. Gradick. The coordinates for Channel 274A at Fruithurst, Alabama, are 33–43–57 and 85–28–06. *See* 54 FR 03821, January 26, 1989. With this action, the proceeding is terminated.

DATES: Effective January 29, 1990; The window period for filing applications on Channel 274A at Fruithurst, Alabama, will open on January 30, 1990, and close on March 1, 1990.

FOR FURTHER INFORMATION CONTACT: Ordee Pearson, (202) 634–6530. Questions related to the window applicaton filing process at Fruithurst, Alabama, should be addressed to the Audio Service Division, FM Branch, Mass Media Bureau, (202) 632–0394.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 88–591, adopted November 29, 1989, and released December 14, 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 Transportation 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 Alabama by adding Fruithurst, Channel 274A.

Federal Communications Commission.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-29707 Filed 12-20-89; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 662

[Docket No. 90775-9215]

Northern Anchovy Fishery

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Emergency interim rule; extension of effective date.

SUMMARY: The Secretary of Commerce (Secretary) extends an emergency interim rule now in effect to allow a 5,000 metric ton (mt) reduction harvest of northern anchovy that otherwise would be prohibited. This action allows a reduction fishery for northern anchovy during the 1989–1990 fishing season, which otherwise would be unnecessarily denied due to a low estimated spawning biomass resulting from atypical environmental conditions during the period of peak spawning.

EFFECTIVE DATE: This document is effective December 21, 1989. The effectiveness of the emergency interim rule published September 29, 1989 (54 FR 40112) is extended from 0001 hours Pacific Standard Time (PST) December 24, 1989, to 2400 hours PST March 23, 1990.

ADDRESS: A copy of the environmental assessment prepared for the emergency rule may be obtained from E.C. Fullerton, Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, CA 90731.

FOR FURTHER INFORMATION CONTACT: James J. Morgan, Fisheries Management and Analysis Branch, Southwest Region, NMFS, 213–514–6667.

SUPPLEMENTARY INFORMATION: Under the emergency action authority of section 305(e) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), the Secretary issued an emergency interim rule (54 FR 40112, September 29, 1989) amending the Northern Anchovy Fishery Management Plan (FMP) and its implementing regulations. The emergency interim rule, which was effective from 0001 hours PDT September 25, 1989, until 2400 hours PDT December 23, 1989, permitted a 5,000 mt quota for the reduction fishery under conditions that ordinarily would prohibit such a fishery. Unusually low water temperatures during the period of peak spawning contributed to low estimates of spawning biomass; however, estimates of total biomass are very high. Additional rationale for taking the emergency action was presented in the preamble of the emergency interim rule.

At its 99th meeting in Portland, Oregon on November 15–17, 1989, the Pacific Fishery Management Council directed its Anchovy Management Team to proceed with an amendment to the FMP that will redefine the allocation formulas in line with the Council's decision under the emergency rule; therefore, the amendment to the FMP would make emergency action unnecessary under similar circumstances in the future. Because the Council has decided to allow a reduction fishery during the 1989–1990 fishing season, and because the circumstances in the fishery at the time of implementation of the emergency interim rule still exist, the Secretary extends for 90 days the effective dates of the emergency interim rule under section 305(e)(3)(B) of the Magnuson Act.

The emergency interim rule is exempt from the normal review procedures of Executive Order 12291 as provided in section 8(a)(1) of that Order. This rule was reported to the Director of the Office of Management and Budget with an explanation of why following the procedures of that Order was not possible.

List of Subjects in 50 CFR Part 662

Fisheries.

Dated: December 15, 1989.

James E. Douglas, Jr.,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 89-29643 Filed 12-20-89; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 54, No. 244
Thursday, December 21, 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.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 330 and 331

RIN 3064-AB01

Deposit Insurance Coverage

AGENCY: Federal Deposit Insurance Corporation ("FDIC").

ACTION: Notice of proposed revision of regulations.

SUMMARY: The FDIC is proposing to amend its existing deposit insurance regualtions (12 CFR parts 330, 331) which clarify and define the extent of insurance coverage afforded by the FDIC to deposit accounts maintained with FDIC-insured banks. These amendments are being proposed pursuant to section 402(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which requires the FDIC to promulgate uniform deposit insurance regulations for deposits in all insured depository institutions, taking into account the regulations, principles and interpretations for deposit insurance coverage established by the former Federal Savings and Loan Insurance Corporation ("FSLIC"). In addition, the FDIC is proposing other amendments to its deposit insurance regulations which the FDIC believes are necessary due to the increased complexity of financial transactions, the proliferation of new banking products and the problems which have confronted the FDIC in making insurance payments on deposits of closed banks, since the regulations were first adopted in 1967. These proposed revisions are intended to: (1) restate some existing regulations so as to make them easier to understand and apply; (2) broaden the scope of the regulations to encompass a wider variety of deposit accounts offered by financial institutions and to take into account more complicated forms of deposit ownership; (3) codify longstanding FDIC and/or FSLIC staff interpretations of the Federal Deposit Insurance Act and the National Housing Act; (4) simplify the process of determining the extent to which deposit accounts are entitled to deposit insurance coverage; and (5) provide answers to some of the most frequently asked questions about deposit insurance.

DATES: Comments must be received by February 20, 1990.

ADDRESSES: Send comments to Hoyle L. Robinson, Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Comments may be hand delivered to Room 6108 on business days between 8:30 a.m. and 5 p.m. Comments may also be inspected in Room 6108 between 8:30 a.m. and 5 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Roger A. Hood, Assistant General Counsel, (202-898-3681), or Claude A. Rollin, Senior Attorney, (202-898-3985), Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in this notice. Consequently, no information has been submitted to the Office of Management and Budget for review.

DISCUSSION

A. Resolution of Differences Between FDIC and FSLIC Rules

Section 402(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (the "FIRRE Act") requires the FDIC to promulgate uniform deposit insurance regulations for deposits in all depository institutions whose deposits are insured pursuant to the Federal Deposit Insurance Act (the "FDI Act"), including foreign banks having insured branches and savings institutions that were insured by the former FSLIC on August 8, 1989 (hereinafter collectively referred to as "insured depository institutions"). In promulgating such uniform regulations, section 402(c)(3) of the FIRRE Act requires the FDIC to take into account the regulations, principles and interpretations for deposit insurance coverage which were utilized by the former FSLIC. Prior to the enactment of the FIRRE Act, there were certain differences between the regulations, principles and interpretations for deposit insurance coverage which governed deposits in FDIC-insured banks and those governed deposits in FSLIC-insured savings associations. The following is a summary of the major differences and the manner in which the FDIC is proposing to resolve those differences with these proposed amendments:

Authorized Signers on Single Ownership Accounts

Under its existing regulations, the FDIC has taken the position that if deposit account records provide that more than one individual has the right to withdraw funds from a deposit account (except by way of a Power of Attorney) then the account would be treated as a joint account even if the account was intended to be, and was operated as, a single ownership account with a second individual serving as an "authorized signer" on the account solely for convenience purposes. The FSLIC treated such accounts, which are commonly referred to as "convenience accounts," as single ownership accounts so long as the named accountholder provided an affidavit indicating that the account was comprised solely of funds owned by that individual (that the authorized signer had no ownership interest in the funds). The FDIC is proposing to amend its single ownership account regulation to, *inter alia*, codify the FDIC's existing staff position with respect to convenience accounts. Accordingly, the amended regulation would expressly provide that if more than one person has the right to withdraw funds from an individual account (except by way of a Power of Attorney), the account will be treated as a joint ownership account, rather than as a single ownership account, and it will be insured in accordance with the provisions governing the deposit insurance afforded to joint ownership accounts.

Custodial Accounts for the Benefit of American Indians

The Bureau of Indian Affairs of the United States Department of the Interior (the "BIA") often invests the funds of various American Indian tribes and individual American Indians pursuant to 25 U.S.C. 162(a). Some of those funds

have been deposited by the BIA acting in a custodial capacity, on behalf of the tribes and the individual American Indians, in insured depository institutions. Both the FDIC and the former FSLIC insured any funds held by the BIA on behalf of an American Indian tribe as funds being held by an official custodian (the BIA) on behalf of a public unit (the tribe). *See*, 12 CFR 564.8 and 12 U.S.C. 1821(a)(2)(A)(v)). The FDIC and the FSLIC did not, however, insure funds held by the BIA on behalf of individual American Indians in the same manner. The FDIC has insured funds held by the BIA on behalf of individual American Indians separately from any single ownership accounts maintained by those individuals with the same insured bank. By contrast, the FSLIC aggregated, for deposit insurance purposes, the interests of individual American Indians in accounts maintained by the BIA with any single ownership accounts maintained by those individuals at the same FSLIC-insured savings institution.

The FDIC is proposing to continue to insure funds deposited by the BIA in custodial accounts for the benefit of individual American Indians separately from any other single ownership accounts maintained by those individual American Indians with the same insured depository institution. Such insurance coverage, which is outlined in a new paragraph of the proposed amended regulations (§ 330.6(e)), would also be provided for custodial accounts maintained on behalf of individual American Indians by any other disbursing agent of the United States.

Joint Account Signature Card Requirement

An existing FDIC regulation (12 CFR 330.9) requires that, in order to obtain separate insurance coverage for a joint ownership account, each co-owner must personally execute a deposit account signature card and possess withdrawal rights, unless the joint deposit is evidenced by a certificate of deposit or negotiable instrument (in which case the deposit must, in fact, be jointly owned). The FSLIC had, prior to the enactment of the FIRRE Act, revised its joint account regulation (12 CFR 564.9) to, *inter alia*, rescind the FSLIC's signature card requirement for joint accounts. *See*, 53 FR 8167 (March 14, 1988). The FSLIC's revised regulation provided that if funds were held in an account in the names of two or more persons and each person possessed equal withdrawal rights, the account would be insured as a joint account. The FDIC is proposing to retain its current signature card requirement for joint accounts since the FDIC believes that signature cards (which specify who has the right to withdraw funds from an account) are generally reliable indicators of deposit ownership. Therefore, the FDIC's existing signature card requirement is retained in the proposed amended regulation governing the deposit insurance afforded to joint ownership accounts.

Accounts Held by Fiduciaries on Behalf of Two or More Persons

A former FSLIC regulation (12 CFR 564.9(f)) provided that a deposit account held by an agent, nominee, guardian, custodian, conservator or loan servicer, on behalf of two or more persons, would be insured as a joint account provided that the account was identified as an agency account and the FSLIC's recordkeeping requirements were satisfied. The FDIC's existing regulations do not address the manner in which this type of account would be insured and the FDIC has not rendered any formal opinions or interpretive regulations on this subject. The FDIC believes that the position of the FSLIC with respect to such accounts was sound and thus the FDIC is proposing to amend its regulations to adopt the FSLIC's position with respect to this type of account. The proposed provision (§ 330.6(c)) provides that funds held by an agent, nominee, guardian, custodian, conservator or loan servicer, on behalf of two or more persons jointly, shall be treated as a joint ownership account and insured in accordance with the provisions governing such accounts.

Custodial Accounts Maintained by Mortgage Servicers

Mortgage servicers for the Government National Mortgage Association ("Ginnie Mae"), the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), as well as other (private) mortgage servicers, have maintained deposit accounts at numerous insured depository institutions. Two basic types of accounts have been maintained by the mortgage servicers. One type of account is comprised of principal and interest ("P&I") payments received by the mortgage servicer from numerous mortgagors (borrowers). The P&I payments are generally held in the deposit account until they are remitted by the mortgage servicer, on a designated date, directly to the holders of Ginnie Mae, Fannie Mae and Freddie Mac securities or to the owners of the mortgages (mortgagees). The other type of account is comprised of tax and insurance ("T&I") payments received by the mortgage servicer from numerous mortgagors. The T&I payments are held in the deposit account until they are used to pay, on behalf of the mortgagors, taxes and insurance premiums due on the properties securing the pooled mortgages.

The FCIC's existing regulations do not expressly indicate the manner in which such accounts would be insured by the FDIC. Since the accounts are custodial in nature, the FDIC has treated them as custodial accounts and has taken the position that each individual owner (mortgagee, investor or holder of Ginnie Mae, Fannie Mae or Freddie Mac securities) has an ownership interest in the P&I accounts for deposit insurance purposes. Therefore, the FDIC has taken the position that P&I accounts are insured in the amount of up to $100,000 for the interest of each owner or investor (security holder) in such accounts, provided that the FDIC's current recordkeeping requirements (12 CFR 330.1(b)) are satisifed. The FDIC has further indicated that if an owner or investor has interests in more than one P&I account, those interests would normally be aggregated for insurance purposes. In addition, if an owner maintains individually owned (single ownership) accounts at the same insured institution, his/her interests in the P&I account(s) would also be aggregated with those single ownership accounts for deposit insurance purposes.

With respect to the T&I accounts, the FDIC has taken the position that such accounts are insured up to $100,000 for the interest of each individual mortgator in the accounts, provided that the FDIC's current recordkeeping requirements (12 CFR § 330.1(b)) are satisfied. However, if a single mortgagor has interests in more than one T&I account at the same insured bank, those interests would be aggregated for insurance purposes. Moreover, to the extent that a mortgagor maintains individually owned (single ownership) accounts at the same insured institution, his/her interests in the T&I account(s) would be added to those single ownership accounts, for deposit insurance purposes, prior to applying the $100,000 insurance limit.

The FSLIC had a specific regulation (12 CFR 564.3(b)(2)) which provided that "[a] loan servicer who receives loan payments and places or maintains such payments in an insured institution prior to remittance to the lender or other parties entitled to the funds shall, for insurance-of-accounts purposes, be considered an agent of each borrower." Pursuant to that regulation, P&I and T&I accounts were insured by the FSLIC in the amount of up to $100,000 for the interest of each individual mortgagor in

such accounts. Such insurance coverage was provided, however, only if certain recordkeeping regulations (12 CFR 564.2(b)) were satisfied. Moreover, if a mortgagor had interests in more than one mortgage servicing account or had any other individually owned (single ownership) accounts, those interests/accounts were all aggregated for deposit insurance purposes.

Section 402(d) of the FIRRE Act requires the FDIC to insure both P&I and T&I accounts maintained at all insured depository institutions in the amount of up to $100,000 per mortgage borrower, on an interim basis, until the effective date of these proposed uniform regulations. Accordingly, the deposit insurance for both P&I and T&I accounts provided by the FDIC for deposits in FDIC-insured banks since the date of enactment of the FIRRE Act has been the same as that provided by the FSLIC for deposits in FSLIC-insured savings institutions prior to the enactment of the FIRRE Act. The proposed regulation would expressly provide that custodial accounts maintained by mortgage servicers which are comprised of P&I payments will be insured in the amount of up to $100,000 per owner (mortgagee, investor or security holder) and those comprised of T&I payments shall be insured in the amount of up to $100,000 per mortgage borrower, provided that the FDIC's proposed amended recordkeeping requirements are satisfied. This proposed provision is based on the FDIC's belief that the mortgagees, investors or security holders, and not the mortgagors (borrowers), have an ownership interest in P&I accounts, and mortgagors have an ownership interest in T&I accounts, which are maintained by mortgage servicers for their benefit at various insured depository institutions. Since the accounts are custodial in nature, any interests that an individual has in those accounts would be aggregated with any individually owned (single ownership) account(s) that the individual may have at the same insured depository institution, under the proposed amended regulations.

Testamentary (Revocable Trust) Accounts Established by and for Husband and Wife

The FDIC has interpreted its existing regulations as providing that when a husband and wife establish a testamentary (revocable trust) account naming themselves as the sole beneficiaries (*i.e.* H & W in trust for H & W), the account is not a valid testamentary account and thus should be treated as a joint ownership account of H & W and insured up to $100,000. The FSLIC treated such accounts as two separate testamentary accounts and insured them in the amount of up to $100,000 for each account, for a total of up to $200,000.

The FDIC is proposing to amend its regulation governing the deposit insurance provided for testamentary trust accounts to formally adopt, *inter alia*, the FDIC's existing staff position which is that when a husband and wife establish a revocable trust account naming themselves as the sole beneficiaries, the account will not be treated as a testamentary account, but rather, it will be treated as a joint ownership account and insured in accordance with the provisions governing the insurance provided for such accounts. This proposal is based on an FDIC staff opinion that when a husband and wife place funds in a trust account and name themselves as the sole beneficiaries thereof, they cannot be said to be holding funds in a "separate right and capacity" since the account has the same attributes as a joint account with right of survivorship. The amended regulation would, however, expressly recognize testamentary accounts established by more than one owner (settlor) when the owners are not the beneficiaries of the accounts (*e.g.* H & W in trust for Son & Daughter). Such accounts would be insured according to the respective interests of each owner (which are presumed to be equal unless otherwise stated in the insured depository institution's deposit account records) held for the benefit of each beneficiary, in the amount of up to $100,000 for the interest of each owner as to each beneficiary. Such insurance coverage would be separate from any insurance coverage provided for other accounts maintained by the owners or the beneficiaries with the same insured depository institution. For instance, with respect to the aforementioned example (H & W in trust for Son & Daughter), the account would be insured in the amount of up to $400,000. This proposal, if adopted, would codify existing staff interpretations of both the FDIC and the former FSLIC.

Pension Plan Accounts

Retirement plans often allow a participant to make voluntary contributions on an after-tax basis. The FSLIC treated such contributions, for insurance purposes, as the individually owned funds of the participant and aggregated them with any other single ownership accounts of the participant, rather than treating them as part of the participant's interest in the pension plan deposit. The FSLIC also treated rollover contributions (amounts which a participant receives as a distribution from a qualified retirement plan and has elected to roll into a different qualified plan) as the individually owned funds of the participant for deposit insurance purposes. The FDIC treats voluntary employee contributions and rollover contributions as part of a participant's interest in the pension plan deposit. The FDIC has not made any distinctions between employer contributions, voluntary employee contributions made on an after-tax basis, rollover contributions and other types of employee contributions, in determining or providing insurance coverage for pension plan accounts.

The FDIC is proposing to continue its policy of insuring the deposits of most trusteed pension plans in the amount of up to $100,000 for the interest of each pension plan participant therein, regardless of whether the funds are derived from employer contributions, employee contributions made on a before-tax or after-tax basis, or rollover contributions. The amended regulation would provide that deposited funds representing the determinable interest of a beneficiary in an employee benefit plan would be insured up to $100,000. Moreover, the regulation would provide that any interests of the same beneficiary in any other employee benefit plans established by the same employer or employee organization would be aggregated for insurance purposes. Under the proposed amended regulation, the value of an employee's interest in a defined contribution plan would be deemed to be the beneficiary's account balance as of the date the insured depository institution is closed. The value of an employee's interest in a defined benefit plan would be deemed to be present value of the beneficiary's interest in the plan, as of the date of default of the insured depository institution.

There has also been a difference in the manner which the FDIC and the FSLIC have treated deposits of "overfunded" pension plans. Pension plans are frequently "overfunded," which is to say that their assets exceed the total present value of all participants' accrued benefits under the plan. Consequently, a portion of a pension plan's deposit is often attributable to the overfunded portion of the pension plan rather than to the participants' interests under the plan. The FDIC has looked to the pension plan documentation to determine who has a greater ownership interest (the corporation or the employees) in the overfunded portion of the pension plan

deposit and has treated the overfunded portion as being owned in accordance with that determination. If it was deemed to be owned by the corporation, the FDIC aggregated the overfunded portion of the deposit with other corporate funds for insurance purposes. If it was deemed to be owned by the employees, each employee's share was aggregated with his/her other interests in the pension plan deposit. The FSLIC treated the overfunded portion of a pension plan deposit as a trust estate and insured that portion up to $100,000, separately from any other funds owned or attributed to the corporation or its employees.

The FDIC is proposing to adopt the FSLIC's position on this issue since, in the the FDIC's experience, it is often extremely difficult to determine whether the employer or employees have a greater ownership interest in the overfunded portion of a pension plan deposit. In addition, the FDIC believes that adopting the FSLIC's position will simplify the deposit insurance determinations on pension plan deposits and thus will enable the FDIC to expedite the payment of the insured portions of such deposits. For these reasons, the proposed provision provides that the overfunded portion of a pension plan deposit would be insured in the amount of up to $100,000 and that such deposit insurance would be separate from the insurance provided for any other funds owned by, or attributed to, the corporation or its employees.

Deposits of Deferred Compensation Plans

The FDIC has taken the psoition that deposit accounts established pursuant to a deferred compensation plan for the employees of a state government, local government or tax-exempt organization, which qualifies under section 457 of the Internal Revenue Code ("IRC"), 26 U.S.C 457 (a "457 Plan"), are entitled to insurance coverage of up to $100,000 in the aggregate, but that such accounts are not entitled to insurance coverage on a per-participant basis. The FSLIC had insured such accounts on a per-participant basis. An FSLIC regulation provided, in relevant part, that "* * * all trust estates as defined in 561.4(b) of this subchapter shall be added together and insured separately up to an additional $100,000." 12 CFR 564.10(c). The term "trust estate" was defined to include "the interest of a participant in a deferred compensation plan, which plan shall be considered a trust for purposes of applying 564.10 of this subchapter." 12 CFR 561.4(b). The staff of the FSLIC had interpreted those provisions to mean that the interest of each 457 Plan participant in the deposits of the plan would be insured up to $100,000, separately from any other deposits maintained by the employer or plan participant at the same insured institution.

The FDIC is proposing to codify its existing staff position which is that 457 Plan deposits will be insured in the amount of up to $100,000 in the aggregate, but will not be insured on a per-participant basis. This proposed provision is based on the fact that the funds of such plans are required, by section 457 of the IRC, to "remain (until made available to the participant or other beneficiary) solely the property and rights of the employer * * * subject only to the claims of the employer's general creditors." 26 U.S.C. 457(b)(6). Since the employer, rather than the employees, is deemed to be the sole owner of the funds until they are distributed, the FDIC believes that the employees (the participants) do not have any ownership interests in the funds upon which insurance coverage could be based and thus the funds cannot be insured on a per-participant basis. In addition, since the funds deposited pursuant to a 457 Plan belong to the employer (*i.e.*, the state government, local government or tax-exempt organization) those funds would be combined for insurance purposes, under the proposed amended regulations, with any other deposits of a like kind (*i.e.*, demand deposits or time and savings deposits, as the case may be) maintained by the same official custodian of a state or local government at the same insured depository institution or, in the case of a tax-exempt organization, with any other deposits of the organization at the same insured depository institution.

Aggregation of IRA and Keogh Accounts

Under existing regulation, the FDIC has taken the position that deposits of Individual Retirement Accounts ("IRA accounts") and Keogh accounts maintained at the same insured bank would be, in most cases, separately insured up to $100,000 each. However, in cases where the depositor is an employer (owner-employee) who has set up a Keogh account in the same bank where he/she maintains an IRA account, the FDIC has aggregated the IRA and Keogh accounts for insurance purposes. The FSLIC maintained the position that IRA and Keogh accounts would be, in all cases, insured separately up to $100,000 per account.

The FDIC is proposing to adopt the FSLIC's position with respect to the aggregation, for deposit insurance purposes, of IRA and Keogh accounts. Under the proposed amended regulations, IRA and Keogh accounts would, in all cases, be separately insured from each other and from all other accounts maintained by the settlors, trustees and beneficiaries of such plans at the same insured depository institution. This proposal is being made in the interest of uniformity and because the FDIC believes that the proposed change would simplify, and thus expedite, the deposit insurance determination for such accounts.

Public Unit Accounts

The FDIC's current regulation concerning the deposit insurance afforded to public unit accounts (12 CFR 330.8) provides that each official custodian of a public unit depositing funds in an insured bank in the state comprising the public unit or wherein the public unit is located will be separately insured for (1) up to $100,000 in the aggregate for all time and savings deposits; and (2) up to $100,000 in the aggregate for all demand deposits. For deposits in an insured bank outside of the state comprising the public unit or wherein the public unit is located, the existing regulation provides that each official custody will be insured for up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits. This regulation has been based on section 11(a) of the FDI Act (12 U.S.C. 1821(a)), which the FDIC staff has interpreted as mandating the aforementioned deposit insurance coverage for public unit accounts maintained with FDIC-insured banks.

An FSLIC regulation (12 CFR 564.8) provided that each official custodian of a public unit is entitled to deposit insurance coverage of up to $100,000 in the aggregate for all of the custodian's deposits in an FSLIC-insured savings institution, regardless of the type of deposit or the location of the insured institution. This regulation was based on section 1724 of Title IV of the National Housing Act (12 U.S.C. 1724) which the FSLIC had interpreted as requiring the above-noted insurance coverage.

Section 407 of the FIRRE Act repealed Title IV of the National Housing Act (12 U.S.C. 1724 *et seq.*). Moreover, section 211 of the FIRRE Act, in conjunction with section 201 of the FIRRE Act, amended section 11(a) of the FDI Act (12 U.S.C. 1821(a)) so that it now applies to deposits in all insured depository institutions. As amended, the FDIC believes that section 11(a) of the FDI Act (12 U.S.C. 1821(a)) requires that each official custodian of a public unit

depositing funds in an insured depository institution in the state comprising the public unit or wherein the public unit is located must be separately insured for (1) up to $100,000 in the aggregate for all time and savings deposits; and (2) up to $100,000 in the aggregate for all demand deposits. For deposits in an insured depository institution outside of the state comprising the public unit or wherein the public unit is located, the statutory provision mandates that each official custodian be insured for up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits. Accordingly, the proposed amended public unit regulation provides for such insurance coverage for public unit accounts maintained at any insured depository institution.

Separate Insurance for Deposits in Merged Institutions

Prior to the enactment of the FIRRE Act, section 8(q) of the FDI Act (12 U.S.C. 1818 (q)) provided that whenever an insured bank assumed the deposit liabilities of another insured bank, the separate insurance of the assumed deposits continued for six months from the date of the assumption, or in the case of a time deposit, the earliest maturity date after the expiration of the six-month period. A FSLIC statutory provision (12 U.S.C. 1728(a)) contained virtually identical language. With respect to time deposits that mature within the six-month period, the FDIC staff has interpreted section 8(q) of the FDI Act (12 U.S.C. 1818(q)) to mean that if such deposits are renewed for the same term and in the same dollar amount (either with or without accrued interest), then the separate insurance would continue until the first maturity date after the six-month period. By contrast, the FSLIC interpreted its statutory provision (12 U.S.C. 1728(a)) to mean that the separate insurance for time deposits in a merger situation terminated upon the first maturity date following the merger. Threfore, if a time deposit matured within the six-month period following a merger, the FSLIC maintained that the depositor could not extend the separate insurance coverage by renewing the deposit on the same terms and conditions.

The FDIC is proposing to adopt and incorporate its existing staff interpretation concerning the continuation of separate insurance for time deposits that mature within the six-month period into a new provision which explains the separate insurance provided when one insured depository institution assumes the deposit liabilities of another insured depository institution. The proposed new provision expressly provides that if a time deposit matures within six months of the date the deposit liabilities of an insured depository institution are assumed, and it is renewed at the same dollar amount (either with or without accrued interest having been added to the principal amount) and for the same term as the original deposit, the separate insurance continues until the first maturity date after the expiration of the six-month period. Moreover, the proposed new provision provides that time deposits which mature within the six-month period and are renewed on any other basis, or that are not renewed and thereby become demand deposits, would be separately insured only until the end of the six-month period.

Unit Investment Trust Deposits

A current FDIC regulation governing the deposit insurance provided for corporate accounts (12 CFR 330.5(b)) provides that trusts which are registered or subject to registration under section 8 of the Investment Company Act of 1940 (the "40 Act") shall be treated as corporations for the purpose of determining insurance coverage on the trust's accounts. Unit investment trusts, which usually consist of a pool of securities including time deposits of the same or nearly the same maturity dates, are generally registered or subject to registration under the 40 Act and thus have been treated as corporations for insurance purposes. Consequently, a unit investment trust's deposits in an FDIC-insured bank have been added together and insured up to $100,000 in the aggregate.

The FSLIC did not have a comparable regulation governing the deposits of entities registered or subject to registration under the 40 Act. The FSLIC treated deposit accounts of unit investment trusts as revocable or irrevocable trust accounts and insured them in the amount of up to $100,000 for the interest of *each* beneficiary of (investor in) such trusts. However, to the extent that a beneficiary maintained other individually owned (single ownership) accounts at the same insured institution, the FSLIC aggregated the beneficiary's interest in the unit investment trust deposit with those other accounts for deposit insurance purposes.

Pursuant to a petition for rulemaking, the FDIC published a proposed rule on October 12, 1988 (at 53 FR 39746) which, had it been adopted, would have resulted in unit investment trust deposits being insured on a "pass-through" basis in the amount of up to $100,000 for the interest of each beneficiary in the deposits. The comments received by the FDIC provided no compelling reasons why the FDIC should afford pass-through deposit insurance coverage to unit investment trust deposits at FDIC-insured banks. Moreover, Congress has recently expressed concern about such an expansion of the scope of deposit insurance coverage. For these reasons, the FDIC is proposing to maintain the current level of deposit insurance for unit investment trust deposits at FDIC-insured banks (which is up to $100,000 in the aggregate) and, for the sake of uniformity, apply this rule to deposits at all FDIC-insured depository institutions (including savings institutions that were previously insured by the FSLIC).

It also should be noted that section 220(b)(2) of the FIRRE Act requires the FDIC to prepare a report for Congress containing the FDIC's findings and recommendations concerning, *inter alia*, the pass-through of deposit insurance to individual investors in unit investment trusts. The report must contain the FDIC's assessment of the potential effects of broadening deposit insurance coverage on the safety of the insurance funds and the operation of capital markets. In light of this required study and report on "pass-through" insurance coverage, the FDIC believes that it would be inappropriate, at this time, to proceed with the proposal to change the amount of deposit insurance which is provided for deposits of unit investment trusts at FDIC-insured banks. Accordingly, the FDIC is proposing to withdraw the proposed rule. Upon completion of the study and report, the FDIC may propose a rule which would change the deposit insurance provided for unit investment trust deposits at all insured depository institutions based upon the conclusions of the study.

Certificates of Deposit Used to Fund Life Insurance or Annuity Contracts

Life insurance companies maintain deposit accounts at insured depository institutions in order to fund various life insurance or annuity contracts. Many states have enacted statutes which specifically govern deposit accounts intended to fund life insurance or annuity contracts. These statutes are known as "separate account" statutes because they require that insurance companies establish separate accounts for the purpose of funding obligations arising from certain life insurance or annuity contracts. Typically, these statutes require not only separate accounts, but also provide that the insurance company is deemed to hold

legal title to the funds in such separate accounts and may not act as trustee with respect to such funds.

The FSLIC had issued an interpretive rule (12 CFR 570.13) codifying earlier staff interpretations, which provided that funds credited to a separate account pursuant to an annuity contract would not be treated as trust funds for deposit insurance purposes. In an interpretive letter, a staff member of the Federal Home Loan Bank Board stated the FSLIC's position that the insurance company was the insured party and thus such accounts would be aggregated with all other corporate or unincorporated association accounts held by the same company at the same institution and insured up to $100,000.

The FDIC staff has taken the position that certificates of deposit used to fund annuity contracts are entitled to insurance coverage in the amount of up to $100,000 per annuitant, according to the interest of each annuitant therein. This position has been based on the fact that the typical state law requires that insurance companies maintain separate deposit accounts which cannot be charged with liabilities arising out of any other business of the insurance company and cannot be invaded by other creditors of the insurance company in the event that the company becomes insolvent and its assets are liquidated. These characteristics have served as the basis for the FDIC's position that such deposits are held in a separate "right and capacity" and thus are eligible for insurance coverage on a per-annuitant basis.

For these reasons, the FDIC is proposing to formally adopt its existing staff position with respect to the deposit insurance afforded for accounts established to fund life insurance or annuity contracts. The proposed new provision provides that funds deposited by a life insurance company or other corporation for the sole purpose of funding life insurance or annuity contracts and any benefits incidental to such contracts shall be insured in the amount of up to $100,000 per annuitant, provided that, pursuant to a state statute, (1) the corporation establishes a separate account for such funds; (2) the account cannot be charged with the liabilities arising out of any other business of the corporation; and (3) the account cannot be invaded by other creditors of the corporation in the event that the corporation becomes insolvent and its assets are liquidated. In addition, the proposed new subsection indicates that such insurance shall be separate from the insurance provided for any other accounts maintained in a different right and capacity at the same insured institution.

Accounts held by Insured Depository Institutions in Fiduciary Capacities

Prior to the enactment of the FIRRE Act, section 7(i) of the FDI Act (12 U.S.C. 1817(i)) provided that funds held by an insured bank in a fiduciary capacity (e.g. as trustee, executor, administrator, guardian or agent), whether held in its trust department, any other department of the fiduciary bank or in another insured bank, would be insured in the amount of up to $100,000 for each trust estate represented. Section 7(i) further provided that such insurance coverage would be separate from, and additional to, the insurance provided for any other deposits of the owners or beneficiaries of such funds. Although such separate insurance coverage has been provided by the FDIC for deposits in FDIC-insured banks, no such insurance coverage was provided by the FSLIC for deposits in FSLIC-insured savings institutions. This was most likely because there was no statutory provision, comparable to section 7(i) of the FDI Act, which provided for separate insurance coverage when a savings institution acted in a fiduciary capacity. Section 208 of the FIRRE Act amended section 7(i) of the FDI Act so that it now applies to deposits in all insured depository institutions. Consequently, the FDIC is proposing to adopt a new regulation which provides separate insurance coverage, in the amount of up to $100,000 for each owner or beneficiary represented, when funds are held by any insured depository institution in a fiduciary capacity.

B. Summary of Other Amendments

In addition to the amendments being proposed to resolve the differences between the FDIC's regulations, principles and interpretations for deposit insurance coverage and those of the former FSLIC (which are outlined above), the FDIC is proposing numerous other amendments to its existing deposit insurance regulations. The FDIC believes that these other amendments are necessary to, in essence, update the FDIC's regulations which have not been substantially modified or revised since they were initially adopted in 1967. Since the regulations were initially adopted, the complexity of financial transactions has increased markedly, there has been a proliferation of new products offered by financial institutions, and the FDIC has gained considerable experience in paying off insured deposits at failed financial institutions. For these reasons, the FDIC is proposing to reorganize its deposit insurance regulations, rewrite many of the existing provisions to simply and/or clarify their meanings and add certain new provisions. The FDIC is also proposing to use gender-neutral language throughout its deposit insurance regulations. The existing regulations contain numerous references to "he," "him," "his" and other terms which refer to males. The proposed amended regulations employ only gender-neutral terms or refer to both males and females (e.g. his or her). The following is a section-by-section analysis of the other major proposed amendments to the deposit insurance regulations, excluding the proposed amendments discussed above:

Definitions

The FDIC is proposing to define the phrase "deposit account records." This phrase has been utilized throughout the existing regulations and would continue to be used in the amended regulations, to describe the type of records maintained by an insured depository institution that the FDIC will consider when determining ownership of funds for deposit insurance purposes. The FDIC has been relying on staff interpretations of that phrase and the proposed definition would be a codification of those interpretations. Under the proposed amended regulations, the phrase "deposit account records" is defined to mean account ledgers, signature cards, certificates of deposit, passbooks, corporate resolutions authorizing accounts and other books and records of an insured depository institution, including records maintained by computer, which relate to the insured depository institution's deposit taking function. The proposed definition would, however, expressly exclude account statements, deposit slips, items deposited or cancelled checks from the definition of "deposit account records." This is because the FDIC believes that when other records of an insured depository institution clearly and unambiguously establish the ownership of deposited funds, the excluded records (which show the manner in which an account was used) should not be permitted to contradict those other records of the depository institution.

The FDIC is also proposing to use the term "default" throughout the proposed amended regulation and to define that term, which does not appear in the existing regulations. The term "default" is utilized throughout the FDI Act, as amended by the FIRRE Act, and it is defined in the new section 3(x) of the FDI Act (12 U.S.C. 1813(x)) to mean "any

adjudication or other official determination by any court of competent jurisdiction, the appropriate Federal banking agency, or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured depository institution or, in the case of a foreign bank having an insured branch, for such branch." In the proposed amended regulations, the term "default" is defined to have the same meaning as provided under section 3(x) of the FDI Act, 12 U.S.C. 1813(x).

Another new phrase employed throughout the FIRRE Act and these proposed amended regulations is the phrase "insured depository institution." consistent with the definition of that term under section 204(c) of the FIRRE Act, the proposed amended regulations define "insured depository institution" to mean any bank or savings association whose deposits are insured pursuant to the FDI Act, including a foreign bank having an insured branch.

The FDIC is also proposing to use and define the term "natural person" in the proposed amended regulations. That term is defined in the Definitions Section of the proposed amended regulation to mean a human being. The purpose of utilizing and defining this term is to make clear that corporations, partnerships and other entities are not entitled to separate insurance coverage for any funds they may hold in single ownership or joint ownership accounts.

The FDIC is also proposing to codify an existing staff interpretation of the term "trust estate," which appears in section 7(i) of the FDI Act (12 U.S.C. 1817(i)). The proposed amended regulations define the term "trust estate" to mean the determinable and beneficial interest of a beneficiary or principal in trust funds. The proposed provision expressly excludes from the definition of "trust estate" the beneficial interest of an heir or devisee in a decendent's estate. The FDIC believes that this proposed new definition is necessary to eliminate uncertainties as to the meaning of the term "trust estate" and to carry out the intent of Congress in enacting section 7(i) of the FDI Act (12 U.S.C. 1817(i)).

Other newly defined terms are from the FDI Act and their definitions are simply re-iterated in the proposed amended regulations. These include the term "deposit," which is defined as having the same meaning as provided under section 3(*l*) of the FDI Act (12 U.S.C. 1813(*l*)); the term "insured deposit," which is defined as having the same meaning as that provided under subsection 3(m)(1) of the FDI Act (12 U.S.C. 1813(m)(1)); the term "trust funds" which has the same definition as provided under section 3(p) of the FDI Act (12 U.S.C. 1813(p)); and the term "insured branch" which has the same definition as provided under section 3(s) of the FDI Act (12 U.S.C. 1813(s)).

Authority and Purpose

The proposed amended regulations contain a new section which outlines the FDIC's authority for, and the purpose of, its deposit insurance regulations. This new section (§ 330.2) recites the requirement of section 402(c)(3) of the FIRRE Act that the FDIC promulgate uniform deposit insurance regulations for deposits in all insured depository institutions. This section also cites the FDIC's general authority, which is derived from sections 3(m) and 12(c) of the FDI Act (12 U.S.C. 1813(m), 1822(c)), to clarify and define, by regulation, the extent of deposit insurance coverage resulting from certain provisions of the FDI Act. The general purpose of the deposit insurance regulations is stated in the proposed new section as follows: to clarify the rules and define the terms employed in affording deposit insurance coverage under the FDI Act and provide rules for the recognition of deposit ownership in various circumstances.

General Principles

The FDIC is proposing to add a new paragraph to the section which enumerates general principles for deposit insurance coverage to more fully describe the concept of "ownership rights and capacities." That concept has served as the fundamental basis for insuring some accounts separately from other accounts and it is mentioned, although not defined, in § 330.1(a) of the current regulations (12 CFR 330.1(a)). The proposed new paragraph provides that deposits maintained in the same right and capacity are those maintained by or for the benefit of the same depositor or depositors. With respect to deposits maintained in the same right and capacity, the proposed paragraph provides that they shall be added together and insured up to $100,000 in the aggregate. The different rights and capacities in which deposits may be held, for deposit insurance purposes, are only those which are outlined in the proposed amended regulations. With respect to deposits held in different rights and capacities, the proposed provision states that they shall be separately insured. This proposed new paragraph merely codifies existing FDIC staff interpretations of the phrase "rights and capacities."

The FDIC is also proposing to add a new paragraph to the general principles section which explains the difference between the deposit insurance afforded to deposits in two or more separately chartered and insured depository institutions and that which is afforded to deposits in two or more offices or branches of the same insured depository institution. This section explains that when a depositor maintains deposits at two or more separately chartered and insured depository institutions, the deposits will be separately insured but when deposits are maintained at two or more offices or branches of the same insured depository institution they will be aggregated for insurance purposes. The subject of this new paragraph is among the most frequently asked questions about deposit insurance coverage and thus the FDIC is proposing to include an explanation of the subject in its regulations.

Another new paragraph being proposed concerns deposits maintained by foreigners and deposits denominated in foreign currency. This new paragraph is being proposed to explain that deposits maintained by any person or entity (regardless of nationality) and deposits maintained in freely convertible foreign currency are insured deposits and thus are entitled to the deposit insurance coverage provided by the FDI Act and the regulations promulgated pursuant thereto. This proposed provision also specifies the exchange rates to be used for the purpose of converting deposits denominated in foreign currency. The proposed rates to be used are the 12 p.m. rates (the "noon buying rates for cable transfers") quoted for major currencies by the Federal Reserve Bank of New York on the date of default of the insured depository institution.

The FDIC is also proposing to incorporate a new paragraph into the general principles section which concerns deposits payable solely outside the United States and its territories/possessions. This new paragraph, which basically reiterates the provisions of section 3(1)(5)(A) of the FDI Act (12 U.S.C. 1813(1)), excludes any obligation of an insured depository institution which is payable solely at on office of such institution located outside the States of the United States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands, from being a "deposit" for purposes of the regulations. The FDIC believes that this result is mandated by section 3(1)(5)(A) of the FDI Act (12 U.S.C. 1813(1)(5)(A)).

The FDIC is similarly proposing to incorporate a new paragraph into the General Principles section which excludes an "international banking facility time deposit" from being a "deposit" for the purposes of the regulations. The term "international banking facility time deposit" is defined by reference to the definition of that phrase prescribed by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR 204.8(a)(2)). This proposed new paragraph essentially reiterates the provisions of section 3(*l*)(5)(B) of the FDI Act (12 U.S.C. 1813(*l*)(5)(B)) and the FDIC believes that the proposed exclusion of international banking facility time deposits is mandated by the statutory provision.

The proposed amended regulations also inlcude a new paragraph to explain the provisions of section 8(q) of the FDI Act (12 U.S.C. 1818(q) and to codify existing staff interpretations of that statutory provision. Section 8(q) provides that whenever the deposit liabilities of one or more insured depository institutions are assumed by another insured depository institution, the separate insurance of the deposits so assumed continues for six months from the date such assumption takes effect or, in the case of a time deposit, the earliest maturity date after the six-month period. 12 U.S.C. 1818(q). The FDIC staff has interpreted this provision to provide for the continuation of such separate insurance, under certain circumstances, for certificates of deposit that mature and are renewed during the six-month period (said interpretations are outlined above). The FDIC is proposing to add this new paragraph explaining the separate insurance coverage provided in merger situations because its staff receives numerous inquiries concerning the application of section 8(q) of the FDI Act (12 U.S.C. 1818(q) in such situations.

The FDIC is proposing to change the current statement in its regulations concerning the appication of state of local law to deposit insurance determinations. The current statement, which appears in § 330.1(a) of the FDIC's existing regulations (12 CFR 330.1(a)), provides that "[i]nsofar as rules of local law enter into such determinations, the law of the jurisdiction in which the insured bank's principal office is located shall govern, except where the insured bank is an insured branch of a foreign bank, in which case the law of the jurisdiction where the insured branch is located shall govern." The FDIC is proposing to modify this statement to describe, with greater precision, the extent to which state law is applicable in deposit insurance determinations. Specifically, the proposed provision indicates that ownership under state law may be a necessary condition, but not always a sufficient condition, for deposit insurance. Moreover, the provision expressly recognizes that the deposit account records of an insured depository institution, recordkeeping requirements, other regulations, and the need for uniform national rules, are partially preemptive of state law. This proposed revised statement on the application of state or local law to deposit insurance determinations constitutes a codification of the FDIC's current staff position on the subject.

A restatement of the FDIC's existing regulation which governs determinations of the amounts of deposits (12 CFR 330.15) is also being proposed. This restatement is being proposed to clarify the basis upon which interest will be calculated by the FDIC in determining the amount of a deposit prior to determining the deposit insurance which will be afforded to the deposit. This proposed restatement is written so as to exclude, from the amount of a deposit, any amount of interest which an insured depository institution in default would not have been obligated to pay if the deposit had matured on the date of default of the insured depository institution and said institution had not failed.

Recognition of Deposit Ownership and Recordkeeping Requirements

The FDIC's existing deposit insurance regulations do not clearly specify the types of evidence that the FDIC will consider in determining the manner in which deposits are owned for purposes of making insurance determinations. A new paragraph is being proposed to outline the FDIC's existing policies concerning the types of evidence that the FDIC will consider in determining the manner in which deposits are owned for deposit insurance purposes. The FDIC's basic persumption has been that funds are owned in the manner indicated on the deposit account records of the depository institution. In cases where such records are clear and unambiguous, the FDIC has not permitted depositors to present any other records to prove that the ownership of funds is, in reality something other than what is indicated on the deposit account records. In cases where the deposit account records have been ambiguous or unclear as to the manner in which funds are owned, the FDIC has permitted depositors to present evidence other than the deposit account records to prove the manner in which the funds are owned for deposit insurance purposes. Moreover, in case where the FDIC has had reason to believe that the deposit account records misrepresented the actual ownership of deposited funds and such misrepresentation would have increased the amount of deposit insuance to which the depositors were entitled, the FDIC has considered evidence other than the deposit account records to establish ownership of the funds and has paid claims for insured deposits on the basis of the actual, rather than the mispresented, ownership. The FDIC is proposing to continue, and codify into these proposed amended regulations, its policies concerning the type of evidence that the FDIC will take into account in determining the ownership of deposits of purposes of determining insurance coverage.

The FDIC is also proposing a revision of its interpretive regulation regarding the methods by which ownership interests in custodial accounts may be calculated for deposit insurnace purposes (12 CFR 330.101). The existing provision, which interprets the requirements of § 330.1 of the FDIC's existing regulations (12 CFR 330.1), permits ownership interests in custodial accounts to be calculated on a fractional or percentage basis. The proposed provision, which is a paragraph in the new section entitled "Recognition of Deposit Ownership and Recordkeeping Requirements," is intended to be substantively identical to the existing rules. The proposed provision is, however, more abbreviated than the existing provision. Since certain parts of the existing interpretive regulation have been incorporated elsewhere in the proposed amended regulations, the FDIC believes that it is unnecessary to include such parts in this proposed provision.

The FDIC is also proposing to modify its existing recordkeeping regulations which require the disclosure of fiduciary relationships and the maintenance of certain records, in order for a depositor to obtain what is known as "pass-through" insurance coverage for the beneficial owners of funds being held by a fiduciary (e.g., a trustee, agent, nominee, guardian, executor or custodian). One paragraph of the current deposit insurance regulations (12 CFR 330.1(b)(1)) requires that the existence of fiduciary relationships be disclosed on the deposit account records of an insured bank. The FDIC is proposing to modify that provision so as to provide that fiduciary relationships must be expressly disclosed, by way of specific references, on the deposit account records of an insured depository

institution. This new requirement can be satisfied by using the terms "trustee," "agent," "nominee," "guardian," "executor," "custodian" or similar terms in the title of an account. Although it is not expressly stated, the proposed provision will adopt the FDIC's existing staff position with respect to deposit account records which misstate the fiduciary relationship involved in an account (e.g. deposit account records indicating that X is acting as trustee under a trust for the benefit of Y, when in fact, X is merely an agent for Y). The FDIC currently permits depositors to prove the actual relationships involved and insures the funds in accordance with those relationships notwithstanding the fact that the actual nature of the fiduciary relationships are improperly stated on the deposit account records.

Another paragraph of the existing deposit insurance regulations (12 CFR 330.1(b)(2)) requires that the details of fiduciary relationships and the interests of other parties in fiduciary accounts must be ascertainable from deposit account records or from records maintained by the depositor in good faith and in the regular course of business. The FDIC is proposing to modify this provision to codify the current FDIC staff position which is that such records may also be maintained by some person or entity that has undertaken (by contract or otherwise) to maintain such records on behalf of the depositor. Such arrangements are common in the case of pension plans, where pension plan trustees (who are the depositors) contract with actuarial firms or plan administrators to maintain records on behalf of the pension plans.

A new paragraph is also being proposed to codify existing staff interpretations of the FDIC's recordkeeping requirements in situations where there are multiple levels of fiduciary relationships. The proposed paragraph provides two alternative methods of satisfying the recordkeeping requirements. The first method is to indicate, on the deposit account records of the insured depository institution, the existence of each level of the fiduciary relationships and to disclose, at each such level, the name(s) and interest(s) of the person(s) on whose behalf the party at that level is acting. The alternative method permits the existence of some fiduciary relationships to be revealed on records other than the deposit account records of the insured depository institution under limited circumstances.

The proposed amended regulations also retain the existing rules concerning the manner in which the FDIC treats deposits evidenced by negotiable instruments and deposit obligations for payment of items forwarded by an insured depository institution acting as an agent. With respect to deposits evidenced by negotiable instruments, the FDIC is proposing to clarify its existing rule and to codify a staff interpretation of that rule. Under the existing provision, the FDIC staff has expressed the opinion that receipt of a negotiable instrument directly from the insured bank that failed will not be considered a negotiation of the instrument for deposit insurance purposes. The proposed amended provision codifies this staff position for deposits evidenced by negotiable instruments in all insured depository institutions. The existing provision concerning deposit obligations for payment of items forwarded for collection by an insured bank acting as agent (12 CFR 330.12) has been rewritten, for clarification purposes, and included in the proposed amended regulations without any substantive changes.

Single Ownership Accounts

The FDIC is proposing to continue the basic rule that each person is entitled to insurance coverage of up to $100,000 for the total of all individually owned funds deposited in his or her name in one insured depository institution. Under existing regulations, the FDIC staff has taken the position that sole proprietorship accounts would be treated as individual or single ownership accounts and thus the FDIC has added such accounts to any other individual accounts maintained by the sole proprietor at the same insured depository institution prior to applying the $100,000 limit. The proposed amended regulation concerning the deposit insurance provided for single ownership accounts formally adopts this staff position. Moreover, the proposed amended regulation defines the term "sole proprietorship" to mean a form of business in which one person owns all of the assets of the business, in contrast to a partnership or corporation.

In addition, the FDIC is proposing to incorporate its current regulation governing the deposit insurance afforded to accounts held by executors or administrators of a decedent's estate (12 CFR 330.4) into the single ownership accounts regulation. The existing rule is restated and additional language is added in recognition that an individual may be acting as the personal representative of a decedent's estate despite the fact that he or she was not appointed as the "executor" or "administrator" of the decedent's estate. The proposed new paragraph expressly provides the same insurance coverage for a personal representative holding funds for a decedent's estate as is provided, under the existing regulation, for an executor or administrator holding funds on behalf of a decedent's estate.

Accounts Held by an Agent, Nominee, Guardian, Custodian or Conservator

Under the current regulations, the provisions relating to accounts held by agents or nominees and those held by guardians, custodians or conservators appear as part of the single ownership accounts regulation (12 CFR 330.2). The proposed amended regulations restate the existing rules, with only slight modifications, in a regulation which is separate from the regulation governing the deposit insurance provided for single ownership accounts.

Joint Ownership Accounts

The FDIC's existing joint ownership account regulation (12 CFR 330.9) provides that qualifying joint accounts shall be insured separately from the individually owned (single ownership) accounts of the co-owners. Under the existing regulation, there are two requirements for joint accounts to be deemed as valid or qualifying joint accounts: (1) each co-owner must execute a deposit account signature card; and (2) each co-owner must possess withdrawal rights. The existing regulation further provides that the signature card requirement does not apply to certificates of deposit or to deposits evidenced by negotiable instruments but such deposits must, in fact, be jointly owned. Under the proposed amended regulation, the two requirements and the exception are continued but a third requirement is added which is that all of the co-owners of the funds in joint accounts must be natural persons. The FDIC is proposing to add this new requirement to make clear that corporations, partnerships and other business entities cannot establish single ownership or joint ownership accounts to increase the amount of the deposit insurance which would otherwise be afforded to their accounts.

The proposed amended joint account regulation also expressly codifies a current FDIC staff position which is that a deposit account will be considered as a joint ownership account regardless of whether the conjunction "and" or "or" is used in the title of the account, and even when both terms are used, such as in the case of a joint ownership account with three or more co-owners.

Revocable Trust Accounts

The FDIC's existing regulation for testamentary (revocable trust) accounts (12 CFR 330.3) addresses the deposit insurance provided for accounts wherein the owner intends that, upon his or her death, the funds in the account shall belong to a named spouse, child or grandchild. The proposed amended regulation requires that the owner of a revocable trust account expressly manifest the required intention (that, upon his or her death, the funds shall belong to the owner's spouse, child or grandchild) by using such terms as "in trust for," "as trustee for," or "payable-on-death" in the title of the account. Moreover, the proposed amended regulation would mandate that the beneficiaries of such accounts be specifically named in the deposit account records of the insured depository institution. These changes are being proposed to simplify the deposit insurance determination process for revocable trust accounts and thus to expedite the payment of the insured portions of such accounts.

The FDIC is also proposing to define the terms "child" and "grandchild" which are utilized in the existing and the proposed amended revocable trust account regulation. These terms are not defined in the current regulations. Under the proposed definitions, a "child" is defined as being the natural, adopted or step- child of the owner and a "grandchild" is defined as being the natural, adopted or step- child of any of the owner's children. This represents a codification of the longstanding position that was maintained by both the FDIC staff and the FSLIC staff in interpreting their respective regulations. The FDIC staff has, in the past, suggested that the FDIC might amend its regulations to exclude step-children and step-grandchildren from the definitions and thus provide no separate deposit insurance for revocable trust accounts established for the benefit of step-children or step-grandchildren. Upon further reflection, the FDIC has determined that it would be inappropriate to distinguish between natural-born, adopted and step- children or grandchildren in providing deposit insurance for revocable trust accounts. Accordingly, the proposed amended regulation includes all such individuals within the definitions of "child" and "grandchild."

Accounts of a Corporation, Partnership or Unincorporated Association

The FDIC is proposing to modify its existing regulations which govern the deposit insurance provided for accounts maintained by corporations, partnerships or unincorporated associations (12 CFR 330.5, 330.6, 330.7). The corporate account regulation would be modified to explain the current FDIC position that separately incorporated entities are entitled to separate deposit insurance for their accounts so long as they are engaged in some "independent activity" (discussed below) but that divisions or units of one corporation, which are not separately incorporated, are not entitled to separate deposit insurance coverage for their accounts. In addition, the proposed amended regulation expressly recognizes that corporations sometimes maintain accounts in a representative or fiduciary capacity and provides that such accounts would not be insured as if owned by the corporation, but rather, they would be insured as agency accounts, according to the interests of the principals/beneficial owners therein.

In addition, the proposed amended regulations are intended to clarify the deposit insurance provided for accounts maintained by partnerships (which is currently outlined in 12 CFR 330.5(a)). The proposed provision makes clear that accounts maintained by a partnership would be separately insured from any individual (single ownership) accounts maintained by the partners within the same insured depository institution. Moreover, the proposed provision includes a new definition of the term "partnership" which is as follows: an association of two or more persons or entities formed to carry on, as co-owners, an unincorporated business for profit.

The existing regulation governing the deposit insurance afforded to unincorporated association accounts (12 CFR 330.6) would also be modified, under the proposed amended regulations, to clarify that such accounts are insured separately from any accounts maintained by the person(s) or entity(ies) comprising the unincorporated association so long as the unincorporated association is engaged in an "independent activity" (discussed below). In addition, the term "unincorporated association" is defined, for purposes of this regulation, as an association of two or more persons formed for some religious, educational, charitable, social or other noncommercial purpose.

Finally, the proposed amended regulations would modify the existing definition of the term "independent activity" (which appears at 12 CFR 330.7). Under the current definition, a corporation is deemed to be engaged in an "independent activity" when it is engaged in an activity other than one directed solely at increasing insurance coverage. Under the proposed modified definition, a corporation, partnership or unincorporated association would be deemed to be engaged in an "independent activity" as long as it was primarily operated for some purpose other than to increase deposit insurance. This change in the definition is being proposed to make it clear that entities must have some function and be engaged in some activity in order for their accounts to be separately insured; they cannot simply be "shells" created for the purpose of increasing deposit insurance coverage.

Accounts Held by Depository Institutions in Fiduciary Capacities

The FDIC is proposing to adopt a new regulatory provision to govern the deposit insurance provided for funds held by insured depository institutions which are acting in fiduciary capacities. As noted above, section 7(i) of the FDI Act (12 U.S.C. 1817(i)) provides for separate insurance coverage whenever an insured depository institution holds funds in an agency or other fiduciary capacity, whether held or deposited in any other department of the fiduciary institution, or deposited by the fiduciary institution in another depository institution.

Under section 7(i) such deposits must be insured in the amount of up to $100,000 for the interest of each owner or beneficiary represented. 12 U.S.C. 1817(i). The proposed regulation also provides methods for determining the amount of insurance coverage which would be provided for such deposits for both funds which are allocated, and those which are unallocated, by the fiduciary. If the funds are allocated to each owner or beneficiary on the books or records of the fiduciary institution, then the deposit insurance will be determined in accordance with that allocation. If the funds are unallocated (all the funds are commingled) then a particular trust estate's percentage interest in the deposit would be equal to the particular trust estate's percentage interest in the total assets held by the fiduciary institution.

Irrevocable Trust Accounts

The proposed amended regulations restate the existing regulations concerning the insurance afforded to deposit accounts established pursuant to irrevocable trust agreements for purposes of clarification. The proposed provision addresses issues which are currently addressed in two sections of the existing regulations (12 CFR 330.10,

330.1(c)). As under the existing regulations (§ 330.1(c)), in order for the interests of the beneficiaries in irrevocable trust accounts to be separately insured from any other accounts maintained by the beneficiaries with the same insured depository institution, those interests must be determinable without evaluation of any contingencies except for those covered by certain present worth tables and rules of calculation for their use as set forth in the Federal Estate Tax Regulations or any similar present worth or life expectancy tables. This rule is incorproated into the proposed regulations by providing that the only interest of a beneficiary in an irrevocable trust which qualifies for separate insurance coverage is a "non-contingent trust interest," which is defined to mean "a trust interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service."

Employee Benefit Plan Accounts

The FDIC is proposing a new regulatory provision to codify the existing FDIC policy which is to provide deposit insurance coverage for the deposits of most trusteed employee benefit plans in the amount of up to $100,000 for each participant's interest, so long as certain recordkeeping requirements are satisifed. Heretofore, the deposits of most trusted employee benefit plans have been treated by the FDIC as deposits of an irrevocable trust. The FDIC believes that, in light of the exponential growth in the number and type of employee benefit plans as well as the increased complexities of employee benefit plans, it is necessary to create a separate regulatory provision to govern the deposit insurance provided for deposits of employee benefit plans.

The proposed provision prescribes the manner in which an employee's interest in a pension plan is to be determined, for deposit insurance purposes, in the case of either a defined contribution plan or a defined benefit plan. In the case of a defined contribution plan, the value of an employee's interest in the plan would be deemed to be the beneficiary's account balance as of the date of default of the insured depository institution. In the case of a defined benefit plan, the value of an employee's interest in the plan would be deemed to be the present value of the beneficiary's interest in the plan, evaluated in accordance with whatever method of calculation such plan ordinarily uses, as of the date of default of the insured depository institution.

In addition, the proposed provision codifies the current FDIC staff position concerning the treatment of contingent interests. The current staff position is that if the employees' interests in an employee benefit plan are not capable of determination without evaluation of contingencies, or an account established for a plan includes amounts for future participants in the plan, the deposits of the plan would be aggregated and insured up to $100,000. Such deposits would not be insured on a per-participant basis.

Under the proposed amended regulations the term "employee benefit plan" is defined to mean any pension, profit-sharing or stock bonus plan established by an employer or employee organization, including plans qualifying under sections 401(a) and 401(k) of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 401(k)) but excluding any plans qualifying under section 457 of the Internal Revenue Code (26 U.S.C. 457). This definition reflects the current FDIC policy with respect to the types of employee benefit plans whose deposits have been afforded insurance coverage on a pass-through or per-participant basis. The FDIC's reasons for not providing pass-through insurance coverage for deposits of 457 Plans are outlined above.

Other terms employed in the proposed amended regulations which are specifically defined in the regulations are the terms "employee organization" and "non-contingent interest." The term "employee organization" is defined broadly in the proposed amended regulations to include, in essence, any entity which represents employees with respect to an employee benefit plan. The term "non-contingent interest" is defined as any interest in an employee benefit plan which is capable of determination without evaluation of any contingencies except for those covered by the present worth tables and the rules of calculation for their use set forth in § 20.2031–7 of the Federla Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service.

Finally, while the FDIC believes that separate deposit insurance coverage should generally be limited to the interests of participating employees in employee benefit plan accounts, there are circumstances where it might be argued that the interests of non-participants should also qualify for separate insurance coverage. For instance, where a participant's interest has been partitioned pursuant to a qualified domestic relations order issued in connection with a divorce proceeding, it may be appropriate to insure the non-participant spouse's interest separately from the interest retained by the participant spouse. Similarly, in situations where a participant has died and the employee benefit plan holds the participant's interest for future distribution to a designated non-participant beneficiary, it may be appropriate to insure the interest of the non-participant beneficiary as a benefit plan interest. Recognizing the vast array of employee benefit plan provisions and the pervasive impact that the provisions of the Internal Revenue Code have on employee benefit plans, the FDIC seeks comments on the extent to which the interests of non-participants in employee benefit plan accounts should be recognized, in the circumstances described above, for deposit insurance purposes.

IRA and Keogh Accounts

The existing provisions which outline the deposit insurance coverage provided by the FDIC for IRA and Keogh Accounts are included as part of the regulation governing the deposit insurance provided for trust accounts (12 CFR 330.10). The FDIC is proposing to adopt a separate regulatory provision to outline the rules governing the deposit insurance provided for IRA and Keogh accounts. The only substantive change in the current rules concerns the aggregation of IRA and Keogh accounts for deposit insurance purposes. As explained above, under the proposed amended regulations IRA and Keogh accounts would, in all situations, be separately insured from each other and from all other accounts maintained by the settlors, trustees and beneficiaries of such plans at the same insured depository institution. This is a change from the FDIC's rationale for proposing this change in the aggregation rules is outlined above.

Public Unit Accounts

The FDIC is proposing to modify the existing regulatory provision which enumerates the deposit insurance provided for accounts maintained by the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, or Guam, or any county, municipality, or political subdivision thereof (12 CFR 330.8(a)(4)). The proposed modification involves adding the Trust Territory of the Pacific Islands and the Commonwealth of the Northern Mariana

Islands to the list of countries, territories and possessions that are entitled to the insurance coverage provided for the deposits of the United States and other public units which are entitled to the same deposit insurance provided for the funds of the United States. The reference to "The Trust Territory of the Pacific Islands" was added after the existing regulatory provision (12 CFR 330.8(a)(4)) was adopted. The FDIC is now proposing to conform the regulation to the existing provisions of the Federal Deposit Insurance Act by adding that public unit to the list of U.S. territories and possessions which qualify for the same deposit insurance which is provided for the funds of the United States and public units located within the United States. In addition, the FDIC is proposing to add the Commonwealth of the Northern Mariana Islands to the list of public units that qualify for such insurance. This is being proposed pursuant to a Congressional Resolution which provides that the federal banking laws of the United States shall apply to the Commonwealth of the Northern Mariana Islands to the same extent as they apply to Guam (*See, Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, Pub. L. No. 94–241, 90 Stat. 263 (1976), *amended by* Pub. L. No. 98–213, 97 Stat. 1461 (1983); Pub. L. No. 99–396, 100 Stat. 837 (1986)).

The proposed amended regulations also include a new paragraph which basically reiterates the statutory provision which treats American Indian tribes as public units for deposit insurance purposes (12 U.S.C. 1821(a)(2)(A)(v)). The proposed provision states that each official custodian of funds of an Indian tribe (as defined in 25 U.S.C. 1452(c)), including an agency of the tribe that has official custody of tribal funds, would be separately insured in the amount of up to $100,000 in the aggregate for all time and savings deposits, and up to $100,000 in the aggregate for all demand deposits, which are lawfully deposited in an insured depository institution. The FDIC believes that this result is mandated by 12 U.S.C. 1821(a) and it is unclear why this provision was not included in the existing regulations.

In addition, the FDIC is also proposing to amend its public unit account regulation by adding a new paragraph to codify an existing FDIC staff interpretation of the term "official custodian." The FDIC staff has interpreted that term to mean a person who has plenary authority, including control, over funds owned by the public unit which that person is appointed or elected to serve. Moreover, the FDIC staff has expressed the opinion that a person can be said to have "control" of public funds when he or she has possession of such funds, the authority to establish deposit accounts with such funds as well as the authority to make deposits, withdrawals and disbursements of such funds. These FDIC staff positions are incorporated into the proposed amended regulations in a paragraph outlining the qualifications for a person to be deemed an "official custodian" of public unit funds for deposit insurance purposes.

Finally, the proposed amended public unit account regulation includes a new paragraph which addresses situations where there is a split of authority or control over public unit funds. Under the proposed new paragraph, if two or more persons have authority or control over the funds of a public unit (e.g. disbursement of funds requires action/consent of two or more persons), they will be treated as one "official custodian" for deposit insurance purposes. This proposed provision constitutes the formal adoption of the existing FDIC staff position with respect to the division of authority or control over public unit funds.

Revocation of Part 331

The FDIC is proposing to revoke part 331 of its Rules and Regulations (12 CFR 331) and incorporate the provisions thereof into Part 330 of the FDIC's Rules and Regulations. Under the proposed amended regulations, the allocation provisions of part 331 are incorporated, with some slight modifications, into § 330.10. In addition, the FDIC is proposing to apply the allocation provisions to funds of banks or trust companies held in a fiduciary capacity under a type of trust Created to facilitate the issuance, distribution, or servicing or corporate bonds, debentures or stock issues (commonly known as "corporate trusts"). The allocation rules are currently inapplicable to such deposits pursuant to § 331.1(c) of the existing regulations. Upon further consideration, however, the FDIC believes that there is no compelling reason why the same allocation rules that apply to other trusts should not apply to corporate trusts.

Proposed Effective Date of Amended Regulations and Proposed Grandfather Provision

Section 402(c)(5)(B) of the FIRRE Act requires that the uniform deposit insurance regulations mandated by the FIRRE Act take effect on or before the end of the 90-day period beginning on the date the uniform regulations become final. In accordance with that provision, the FDIC intends to establish an effective date for the final regulations which will be 90 days from the date that the final regulations are published in the **Federal Register**. Delaying the effective date for the maximum amount of time permitted under the statute, maximizes the time that depositors will have to learn about the changes in the deposit insurance rules and to make whatever changes in their accounts are necessary to avoid being in an uninsured position. The FDIC realizes, however, that some depositors who are adversely affected by the changes in the deposit insurance rules will have time deposits with maturity dates beyond the effective date of the amended regulations. Such depositors would then most likely be forced to choose between continuing to maintain their deposits which, as a result of the amended regulations, would be partially or wholly uninsured, or withdrawing the uninsured funds and paying a substantial early withdrawal penalty. In order to avoid placing depositors in such a difficult position, the FDIC is proposing to adopt some type of "grandfather" provision for time deposits. The FDIC is inclined to provide in the final regulations that any time deposit which is issued by an insured depository institution on or before the date that the final uniform regulations are published in the **Federal Register** would be entitled to the deposit insurance provided under the regulations currently in existence (the "old rules") or that which is provided under the amended regulation (the "new rules"), whichever is more favorable to the depositor, until the first maturity date of the time deposit. The FDIC is interested in receiving comments on the subject of what would constitute an appropriate "grandfather" provision.

Notice to Depositors of Changes in Deposit Insurance

Section 402(c)(5)(A) of the FIRRE Act requires that the uniform regulations promulgated by the FDIC must provide for effective notice to depositors of any change in deposit insurance coverage resulting from such regulations. The FDIC is proposing to require one of the following methods of notifying depositors in insured depository institutions of the changes in deposit insurance coverage which will result from the adoption of the uniform regulations.

Each depository institution could be required to include a notice stating that changes in deposit insurance coverage have been made in the two monthly

statements of account of each depositor immediately following the effective date of this rule (for which the FDIC is proposing a 90-day delayed effective date). The notice would further state that depositors interested in obtaining more information about the extent of the changes may call their depository institution or the FDIC, and the notice would provide telephone numbers for that purpose.

Alternatively, each depository institution could be required to include a pamphlet or brochure which describes the deposit insurance coverage changes in the two monthly statements of account of each depositor immediately following the effective date of this rule. The required pamphlet or brochure could be one developed by the depository institution, could be one developed by the depository institution according to a prototype provided by the FDIC, or could be one provided distribution by the FDIC.

The FDIC would additionally like comment on the following: (1) whether the FDIC should require each depository institution to designate one individual who would respond to deposit insurance coverage inquiries, be the contact person for such inquiries in the notice to depositors, and assume responsibility for keeping abreast of a deposit insurance coverage matters; and, (2) whether any notice to depositors concerning changes in deposit insurance coverage should be differentiated according to the type of depositor, e.g. depositors whose combined accounts exceed $100,000, and depositors whose account balances are less than $100,000 in the aggregate.

Regulatory Flexibility Act Statement

The Board of Directors of the FDIC hereby certifies that the proposed amended regulations will not, if promulgated, have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed amended regulations modify the rules governing the deposit insurance coverage provided for certain depositors in banks and savings institutions of all sizes. The proposed amendments do not, however, impose any additional regulatory burdens on banks or savings institutions of any size. In light of the above-noted certification, the Regulatory Flexibility Act requirements (at 5 U.S.C. 603, 604) to prepare initial and final regulatory flexibility analyses do not apply.

List of Subjects

12CFRPart 330

Bank deposit insurance, Banks, banking, Savings and loan associations.

12 CFR Part 331

Bank deposit insurance, Banks, banking, Trusts and trustees, Savings and loan associations.

The Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 330 and part 331 of title 12 of the Code of Federal Regulations as follows:

PART 331—[REMOVED AND RESERVED]

1. Part 331 is removed and reserved.

2. Part 330 is revised to read as follows:

PART 330—DEPOSIT INSURANCE COVERAGE

Sec.

330.1 Definitions.
330.2 Authority and purpose.
330.3 General principles.
330.4 Recognition of deposit ownership and recordkeeping requirements.
330.5 Single ownership accounts.
330.6 Accounts held by an agent, nominee, guardian, custodian or conservator.
330.7 Joint ownership accounts.
330.8 Revocable trust accounts.
330.9 Accounts of a corporation, partnership or unincorporated association.
330.10 Accounts held by insured depository institutions in fiduciary capacities.
330.11 Irrevocable trust accounts.
330.12 Employee benefit plan accounts.
330.13 IRA and Keogh accounts.
330.14 Public unit accounts.

Authority: 12 U.S.C. 1813, 1817, 1821, 1822.

§ 330.1 Definitions.

For the purposes of this part:

(a) "Act" means the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(b) "Default" has the same meaning as provided under section 3(x) of the Act (12 U.S.C. 1813(x)).

(c) "Deposit" has the same meaning as provided under section 3 (*l*) of the Act (12 U.S.C. 1813(*l*)).

(d) "Deposit account records" means account ledgers, signature cards, certificates of deposit, passbooks, corporate resolutions authorizing accounts in the possession of the insured depository institution and other books and records of the insured depository institution's deposit taking function, but does not mean account statements, deposit slips, items deposited or cancelled checks.

(e) "FDIC" means the Federal Deposit Insurance Corporation.

(f) "Insured deposit" has the same meaning as that provided under subsection 3(m)(1) of the Act (12 U.S.C. 1813(m)(1)).

(g) "Insured depository institution" is any depository institution whose deposits are insured pursuant to the Act, including a foreign bank having an insured branch.

(h) "Insured branch" means a branch of a foreign bank any deposits in which are insured in accordance with the provisions of the Act.

(i) "Natural person" means a human being.

(j) "Trust funds" means funds held by an insured depository institution as trustee, executor, administrator, guardian, agent or in any other fiduciary capacity.

(k) "Trust estate" means the determinable and beneficial interest of a beneficiary or principal in trust funds but does not include the beneficial interest of an heir or devisee in a decedent's estate.

§ 330.2 Authority and purpose.

Section 402(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101–73, 103 Stat. 183 (the "FIRRE Act"), requires the FDIC to promulgate uniform deposit insurance regulations for deposits in all insured depository institutions, taking into account the regulations, principles and interpretations for deposit insurance coverage established by the former Federal Savings and Loan Insurance Corporation ("FSLIC"). In addition, subsection 3(m) of the Act (12 U.S.C. § 1813(m)) vests the Board of Directors of the FDIC with the authority to clarify and define, by regulation, the extent of deposit insurance coverage resulting from subsections 3(m)(1), 3(p), 7(i) and 11(a) of the Act (12 U.S.C. 1813(m)(1), 1813(p), 1817(i), 1821(a)), and to define the terms used in those sections. Section 12(c) of the Act (12 U.S.C. 1822(c)) authorizes the Board of Directors, by regulation, to recognize as the owner of any portion of a deposit appearing on the records of an insured depository institution in default under the name other than that of the claimant, any person whose name or interest as such owner is not disclosed on the records of the institution as part owner of the deposit. The purpose of this part is to clarify the rules and define the terms employed in affording deposit insurance coverage under the Act and provide rules for the recognition of deposit ownership in various circumstances.

§ 330.3 General principles.

(a) *Ownership rights and capacities.* The insurance coverage provided by the Act and the regulations in this part is based upon the ownership rights and capacities in which deposit accounts are maintained at insured depository institutions. All deposits in an insured depository institution which are maintained in the same right and capacity (by or for the benefit of a particular depositor or depositors) shall be added together and insured in accordance with the regulations in this part. Deposits maintained in different rights and capacities, as recognized under this part, shall be insured separately from each other.

(b) *Deposits maintained in separate insured depository institutions or in separate branches of the same insured depository institution.* Any deposit accounts maintained by a depositor at one insured depository institution are insured separately from, and without regard to, any deposit accounts that the same depositor maintains at any other separately chartered and insured depository institution, even if two or more separately chartered and insured depository institutions are affiliated through common ownership. The deposit accounts of a depositor maintained in the same right and capacity at different branches or offices of the same insured depository institution are not separately insured; rather they shall be added together and insured in accordance with the regulations in this part.

(c) *Deposits maintained by foreigners and deposits denominated in foreign currency.* The availability of deposit insurance is not limited to citizens and residents of the United States. Any person or entity that maintains deposits in an insured depository institution is entitled to the deposit insurance provided by the Act and the provisions of this part. In addition, deposits denominated in a foreign currency shall be insured in accordance with the provisions of this part. Deposit insurance for such deposits shall be determined and paid in the amount of American dollars that is equivalent in value to the amount of the deposit denominated in the foreign currency as of close of business on the date of default of the insured depository institution. The exchange rates to be used for such conversions are the 12 p.m. rates (the "noon buying rates for cable transfers") quoted for major currencies by the Federal Reserve Bank of New York on the date of default of the insured depository institution.

(d) *Deposits in insured branches of foreign banks.* Deposits in an insured branch of a foreign bank which are payable by contract in the United States shall be insured in accordance with the provisions of this part, except that any deposits to the credit of the foreign bank, or any office, branch, agency or any wholly owned subsidiary of the foreign bank, shall not be insured. All deposits held by a depositor in the same right and capacity in more than one insured branch of the same foreign bank shall be added together for the purpose of determining the amount of deposit insurance.

(e) *Deposits payable solely outside of the United States.* Any obligation of an insured depository institution which is payable solely at an office of such institution located outside the States of the United States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands, is not a deposit for the purposes of this part.

(f) *International banking facility deposits.* An "international banking facility time deposit," as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR 204.8(a)(2)), or in any successor regulation, is not a deposit for the purposes of this part.

(g) *Continuation of separate deposit insurance after merger of insured depository institutions.* Whenever the liabilities of one or more insured depository institutions for deposits shall have been assumed by another insured depository institution, whether by merger, consolidation, other statutory assumption, or contract:

(1) The insured status of the institution whose liabilities have been so assumed terminates on the date of receipt by the FDIC of satisfactory evidence of such assumption; and

(2) The separate insurance of deposits so assumed continues for six months from the date of such assumption takes effect or, in the case of a time deposit, the earliest maturity date after the six-month period.

In the case of time deposits which mature within six months of the date such deposits are assumed and which are renewed at the same dollar amount (either with or without accrued interest having been added to the principal amount) and for the same term as the original deposit, the separate insurance is applicable to the renewed deposits until the first maturity date after the six-month period. Time deposits that mature within six months of the deposit assumption and that are renewed on any other basis, or that are not renewed and thereby become demand deposits, are separately insured only until the end of the six-month period.

(h) *Application of state or local law to deposit insurance determinations.* In general, deposit insurance is for the benefit of the owner or owners of funds on deposit. However, while ownership under state law of deposited funds is a necessary condition for deposit insurance, ownership under state law is not sufficient for, or decisive in, determining deposit insurance coverage. Deposit insurance coverage is also a function of the deposit account records of the insured depository institution, of recordkeeping requirements, and of other provisions of this part, which, in the interest of uniform national rules for deposit insurance coverage, are controlling for purposes of determining deposit insurance coverage.

(i) *Determination of the amount of a deposit.* (1) *General rule.* The amount of a deposit is the balance of principal and interest unconditionally credited to the deposit account as of the date of default of the insured depository institution, plus the ascertainable amount of interest to that date, accrued at the contract rate (or the anticipated or announced interest or dividend rate), which the insured depository institution in default would have paid if the deposit had matured on that date and the insured depository institution had not failed. In the absence of any such announced or anticipated interest or dividend rate, the rate for this purpose shall be whatever rate was paid in the immediately preceding payment period.

(2) *Discounted certificates of deposit.* The amount of a certificate of deposit sold by an insured depository institution at a discount from its face value is its original purchase price plus the amount of accrued earnings calculated by compounding interest annually at the rate necessary to increase the original purchase price to the maturity value over the life of the certificate.

(3) *Waiver of minimum requirements.* In the case of a deposit with a fixed payment date, fixed or minimum term or a qualifying or notice period that has not expired as of such date, interest thereon to the date of closing shall be computed according to the terms of the deposit contract as if interest had been credited and as if the deposit could have been withdrawn on such date without any penalty or reduction in the rate of earnings.

§ 330.4 Recognition of deposit ownership and recordkeeping requirements.

(a) *Recognition of deposit ownership.* (1) *Evidence of deposit ownership.* In

determining the amount of insurance available to each depositor, the FDIC shall presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution. If the FDIC, in its sole discretion, determines that the deposit account records of the insured depository institution are clear and unambiguous, those records shall be considered binding on the depositor, and no other records shall be considered, as to the manner in which the funds are owned. If the deposit account records are ambiguous or unclear as to the manner in which the funds are owned, then the FDIC may, in its sole discretion, consider evidence other than the deposit account records of the insured depository institution for the purpose of establishing the manner in which the funds are owned. Notwithstanding the foregoing, if the FDIC has reason to believe that the insured depository institution's deposit account records misrepresent the actual ownership of deposited funds and such misrepresentation would increase deposit insurance coverage, the FDIC may consider all available evidence and pay claims for insured deposits on the basis of the actual rather than the misrepresented ownership.

(2) *Recognition of deposit ownership in custodial accounts.* In the case of custodial deposits, the interest of each beneficial owner may be determined on a fractional or percentage basis. This may be accomplished in any manner which indicates that where the funds of an owner are commingled with other funds held in a custodial capacity and a portion thereof is placed on deposit in one or more insured depository institutions without allocation, the owner's insured interest in such a deposit in any one insured depository institution would represent, at any given time, the same fractional share as his or her share of the total commingled funds.

(b) *Recordkeeping requirements.* (1) *Disclosure of fiduciary relationships.* The deposit account records of an insured depository institution must expressly disclose, by way of specific references, the existence of any fiduciary relationship including, but not limited to, relationships involving a trustee, agent, nominee, guardian, executor or custodian, pursuant to which funds in an account are deposited and on which a claim for insurance coverage is based. No claim for insurance coverage based on a fiduciary relationship will be recognized if no fiduciary relationship is evident from the deposit account records of the insured depository institution.

(2) *Details of fiduciary relationships.* If the deposit account records of an insured depository institution disclose the existence of a relationship which might provide a basis for additional insurance, the details of the relationship and the interests of other parties in the account must be ascertainable either from the deposit account records of the insured depository institution or from records maintained, in good faith and in the regular course of business, by the depositor or by some person or entity that has undertaken to maintain such records for the depositor.

(3) *Multi-tiered fiduciary relationships.* In deposit accounts where there are multiple levels of fiduciary relationships, there are two alternative methods of satisfying paragraphs (b)(1) and (b)(2) of this section so as to obtain insurance coverage for the interests of the true beneficial owners of a deposit account.

(i) One method is to:

(A) Expressly indicate, on the deposit account records of the insured depository institution, the existence of each and every level of fiduciary relationships; and

(B) Disclose, at each level, the name(s) and interest(s) of the person(s) on whose behalf the party at that level is acting.

(ii) An alternative method is to:

(A) Expressly indicate, on the deposit account records of the insured depository institution, that the depositor is acting in a fiduciary capacity on behalf of certain persons or entities who may, in turn, be acting in a fiduciary capacity for others;

(B) Disclose the existence of additional levels of fiduciary relationships in records, maintained in good faith and in the regular course of business, by parties at subsequent levels; and

(C) Disclose, at each of the levels, the name(s) and interest(s) of the person(s) on whose behalf the party at that level is acting.

No person or entity in the chain of parties will be permitted to claim that they are acting in a fiduciary capacity for others unless the possible existence of such a relationship is revealed at some previous level in the chain.

(4) *Exceptions to recordkeeping requirements.* (i) *Deposits evidenced by negotiable instruments.* If any deposit obligation of an insured depository institution is evidenced by a negotiable certificate of deposit, negotiable draft, negotiable cashier's or officer's check, negotiable certified check, negotiable traveler's check, letter of credit or other negotiable instrument, the FDIC will recognize the owner of such deposit obligation for all purposes of claim for insured deposits to the same extent as if his or her name and interest were disclosed on the records of the insured depository institution: *Provided,* That the instrument was in fact negotiated to such owner prior to the date of default of the insured depository institution. The owner must provide affirmative proof of such negotiation, in a form satisfactory to the FDIC, to substantiate his or her claim. Receipt of a negotiable instrument directly from the insured depository institution in default shall, in no event, be considered a negotiation of said instrument for purposes of this provision.

(ii) *Deposit obligations for payment of items forwarded for collection by depository institution acting as agent.* Where an insured depository institution in default has become obligated for the payment of items forwarded for collection by a depository institution acting solely as agent, the FDIC will recognize the holders of such items for all purposes of claim for insured deposits to the same extent as if their name(s) and interest(s) were disclosed as depositors on the deposit account records of the insured depository institution, when such claim for insured deposits, if otherwise payable, has been established by the execution and delivery of prescribed forms. The FDIC will recognize such depository institution forwarding such items for the holders thereof as agent for such holders for the purpose of making an assignment to the FDIC of their rights against the insured depository institution in default and for the purpose of receiving payment on their behalf.

§ 330.5 Single Ownership accounts.

(a) *Individual accounts.* Funds owned by a natural person and deposited in one or more deposit accounts in his or her own name shall be added together and insured up to $100,000 in the aggregate. If more than one natural person has the right to withdraw funds from an individual account (excluding persons who have the right to withdraw by virtue of a Power of Attorney) the account shall be treated as a joint ownership account and shall be insured in accordance with the provisions of § 330.7 of this part.

(b) *Sole proprietorship accounts.* (1) Funds owned by a business which is a sole proprietorship and deposited in one or more deposit accounts in the name of the business, shall be treated as the individual account(s) of the person who is the sole proprietor, added to any other individual accounts of that person, and insured up to $100,000 in the aggregate.

(2) The term "sole proprietorship" means a form of business in which one person owns all the assets of the business, in contrast to a partnership or corporation.

(c) *Single-name accounts containing community property funds.* Community property funds deposited into one or more deposit accounts in the name of one member of a husband-wife community shall be treated as the individual account(s) of the named member, added to any other individual accounts of that person, and insured up to $100,000 in the aggregate.

(d) *Accounts of a decedent and accounts held by executors or administrators of a decedent's estate.* Funds held in the name of a decedent or in the name of the executor, administrator, or other personal representative of his or her estate and deposited into one or more deposit accounts shall be added together and insured up to $100,000 in the aggregate. Such deposit insurance shall be separate from any insurance coverage provided for the individual deposit accounts of the executor, administrator, other personal representative or the beneficiaries of the estate.

§ 330.6 Accounts held by an agent, nominee, guardian, custodian or conservator.

(a) *Agency or nominee accounts.* Funds owned by a principal or principals and deposited into one or more deposit accounts in the name of an agent, custodian or nominee, other than an insured depository institution, shall be insured to the same extent as if deposited in the name of the principal(s). When such funds are deposited by an insured depository institution acting in a fiduciary capacity, the insurance coverage shall be governed by the provisions of § 330.10 of this part.

(b) *Guardian, custodian or conservator accounts.* Funds held by a guardian, custodian, or conservator for the benefit of his or her ward, or for the benefit of a minor under the Uniform Gifts to Minors Act, and deposited into one or more accounts in the name of the guardian, custodian or conservator shall, for purposes of this part, be deemed to be agency or nominee accounts and shall be insured in accordance with paragraph (a) of this section.

(c) *Accounts held by fiduciaries on behalf of two or more persons.* Funds held by an agent, nominee, guardian, custodian, conservator or loan servicer, on behalf of two or more persons jointly, shall be treated as a joint ownership account and shall be insured in accordance with the provisions of § 330.7 of this part.

(d) *Mortgage servicing accounts.* Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of principal and interest, shall be added together and insured in the amount of up to $100,000 for the interest of each owner (mortgagee, investor or security holder) in such accounts. Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of taxes and insurance premiums shall be added together and insured in the amount of up to $100,000 for the ownership interest of each mortgagor in such accounts.

(e) *Custodial accounts for American Indians.* Paragraph (a) of this section shall not apply to any interest an individual American Indian may have in funds deposited by the Bureau of Indian Affairs of the United States Department of the Interior (the "BIA") on behalf of that person pursuant to 25 U.S.C. 162(a), or by any other disbursing agent of the United States on behalf of that person pursuant to similar authority, in an insured depository institution. The interest of each American Indian in all such accounts maintained at the same insured depository institution shall be added together and insured, up to $100,000, separately from any other accounts maintained by that person in the same insured depository institution.

(f) *Annuity Contract Accounts.* Funds held by an insurance company or other corporation in a deposit account for the sole purpose of funding life insurance or annuity contracts and any benefits incidential to such contracts, shall be insured in the amount of up to $100,000 per annuitant, provided that, pursuant to a state statute:

(1) The corporation establishes a separate account for such funds; and

(2) The account cannot be charged with the liabilities arising out of any other business of the corporation; and

(3) The account cannot be invaded by other creditors of the corporation in the event that the corporation becomes insolvent and its assets are liquidated.

Such insurance coverage shall be separate from the insurance provided for any other accounts maintained in a different right and capacity by the corporation or the annuitants at the same insured depository institution.

§ 330.7 Joint ownership accounts.

(a) *Separate insurance coverage.* Qualifying joint accounts, whether owned as joint tenants with right of survivorship, as tenants in common or as tenants by the entirety, shall be insured separately from any individually owned (single ownership) deposit accounts maintained by the co-owners. Qualifying joint accounts in the names of both husband and wife which are comprised of community property funds shall be added together and insured up to $100,000, separately from any funds deposited into accounts bearing their individual names.

(b) *Determination of insurance coverage.* All qualifying joint accounts owned by the same combinatin of individuals shall first be added together and insured up to $100,000 in the aggregate. The interests of each co-owner in all qualifying joint accounts, whether owned by the same or different combinations of persons, shall then be added together and the total shall be insured up to $100,000.

(c) *Qualifying joint accounts.* A joint deposit account shall be deemed to be a qualifying joint account, for purposes of this section, only if:

(1) All co-owners of the funds in the account are natural persons; and

(2) Each co-owner has personally signed a deposit account signature card; and

(3) Each co-owner possesses withdrawal rights on the same basis.

The requirement of paragraph (c)(2) of this section relating to account signature cards shall not apply to certificates of deposit, to any deposit obligation evidenced by a negotiable instrument, or to any account maintained by an agent, nominee, guardian, custodian or conservator on behalf of two or more persons, but all such deposits must, in fact, be jointly owned. The signatures of two or more persons on a deposit account signature card shall be conclusive evidence that the account is a joint account unless there is a contrary ownership capability stated on the signature card.

(d) *Nonqualifying joint accounts.* A deposit account held in two or more names which is not a qualifying joint account, for purposes of this section, shall treated as being owned by each named owner, as an individual, corporation, partnership, or unincorporated association, as the case may be, and the actual ownership interest of each individual or entity in such account shall be added to any other single ownership accounts of such individual or other accounts of such entity, and shall be insured in accordance with the provisions of this part governing the insurance of such accounts.

(e) *Determination of Interests.* (1) The interests of the co-owners of qualifying

joint accounts held as tenants in common, shall be deemed equal, unless otherwise stated in the insured depository institution's deposit account records.

(2) The rule set forth in paragraph (e)(1) of this section shall apply regardless of whether the conjunction "and" or "or" is used in the title of a joint deposit account, even when both terms are used, such as in the case of a joint deposit account with three or more co-owners.

§ 330.8 Revocable trust accounts.

(a) *General rule.* Funds owned by an individual and deposited into any account commonly referred to as a tentative or "Totten" trust account, "payable-on-death" account, revocable trust account, or similar account evidencing an intention that upon the death of the owner, the funds shall belong to such owner's spouse, or to one or more children or grandchildren of the owner, shall be insured in the amount of up to $100,000 in the aggregate as to each such named beneficiary, separately from any other accounts of the owner or the beneficiaries. Such intention must be manifested in the title of the account using commonly accepted terms such as, but not limited to, "in trust for," "as trustee for," "payable-on-death to," or any acronym therefor, and the beneficiaries of the account must be specifically named in the deposit account records of the insured depository institution. The settlor of a revocable trust account shall be presumed to own the funds deposited into the account.

(b) *Interests of nonqualifying beneficiaries.* If a named beneficiary of such an account is not a spouse, child, or grandchild of one or more owners, the funds corresponding to that beneficiary, who is not within the qualifying degree of kinship, shall be treated as individually owned (single ownership) accounts of such owner(s), aggregated with any other single ownership accounts of such owners, and insured up to $100,000 per owner.

(c) *Joint revocable trust accounts.* Where an account described in paragraph (a) of this section is established by more than one owner and held for the benefit of others, some or all of whom are within the qualifying degree of kinship, the respective interests of each owner (which shall be deemed equal unless otherwise stated in the insured depository institution's deposit account records) held for the benefit of each qualifying beneficiary shall be separately insured up to $100,000. However, where a husband and a wife establish a revocable trust account naming themselves as the sole beneficiaries, such account shall not be insured according to the provisions of this section but shall instead be insured in accordance with the provisions of section 330.7 of this part.

(d) *Definition of "children" and "grandchildren".* For the purpose of establishing the qualifying degree of kinship set forth in paragraph (a) of this section, the term "children" includes any natural-born, adopted and step-children of the owner and the term "grandchildren" includes natural-born, adopted, or step-children of any of the owner's children.

§ 330.9 Accounts of a corporation, partnership or unincorporated association.

(a) *Corporate accounts.* (1) The deposit accounts of a corporation engaged in any independent activity shall be added together and insured up to $100,000 in the aggregate. If a corporation has divisions or units which are not separately incorporated, the deposit accounts of those divisions or units shall be added to any other deposit accounts of the corporation. If a corporation maintains deposit accounts in a representative or fiduciary capacity, such accounts shall not be treated as the deposit accounts of the corporation but shall be treated as fiduciary accounts and insured in accordance with the provisions of § 330.6 of this part.

(2) Notwithstanding any other provision of this part, any trust or other business arrangement which has filed or is required to file a registration statement with the Securities and Exchange Commission pursuant to section 8 of the Investment Company Act of 1940 or that would be required so to register but for the fact it is not created under the laws of the United States or a state or but for sections 2(b), 3(c)(1), or 6(a)(1) of that act shall be deemed to be a corporation for purposes of determining deposit insurance coverage.

(b) *Partnership accounts.* The deposit accounts of a partnership engaged in any independent activity shall be added together and insured up to $100,000 in the aggregate. Such insurance coverage shall be separate from any insurance provided for individually owned (single ownership) accounts maintained by the individual partners. A partnership shall be deemed to exist, for purposes of this paragraph, anytime there is an association of two or more persons or entities formed to carry on, as co-owners, an unincorporated business for profit.

(c) *Unincorporated association accounts.* The deposit accounts of an unincorporated association engaged in any independent activity shall be added together and insured up to $100,000 in the aggregate, separately from the accounts of the person(s) or entity(ies) comprising the unincorporated association. An unincorporated association shall be deemed to exist, for purposes of this paragraph, whenever there is an association of two or more persons formed for some religious, educational, charitable, social or other noncommercial purpose.

(d) *Definition of "independent activity".* A corporation, partnership or unincorporated association shall be deemed to be engaged in an "independent activity," for purposes of this section, if the entity is operated primarily for some purpose other than to increase deposit insurance. The deposit accounts of an entity which is not engaged in an independent activity shall be deemed to be owned by the person or persons owning the corporation or comprising the partnership or unincorporated association, and, for deposit insurance purposes, the interest of each person in such a deposit account shall be added to any other deposit accounts individually owned by that person and insured up to $100,000 in the aggregate.

§ 330.10 Accounts held by depository institutions in fiduciary capacities.

(a) *Separate insurance coverage.* Funds held by an insured depository institution in an agency or other fiduciary capacity, whether held in its trust department, held or deposited in any other department of the fiduciary institution, or deposited by the fiduciary institution in another insured depository institution, shall be insured up to $100,000 for each owner or beneficiary represented. This insurance shall be separate from, and in addition to, the insurance provided for any other deposits of the owners or the beneficiaries.

(b) *Determination of interest.* The insurance for funds held by an insured depository institution in a fiduciary capacity shall be determined in accordance with the following rules:

(1) *Allocated funds of a trust estate.* If trust funds of a particular trust estate are allocated by the fiduciary and deposited, the insurance with respect to such trust estate shall be determined by ascertaining the amount of its funds allocated, deposited and remaining to the credit of the claimant as fiduciary at the insured depository institution in default.

(2) *Interest of a trust estate in unallocated trust funds.* If funds of a particular trust estate are commingled

with funds of other trust estates and deposited by the fiduciary institution in one or more insured depository institutions to the credit of the depositing institution as fiduciary, without allocation of specific amounts from the particular trust estate to an account in such institution(s), the deposit with respect to such estate in any insured depository institution in default will be the amount which will bear the same ratio to all unallocated funds of the trust estate for which the fiduciary is accountable as the entire unallocated trust funds to the credit of the fiduciary institution or trust company in the insured depository institution in default will bear to the entire amount of such funds so deposited by the fiduciary in all depositories (including unallocated trust funds in the fiduciary institution).

(c) *Limitation on applicability.* This section shall not apply to deposits of trust funds belonging to a trust which is classified as a corporation under § 330.9(b) of this part.

§ 330.11 Irrevocable trust accounts.

(a) *General rule.* Funds representing the non-contingent trust interest(s) of a beneficiary deposited into one or more deposit accounts established pursuant to one or more irrevocable trust agreements created by the same settlor(s) (grantor(s)) shall be added together and insured up to $100,000 in the aggregate. Such insurance coverage shall be separate from the coverage provided for other accounts maintained by the settlor(s), trustee(s) or beneficiary(ies) of the irrevocable trust(s) at the same insured depository institution. Each trust interest in any irrevocable trust established by two or more settlors shall be deemed to be derived from each settlor pro rata to his or her contribution to the trust.

(b) *Treatment of contingent trust interests.* In the case of any trust in which certain trust interests do not qualify as non-contingent trust interests, the funds representing those interests shall be added together and insured up to $100,000 in the aggregate. Such insurance coverage shall be in addition to the coverage provided for the funds representing non-contingent trust interests which are insured pursuant to paragraph (a) of this section.

(c) *Definitions of "trust interest" and "non-contingent trust interest".* For the purposes of this section:

(1) The term "trust interest" means the interest of a beneficiary in an irrevocable express trust (other than an employee benefit plan) created either by written trust instrument or by statute, but does not include any interest retained by the settlor.

(2) The term "non-contingent trust interest" means a trust interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service.

§ 330.12 Employee benefit plan accounts.

(a) *General rule.* Funds representing the non-contingent interest of a beneficiary in an employee benefit plan, which are deposited in one or more deposit accounts, shall be aggregated with any other deposited funds representing such interests of the same beneficiary in other employee benefit plans established by the same employer or employee organization and the total shall be insured up to $100,000. Such insurance coverage shall be separate from the coverage provided for other types of accounts maintained by the employer, employee organization, trustee, administrator, or beneficiary of such plan(s) at the same insured depository institution.

(b) *Determination of interests.*—(1) *Defined contribution plans.* The value of an employee's non-contingent interest in a defined contribution plan shall be deemed to be the beneficiary's account balance as of the date of default of the insured depository institution, regardless of whether said amount was derived, in whole or in part, from contributions of the employee and/or the employer to the account.

(2) *Defined benefit plans.* The value of an employee's non-contingent interest in a defined benefit plan shall be deemed to be the present value of the beneficiary's interest in the plan, evaluated in accordance with the method of calculation ordinarily used under such plan, as of the date of default of the insured depository institution.

(3) *Presumption of vested interests.* For the purposes of this section, all interests of beneficiaries in an employee benefit plan shall be deemed to be fully vested as of the date of default of the insured depository institution.

(c) *Treatment of contingent interests.* In the event that employees' interests in an employee benefit plan are not capable of evaluation in accordance with the rules contained in this section, or an account established for any such plan includes amounts for future participants in the plan, payment by the FDIC with respect to all such interests shall not exceed $100,000 in the aggregate.

(d) *Overfunded pension plan deposits.* Any portion(s) of an employee benefit plan's deposits which are not attributable to the interests of the beneficiaries under the plan shall be deemed attributable to the overfunded portion of the plan's assets and shall be aggregated and insured up to $100,000, separately from any other deposits.

(e) *Deposits of deferred compensation plans sponsored by state or local governments, or tax-exempt organizations.* Funds representing the interests of employees under a deferred compensation plan of a state or local government, or a tax-exempt organization, which plan qualifies under section 457 of the Internal Revenue Code of 1954 (26 U.S.C. 457), shall be added together and insured up to $100,000 in the aggregate. Such insurance coverage shall be separate from the insurance provided for any other accounts maintained by the state government, local government or tax-exempt organization at the same insured depository institution. Notwithstanding any other provision of this part, the interests of the individual participants in such plans shall not be separately insured.

(f) *Definitions of "employee benefit plan," "employee organization" and "non-contingent interest".* For the purposes of this section:

(1) The term "employee benefit plan" means a pension, profit-sharing or stock bonus plan established by an employer or employee organization for the benefit of employees, including plans qualifying under sections 401(a) or 401(k) of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 401(k)), but does not include any plans qualifying under section 457 of the Internal Revenue Code of 1954 (26 U.S.C. 457).

(2) The term "employee organization" means any labor union, organization, employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan.

(3) The term "non-contingent interest" means an interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax

Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables as may be published by the Internal Revenue Service.

§ 330.13 IRA and Keogh accounts.

(a) *Individual Retirement Account.* All vested interests, excluding remainder interests, of any one natural person in time and savings deposits in an insured depository institution which qualify under section 408(a) of the Internal Revenue Code of 1954 (26 U.S.C. 408(a)) shall be added together and insured up to $100,000 in the aggregate, separately from any other accounts held by, or any other interests in such accounts owned by, the beneficiary, trustee, or custodian at the same insured depository institution.

(b) *Keogh Plan accounts.* All vested interests, excluding remainder interests, of any one natural person in time and savings deposits in an insured depository institution which qualify under section 401(d) of the Internal Revenue Code of 1954 (26 U.S.C. 401(d)) shall be added together and insured up to $100,000 in the aggregate, separately from any other accounts held by, or other interests in accounts owned by, the beneficiary, trustee, or custodian at the same insured depository institution.

§ 330.14 Public unit accounts.

(a) *Extent of insurance coverage.* (1) *Accounts of the United States.* Each official custodian of funds of the United States lawfully depositing such funds in an insured depository institution shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

(2) *Accounts of a state, county, municipality or political subdivision.* Each official custodian of funds of any state of the United States, or any county, municipality, or political subdivision thereof, lawfully depositing such funds in an insured depository institution in the state comprising the public unit or wherein the public unit is located (including any insured depository institution having a branch in said state) shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

In addition, each such official custodian depositing such funds in an insured depository institution outside of the state comprising the public unit or wherein the public unit is located, shall be insured in the amount of up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(3) *Accounts of the District of Columbia.* Each official custodian of funds of the District of Columbia lawfully depositing such funds in an insured depository institution in the District of Columbia (including an insured depository institution having a branch in the District of Columbia) shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

In addition, each such official custodian depositing such funds in an insured depository institution outside of the District of Columbia shall be insured in the amount of up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(4) *Accounts of the Commonwealth of Puerto Rico and other government possessions and territories.* Each official custodian of funds of the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, Guam, or The Commonwealth of the Northern Mariana Islands, or of any county, municipality, or political subdivision thereof lawfully depositing such funds in an insured depository institution in Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, Guam, or The Commonwealth of the Northern Mariana Islands, respectively, shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

In addition, each such official custodian depositing such funds in an insured depository institution outside of the commonwealth, possession or territory comprising the public unit or wherein the public unit is located, shall be insured in the amount of up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(5) *Accounts of an Indian tribe.* Each official custodian of funds of an Indian tribe (as defined in 25 U.S.C. 1452(c)), including an agency thereof having official custody of tribal funds, lawfully depositing the same in an insured depository institution shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

(b) *Rules relating to the "official custodian".* (1) *Qualification for an "official custodian".* In order to qualify as an "official custodian" for the purposes of paragraph (a) of this section, such custodian must have plenary authority, including control, over funds owned by the public unit which the custodian is appointed or elected to serve. Control of public funds includes possession, as well as the authority to establish accounts for such funds in insured depository institutions and to make deposits, withdrawals, and disbursements of such funds.

(2) *Official custodian of the funds of more than one public unit.* For the purposes of paragraph (a) of this section, if the same person is an official custodian of the funds of more than one public unit, he or she shall be separately insured with respect to the funds held by him or her for each such public unit, but shall not be separately insured by virtue of holding different offices in such public unit or, except as provided in paragraph (c) of this section, holding such funds for different purposes.

(3) *Split of authority or control over public unit funds.* If the exercise of authority or control over the funds of a public unit requires action by, or the consent of, two or more officers, employees, or agents of such public unit, then they will be treated as one "official custodian" for the purposes of this section.

(c) *Public bond issues.* Where an officer, agent or employee of a public unit has custody of certain funds which by law or under a bond indenture are required to be set aside to discharge at maturity a debt owed to the holders of notes or bonds issued by the public unit, any deposit of such funds in an insured depository institution shall be deemed to be a deposit by a trustee of trust funds of which the noteholders or bondholders are pro rata beneficiaries, and the beneficial interest of each noteholder or bondholder in the deposit shall be separately insured up to $100,000.

(d) *Definition of "political subdivision".* The term "political subdivision" includes drainage, irrigation, navigation, improvement, levee, sanitary, school or power districts, and bridge or port authorities and other special districts created by state statute or compacts between the states. it also includes any subdivision of a public unit mentioned in paragraphs (a)(2), (a)(3) and (a)(4) of this section or any principal department of such public unit:

(1) The creation of which subdivision on department has been expressly authorized by the law of such public unit;

(2) To which some functions of government have been delegated by such law; and

(3) Which is empowered to exercise exclusive control over funds for its exclusive use.

By order of the Board of Directors.

Dated at Washington, DC., this 5th day of December 1989.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 89-29536 Filed 12-20-89; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 942

[Docket No. 902 39-9121]

RIN 0648-AB50

Cordell Bank National Marine Sanctuary Regulations

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce (DOC).

ACTION: Notice of withdrawal of proposed regulations.

SUMMARY: The National Oceanic and Atmospheric Administration, by this notice, is withdrawing its proposal to amend its regulations governing the conduct of activities in the Cordell Bank National Marine Sanctuary to prohibit hydrocarbon (*i.e.*, oil and gas) exploration, development, and production activities in any area of the Sanctuary (54 FR 22449, May 24, 1989). The Sanctuary is an area of marine waters encompassing 397.05 square nautical miles surrounding Cordell Bank, which is located approximately 50 nautical miles west-northwest of San Francisco, California. This proposal was superseded by section 2(a) of H.J. Res. 281 when it was signed into law by the President on August 9, 1989 (Pub. L. No. 101-74; 103 Stat. 554). Section 2(a) bans all oil, gas, or mineral activities in the Sanctury effective upon enactment. Section 2(b) requires the Secretary of Commerce to revise the regulations governing the conduct of activities in the Cordell Bank National Marine Sanctuary to conform to the legislative ban within 120 days of August 9. Since section 2 supersedes the previous discretionary notice-and-comment rulemaking and leaves the Secretary no discretion but to conform the existing regulations to the language of the statutory ban, no purpose would be served by allowing the notice-and-comment rulemaking to run its course. Within the 120-day allowed period, NOAA will issue a final rule making the required conforming change. The Secretary would like to thank all who have submitted written comments on the proposed rule.

FOR FURTHER INFORMATION CONTACT: Joseph A. Uravitch, Chief, Marine and Estuarine Management Division, OCRM, NOS, NOAA, 1825 Connecticut Avenue, NW., Washington, DC 20235, (202/673-5126).

Dated: December 13, 1989.

Virginia K. Tippie,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 89-29663 Filed 12-20-89; 8:45 am]

BILLING CODE 3510-08-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Test Methods for Simulating Use and Abuse of Toys, Games, and Other Articles Intended for Use by Children

AGENCY: Consumer Product Safety Commission.

ACTION: Proposed rule.

SUMMARY: The Commission proposes to amend regulations prescribing apparatus and procedure for tests to simulate use and abuse of toys and children's articles. These tests include an impact test, which consists of dropping the object to be tested from a specified height onto a specified surface a specified number of times. Existing provisions of the regulations describing the surface for the impact test specify that a ⅛-inch thickness of vinyl-asbestos tile over a base of concrete at least 2.5 inches thick will be used by the Commission when it conducts compliance testing. Vinyl-asbestos tile is no longer generally available. The Commission proposes to amend those regulations to specify a commercially available material, asbestos-free vinyl-composition tile, as the covering of the surface used for the impact test. The Commission is proposing this amendment to enable manufacturers, importers, and sellers of toys and children's articles to duplicate the surface to be used by the Commission for the impact test.

DATE: Written comments and submissions in response to this notice must be received by the Commission by March 6, 1990, to be considered in this proceeding.

ADDRESS: Comments should be mailed, preferably in five (5) copies to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 492-6800, or delivered to the Office of the Secretary, Consumer Product Safety Commission, Room 528, 5401 Westbard Avenue, Bethesda, Maryland.

FOR FURTHER INFORMATION CONTACT: Elaine A. Tyrrell, Project Manager, Office of Program Management and Budget, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 492-6554.

SUPPLEMENTARY INFORMATION:

A. Background

Provisions of the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261 *et seq.*) authorize the Commission to issue rules banning toys and children's articles which present a "mechanical hazard" during normal use or when subjected to "reasonably foreseeable damage or abuse." See sections 2(f)1(D), 2(q)(1)(A), 2(s), and 3(e) of the FHSA (15 U.S.C. 1261(f)1(D), (q)(1)(A), (s), and 1262(e)).

In 1975, the Commission issued regulations which prescribe tests to simulate normal use and reasonably foreseeable abuse to which toys and children's articles may be subjected. These regulations were issued by a notice published in the Federal Register of January 7, 1975 (40 FR 1480), and are codified at 16 CFR 1500.50 through 1500.53.

These regulations specify the apparatus and procedure which the Commission will use for a series of tests to expose potential hazards resulting from normal use or the reasonably foreseeable abuse of the item being tested. Provisions of 16 CFR 1500.51 apply to toys and other articles intended for use by children 18 months of age or less. Provisions of § 1500.52 apply to toys and other articles intended for use by children over 18 months but less than 36 months of age. Provisions of § 1500.53 apply to toys and articles intended for children over 36 months of age not over 96 months of age.

The regulations codified at 16 CFR 1500.50 through 1500.53 do not contain pass/fail criteria, and do not by themselves ban any toy or children's article. Instead, they are used in conjunction with specific banning regulations issued under the authority of the FHSA to identify toys and children's

articles which present a particular mechanical hazard.

For example, toys and other articles intended for children under three years of age which present a choking, aspiration, or ingestion hazard because of small parts are banned by provisions of 16 CFR 1500.18 and part 1501. Part 1501 prescribes a test to determine whether an article is hazardous to children younger than three years of age because the article or any of its components is too small. The test for small parts, set forth at 16 CFR 1501.4, requires the article being tested to be subjected to specified provisions of the "use and abuse" tests codified at 16 CFR 1500.51 and 1500.52. The article being tested must pass the test for small parts both before and after "use and abuse" testing. See 16 CFR 1501.4(b).

B. Impact Test

The "use and abuse" tests for each age group include an impact test. See 16 CFR 1500.51(b), 1500.52(b), and 1500.53(b). The impact test consists of dropping the article being tested from a specified height onto a specified surface a specified number of times. The surface specified for the impact tests is a ⅛-inch thickness of "type IV vinyl-asbestos tile, as specified in Federal Specification SS–T–312A," over a concrete base at least 2.5 inches thick. See 16 CFR 1500.51(b)(2), 1500.52(b)(2), and 1500.53(b)(2).

Neither the small parts regulation nor the "use and abuse" tests require manufacturers, importers, distributors, or retailers to conduct premarket testing of toys and children's articles. Instead, the FHSA and these rules provide that products must meet all applicable requirements if tested by the Commission. However, many firms that import, manufacture, or sell toys and children's articles conduct tests of the products they handle to ensure that those items comply with all applicable requirements issued under provisions of the FHSA. Additionally, many independent laboratories offer testing services to toy manufacturers and importers.

Vinyl-asbestos tile is no longer generally available. Consequently, importers and manufacturers of toys, laboratories, and other firms which test toys and children's articles are not able to construct or replace the surface specified for the impact test by 16 CFR 1500.51(b), 1500.52(b), and 1500.53(b).

The Commission has conducted a series of tests and analyses to find a commercially available material to replace vinyl-asbestos tile as a component of the surface specified for the impact test. These tests and analyses demonstrate that an impact surface consisting of vinyl-composition tile over a concrete base has the same resilience as an impact surface of vinyl-asbestos tile over concrete. Consequently, impact tests conducted by dropping an object onto a surface of vinyl-composition tile over a concrete base will yield the same results as those obtained by dropping the same object onto an impact vinyl-asbestos tile over concrete. The tests and analyses conducted by the Commission are described in a memorandum from John Preston, ESMT, to Alan Schoem, CAAL, entitled "Response to PSA Request No. 3602, Change Specification for Floor Tile Referenced in Use & Abuse Test," dated June 20, 1988; a memorandum from Carl A. Fenstermacher, ESEL, to John T. Preston, ESMT, entitled "Impact Studies on Tile Samples," dated April 27, 1987; and Engineering Laboratory Report 546403, dated April 27, 1987. These documents are available for inspection in the Office of the Secretary, Consumer Product Safety Commission, Room 528B, 5401 Westbard Avenue, Bethesda, Maryland, from 8:30 a.m. to 5 p.m., Monday through Friday.

The vinyl-composition tile tested by the Commission is described as "Type IV—Vinyl-composition, Composition 1—Asbestos-free" tile in Paragraphs 1.2 and 3.1.4 of the Federal Specification, entitled Tile, Floor: Asphalt, Rubber, Vinyl, Vinyl-Asbestos, SS–T–312B, issued on October 10, 1974, as amended by Interim Amendment-1(YD), issued on November 14, 1979. These documents may be ordered from the General Services Administration, Specifications Unit, Room 6654, 7th and D Streets SW., Washington, DC 20407. The price of the specification and amendment is currently $1.00.

For this reason, the Commission proposes to amend provisions of 16 CFR 1500.51(b)(2), 1500.52(b)(2), and 1500.53(b)(2) to specify that the surface used for the impact test shall consist of a ⅛-inch thickness of asbestos-free vinyl-composition tile, as described in the 1979 amendment of Federal Specification SS–T–312B, over a concrete base at least 2.5 inches thick.

C. Statutory Authority

Sections 10(a) of the FHSA (15 U.S.C. 1269(a)) and 30(a) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2079(a)) authorize the Commission to issue regulations for the "efficient enforcement" of the FHSA. The Commission is conducting this proceeding under the authority of section 10(a) of the FHSA in accordance with the rulemaking procedures specified by the Administrative Procedure Act (APA) (5 U.S.C. 553). Those procedures consist of publishing a notice of proposed rulemaking in the **Federal Register**; soliciting written comments from all interested parties; and issuing a final rule with an effective date at least 30 days after publication of the final rule in the **Federal Register**. As noted above, the "use and abuse" tests, set forth in 16 CFR 1500.50 through 1500.53, do not ban any toy or children's article. For that reason, provisions of section 3(e) of the FHSA (15 U.S.C. 1262(e)) for issuance of a rule to ban a toy or children's article presenting an electrical, mechanical, or thermal hazard are not applicable to this proceeding.

D. Impact on Small Businesses

Section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis of the impact of a proposed rule on small entities, including small businesses. Section 605(b) of the RFA provides that an agency is not required to prepare a regulatory flexibility analysis when the agency certifies that the rule will not, if issued, have a significant economic impact on a substantial number of small entities. In accordance with section 605(b) of the RFA, the Commission certifies that the amendment proposed below, if issued on a final basis, will not have a significant economic impact on a substantial number of small entities.

The proposal published below would substitute commercially available vinyl-composition tile for a material which is generally unavailable as a component of the surface used for the impact tests specified by 16 CFR 1500.51(b), 1500.52(b), and 1500.53(b). The Commission's purpose in this proceeding is to enable manufacturers, importers, and sellers of toys and children's articles to duplicate the impact surface to be used by the Commission when performing the "use and abuse" tests, specified by 16 CFR 1500.51 through 1500.53, if those firms elect to conduct any of those tests. As noted above, provisions of the FHSA and 16 CFR 1500.50 through 1500.53 do not require any person or firm to conduct premarket tests of any toy or children's article. Toys and children's articles must comply with applicable requirements when tested by the Commission.

If the amendment proposed below is issued on a final basis, firms which have constructed the impact surface using the vinyl-asbestos tile specified by existing provisions of the "use and abuse" tests

will not be required to replace that tile with the asbestos-free vinyl-composition tile described in this proposal. As noted above, tests and analyses performed by the Commission demonstrate that impact tests conducted by dropping objects onto a surface covered with vinyl-asbestos tile will yield the same results as those obtained dropping the same objects onto a surface covered with asbestos-free vinyl-composition tile. If the proposed amendment is issued on a final basis, the Commission will recognize impact tests conducted on a surface covered with vinyl-asbestos tile meeting the requirements of Federal Specification SS-T-312A as equivalent to impact tests conducted on a surface covered with asbestos-free vinyl composition tile.

E. Environmental Considerations

The proposed amendments fall within the categories of Commission actions described at 16 CFR 1021.5(c) that have little or no potential for affecting the human environment. The only purpose of the proposed amendments is to modify the apparatus used by the Commission to conduct one of the "use and abuse" tests, specified by 16 CFR 1500.51 through 1500.53. Because the proposal, if issued on a final basis, will not require any person or firm to change or replace the tile used to conduct the impact test, the proposed action does not have the potential for producing significant environmental effects, and neither an environmental assessment nor an environmental impact statement is required.

[Note: Although not required to do so by the proposed amendment, any firm contemplating removal of vinyl-asbestos tile should not sand that tile or its backing. Sanding vinyl-asbestos tile or its backing can place fine particles of asbestos in the air. These asbestos particles, if inhaled, may cause cancer. If removal is contemplated, contact a certified asbestos removal consultant or contractor. Do not remove tile without appropriate precautions.]

F. Effective Date

If the amendment proposed below is issued on a final basis, the Commission proposes to establish an effective date 60 days after issuance of the final amendment. That period of time will be adequate to allow the Commission to install the non-asbestos title specified by the proposed amendment, and to allow any firm or laboratory desiring to duplicate the Commission's test facility to obtain and install the same kind of tile.

G. Conclusion and Proposal

In summary, existing regulations which prescribe the apparatus to be used by the Commission when conducting "use and abuse" testing of toys and children's articles require vinyl-asbestos tile as the surface for impact tests. Firms and laboratories desiring the equipment used by the Commission for impact testing may be unable to purchase vinyl-asbestos tile. The Commission proposes to amend the regulations to prescribe a non-asbestos vinyl composition tile as the surface to be used by the Commission for impact tests.

If the amendment proposed below is issued on a final basis, the Commission will use a non-asbestos vinyl composition tile as the impact surface when conducting compliance tests of toys and children's articles. Firms and laboratories which perform "use and abuse" testing will then be able to purchase the same type of tile as that used by the Commission's laboratory. Firms and laboratories which now have facilities with an impact test surface made with vinyl-asbestos tile will not be required to purchase non-asbestos vinyl composition tile if the proposed amendment is issued on a final basis. The Commission has performed tests and analyses which demonstrate that impact tests conducted by dropping an object onto a surface of vinyl-asbestos tile will yield the same results as those obtained by dropping the same object onto a surface covered with non-asbestos composition tile.

PART 1500—[AMENDED]

Therefore, in accordance with provisions of the Federal Hazardous Substances Act (15 U.S.C. 1279(a)) and under the authority of the Consumer Product Safety Act (15 U.S.C. 2079(a)), the Commission hereby proposes to amend chapter II, subchapter C, part 1500 of title 16 of the Code of Federal Regulations, as follows:

1. The authority citation for part 1500 continues to read as follows:

Authority: 15 U.S.C. 1261–1276.

2. Section 1500.51(b)(2) is proposed to be revised as follows:

§ 1500.51 Test methods for simulating use and abuse of toys and other articles intended for use by children 18 months of age or less.

* * * * *

(b) *Impact test* * * *

(2) *Impact medium.* The impact medium shall consist of a ⅛-inch (0.3-centimeter) nominal thickness of type IV vinyl-composition tile, composition 1-asbestos free, as specified by paragraphs 1.2 and 3.1.4 of Interim Amendment–1 (YD), dated November 14, 1979, to the Federal Specification entitled Tile, Floor: Asphalt, Rubber, Vinyl, Vinyl-Asbestos, SS-T–312B, dated October 10, 1974,[1] over at least a 2.5-inch (6.4 centimeter) thickness of concrete. The impact area shall be at leat 3 square feet (0.3 square meter).

3. Section 1500.52(b)(2) is proposed to be revised as follows:

§ 1500.52 Test methods for simulating use and abuse of toys and other articles intended for use by children over 18 but not over 36 months of age.

* * * * *

(b) *Impact test.* * * *

(2) *Impact medium.* The impact medium shall consist of a ⅛-inch (0.3-centimeter) nominal thickness of type IV vinyl composition tile, composition 1-asbestos-free, as specified by paragraphs 1.2 and 3.1.4 of Interim Amendment–1 (YD), dated November 14, 1979, to the Federal Specification entitled tile, Floor: Asphalt, Rubber, Vinyl, Vinyl-Asbestos, SS-T–312B, dated October 10, 1974,[1] over at least a 2.5-inch (6.4 centimeter) thickness of concrete. The impact area shall be at least 3 square feet (0.3 square meter).

4. Section 1500.53(b) (2) is proposed to be revised as follows:

§ 1500.53 Test methods for simulating use and abuse of toys and other articles intended for use by children over 36 but not over 96 months of age.

* * * * *

(b) Impact test* * *

(2) *Impact medium.* The impact medium shall consist of a ⅛-inch (0.3-centimeter) nominal thickness of type IV vinyl composition tile, composition 1-asbestos-free, as specified by paragraphs 1.2 and 3.1.4 of Interim Amendment–1 (YD), dated November 14, 1979, to the Federal Specification entitled tile, Floor: Asphalt, Rubber, Vinyl, Vinyl-Asbestos, SS-T–312B, dated October 10, 1974,[1] over at least a 2.5-inch (6.4 centimeter) thickness of concrete. The impact area shall be at least 3 square feet (0.3 square meter).

Interested persons are invited to submit written comments by March 6, 1990. Comments may be accompanied

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[1] These documents may be ordered from the General Services Administration, Specifications Unit, Room 6654, 7th and D Streets SW., Washington, DC 20407. The price of the specification and amendment is $1.00.

by written data, views, and arguments and should be addressed to the Secretary, Consumer Product Safety Commission, Washington, DC 20207. (15 U.S.C. 1269(a); 15 U.S.C. 2079(a)).

Dated: December 12, 1989.

Sadye E. Dunn,

Secretary Consumer Product Safety Commission.

[FR Doc. 89-29371 Filed 12-20-89; 8:45 am]

BILLING CODE 6355-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 226

[Docket No. 89N-0390]

Current Good Manufacturing Practice for Type A Medicated Articles; Laboratory Controls

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing a conforming amendment for a provision of its current good manufacturing practice regulations for Type A medicated articles. The provision currently states "* * * expiration dates shall appear on the labels of the Type A medicated article(s) when needed * * *." FDA is proposing to remove the phrase "when needed" to make the provision of the regulations consistent with the agency's intent, with its interpretation that expiration dates must always appear on the labels of Type A medicated articles, and with other provisions of the regulations.

DATES: Comments by February 20, 1990.

ADDRESSES: 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: Andrew J. Beaulieu, Center for Veterinary Medicine (HFV-210), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3044.

SUPPLEMENTARY INFORMATION: In the Federal Register of March 3, 1986 (51 FR 7382), FDA published the "Second Generation" final rule which revised the procedures and requirements concerning conditions of approval for the manufacture of animal feeds containing new animal drugs. That document unequivocally states in its preamble (51 FR 7382 at 7386) that § 226.58 of the current good manufacturing practice (CGMP) regulations (21 CFR 226.58) requires expiration dates for Type A medicated articles. Currently, however, § 226.58(d) states that "Suitable expiration dates shall appear on the labels of the Type A medicated article(s) when needed to assure that the articles meet the appropriate standards of identity, strength, quality, and purity at the time of use." The "Second Generation" final rule inadvertently failed to revise § 226.58(d) by removing the phrase "when needed." Although the section contains that phrase, the agency has in several instances made clear its interpretation of § 226.58(d) as requiring that the labels of Type A medicated articles always bear expiration dates.

The "Second Generation" final rule (51 FR 7382 at 7391) did revise 21 CFR 514.1(b)(5)(x) to include the statement "Expiration dates shall be proposed for finished pharmaceutical dosage forms and Type A medicated articles." Accordingly, the agency is proposing, through notice and comment rulemaking, to amend § 226.58(d) by removing the phrase "when needed" so that the regulation conforms to the clear intent of the "Second Generation" preamble and 21 CFR 514.1(b)(5)(x). The agency has decided to rectify the discrepancy through informal rulemaking not because it feels such procedures are required but to provide additional notice and opportunity for concerned parties to comment.

Interested persons may, on or before February 20, 1990, submit to the Dockets Management Branch (address above) written comments regarding this proposal. 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 Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 226

Animal drugs, Animal feeds, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 226 be amended as follows:

PART 226—CURRENT GOOD MANUFACTURING PRACTICE FOR TYPE A MEDICATED ARTICLES

1. The authority citation for 21 CFR part 226 continues to read as follows:

Authority: Secs. 501, 502, 512, 701, 704 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351, 352, 360b, 371, 374).

§ 226.58 [Amended]

2. Section 226.58 *Laboratory controls* is amended in paragraph (d) by removing the phrase "when needed".

Dated: November 17, 1989.

Ronald G. Chesemore,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-29687 Filed 12-20-89; 8:45 am]

BILLING CODE 4160-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 89-564, RM-7016]

Radio Broadcasting Services; Forrest City, AR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of Forrest City Broadcasting Company, licensee of Station KBFC(FM), Channel 228A, Forrest City, Arkansas, seeking the substitution of FM Channel 228C3 for Channel 228A and modification of its license accordingly. Coordinates for this proposal are 34-52-36 and 90-55-00.

DATES: Comments must be filed on or before February 2, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Eugene T. Smith, Esq., 715 G Street, SE., Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89-564 adopted November 29, 1989, and released December 12, 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 by 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* contracts 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-29708 Filed 12-20-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 89-565, RM-6950]

Radio Broadcasting Services; Tahoe City, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of Mid-South Broadcasting Company, licensee of Station KRZQ-FM, Channel 243C2, Tahoe City, California, seeking the substitution of FM Channel 243C1 for Channel 243C2 and modification of its license accordingly. Coordinates for this proposal are 39-16-22 and 119-42-13.

DATES: Comments must be filed on or before February 2, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: William R. Richardson, Jr., Esq., Wilmer, Cutler & Pickering, 2445 M Street, NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89-565 adopted November 29, 1989, and released December 12, 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-29709 Filed 12-20-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 89-566, RN-7013]

Radio Broadcasting Services; Good Hope, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Community Broadcasting Company, Inc., proposing the allotment of Channel 222A to Good Hope, Georgia, as that community's first local FM service. The coordinates for the proposal are North Latitude 33-45-54 and West Longitude 83-33-45.

DATES: Comments must be filed on or before February 2, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: 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: Samuel Miller, Miller & Fields, P.C., P.O. Box 33003, Washington, DC 20033 (Attorney for petitioner).

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89-566, adopted November 29, 1989, and released December 12, 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-29710 Filed 12-20-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 89-569, RM-7025]

Radio Broadcasting Services; Belle Chasse, LA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by First Belle Chasse Media Group, proposing ths substitution of Channel 275C3 for Channel 275A at Belle Chasse, Louisiana, and the modification of its construction permit accordingly. Channel 275C3 can be allotted to Belle

Chasse consistent with the Commission's minimum distance separation requirements at a site 9.2 kilometers (5.7 miles) east of the city, at coordinates 29–52–06 and 89–53–38.

DATES: Comments must be filed on or before February 5, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: 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: David D. Oxenford, Esquire, Fisher, Wayland, Cooper & Leader, 1255 23rd Street, NW., Suite 800, Washington, DC 20037 (Counsel for petitioner).

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89–569, adopted November 30, 1989, and released December 14, 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89–29711 Filed 12–20–89; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 89–571, RM–7033]

Radio Broadcasting Services; Benton, Tn

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Stonewood Communications Corporation proposing the allotment of Channel 226A to Benton, Tennessee, as that community's first local FM service. A site restriction of 0.9 kilometers (0.6 miles) southwest of the city is required. The coordinates are 35–09–54 and 84–39–35.

DATES: Comments must be filed on or before February 5, 1990, and reply comments on or before February 20, 1990.

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: Stanley G. Emert, Jr., Esquire, Lockridge & Becker, P.C., Post Office Box 107, Knoxville, TN 37901 (Counsel for petitioner).

FOR FURTHER INFORMATION CONTACT: Particia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of proposed Rule Making, MM Docket 89–571, adopted November 30, 1989, and released December 14, 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* contractors 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89–29712 Filed 12–20–89; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 89–570, RM–7061]

Radio Broadcasting Services; Lafayette, TN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Ivan Davis proposing the allotment of Channel 281A to Lafayette, Tennessee, as that community's first local FM service. The proposed channel allotment can be made in compliance with § 73.207 of the Commission's Rules at the city reference coordinates. The coordinates are 36–31–24 and 86–01–36.

DATES: Comments must be filed on or before February 5, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners, or their counsel of consultant, as follows: Timothy K. Brady, Esquire, Post Office Box 986, Brentwood, TN 37027–0986 (Counsel for petitioner).

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89–570, adopted November 30, 1989, and released December 14, 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 no 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-29713 Filed 12-20-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR 73

[MM Docket No. 89-568, RM-7024]

Radio Broadcasting Services; Clifton, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Bosque Broadcasting Corp., proposing the substitution of Channel 277C3 for Channel 277A at Clifton, Texas, and the modification of its construction permit for Station KWOW (FM) to specify Channel 277C3. Channel 277C3 can be allotted to Clifton consistent with the Commission's minimum distance separation requirements at a site 12.7 kilometers (7.9 miles) east of the city, at coordinates 31-47-30 and 97-26-35.

DATES: Comments must be filed on or before February 2, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: 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: Arthur Blooston, Esquire, Caressa L. Davison, Esquire, Blooston, Mordkofsky, Jackson and Dickens, 2120 L Street, NW., Washington, DC 20037 (Counsel for petitioner).

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89-568, adopted November 29, 1989, and released December 12, 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-29714 Filed 12-20-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 89-567, RM-7028]

Radio Broadcasting Services; Electra, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Albert L. Crain, proposing the substitution of Channel 235C2 for Channel 236A at Electra, Texas, and the modification of his construction permit for Station KWTA(FM) at Electra to specify operation on the higher powered channel. Channel 235C2 can be allotted to Electra consistent with the Commission's minimum distance separation requirements at coordinates 34-06-03 and 98-57-15.

DATES: Comments must be filed on or before February 2, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: 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: Albert L. Crain, Route 5, Box 755-1, Byhalia, MS 38611.

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is synopsis of the Commission's Notice of Proposed Rule Making, MM Docket 89-567, adopted November 29, 1989, and released December 12, 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 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.

Karl A. Kensinger,

Chief, Allocated Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-29715 Filed 12-20-89; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 89-572; RM-7020]

Radio Broadcasting Services; Canaan, VT

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Four Seasons Communications, Inc., proposing the substitution of Channel 231C3 for Channel 231A at Canaan, Vermont, and the modification of its construction permit for Station WKQC(FM) to specify operation on the higher powered channel. The proposal could provide the community with its first wide coverage

area FM service. Channel 231C3 can be allotted to Canaan consistent with the Commission's minimum distance separation requirements at the station's current transmitter site. The coordinates are 45–01–20 and 71–25–05.

DATES: Comments must be filed on or before February 5, 1990, and reply comments on or before February 20, 1990.

ADDRESSES: 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: Timothy D. Martz, President, Four Seasons Communications, Inc., P.O. Box 36, Fairfield, CT 06430 (Petitioner).

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89–572, adopted November 30, 1989, and released December 14, 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.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89–29716 Filed 12–20–89; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 572

[Docket No. 89–11; Notice 01]

RIN 2127–AC10

Anthropomorphic Test Dummies; 9-Month-Old Child

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to establish design and performance specifications for a test dummy representing a 9-month old child. NHTSA currently sets specifications for test dummies representing a 6-month old infant and 3-year-old child, and has published proposed specifications earlier this year for a 6-year-old child dummy. NHTSA tentatively believes this array of test devices is needed to evaluate in a satisfactory manner the performance of appropriate child restraint systems when subjected to the crash forces generated by a certain group of child occupants, and the impact responses of a child restrained in a system. Research has indicated that restraint systems can differ significantly in their crash protection depending on the height and weight of the child occupant.

The specifications proposed in this notice are intended to facilitate the evaluation of crash protection afforded to children of the height and weight of an average 9-month-old. Any research into crash protection systems must have available a test instrument that provides accurate and reliable data on the level of protection provided by the system. That instrument must also be representative of the human occupant, so that researchers can understand the degree to which the system would protect its occupant in an actual crash. NHTSA tentatively concludes that the dummy described in this notice satisfies those criteria for a 9-month-old.

NHTSA is issuing this notice to solicit public comments on its tentative choice of a test dummy. If the agency adopts the dummy for research purposes, NHTSA will be able to develop test data using the dummy that would assist the agency in determining whether the dummy should be used in agency compliance testing of child restraint systems.

DATE: Comments on this notice must be received by the agency no later than March 21, 1990. The proposed effective date is 30 days after the date of publication of the final rule.

ADDRESSES: Comments should refer to the docket number and notice number and be submitted in writing to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–5267. Docket hours are 9:30 a.m. to 4 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Mr. Stan Backaitis, Office of Vehicle Safety Standards, NRM–12, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590. Telephone: (202) 366–4912.

SUPPLEMENTARY INFORMATION: This notice proposes to establish design and performance specifications for a test dummy representing a 9-month-old child. NHTSA currently sets specifications for test dummies representing a 6-month old infant and 3-year-old child (49 CFR part 572), and published proposed specifications earlier this year for a 6-year-old child dummy (54 FR 13901; April 6, 1989). NHTSA tentatively concludes an array of test devices is needed to evaluate in a satisfactory manner the capability of child restraint systems to withstand the loads generated by occupants in a crash, and the impact responses of a child restrained in a system. Research has indicated that child restraint systems can differ significantly in their occupant crash protection depending on the height and weight of the child occupant.

Background

Currently, Standard No. 213 specifies only two dummies for conducting compliance testing of child restraint systems. Selection of either of the dummies depends on the weight of the child for whom the restraint is recommended. Restraint systems that are recommended for use by children in a weight range that includes children weighing 20 pounds or less are tested by the agency with an uninstrumented dummy representing a 6-month-old infant (weighing 17.4 pounds and standing 26 inches tall). Restraints recommended for children weighing more than 20 pounds are tested with an instrumented dummy representing a 3-year-old (weighing approximately 33 pounds and standing 38 inches tall). The agency tentatively believes a 9-month old-child dummy is needed to provide information on a restraint system's effectiveness in preventing or reducing injuries for children between 18 and 25 pounds. Moreover, the proposed dummy

would be NHTSA's first instrumented test surrogate representing a child younger than 3 years old. The agency believes that the ability to measure the effects of forces imposed on a child during a crash would provide a fuller evaluation of the actual safety performance of the system.

NHTSA is issuing this proposal to acquire general information about the performance of child restraint systems for a previously-unexamined child occupant age group. In proposing to use the dummy, the agency also wishes to obtain information specific to comments NHTSA received in connection with a 1986 rulemaking amending Standard No. 213. The amendment requires most child restraint systems equipped with a tether strap to pass the 30 mile per hour (mph) compliance test with the tether strap unattached. (51 FR 5335; February 13, 1986.) A number of commenters on the proposed amendment expressed concern that, with respect to a shield-type booster seat restraint system (which is tested with the NHTSA-specified 3-year-old (33 pounds) child dummy), the shield does not provide any crotch restraint. Thus, commenters believed that it is possible that small children could submarine under the short shields on booster seats (i.e., slide too far downward underneath the shield and forward, legs first), leaving these children completely unrestrained in a crash. NHTSA stated its intention to investigate this concern about some booster seats. This notice is intended as a step toward that goal. The agency also wishes to study other potential safety problems (e.g., structural failures; dummy ejections and excessive excursions) that could arise when the restraint is occupied by a child in the weight class recommended for the restraint, but which are not readily apparent during tests using the currently-specified NHTSA child dummies. In order to explore and resolve these safety concerns, the agency needs a child surrogate, such as the proposed dummy, whose human dimensions and dynamic responses correspond to those of small children. The dummy could be used to develop improved restraints for children.

Summary of the Proposed Rule

NHTSA has tentatively chosen the design and performance specifications developed and used by the United Nations Economic Commission of Europe (ECE) for its 9-month-old child test dummy. As described in detail below in this notice, NHTSA has conducted a substantial number of tests to determine the suitability of the ECE dummy as an instrument in child protection research. The agency believes that the resulting test data shows that the ECE dummy is suitable for use.

The specifications for the 9-month-old child dummy would consist of the following two elements: a drawing package containing all of the technical details of the dummy parts and dummy assembly; and a set of master patterns for all molded and cast parts of the dummy. Those patterns make possible the rapid reproduction of those parts. In addition, there would be a user's manual, containing instructions for assembly, disassembly, use, adjustment, calibration and maintenance of dummies. These drawings and specifications would ensure that the dummies would vary little in their construction and use. Performance criteria would serve as calibration checks and further assure the uniformity of dummy assembly, construction, and instrumentation. As a result, the repeatability of performance in dynamic tests would be ensured.

The dummy would be instrumented with accelerometers for measurement of accelerations in the head and chest during impacts. The proposal specifies the manner and location of installation of the instrumentation to reduce variability in their measurements resulting from differences in location and mounting.

Drawings and specifications for the 9-month-old child dummy are available for examination in NHTSA's Docket Section. Copies of those materials and an operation and maintenance manual can be obtained from Rowley-Scher Reprographics, Inc., 1216 K St., NW., Washington, DC 20002, telephone (202) 628–6667. In addition, patterns for all cast and molded parts are available on a loan basis from NHTSA's Office of Vehicle Safety Standards.

Description

As noted above, the proposed 9-month-old child dummy is identical to the existing ECE dummy specified in ECE Regulation No. 44. The dummy has been used in dynamic compliance tests in ECE member countries since 1981. The dummy weighs approximately 20 pounds and stands 28 inches tall (its sitting height is approximately 17.7 inches). The dummy is instrumented for chest acceleration and is capable of measuring abdominal intrusion, and the accelerometer mount in the head is suitable for installation of acceleration sensors. The dummy's weight can be adjusted from 20 up to 25 pounds. It is designed and manufactured by Instituut Voor Wegtransportmiddelen (TNO), Delft, Netherlands.

NHTSA tentatively concludes that the proposed dummy's specifications are similar to those of the existing part 572 subpart B and C test dummies, in that the proposed specifications describe a dummy that is complete in its design details, can adequately withstand the test load imposed during impact testing, has accurately described body parts and size (anthropometry) and mass distribution, and can be easily instrumented for testing. It simulates the inertial and kinematic responses of a child during impact testing and produces consistent head and chest acceleration measurements during impact testing. NHTSA also tentatively concludes that adoption of the proposed dummy, as designed and manufactured by TNO, would be cost efficient since the cost of developing a new, alternative test dummy would be substantially reduced or eliminated. Adopting the ECE-specified dummy would also be consistent with NHTSA's goals of promoting international harmonization to the extent possible.

Biofidelity

Biofidelity is a measure of how human-like a test dummy would be in an impact NHTSA's evaluation of the biofidelity of the ECE dummy included examinations of the dummy's anthropometry and its kinematics and response measurements in dynamic tests. Available anthropometric data indicate that the proposed dummy corresponds well to a 50th percentile 9-month-old child. ("Physical Characteristics of Children," Report PB–242–221, Consumer Product Safety Commission; "Source Data of Infant and Child Measurements Interim Data, 1972," Bureau of Product Safety, Food and Drug Administration.) NHTSA's evaluation of the ECE dummy included high-speed motion picture photography of a dynamic test of the part 572 specified 3-year-old and 6-month-old dummies and the 9-month-old dummy. A comparison of kinematic responses of these dummies indicates that the 9-month-old surrogate is as representative of human responses as are the child dummies currently specified in part 572.

Further, the head and chest acceleration measurements of the 9-month-old dummy are reasonably equivalent to measurements obtained with the part 572 3-year-old dummy. Given the firmer and stiffer skeletal structure of a 3-year-old as compared to a 9-month-old, the acceleration pulse duration for the older surrogate should be shorter, reflecting the stiffer structure. In pendulum impact tests the pulse width of the head acceleration

response at the 20g level is 3.5 to 4.5 milliseconds for the 3-year-old dummy and 5.0 to 6.5 milliseconds for the 9-month-old dummy. For chest acceleration at the 30g level, the pulse duration for the 3-year-old is 2.5 to 4 milliseconds; for the 9-month-old, 5 to 6 milliseconds. These test results reflect directionally correct responses, and establish a reasonable correspondence between impact responses of the two dummies.

Repeatability and Reproducibility

NHTSA studied the control of the variation of dummy responses for the same device (repeatability) and among different devices (reproducibility) by comparing the coefficient of variation for a sample of data obtained by testing two dummies in five sled impacts. (Repeatability and Reproducibility of the TNO P3/4 Dummy in Frontal Impacts, (Docket 89–11, General Reference).) The dummies were each secured in a child restraint, and tested according to the conditions and procedures set forth in ECE Regulation No. 44. In these tests, the variabilities from mean values for each dummy were not greater than ±5.8 percent for head peak resultant acceleration, and ±6.5 percent for chest peak resultant acceleration measurements. The variabilities for both dummies were not greater than ±7.4 percent for head acceleration and ±5.8 percent for chest acceleration measurements. These tests show that the variability of the ECE dummy in compliance-type testing is good given that other commercially available dummies have a variability of ±10 percent, and the variability of the instrumentation system in use is about ±5 percent. Also, these results compare favorably with the measurements for the 3-year-old dummy, which has a repeatability of ±6.7 percent for the head and ±4.1 percent for the chest, and reproducibility of ±5.6 for the head and ±4.1 percent for the chest (Report DOT–HS–805–071, June 1979). The agency notes that the 3-year-old child dummy's repeatability and reproducibility have been considered fully acceptable by NHTSA and the industry for testing child restraints since 1980.

Qualification Tests

Before a test dummy can be used in a dynamic test, the dummy must be examined to determined whether it conforms to all of the specifications set out in the blueprints for the dummy. In addition, the dummy must be carefully examined to ensure that it has been correctly assembled. Finally, the test dummy must pass qualification tests to measure the performance of the test dummy in a controlled laboratory impact test. These tests ensure that the dummy responds in an accurate and reliable manner.

The agency is proposing qualification procedures that are virtually identical to those set forth for the existing 3-year-old dummy. The proposed qualification test would use readily available compliance test equipment, instrumentation and procedures that are already used in qualification testing of other part 572 test dummies. Information on part 572 testing indicates that those qualification procedures reflect well expected kinematic impact responses of the dummy in a crash environment and are also good indicators of the uniformity of performance response of individual test dummies. In tests of the 9-month-old dummy involving five tests of one dummy measuring head and chest acceleration, the calibration test data showed that the results were repeatable within 1.8 percent for head acceleration and 3.5 percent for chest acceleration. (Performance Characteristics of the Economic Commission of Europe (ECE) 9-Month-Old-Child Test Dummy (UM–HSRI–82–7.) These repeatability values are well within the repeatability norms of the other currently specified part 572 dummies.

Impact Analyses

NHTSA has considered costs and other factors associated with this proposal, and concludes that this proposed rule is neither major within the meaning of Executive Order 12291 nor significant within the meaning of the Department of Transportation's regulatory policies and procedures.

The specifications proposed in this notice are intended to facilitate the evaluation of crash protection afforded to children of the height and weight of an average 9-month-old. If this proposed rule becomes final, manufacturers would not be required to use the dummy. The rule would affect only those businesses that choose to manufacture child restraints and/or test them with the dummy. If a manufacturer wishes to use the dummy, the agency tentatively believes the tests would provide more useful data on the safety of restrained children in the 18–25 pound weight range than using any other currently-specified part 572 dummies in tests.

However, in the event NHTSA adopts the proposed dummy and finds through its use that some child restraint systems are deficient in protecting children, NHTSA would consider amending Standard 213 to use this dummy in compliance tests. The agency will evaluate the costs and other impacts of such rulemaking at that time.

NHTSA estimates the cost of a 9-month-old child test dummy to be about $4,500, based on current monetary exchange rates. The cost of the specified 3-year-old dummy is about $9,700. Currently, testing laboratories buy the dummy with the associated instrumentation, and then charge child seat manufacturers about $1800 per test for compliance-type testing. If the agency adopts the proposed 9-month-old child dummy, a child restraint or vehicle manufacturer may voluntarily use the dummy for purposes of evaluating child restraint systems. However, they would not be required by the rule to do so. NHTSA believes that the use of the specified dummy should not increase costs of child restraints, since most, if not all, restraint manufacturers already test their products with other currently-specified part 572 and other unspecified child dummies. Because the total impacts of this proposal are minimal, a preliminary regulatory evaluation is not necessary.

NHTSA has considered the impact of this rulemaking action under the Regulatory Flexibility Act. I hereby certify that this proposed rule would not have a significant economic impact on a substantial number of small entities. There are only two child anthropomorphic test device developers/manufacturers currently operating in this country. While both are small businesses, neither are involved in the manufacture of dummies of the type and size of the one proposed in this notice. The proposed dummy is currently made in the Netherlands. If the proposal is adopted, NHTSA anticipates that the number of dummies purchased in the U.S. for the first two years following the final rule should not exceed 10 per year. Thereafter, the agency expects only two to four units would be purchased in this country per year. NHTSA believes this number is so small that it would be unlikely that U.S. companies, including small businesses, would find production of this dummy in this country profitable. NHTSA also believes that use of the proposed dummy would not affect the sales or use of other currently-specified part 572 child dummies, since the latter ones would continue to be used in testing child restraint systems. Small organizations and small governmental jurisdictions that deal with automotive child safety should not be significantly affected since the potential cost increments associated with this proposed action should have nearly negligible effects on the purchase price of applicable child restraint systems, if at all. In view of the above, the agency

has not prepared an initial regulatory flexibility analysis.

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action would not have any significant effect on the quality of the human environment.

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Comments

NHTSA solicits public comments on this notice. It is requested but not required that 10 copies be submitted.

All comments must not exceed 15 pages in length. (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15-page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential business information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation. 49 CFR part 512.

All comments received before the close of business on the comment closing date indicated above for the advance proposal will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Comments on the advance proposal will be available for inspection in the docket. The NHTSA will continue to file relevant information as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the docket should enclose a self-addressed, stamped postcard in the envelope with their comments. Upon receiving the comments, the docket supervisor will return the postcard by mail.

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 572

Motor vehicle safety.

In consideration of the foregoing, NHTSA proposes to amend 49 CFR part 572 as follows:

PART 572—[AMENDED]

1. The authority citation for part 572 would continue to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, and 1407; delegation of authority at 49 CFR 1.50.

2. 49 CFR part 572 would be amended by adding a new subpart H, consisting of §§ 572.60 through 572.66, to read as follows:

Subpart H—9-Month-Old Child

Sec.

572.60 Incorporated materials.
572.61 General description.
572.62 Head.
572.63 Head-Neck.
572.64 Thorax.
572.65 Lumbar spine and pelvis.
572.66 Test conditions and instrumentation.

Subpart H—9-Month-Old Child.

§ 572.60 Incorporated materials.

(a) The drawings and specifications referred to in this regulation that are not set forth in full are hereby incorporated in this part by reference. These materials are thereby made part of this regulation. The Director of the Federal Register has approved the materials incorporated by reference. For materials subject to change, only the specific version approved by the Director of the Federal Register and specified in the regulation are incorporated. A notice of any change will be published in the Federl Register as a convenience to the reader, the materials incorporated by reference are listed in the Finding Aid Table found at the end of this volume of the Code of Federal Regulations.

(b) The drawings, specifications, and assembly manual incorporated in this part by reference are available for examination in the general reference section of Docket 89–11, Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC. Copies may be obtained from Rowley-Scher Reprographics, Inc., 1216 K Street, NW., Washington, DC 20002, telephone (202) 628–6667.

§ 572.61 General description.

(a) The dummy consists of:

(1) The assembly specified in drawing LP 1049/A, which is described in its entirety by means of approximately 54 separate drawings and specifications, 1049/1 through 1049/54; and

(2) A parts list LP 1049/0 (5 sheets); and,

(3) A Construction Manual dated January 1979 ("The TNO Child Dummies P3/4, P3, P6 and P10").

(b) Adjacent dummy segments are joined in a manner such that throughout the range of motion and also under simulated crash-impact conditions there is no contact between metallic elements except for contacts that exist under static conditions.

(c) The structural properties of the dummy are such that the dummy conforms to the part in every respect both before and after being used in dynamic tests such as that specified in Standard No. 213 of this chapter (§ 571.213).

§ 572.62 Head.

(a) The head impact is carried out on the head of a complete dummy assembly as shown in drawing LP 1049/A.

(b) When the head of an upright seated dummy is impacted in accordance with paragraph (c) of this section by a test probe conforming to § 572.21(a) at 7 fps, the peak resultant acceleration measured by the acceleration sensors mounted in the headform in accordance with § 572.66(b) shall be not less than 50.0g and not more than 58.0g. The recorded acceleration-time curve for this test shall be unimodal at, or above the 20.0g level and shall lie at, or above that level for an interval not less than 5.0 and not more than 6.5 milliseconds. The lateral acceleration vector shall not exceed 7.0g.

(c) *Test procedure.* (1) Seat the dummy on a seating surface having a back support as specified in § 572 66(h)(1), orient the dummy in accordance with § 572.66(h)(2), and adjust the joints of the limbs in accordance with § 572.66(f).

(2) Adjust the test probe so that its longitudinal centerline is at the forehead at the point of orthogonal intersection of the head midsagittal plane and the transverse plane which is perpendicular to the "Z" axis of the head (longitudinal centerline of the skull anchor) and is 2.9 ± 0.2 inches below the top of the head measured along the head's "Z" axis.

(3) Adjust the dummy so that the surface area on the forehead immediately adjacent to the projected

longitudinal centerline of the test probe is vertical.

(4) Impact the head with the test probe so that at the moment of impact the probe's longitudinal centerline falls within 2 degrees of a horizontal line in the dummy's midsagittal plane.

(5) Guide the probe during impact so that it moves with no significant lateral, vertical, or rotational movement.

(6) Allow a time period of at least 20 minutes between successive tests of the head.

§ 572.63 Head-Neck.

(a) The head-neck assembly shown in drawing 1049/A consists of parts specified as items 1 through 16 and 58.

(b) When the head-neck assembly is tested in accordance with paragraph (c) of this section, the head shall rotate in reference to the pendulum's longitudinal centerline a total of 85 degrees ± 6 degrees about its center of gravity, with the chordal displacement measured at its center of gravity not less than 4.0 inches and not more than 5.6 inches at maximum rotation. The chordal displacement at time T is defined as the straight line distance between: (1) The position relative to the pendulum arm of the head center of gravity at time zero, and (2) the position relative to the pendulum arm of the head center of gravity at time T as illustrated in Figure 3 (49 CFR 572.11). The peak resultant acceleration recorded at the location of the accelerometers mounted in the headform in accordance with § 572.66(b) shall not exceed 55g. The pendulum shall not reverse direction until the head's center of gravity returns to the original zero time position relative to the pendulum arm.

(c) *Test procedure.* (1) Mount the head and neck assembly on a rigid pendulum as specified in Figure 4 (§ 572.11), so that the head's midsagittal plane is vertical and coincides with the plane of motion of the pendulum's longitudinal centerline. Mount the neck directly to the pendulum as shown in Figure 15 (§ 572.21).

(2) Release the pendulum and allow it to fall freely from a height such that the velocity at impact is 17.00 ± 1.0 feet per second (fps), measured at the center of the accelerometer specified in Figure 4 (§ 572.11).

(3) Decelerate the pendulum to a stop with an acceleration-time pulse described as follows:

(i) Establish 5g and 20g levels on the a-t curve.

(ii) Establish T_1 at the point where the rising a-t curve first crosses the 5g level; t_2 at the point where the rising a-t curve first crosses the 20g level; t_3 at the point where the decaying a-t curve first crosses the 20g level; and t_4 at the point where the decaying a-t curve first crosses the 5g level.

(iii) t_2-t_1, shall be not more than 3 milliseconds.

(iv) t_3-t_2, shall be not less than 16 and not more than 20 milliseconds.

(v) t_4-t_3, shall be not more than 7 milliseconds.

(vi) The average deceleration between t_2 and t_3 shall be not less than 22g and not more than 40g.

(4) Allow the neck to flex without contact of the head or neck with any object other than the pendulum arm.

(5) Allow a time period of at least 30 minutes between successive tests of the head and neck.

§ 572.64 Thorax.

(a) The thorax impact is carried out on the sternum of a complete dummy assembly as shown in drawing LP 1049/A.

(b) When impacted by a test probe conforming to § 572.21(a) at 13.0 ± .3 fps in accordance with paragraph (c) of this section, the peak resultant accelerations at the location of the accelerometers mounted in the chest cavity in accordance with § 572.66(c) shall be not less than 65g and not more than 75g. The acceleration-time curve for the test shall be unimodal at or above the 30g level, and shall lie at or above the 30g level for an interval not less than 5 milliseconds, and not more than 6 milliseconds. The lateral acceleration shall not exceed 7g.

(c) *Test procedure.* (1) With the completely assembled dummy seated without back support on a surface as specified in § 572.66(h)(1) and oriented as specified in § 572.66(h)(2), adjust the dummy's arms and legs until they are extended horizontally forward parallel to the midsagittal plane. The joints of the limbs are adjusted in accordance with § 572.66(f).

(2) Establish the impact point on the sternum at the chest midsagittal plane so that the impact point is 6.2 inches above the seating surface when the back surface of the dummy's thoracic spine is vertical.

(3) Adjust the dummy so that the tangent plane at the surface on the thorax immediately adjacent to the designated impact point is vertical and parallel to the face of the test probe.

(4) Place the longitudinal center line of the test probe to coincide with the designated impact point and align the test probe so that at impact the probe's longitudinal centerline coincides within 2 degrees with the line formed by intersection of the horizontal and midsagittal planes passing through the designated impact point.

(5) Impact the thorax with the test probe so that at the moment of impact the probe's longitudinal centerline falls within 2 degrees of a horizontal line in the dummy midsagittal plane.

(6) Guide the probe during impact so that it moves with no significant lateral, vertical, or rotational movement.

(7) Allow a time period of at least 30 minutes between successive tests of the chest.

§ 572.65 Lumbar spine and pelvis.

(a) The lumbar spine flexure test is conducted on a partial dummy assembly as shown in drawing LP 1049/A, but with removed arms which consist of parts identified as items 17 through 30 and all head-neck parts described as items 1 through 13 and 59 through 63.

(b) When subjected to continuously applied force in accordance with paragraph (c) of this section, the lumbar spine assembly shall flex by an amount that permits the thoracic spine to rotate from its initial position in accordance with Figure No. 18 of § 572.21 (49 CFR part 572) by 40 degrees at a force level of not less than 18 pounds and not more than 22 pounds, and straighten upon removal of the force to within 5 degrees of its initial position.

(c) *Test procedure.* (1) The dummy is positioned in an upright seated position on a seat as indicated in Figure No. 18 of § 572.21 (lower legs do not need to be removed, but must be clamped firmly to the seating surface), ensuring that all dummy component surfaces are clean, dry and untreated unless otherwise specified.

(2) The dummy is firmly affixed to the seating surface through the pelvis at the hip joints by suitable clamps that also prevent any relative motion with respect to the upper legs during the test in § 572.65(c)(3). A pull attachment is installed at the neck to torso juncture as shown in Figure 18 of § 572.21.

(3) Flex the thorax forward 50 degrees and then rearward as necessary to return it to its initial position.

(4) Apply a forward pull force in the midsagittal plane at the top of the neck adapter so that at 40 degrees of the lumbar spine flexion the applied force is perpendicular to the thoracic spine box. Apply the force at any torso deflection rate between 0.5 and 1.5 degrees per second up to 40 degrees of flexion but no further; continue to apply for 10 seconds the force necessary to maintain 40 degrees of flexion, and record the highest applied force at that time. Release all force as rapidly as possible and measure the return angle three minutes after release.

§ 572.66 Test conditions and instrumentation.

(a) The test probe used for head and thoracic impact tests is a cylinder three inches in diameter, 13.8 inches long and weighs 10 lbs., 6 ozs. Its impacting end has a flat right face that is rigid and that has an edge radius of 0.5 inches.

(b) Accelerometer assembly Part No. SA 572.S1 is mounted in the head on the accelerometer mount (shown in Drawing LP 1049/A and identified as item 2) so that their sensitive axes intersect within 0.2 inches at the point of the intersection of a line connecting the longitudinal centerlines of two screws (LP 1049/A, item 3) attaching the accelerometer mount in the dummy head with the midsagittal plane of the head. One accelerometer is aligned with its sensitive axis perpendicular to the horizontal bulkhead in the midsagittal plane, another accelerometer is aligned with its sensitive axis parallel to the horizontal bulkhead and perpendicular to the midsagittal plane, and a third accelerometer is aligned with its sensitive axis parallel to the horizontal bulkhead in the midsagittal plane.

(c) Accelerometer assembly part No. SA 572.S1 is mounted in the chest cavity on the provided mount located on the vertical anterior surface (item 16 detail "A" of drawing LP 1049/A) within 0.2 inches of the mid-point of the mounting bracket in the thorax midsagittal plane located within 0.65 inches anterior to the frontal vertical surface of the mounting bracket (detail A of item 16). One accelerometer has its sensitive axis oriented parallel to the attachment surface in the midsagittal plane, another accelerometer has its sensitive axis oriented parallel to the attachment surface and perpendicular to the midsagittal plane and a third accelerometer has its sensitive axis oriented perpendicular to the attachment surface in the midsagittal plane.

(d) The outputs of acceleration devices installed in the dummy and in the test apparatus specified by this part are recorded in individual data channels that conform to the requirements of SAE Recommended Practice J211, June 1980. with channel classes as follows:

(1) Head acceleration—Class 1000

(2) Pendulum acceleration—Class 60

(3) Thorax acceleration—Class 180

(e) The mountings to which the acceleration sensors are attached shall have no resonance frequency within a range of 3 times the frequency range of the applicable channel class.

(f) Limb joints are set at lg. barely restraining the weight of the limb when it is extended horizontally. The force required to move a limb segment does not exceed 2g throughout the range of limb motion.

(g) Performance tests are conducted at any temperature from 66 °F to 78 °F and at any relative humidity from 10 percent to 70 percent after exposure of the dummy to these conditions for a period of not less than 4 hours.

(h) For the performance tests specified in §§ 572.62, 572.64, and 572.65, the dummy is positioned in accordance with Figures No. 16, 17 and 18 of § 572.21 (49 CFR part 572) as follows:

(1) The dummy is seated on a flat, rigid, clean, dry, horizontal surface of teflon sheeting with a smoothness of 40 microinches and whose length and width dimensions are not less than 16 inches, so that the dummy's midsagittal plane is vertical and centered on the test surface. For head tests, the seat has a vertical back support whose top is 10.3 ± 0.2 inches above the seating surface. The rear surfaces of the dummy's back and buttocks are touching the back support as shown in Figure No. 16 of § 572.21. For thorax and lumbar spine tests, the seating surface is without the back support as shown in Figures No. 17 and 18 of § 572.21.

(2) The dummy is adjusted for head and thorax impact tests and for lumbar flexion tests so that the rear surfaces of the shoulders and buttocks are tangent to a transverse vertical plane.

(3) The arms and legs are positioned so that their centerlines are in planes parallel to the midsagittal plane.

(4) Performance tests of the same component, segment, assembly or fully assembled dummy are separated in time by a period of not less than 20 minutes unless otherwise specified.

(5) Surfaces of the dummy components are not painted except as specified in this part or in drawings subtended by the part.

Issued on December 13, 1989.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 89-29485 Filed 12-20-89; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Notice of Finding on a Petition to List an Undescribed Southern Pine

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of finding on petition.

SUMMARY: The Fish and Wildlife Service announces a 90-day petition finding for a petition to amend the List of Endangered and Threatened Plants. The Service finds that the petitioner has not presented substantial information to show that the pine trees in question represent a potentially valid new species, or that their listing as an endangered or threatened species may otherwise be warranted.

DATES: The finding announced in this notice was made in October 1989. Comments and information may be submitted until further notice.

ADDRESSES: Information, comments, or questions should be sent to the Field Supervisor, Jacksonville Field Office, U.S. Fish and Wildlife Service, 3100 University Boulevard South, Suite 120, Jacksonville, Florida 32216.

FOR FURTHER INFORMATION CONTACT: David J. Wesley, Field Supervisor, at the above address (telephone: 904/791-2580 or FTS 946-2580).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973 (Act), as amended in 1982 (16 U.S.C. 1531 *et seq.*) requires that the U.S. Fish and Wildlife Service (Service) make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the **Federal Register**. If the finding is positive, the Service is also required to promptly commence a review of the status of the species.

On August 14, 1989, the Fish and Wildlife Service received two letters from Mr. Charles E. Littlejohn of Atlanta, Georgia, on dated July 26 and addressed to the Secretaries of Agriculture, Commerce, Interior, and Transportation; the second dated July 28 and addressed to the Secretary of Agriculture. The first letter pointed out to the Federal government "the existence of a rare and threatened specie (sic) or sub-specie (sic) of Southern Pine believed to be of the *Pinus taeda* or *Pinus virginiana*, or more likely, an ancient genetic form of one or both of those species, which I shall refer to as the hypothetical *Pinus petitjonii*, subject to Federal research and determination." Mr. Littlejohn sought

"the temporary declaration by the Secretaries of a new specie/sub-specie (sic) of the *Pinus* species pending the determination of the need to place this hypothetical *Pinus petitjonii* specie (sic) and its habitat under protection of the ESA (Endangered Sepcies Act) as appropriate to preserve the specie (sic)."

Mr. Littlejohn noted that a recently deceased pine tree in his yard had been 255 years old, that other equally old trees existed in the area, that they grew very slowly, with dense ring counts, and he cliemed that the timber of these old trees had superior structural strength and, because of its heavy resin content, had great resistance to insect and fungus damage both as living trees and as timber. He further claimed that such "primitive" trees are genetically superior to younger trees of the same species, and that the development of "managed forests" and genetic research may have genetically degraded the native species of pine. He also noted that an expressway to be built through northern Atlanta would destroy old pines.

The charactreristics that Mr. Littlejohn ascribes to the old pines in north Atlanta are typical of trees growing under high density conditions and do not indicate any unique genetic features. Even if tree breeding and/or natural selection has caused changes in gene frequency in younger pine trees, as compared to older trees, the different age classes still belong to the same population. Members of the same population are always assigned to the same variety, subspecies, or species. There are no known taxonomic references that support Mr. Littlejohn's suggestion that older trees should be treated as a distinct subspecies or variety from younger living trees. The older pine trees in northern Atlanta are not eligible for protection under the provisions of the Endangered Species Act because they do not meet the Act's definition of "species" (which includes subspecies or varieties).

On the basis of the best scientific and commercial information available, the Service found that this petition did not present substantial information indicating that the action requested may be warranted.

Author

This notice was prepared by Mr. David Martin, Jacksonville Field Office, U.S. Fish and Wildlife Service, 3100 University Boulevard South, Suite 120, Jacksonville, Florida 32216 (904/791–2580 or FTS 946–2580).

Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531–1543).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Fish, Marine mammals, Plants (agriculture).

Dated: December 12, 1989.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 89–29683 Filed 12–20–89; 8:45 am]

BILLING CODE 4310–55–M

Notices

Federal Register
Vol. 54, No. 244
Thursday, December 21, 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

Agricultural Stabilization and Conservation Service

Feed Grain Donations for the Three Affiliated Tribes, Fort Berthold Indian Reservation in North Dakota

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 Three Affiliated Tribes, Fort Berthold Indian Reservation in North Dakota 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 Three Affiliated Tribes 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 December 15, 1989, and shall be made available through May 15, 1990, or such other date as may be stated in a notice issued by the USDA.

Signed at Washington, DC on December 14, 1989.

John A. Stevenson,

Acting Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 89-29684 Filed 12-20-89; 8:45 am]

BILLING CODE 3410-05-M

Feed Grain Donations for the Cheyenne River Sioux Tribe in South Dakota

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 Cheyenne River Sioux Tribe in South Dakota 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 Cheyenne River Sioux 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 December 8, 1989, and shall be made available through May 15, 1990, or such other date as may be stated in a notice issued by the USDA.

Signed at Washington, DC, on December 14, 1989.

John A. Stevenson,

Acting Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 89-29685 Filed 12-20-89; 8:45 am]

BILLING CODE 3410-05-M

Forest Service

Shasta Costa Creek Timber Sales and Other Projects, Siskiyou National Forest, Curry County, OR

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: Notice is hereby given that the Forest Service, USDA will prepare an environmental impact statement (EIS) for a set of proposals to implement three timber sales and other related projects. The EIS will tier to the final EIS and Land and Resource Management Plan (Forest Plan) for the Siskiyou National Forest.

The proposed projects to be implemented are all located in the Shasta Costa drainage and develop or use some common road systems. The specific projects include: (1) Harvest of timber from three timber sales; (2) development of associated road systems; (3) provide two vista overlooks; and (4) other related projects.

The proposed projects will be in compliance with the direction in the Forest Plan which provides the overall guidance for management of the area and the proposed projects. The proposed projects would be implemented within the Shasta Costa Creek drainage from Fiscal Years 1991 through 1993 on the Gold Beach and Galice Ranger Districts. The Shasta Costa Creek drainage is located approximately 35 miles northeast of Gold Beach. The Siskiyou National Forest invites written comments and suggestions on the scope of the analysis in addition to comments already received as a result of local public participation activities.

The agency also gives notice of the full environmental analysis and decision-making proces that will occur on the proposal so that interested and affected people are aware of how they may participate and contribute to the final decision.

DATE: Comments concerning the scope and implementation of this proposal must be received by January 22, 1990.

ADDRESSES: Submit written comments and suggestions concerning the scope of the analysis to Susan Mathison, Public Information Assistant, Gold Beach Ranger District, 1225 S. Ellensburg, #7, Gold Beach, Oregon 97444.

FOR FURTHER INFORMATION: Direct questions about the proposed action and environmental impact statement to Kurt Wiedenmann, Project Coordinator, Gold Beach Ranger District, 1225 S. Ellensburg, #7, Gold Beach, Oregon 97444 [telephone: (503) 247–6651].

SUPPLEMENTARY INFORMATION: The proposed actions are listed in Appendices B and C of the Forest Plan and include the following:

TIMBER SALES AND ASSOCIATED ROADS

Fiscal year	Sale name	Legal description	Acres	Net MMBF	Road miles		Harvest method	Yarding system
					C	R		
1992	Shasta Costa	S31,T34S, R10W, WM	330	10.3	2.0	5.0	HCC/HSM	S
1993	Top Shasta	S09,T34S, R10W, WM	120	4.2	1.0	0.0	HCC	S
1993	Tipsy Squirrel	S21,T34S, R10W, WM	44	1.1	0.0	0.0	HSH	HEC

Abbreviations used above
S: section; *T:* Township; *R:* Range; *W:* West; *WM:* Willamette Meridian; *MMBF:* Million Board Feet; *C:* Construction; *R:* Reconstruction; *HCC:* Harvest, Clearcut; *HSM:* Harvest, Streamside Management Cut; *HSH:* Harvest, Shelterwood Cut; *S:* (yarding system): Skyline; *HEC:* Helicopter.

SCENIC OVERLOOKS

Project name	Fiscal year	Measure	Unit M $
Shasta Costa Overlook.	1990–91	PAOT	20.0 25.0
Bear Camp Overlook.	1991–91	PAOT	20.0 25.0

Abbreviations used above
PAOT: Persons at one time; *M $:* Thousands of 1989 dollars.

Other Related Projects—

Recreation Enhancement resource-interpretive signing trail construction
Fuels Reduction
Wildlife Enhancement
Fisheries Enhancement
Soils Enhancement
Water Enhancement
Seral Stage Management
Hardwood Stand Conversion

This EIS will tier to the Final EIS and Forest Plan (3/10/89). The Forest Plan provides goals and objectives, forest-wide standards and guidelines, management area standards and guidelines, and management area prescriptions for the various lands on the Forest. This direction provides for management practices that will be utilized during the implementation of the Forest Plan.

The Shasta Costa area contains about 25,000 acres. It is allocated to the following Management Areas (MA):

—1 per cent of the 25,000 acres is in the Wild Rogue Wilderness (MA 1);

—2 per cent is in the Bear Camp Botanical Area (MA 4), to be managed to feature and protect special botanical and geological resources;

—6 per cent is in the Supplemental Resource area flanking Shasta Costa Creek (MA 7) designed to provide high-quality fish and wildlife habitat, and protect sensitive watershed areas and recreation values;

—7 per cent is in Designated Wildlife Habitat for the pileated woodpecker and pine marten (MA 8);

—7 percent is in Special Wildlife Sites (MA 9), including meadows/meadow buffers, a small botanical area, a general wildlife site, a pond/bog, dispersed old-growth sites, rock outcrops, and hardwood areas;

—1 per cent is in Scenic/Recreation River (MA 10) designed to maintain the recreation and scenic values accorded the Rogue Wild and Scenic River;

—6 per cent is in Riparian ecosystems (MA 11) where multiple uses are allowed while maintaining water, fisheries, and other streamside values;

—9 per cent is in Retention Visual (MA 12), designed to provide for a visually pleasing level of scenery while management activities occur;

—60 per cent is in Partial Retention Visual (MA 13), where management activities will be more evident to the average forest visitor than in Retention Visual, but where their presence will be visually subordinate to the landscape; and,

—1 per cent is in General Forest (MA 14), where multiple-use activities occur and timber management is programmed for full, sustained yield.

The analysis will consider a range of alternatives. Along with the proposed action, the analysis will consider a no-action alternative in the Shasta Costa Creek drainage.

Public participation will be especially important at several points during the analysis, beginning with the scoping process (40 CFR 1501.7). The Forest Service will be seeking information, comments, and assistance from Federal, State, local agencies and other individuals or organizations who may be interested in or affected by the proposed project. This input will be used in preparation of the draft EIS. The scoping process includes:

1. Identifying potential issues.

2. Identifying major issues to be analyzed in depth.

3. Identifying issues which have been covered by a relevant previous environmental analysis.

4. Exploring additional alternatives based on themes which will be derived from issues recognized during scoping activities.

5. Identifying potential environmental effects of this project and alternatives (i.e., direct, indirect, and cumulative effects and connected actions).

6. Determining potential cooperating agencies and task assignments.

7. Notifying interested publics of opportunities to participate through meetings, personal contacts, or written comment. Keeping the public informed through the media and/or written material (i.e., newsletters, correspondence, etc.).

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by April, 1990. At that time EPA will publish a notice of availability of the draft EIS in the **Federal Register.**

The Forest Service believes it is important to give reviewers notice of this early stage of public participation and of several court rulings related to public participation in the environmental review process.

First, reviewers of environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could have been raised at the draft stage may be waived or dismissed by the court if not raised until after completion of the final EIS. *City of Angoon* v. *Hodel,* 803 F.2d. 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490

F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider and respond to them in the final EIS.

To be the most helpful, comments on the draft EIS should be as specific as possible and may address the adequacy of the statement or the merit of the alternatives discussed (see Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3).

The final EIS is scheduled to be completed by September, 1990. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and policies considered in making a decision regarding the proposal. Ron McCormick, Forest Supervisor, Siskiyou National Forest, P.O. Box 440, Grants Pass, Oregon 97526, is the Responsible Official. As the Responsible Official he will decide which, if any, of the proposed projects will be implemented. The Responsible Official will document the decision and reasons for the decision in the Record of Decision. That decision will be subject to Forest Service Appeal Regulations (36 CFR part 217).

Dated: December 11, 1989.

Ronald J. McCormick,

Forest Supervisor.

[FR Doc. 89-29669 Filed 12-20-89; 8:45 am]

BILLING CODE 3410-11-M

Etolin Island Implementation Analysis, Strikine Area, Tongass National Forest, Petersburg, AK: Revised Notice of Intent To Prepare an Environmental Impact Statement

The Department of Agriculture, Forest Service, will prepare an Environmental Impact Statement (EIS) on timber standards proposed to be harvested in one or more timber sales on the North Etolin Island Management Area S23, Value Comparison Units (VCUs) 464, 467, and 468 on the Wrangell Ranger District. The deicsions required to be made are: (1) How and where would timber sales be scheduled in the immediate future to best address the issues and concerns to be identified as a result of the scoping process; (2) where and how should resource protection constraints suggested by the Tongass Land Management Plan land allocation, be site specifically identified.

This Notice of Intent (NOI) is a revision of a previous NOI published in the **Federal Register** on January 5, 1987. There has been a signficant change in the analysis approach from one of area analysis that included all of Etolin Island and surrounding islands, to one of a more project specific implementation analysis for a specified area on Etolin Island.

The Tongass Land Management Plan allocated North Etolin Island to Land Use Designations (LUDs) III, and IV, providing for a balanced mix of commodity and non-commodity uses. The implementation analysis will consider a range of alternative road and harvest unit locations and designs, including a "no action" alternative. The proposed harvest scenarios will examine the entire road network needed to access commerical timber stands and meet various resource objectives. Multi-entry harvest unit layouts will also be examined within the analysis area.

Major issues to be considered appear to be associated with the timber, wildlife, fisheries, visual and recreation resources.

The EIS will include a cumulative effects analysis within the analysis area and on the remaining VCUs 462, 463, 465, 566, and 470 within North Etolin Management Area S23, along with the South Etolin Island Management Area S24 VCUs 471, 472, 473, and 474. Wilderness designation (LUD I) was recommended for the southern portion of the island in the Tongass Land Management Plan, however, the area was not designated wilderness by the Alaska National Interest Lands Conservation Act. This area is presently managed to maintain its natural condition.

Previous analysis on Etolin Island has resulted in an Environmental Impact Statement and Record of Decision on timber harvest at Olive Cove under the Pacific Northern Timber long term contract; Environmental Assessments and Decison Notices on timber harvest near Anita Bay and Quite Harbor under the Granite and Quiet Timber Sale contracts; and an Environmental Analysis for the proposed Canoe Passage Blowdown Tiber Sale. Initial scoping has begun. Federal, state, and local agencies, along with other individuals or organizations who have been or may be interested in or affected by the decision, are invited to participate in the scoping process.

The implementation analysis will take approximately 5 months. The Draft EIS should be available for public review by May , 1990. The Final EIS is scheduled for completion by July, 1990.

The responsible official for the decision is Ronald R. Humphrey, Forest Supervisor, Stikine Area, Tongass National Forest, Petersburg, Alaska.

Written comments and suggestions concerning the implementation analysis and Environmental Impact Statement should be sent to Richard Strauss, ID Team Leader, Supervisor's Office, strikine Area, Tongass National Forest, P.O. Box 309, Petersburg, Alaska, 99833, phone (907) 772-3841, by January 14, 1990.

Dated: December 4, 1989.

Ronald R. Humphrey,

Forest Supervisor.

[FR Doc. 89-29637 Filed 12-20-89; 8:45 am]

BILLING CODE 3410-11-M

Rural Electrification Administration

Jackson Electric Membership Corp.; Finding of No Significant Impact

AGENCY: Rural Electrification Administration, USDA.

ACTION: Finding of no significant impact relating to the construction of an engineering, operations and maintenance facility in Hall County, Georgia.

SUMMARY: Notice is hereby given that the Rural Electrification Administration (REA), pursuant to the National Environmental Policy Act of 1969, as amended, the Council on Environmental Quality Regulations (40 CFR parts 1500-1508), and REA Environmental Policies and Procedures (7 CFR part 1794), has made a Finding of No Significant Impact (FONSI) with respect to the construction of an engineering, operations and maintenance facility in Hall County, Georgia. Jackson Electric Membership Corporation (EMC) has requested REA's approval to construct the project.

FOR INFORMATION CONTACT: Alex M. Cockey, Jr., Director, Southeast Area—Electric, Room 0270, South Agriculture Building, Rural Electrification Aldministration, Washington, DC 20250, telephone (202) 382-8436.

SUPPLEMENTARY INFORMATION: REA, in accordance with its environmental policies and procedures, required that Jackson EMC develop a Borrower's Environmental Report (BER) reflecting the potential impacts of the proposed facility. The BER, which includes input from certain local and state agencies, has been adopted as REA's

Environmental Assessment (EA) for the projects in accordance with 7 CFR 1794.61. BEA has concluded that the BER represents an accurate assessment of the environmental impacts of the project. The project will allow Jackson EMC to expand its office, storage and maintenance facilities to meet the needs of its growing service area.

The engineering and operations facility will consist of a building that will house 9,360 square feet of office space, 12,250 square feet of warehouse space, 3,500 square feet of covered storage and 16,960 square feet of covered parking. There will also be an 8,250 square foot truck maintenance building, a transformer storage area and pole racks. The entire facility will require 12 acres of a 34 acre site owned by Jackson EMC.

REA has concluded that the proposed project will have no impact on wetlands, prime farmlands, floodplains, threatened or endangered species or critical habitat, property listed or eligible for listing in the National Register of Historic Places, or water quality.

Alternatives examined for the proposed project were no action and alternative sites. REA determined that there is a demonstrated need for the project and constructing it at the preferred site will have no significant impact to the environment.

REA has concluded that its approval to allow Jackson EMC to construct the proposed project does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, REA has reached a FONSI with respect to its action related to the project.

Copies of the EA and FONSI can be obtained from REA at the address provided herein or at the office of Jackson Electric Membership Corporation, P.O. Box 38, Jefferson, Georgia 30549–0038.

In accordance with REA Environmental Policies and Procedures, 7 CFR part 1794, Jackson EMC published a notice and advertisement in the Gainesville Times which has a general circulation in Hall County, Georgia. The notice appeared in the October 27, 1989, issue. The notice described the project, announced the availability of the BER and gave information where the BER could be obtained for review and where comments could be sent. The advertisement appeared in the same issue of the newspaper and briefly described the project and referred the reader to the legal notice. The public was given at least 30 days to respond to the notice. No responses to the notice were received by Jackson EMC or REA.

Dated: December 15, 1989.

John H. Arnesen,

Assistant Administrator—Electric.

[FR Doc. 89–29686 Filed 12–20–89; 8:45 am]

BILLING CODE 3410–15–M

CIVIL RIGHTS COMMISSION

Iowa Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Iowa Advisory Committee to the Commission will convene at 10 a.m. and adjourn at 2 p.m., on January 17, 1990, at the Urban Campus, Des Area Community Colleges, 1100 7th Street, room 112, Des Moines, Iowa. The purpose of the meeting is to review the status of current Committee projects and discuss issues which are possible planning subjects for future activities.

Persons desiring additional information should contact Committee Chairperson, Dr. Lenola Allen-Sommerville, or Ascension Hernandez, Civil Rights Analyst of the Central Regional Division, (816) 426–5253 (TDD 816/426–5009). 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, December 14, 1989.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 89–29657 Filed 12–20–89; 8:45 am]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Plant and Equipment Expenditures Survey.

Form Number(s): PE–1, –2, –3, –4, –4(P), PE–5, –5(P), –5(T), –6, PA.

Agency Approval Number: 0607–0641.

Type of Request: Revision of a currently approved collection.

Burden: 30,175 hours.

Number of Respondents: 15,000.

Avg Hours Per Response: 43 minutes.

Needs and Uses: The Plant and Equipment (P&E) Expenditures Survey obtains data quarterly on planned and actual capital spending of nonagricultural business firms. These estimates are one of the most important indicators used by business and public officials in assessing near-term economic activity. The P&E Survey also collects data on annual capital expenditures for pollution abatement. These data are used to adjust total capital expenditures by industry to obtain a better measure of real capital stock used for expansion and modernization of pollution abatement equipment.

Affected Public: Businesses or other for-profit organizations, non-profit institutions, and small businesses or organizations.

Frequency: Quarterly: PE–1, –2, –3, –4, –4(P), Annually: PE–5, –5(T), –6, –PA.

Respondent's Obligation: Voluntary (quarterly forms), Mandatory (annual forms).

OMB Desk Officer: Don Arbuckle, 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Clearance Officer, (202) 377–3271, Department of Commerce, Room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Don Arbuckle, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: December 18, 1989.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 89–29696 Filed 12–20–89; 8:45 am]

BILLING CODE 3510–07–M

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of the Census.

Title: School Project Evaluation—Instructional Staff Questionnaire.

Form Number(s): D–1403, D–1403–L1.

Agency Approval Number: None.
Type of Request: New collection.
Burden: 900 hours.
Number of Respondents: 3,600.
Avg Hours Per Response: 15 minutes.
Needs and Uses: This survey as well as the Administrator Questionnaire portion of the School Project Evaluation (currently pending OMB approval) will be used by the Census Bureau to evaluate and improve the Census Education Project and associated materials that are targeted for school children. Data will be collected from a sample of primary and secondary school teachers on the effectiveness of the 1990 Census Education Project.
Affected Public: Individuals or households and non-profit institutions.
Frequency: One time only.
Respondent's Obligation: Voluntary.
OMB Desk Officer: Don Arbuckle, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Clearance Officer, (202) 377-3271, Department of Commerce, Room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Don Arbuckle, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: December 18, 1989.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 89-29697 Filed 12-20-89; 8:45 am]

BILLING CODE 3510-07-M

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review

AGENCY: International Trade Administration/Import Administration, Commerce.

ACTION: Notice of opportunity to request administative review of antidumping or countervailing duty order, finding, or suspended investigation.

BACKGROUND: Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party as defined in section 771(9) of the Tariff Act of 1930 may request, in accordance with section 353.22 or 355.22 of the Commerce Regulations, that the Department of Commerce ("the Department") conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

OPPORTUNITY TO REQUEST A REVIEW: Not later than December 31, 1989, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in December for the following periods:

Antidumping Duty Proceeding and Period

Brazil: Certain Carbon Steel Butt-Weld Pipe Fittings
(A-351-602)—12/01/88-11/30/89
Canada: Elemental Sulphur
(A-122-047)—12/01/88-11/30/89
Hong Kong: Photo Albums and Filler Pages
(A-582-501)—12/01/88-11/30/89
Italy: Clear Sheet Glass
(A-475-025)—12/01/88—11/30/89
Japan: Cellular Mobile Telephones and Subassemblies
(A-588-405)—12/01/88-11/30/89
Japan: Certain Electric Motors of 150-500 HP
(A-588-091)—12/01/88-11/30/89
Japan: Polychloroprene Rubber
(A-588-046)—12/01/88-11/30/89
Japan: Steel Wire Strand for Prestressed Concrete
(A-588-068)—12/01/88-11/30/89
Japan: Tuners (of the type used in consumer electronic products)
(A-588-014)—12/01/88-11/30/89
Mexico: Porcelain-On-Steel Cooking Ware
(A-201-504)—12/01/88—11/30/89
Netherlands: Animal Glue and Inedible Gelatin
(A-421-060)—12/01/88—11/30/89
New Zealand: Low-Fuming Brazing Copper Rod and Wire
(A-614-502)—12/01/88—11/30/89
Sweden: Animal Glue and Inedible Gelatin
(A-401-061)—12/01/88—11/30/89
Sweden: Certain Carton-Closing Staples and Staple Machines
(A-401-004)—12/01/88—11/30/89
Sweden: Seamless Stainless Steel Hollow Products
(A-401-603)—12/01/88—11/30/89
Taiwan: Certain Carbon Steel Butt-Weld Pipe Fittings
(A-583-605)—12/01/88—11/30/89
Taiwan: Porcelain-On-Steel Cooking Ware
(A-583-508)—12/01/88—11/30/89
The People's Republic of China: Porcelain-On-Steel Cooking Ware
(A-570-506)—12/01/88—11/30/89
The Republic of Korea: Photo Albums and Filler Pages
(A-580-501)—12/01/88—11/30/89
West Germany: Animal Glue and Inedible Gelatin
(A-428-062)—12/01/88—11/30/89
Yugoslavia: Animal Glue and Inedible Gelatin
(A-479-063)—12/01/88—11/30/89

Suspended Investigation and Period

Mexico: Pectin
(C-201-007)—01/01/88—12/31/88
Mexico: Polypropylene Film
(C-201-006)—01/01/88—12/31/88

Countervailing Duty Proceeding and Period

Mexico: Litharge, Red Lead and Lead Compounds
(C-201-005)—01/01/88—12/31/88
Mexico: Porcelain-On-Steel Cooking Ware
(C-201-505)—01/01/89—12/31/89
Mexico: Toy Balloons and Playballs
(C-201-004)—01/01/88—12/31/88

Seven copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room B-099, U.S. Department of Commerce, Washington, DC 20230.

The Department will publish in the **Federal Register** a notice of "Initiation of Antidumping (Countervailing) Duty Administrative Review," for requests received by December 31, 1989.

If the Department does not receive by December 31, 1989 a request for review of entries covered by an order or finding listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute, but is published as a service to the international trading community.

Dated: December 27, 1989.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 89-29699 Filed 12-20-89; 8:45 am]

BILLING CODE 3510-DS-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 Macau

December 15, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year.

EFFECTIVE DATE: January 1, 1990.

FOR FURTHER INFORMATION CONTACT: Diana Solkoff, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 343–6495. For information on embargoes and quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current bilateral textile agreement between the Governments of the United States and Macau establishes limits for the period January 1, 1990 through December 31, 1990. The limits for Categories 333/334/335/833/834/835, 336, 339, 340, 341, 345, 347/348/847, 641/840 and 445/446 have been reduced for carryforward used in 1989.

A copy of the agreement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647–1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 54 FR 50797, published on December 11, 1989).

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 15, 1989.

Commissioner of Customs,
Department of the Treasury,
Washington, DC. 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further amended on July 31, 1986; pursuant to the Bilateral Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Agreement, effected by exchange of notes dated December 28, 1983 and January 9, 1984, as amended and extended, between the Governments of the United States and Macau; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 1, 1990, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products in the following categories, produced or manufactured in Macau and exported during the twelve-month period beginning on January 1, 1990 and extending through December 31, 1990, in excess of the following restraint limits:

Category	12-month restraint limits
200–239, 300–369, 400–469, 600–670 and 800–899, as a group.	81, 384, 126 square meters equivalent.
Group I	
200–239, 300–369, 600–670 and 800–899, as a group.	78, 369, 656 square meters equivalent.
Sublevels within Group I	
237	61,000 dozen.
239	93,387 Kilograms.
331/831	300,000 dozen pairs.
333/334/335/833/834/835.	156,179, dozen of which not more than 87,192 dozen shall be in categories 333/335/833/835.
336/836	23,000 dozen.
338	201,055 dozen.
339	842,148 dozen.
340	190,299 dozen.
341	122,739 dozen.
342	39,326 dozen.
345	33,952 dozen.
347/348/847	475,892 dozen.
350/850	18,000 dozen.
351/851	27,000 dozen.
352	66,636 dozen.
359/859	132,892 Kilograms.
631	231,386 dozen pairs.
633/634/635	350,515 dozen.
636	15,453 dozen.
638/639/838	1,091,511 dozen.
640	77,607 dozen.
641/840	125,854 dozen.
642/842	77,712 dozen.
645/646	181,918 dozen.
647/648	366,986 dozen.
649	145,833 dozen.
651	13,462 dozen.
652/852	160,000 dozen.
659	89,762 kilograms.
670	340,194 kilograms.
845/846	203,015 dozen.
Group II	
400–469, as a group	1,391,520 square meters equivalent.
Sublevels within Group II	
434	1,852 dozen.
438	6,667 dozen.
442	5,556 dozen.
445/446	70,563 dozen.

Imports charged to these category limits for the period January 1, 1989 through December 31, 1989 shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such good shall be subject to the levels set forth in this directive.

The limits set forth above are subject to adjustment in the future according to the provisions of the current bilateral agreement between the Governments of the United States and Macau.

The conversion factors are listed below:

Category	Conversion factor
333/334/335/833/834/835	34.2
333/335/833/835	34.2
359/859	8.5
633/634/635	34.5
638/639/838	12.9
641/840	12.1
652/852	13.4

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs. exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89–29661 Filed 12–20–89; 8:45 am]

BILLING CODE 3510–DR–M

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Taiwan

December 15, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: December 22, 1989.

FOR FURTHER INFORMATION CONTACT: Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566–8791. For information on embargoes and quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION:

Authority Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain categories in Group II are being adjusted for special shift.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (See **Federal Register** notice 53 FR 44937, published on November 7, 1989). Also see 53 FR 49345, published on December 7, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreement

December 15, 1989.

Commissioner of Customs,
Department of the Treasury,
Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 2, 1988 by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Taiwan and exported during the period which began on January 1, 1989 and extends through December 31, 1989.

Effective on December 22, 1989, the directive of December 2, 1988 is amended further to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement of November 18, 1982, as amended and extended:

Category	Adjusted 12 month limit [1]
Sublevels in Group II:	
239	3,253,224 kilograms.
350	100,682 dozen.
351	374,927 dozen.
650	56,461 dozen.
651	445,877 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1988.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89–29662 Filed 12–20–89; 8:45 am]

BILLING CODE 3510–DR–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Advisory Group on Electron Devices; Committee Meeting

SUMMARY: The DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATE: The meeting will be held at 0900, Tuesday, 9 January 1990.

ADDRESS: The meeting will be held at Palisades Institute for Research Services, Inc., 2011 Crystal Drive, Suite 307, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: David Slater, AGED Secretariat, 201 Varick Street, New York, 10014.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide the Under Secretary of Defense for Acquisition, the Director, Defense Advanced Research Projects Agency and the Military Departments with technical advice on the conduct of economic and effective research and development programs in the area of electron devices.

The AGED meeting will be limited to review of research and development programs which the Military Departments propose to initiate with industry, universities or in their laboratories. The agenda for this meeting will include programs on Radiation Hardened Devices, Microwave Tubes, Displays and Lasers. The review will include details of classified defense programs throughout.

In accordance with section 10(d) of Public Law No. 92–463, as amended, (5 U.S.C. App. II 10(d)(1982)), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1)(1982), and that accordingly, this meeting will be closed to the public.

Dated: December 18, 1989.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 89–29675 Filed 12–20–89; 8:45 am]

BILLING CODE 3810–01–M

Department of the Army

Environmental Protection Agency

[FRL 3698–8]

Memorandum of Agreement

AGENCIES: Environmental Protection Agency, Department of the Army, DOD.

ACTION: Notice.

SUMMARY: On November 15, 1989, the Assistant Administrator for Water of the Environmental Protection Agency (EPA) and the Assistant Secretary of the Army for Civil Works (Civil Works) signed a Memorandum of Agreement (MOA or Agreement) which articulates the policy and procedures to be used in determining the type and level of mitigation necessary to demonstrate compliance with the guidelines under section 404(b)(1) of the Clean Water Act. Under the terms of the MOA, the Agreement was to become effective 30 days after signature (December 15, 1989).

We have heard from a number of Federal agencies which have expressed concern regarding the wording of the MOA. In order for us to provide these agencies an opportunity for further discussion, we will delay implementation for a period of 30 days (i.e., January 16, 1990).

DATE: With this extension, the effective date of the Memorandum of Agreement is January 16, 1990.

ADDRESSES: Copies of the MOA are available from:

Office of Wetlands Protection (A–104F), U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office of the Assistant Secretary of the Army, Department of the Army, Room 2E569, The Pentagon, Washington, DC 20310–0103.

Headquarters, U.S. Army Corps of Engineers, (CECW–OR), 20 Massachusetts Ave., NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION: Suzanne Schwartz of the Environmental Protection Agency at the address given above; telephone 202/475–7799, (FTS) 475–7799; or David Barrows of the Department of the Army at the address given above; telephone 202/695–1376, (FTS) 695–1376.

SUPPLEMENTARY INFORMATION: Under paragraph III.G. of the EPA-Army Memorandum of Agreement, the MOA was to become effective on December 15, 1989. EPA and Army hereby amend the first sentence of paragraph III.G. to read as follows:

This MOA shall take effect on January 16, 1990, and will apply to those completed standard permit applications which are received on or after that date.

LaJuana S. Wilcher,

Assistant Administrator for Water.

Robert W. Page,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 89–29690 Filed 12–20–89; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF ENERGY

Privacy Act of 1974; Proposed Amendment to Existing Systems of Records

AGENCY: Department of Energy (DOE).

ACTION: Correction.

SUMMARY: This document corrects a notice that appeared in the Federal Register on Thursday, October 13, 1988 (53 FR 40119), to clarify a routine use for an existing system of records, DOE–19 Accounts Receivable Financial System. The routine use involves the disclosure of information to other Federal agencies, consumer reporting agencies, and collection agencies to assist in the collection of delinquent debts owed to the Federal Government. This correction clarifies the purposes of disclosing information to credit reporting agencies to aid in the collection of outstanding debts.

EFFECTIVE DATE: November 14, 1988.

FOR FURTHER INFORMATION CONTACT:

U.S. Department of Energy, John H. Carter, Chief, Freedom of Information and Privacy Act, MA–203.41, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–5955

or

U.S. Department of Energy, Abel Lopez, Office of General Counsel, GC–43, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–8618.

SUPPLEMENTARY INFORMATION: On October 13, 1988, a notification of intent to amend an existing system of records, DOE–19 Accounts Receivable Financial System, was published in the Federal Register (53 FR 40119). The amendment, which was effective November 14, 1988, allows as a rountine use the disclosure of information maintained in the system of records to other Federal agencies, consumer reporting agencies, and collection agencies to assist the Department in the collection of debts owed to the Federal Government. This revision is to distinguish between two types of disclosure of information from the sytem of records to consumer reporting agencies. Disclosure of bad debt information will follow the procedures of section (b)(12) of the Privacy Act of 1974 (5 U.S.C. 552a). Disclosure of information not containing bad debt information (e.g., information needed to identify a person and obtain a credit report thereon) will remain a routine use of the system of records.

Dated: November 11, 1989.

Charles R. Tierney,

Director of Administration.

Accordingly, the systems of records amendment published on October 13, 1988, (53 FR 40119) is corrected as follows:

1. The Routine Uses section is revised as follows:

Routine Uses of Records Maintained in the System, Including Categories of Users and the Purposes of Such Uses:

Other Federal Agencies, Consumer Reporting Agencies (only for the purpose of acquiring credit information), and Collection Agencies—To aid in the collection of outstanding debts owed to the Federal Government.

Additional routine uses as listed in Appendix B of the Department of Energy; Privacy Act of 1974; Annual Publication of System Notices (47 FR 14333, April 2, 1982).

2. A new section is added as follows:

Disclosures to Consumer Reporting Agencies:

Disclosure Pursuant to 5 U.S.C. 552a(b)(12):

Disclosures may be made from this system to "consumer reporting agencies" as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)).

[FR Doc. 89–29701 Filed 12–20–89; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Project No. 9765–001 Utah]

Big Sand Wash Dam; Availability of Environmental Assessment

December 12, 1989.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the application for minor license for the proposed Big Sand Wash Dam Hydroelectric Project, which would be located on the Big Sand Wash in Duchesne County, near Upalco, Utah, and prepared an Environmental Assessment (EA) for the proposed project. In the EA, the Commission's staff analyzes the potential environmental impacts of the proposed project and concludes that approval of the proposed project, with appropriate mitigative measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 1000, of the Commission's offices at 825 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 89–29611 Filed 12–20–89; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 10502–000 Utah]

Lower Builder Creek; Availability of Environmental Assessment

December 12, 1989.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the application for minor license for the proposed Lower Boulder Creek Hydroelectric Project located on the Lower Boulder Creek in Garlfield County, near Boulder, Utah, and has prepared an Environmental Assessment (EA) for the proposed project. In the EA, the Commission's staff has analyzed the potential environmental impacts of the proposed project and has concluded that approval of the proposed project, with appropriate mitigation measures, would not constitute a major federal action

significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 1000, of the Commission's office at 825 North Capitol Street NE., Washington, DC 20426.

Lois Cashell,

Secretary.

[FR Doc. 89-29612 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 503-006 Idaho]

Swan Falls; Availability of Environmental Assessment

December 12, 1989.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing reviewed the application for an amendment to the license for the Swan Falls Hydroelectric Project, which is located on the Snake River in Ada and Owhyee Counties, near Kuna, Idaho, and prepared an Environmental Assessment (EA) for the proposed project. In the EA, the Commission's staff analyzes the potential environmental impacts of the proposed amendment and concludes that approval of the proposed amendment, with appropriate mitigative measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 2200, of the Commission's offices at 825 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29613 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CI90-5-000, et al.]

Conoco Inc., et al. Applications for Certificates and Abandonment of Service [1]

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to sell natural gas in interstate commerce or to abandon service as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

December 14, 1989.

Any person desiring to be heard or to make any protest with reference to said applications should on or before January 2, 1990, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No. and date filed	Applicant	Purchaser and location	Description
CI90-5-000, (CI64-421) B, 10-20-89.	Conoco Inc., P.O. Box 2197, Houston, TX 77252.	Texas Eastern Transmission Corporation, West Cameron Block 459, Offshore Louisiana.	Well was plugged and abandoned on 5-5-89.
CI90-18-000, E, 11-30-89	Mitchell Energy Corporation, P.O. Box 4000, The Woodlands, TX 77387-4000.	Natural Gas Pipeline Company of America, Boonsville Field, Wise County, Texas.	Acreage acquired 12-1-88 from Carlson Petroleum Company and the Carlson 1979 Program.
CI90-19-000, (CI72-440) F, 12-4-89.	TOC-Rocky Mountains Inc., 1670 Broadway, Rm. 1754, Denver, CO 80202.	Panhandle Eastern Pipe Line Company, Norden Field, Weld County, Colorado, and Sweetwater County, Wyoming.	Acreage acquired 12-7-88 from Amoco Production Company.
CI90-20-000, (CI71-425) F, 12-4-89.	TOC-Rocky Mountains Inc.	Panhandle Eastern Pipe Line Company, Richfield Field, Morton County, Kansas.	Acreage acquired 12-7-88 from Amoco Production Company.
CI90-21-000, (CI65-750) F, 12-5-89.	TOC-Rocky Mountains Inc.	Arkla Energy Resources, a division of Arkla, Inc. Wilburton Field, Pittsburg County, Oklahoma.	Acreage acquired 12-7-88 from Amoco Production Company.
CI90-22-000, (CI64-23) F, 12-5-89.	TOC-Rocky Mountains Inc.	Arkla Energy Resources, a division of Arkla, Inc. Lacy Area, Kingfisher and Blaine Counties, Oklahoma.	Acreage acquired 12-7-88 from Amoco Production Company.
CI90-23-000, B, 11-29-89	Conoco Inc.	Warren Petroleum Corporation, Pauls Valley Penn Unit, Pauls Valley Field, Garvin County, Oklahoma.	Wells plugged and abandoned.
CI90-24-000, B, 11-29-89	Conoco Inc.	Warren Petroleum Corporation, Pauls Valley Penn Unit, Garvin County, Oklahoma.	Wells plugged and abandoned.
CI90-25-000, (CI64-148) F, 12-6-89.	TOC-Rocky Mountains Inc.	Arkla Energy Resources, a division of Arkla, Inc. Lacy Area, Kingfisher and Blaine Counties, Oklahoma.	Acreage acquired 12-7-88 from Amoco Production Company.
CI90-26-000, (CI66-942) F, 12-6-89.	TOC-Rocky Mountains Inc.	Northern Natural Gas Company, Division of Enron Corp. 42 Township Field, Woodward County, Oklahoma.	Acreage acquired 12-7-88 from Amoco Production Company.
CI90-27-000, (CI78-628) F, 12-7-89.	Marathon Oil Company, P.O. Box 3128, Houston, TX 77253.	United Gas Pipe Line Company, High Island Block 480, Offshore Texas.	Acreage acquired 1-1-89 from LLOXY Holdings, Inc.
CI90-28-000, (CI81-102) F, 12-7-89.	Marathon Oil Co.	Texas Eastern Transmission Corporation, Vermilion Blocks 369 and 386, Offshore Louisiana.	Acreage acquired 1-1-89 from LLOXY Holdings, Inc.

Filing code. A—Initial Service. B—Abandonment. C—Amendment to add acreage. D—Assignment of acreage. E—Succsssion. F—Partial Succession.

[FR Doc. 89-29615 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. G-5145-001, et al.]

Exxon Corp., et al; Applications for Termination or Amendment of Certificates[1]

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to terminate or amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before January 2, 1990, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211 and 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

Docket no. and date filed	Applicant	Purchaser and location	Description
G-5145-001, D, 11-17-89	Exxon Corporation, P.O. Box 2180, Houston, TX 77252-2180.	El Paso Natural Gas Company, Spraberry Field, Upton County, Texas.	Assigned 3-23-87 to John L. Cox.
G-6355-004, D, 11-27-89	Conoco Inc., P.O. Box 2197, Houston, TX 77252.	El Paso Natural Gas Company, Arrowhead Field, Lea County, New Mexico.	Assigned 9-1-89 to Morexco, Inc.
G-6342-028, D, 11-13-89	Conoco Inc.	El Paso Natural Gas Company, Monument Area, Lea County, New Mexico.	Assigned 9-1-89 to Lewis B. Burleson.
G-10202-000, D, 11-27-89	Texaco Inc., P.O. Box 52332, Houston, TX 77052-2332.	Colorado Interstate Gas Company, Mocane-LaVerne Field, Beaver County, Oklahoma.	Assigned 6-1-89 to Mesa Operating Limited Partnership.
CI62-1251-017, D, 11-15-89.	Oryx Energy Company, P.O. Box 2880, Dallas, TX 75221-2880.	Arkla Energy Resources, a Division of Arkla, Inc., Kinta Field, Pittsburg County, Oklahoma.	Assigned 5-5-87 to Exxon Corporation, Eberly & Mead, Inc., ARCO Oil & Gas Co., James Allen Clark and Robert T. Priddy.
CI63-1585-000, D, 10-26-89.	Marathon Oil Company, P.O. Box 3128, Houston, TX 77253.	Panhandle Eastern Pipe Line Company, Avard Area, Woods County, Oklahoma.	Assigned 3-1-89 to Plains Resources, Inc.
CI76-323-003, D, 11-17-89.	Enron Oil & Gas Company, 1400 Smith Street, Houston, TX 77002.	El Paso Natural Gas Company, Allison Parks Field, Hemphill County, Texas.	Assigned 4-1-89 to Kerr-McGee Corporation.
CI90-7-000, (CI67-123), D, 10-23-89.	BHP Petroleum Company, Inc., 5847 San Felipe, Suite 3600, Houston, TX 77057.	El Paso Natural Gas Company, San Juan County, New Mexico, San Juan County, Utah, and Apache County, Arizona.	Assigned 4-1-87 to Cross Creek Corporation.
CI90-8-000, (CI73-4), D, 10-23-89.	BHP Petroleum (Americas) Inc., 5847 San Felipe, Suite 3600, Houston, TX 77057.	El Paso Natural Gas Company, San Juan County, New Mexico, San Juan County, Utah, and Apache County, Arizona.	Assigned 4-1-87 to Cross Creek Corporation.
CI90-16-000, (CI64-49), D, 11-3-89.	Enron Oil & Gas Company	El Paso Natural Gas Company, Basin Pool Field, San Juan County, New Mexico.	Assigned 9-1-88 to Meridian Oil Production, Inc.

Filing Code: A—Initial service; B—Abandonment; C—Amendment to add acreage; D—Assignment of acreage; E—Succession; F—Partial succession.

[FR Doc. 89-29616 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CS90-6-000, et al.]

Amoven Oil Co., et al.; Applications for Small Producer Certificates[1]

December 13, 1989.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7(c) of the Natural Gas Act and § 157.40 of the Commission's regulations thereunder for a small producer certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce, all as more fully set forth in the applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before January 2, 1990, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

Docket No.	Date filed	Applicant
CS90-6-000	11-13-89	AMOVEN OIL COMPANY, P.O. Box 670663, Houston, TX 77267.
CS90-8-000	11-24-89 [2]	RAMCO Oil & Gas, Inc., *et al.*, Two Warren Place, Suite 1700, 6120 South Yale, Tulsa, OK 74136.
CS90-9-000	11-28-89	Eclipse Services, Inc., P.O. Box 837, La Grange, TX 78945.
CS90-10-000	11-29-89	Renegade Oil and Gas Company, P.O. Box 440983, Aurora, CO 80044-0983.
CS90-11-000	11-30-89 [3]	Main Energy, Inc., 1100 Louisiana, Suite 4650, Houston, TX 77002.
CS90-12-000	12-15-89	DAR-LON OPERATING, P.O. Box 158, Lamont, OK 74643.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No.	Date filed	Applicant
CS90-13-000	12-6-89.....	A. G. MIKELL, P.O. Box 702675, Tulsa, OK 74170.

[1] The *et al.* parties are: RAMCO-NYL 1987 Limited Partnership; RAM Reserve Consolidation, Inc.; and RB Operating Company.
[2] The application was received on November 8, 1989. The filing date is the date of receipt of the filing fee.

[FR Doc. 89-29614 Filed 12-20-89; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. RP86-41-007 & Docket No. RP87-14-007]

Algonquin Gas Transmission Co.; Compliance Filing

December 13, 1989.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on December 7, 1989, in compliance with the Federal Energy Regulatory Commission's "Order Accepting, Suspending and Rejecting Tariff Sheets" issued November 24, 1989, tendered for filing to its FERC Gas Tariffs, Second Revised Volume No. 1 and Original Volume No. 2 certain tariff sheets to be effective November 1, 1989.

Algonquin states that this instant filing (1) eliminates the transmission and compressions tracking provisions which the Commission directed be removed from Algonquin's tariff; (2) reflects the rates under the RP87-14 settlement cost of service including the negotiated level of transmission and compression expenses which the Commission observed were necessary for inclusion in lieu of the tracker; (3) includes the revision required by the Commission to section 2.4 of Rate Schedule AFT-1; and (4) modifies section 17 of the General Terms and Conditions of its tariff.

Algonquin further states that additional workpapers were submitted as requested by the Commission to provide further explanation supporting said filing.

Algonquin notes that copies of this filing were served upon all parties on the official service list, each affected party and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before December 21, 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

List of Tariff Sheets

Second Revised Volume No. 1

Second Substitute Thirty-sixth Revised Sheet No. 201 (Page 1 of 2)
Second Substitute Thirty-sixth Revised Sheet No. 201 (Page 2 of 2)
Second Substitute Thirty-seven Revised Sheet No. 203
Second Substitute Thirty-third Revised Sheet No. 204
Third Substitute Thirtieth Revised Sheet No. 205
Substitute Ninth Revised Sheet No. 221
Substitute Second Revised Sheet No. 301
Substitute Eighth Revised Sheet No. 311
Substitute First Revised Sheet No. 321
Substitute Eleventh Revised Sheet No. 324
Substitute First Revised Sheet No. 331
Substitute Fourth Revised Sheet No. 361
Substitute Fourth Revised Sheet No. 371
Substitute Second Revised Sheet No. 382
Substitute First Revised Sheet No. 435
Substitute First Revised Sheet No. 562
Substitute Seventh Revised Sheet No. 600
Substitute Fifth Revised Sheet No. 629
Substitute Third Revised Sheet No. 630
Substitute Sixth Revised Sheet No. 631
Substitute Fifth Revised Sheet No. 631-A
Substitute Fourth Revised Sheet No. 632
Substitute Third Revised Sheet No. 633
Substitute Fourth Revised Sheet No. 634
Substitute Third Revised Sheet No. 635
Substitute Third Revised Sheet No. 636
Substitute Second Revised Sheet No. 637
Original Sheet Nos. 664-667

Original Volume No. 2

Substitute Third Revised Sheet No. 266

[FR Doc. 89-29621 Filed 12-20-89; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. RP90-12-003]

Colorado Interstate Gas Co., Compliance Filing

December 14, 1989.

Take notice that on December 6, 1989, Colorado Interstate Gas Company (CIG) filed Substitute Original Sheet No. 31 to its FERC Gas Tariff, Second Revised Volume No. 1-A, to be effective August 1, 1988.

CIG states that the purpose of this filing is to reinstate section 3.2(f)(ii) of its tariff in compliance with the Commission's order issued November 16, 1989 in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989)). All such protests should be filed on or before December 21, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29604 Filed 12-20-89; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. TM90-2-5-001]

Midwestern Gas Transmission Co.; Tariff Filing

December 14, 1989.

Take notice that on December 11, 1989 Midwestern Gas Transmission Company (Midwestern) submits for filing in the referenced docket Original Sheet Nos. 6, 8 and 9 (Reserved for Future Use) and Original Sheet No. 7 to its FERC Gas Tariff, First Revised Volume 1, to be effective August 1, 1989, and First Revised Sheet No. 7, Superseding Original Sheet No. 7, to be effective January 1, 1990.

Midwestern has also included for filing Original Sheet Nos. 88, 89 and 90 through 109 (Reserved for Future Use) to its FERC Gas Tariff, First Revised Volume No. 1. The above sheets are provided to reflect an August 1, 1989 effective date.

Midwestern also states that copies of the tariff filing has been mailed to all affected customers and state regulatory commission.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the

Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989)). All such protests should be filed on or before December 21, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29622 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP90-44-001]

Northern Border Pipeline Co.; Proposed Change in F.E.R.C. Gas Tariff

December 14, 1989.

Take notice that on Dec. 6, 1989, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of Northern Border Pipeline Company's FERC Gas Tariff, Original Volume No. 1, the following revised tariff sheet:

Substitute Seventh Revised Sheet No. 157

On November 21, 1989, Northern Border filed in Docket No. RP90-44-000 to revise certain tariff sheets. In that filing, Seventh Revised Sheet No. 157 stated an erroneous effective time period for the revised Maximum Rate. Substitute Seventh Revised Sheet No. 157 was filed to correct that error.

Northern Border has requested that this revised tariff sheet be effective January 1, 1990. Copies of this filing have been sent to all of Northern Border's contracted shippers.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such protests should be filed on or before Dec. 21, 1989. Protests will be considered but not have to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter.

Copies of this filing are on file with the Commission and are available for public inspection.

Lois Cashell,

Secretary.

[FR Doc. 89-29605 Filed 12-20-89; 8:45]

BILLING CODE 6717-01-M

[Docket No. TQ90-1-38-002]

Ringwood Gathering Co.; Revised Tariff Sheets

December 14, 1989.

Take notice that on December 11, 1989, Ringwood Gathering Company (Ringwood) filed revisions to its December 1, 1989 quarterly PGA filing. Ringwood states that Fifty-Second Sheet Quarterly PGA-1 has been resubmitted and changed to reflect the elimination of the word "Substitute" from the description only and Schedule Q0101, which was omitted from the December 1, 1989 filing is also filed.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989). All such protests should be filed on or before December 21, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29623 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP90-11-001]

Seagull Interstate Corp.; Compliance Filing

December 13, 1989.

Take notice that on December 4, 1989, Seagull Interstate Corporation ("Seagull"), 1001 Fannin, Suite 1700, Houston, Texas 77002, filed pursuant to Federal Energy Regulatory Commission ("Commission") letter order dated November 15, 1989, tariff sheets to Original Volume No. 1 of its FERC Gas Tariff. The tariff sheets filed by Seagull are:

To Be Effective April 1, 1989

Second Revised Sheet No. 54B
First Revised Sheet No. 54C

Seagull states that these tariff sheets are filed, as required by Order No. 509, issued December 9, 1988, as amended by Order No. 509-A issued February 21, 1989. On October 16, 1989, Seagull filed tariff sheets to reflect revisions in its tariff pursuant to the requirements of Order Nos. 509 and 509-A. On November 15, 1989, the Commission issued a letter order requiring Seagull to make certain revisions in its tariff sheets. This compliance filing reflects the revisions requested by the Commission. Seagull has also redesignated "Second Revised Sheet No. 54C" as "First Revised Sheet No. 54C". In its October 16, 1989 filing, Seagull had mistakenly identified the sheet. Seagull requests that the Commission grant any and all waivers necessary to permit these tariff sheets to become effective April 1, 1989.

Seagull states that copies of its compliance filing have been served upon all of its shippers. Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 on or before December 21, 1989, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Persons who are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29606 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP90-4-002]

Transwestern Pipeline Co.; Compliance Filing

December 13, 1989.

Take notice that Transwestern Pipeline Company ("Transwestern") on December 4, 1989, tendered for filing, as part of its FERC Gas Tariff Second Revised Volume No. 1, the following tariff sheets:

Effective November 1, 1989

Substitute 71st Revised Sheet No. 5
Substitute 6th Revised Sheet No. 38

The above referenced tariff sheets are being filed to comply with Commission's order issued November 3, 1989. On October 4, 1989, Transwestern Pipeline Company (Transwestern) filed revised tariff sheets requesting changes to the maximum and minimum rates for service under Rate Schedule IS-1. In addition, Transwestern requested authority to determine the priority of IS-1 Service in the event of a supply shortage based upon the economic value where the maximum IS rate is not charged. Finally, Transwestern requested three related technical revisions to the IS-1 Service Agreement. The November 3, 1989 order accepted in

part, effective November 1, 1989, and rejected in part the tariff sheets filed October 4, 1989. The Commission's order accepted Transwestern's tariff provisions concerning the maximum IS rate and the three technical revisions to the IS–1 Service Agreement and rejected Transwestern's tariff provisions concerning the minimum IS rate and interruption of IS service. Pursuant to, and in compliance with Ordering Paragraphs A and B of the November 3, 1989 order, Transwestern submited the above referenced tariff sheets.

Transwestern respectfully requests that the Commission grant any and all waivers of it rules, regulations, and orders as may be necessary so as to permit the above-listed tariff sheets to become effective on November 1, 1989, as approved in the November 3, 1989 Commission order.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 N. Capitol Stret, NW., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before December 20, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89–29607 Filed 12–20–89; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM90–4–42–001]

Transwestern Pipeline Co.; Proposed Changes in FERC Gas Tariff

December 14, 1989.

Take notice that Transwestern Pipeline Company ("Transwestern") on December 11, 1989, tendered for filing, as part of its FERC Gas Tariff Second Revised Volume No. 1, the following tariff sheets:

Substitute 73rd Revised Sheet No. 5
Substitute 40th Revised Sheet No. 6
Substitute 8th Revised Sheet No. 37

On December 1, 1989 Transwestern filed the above referenced tariff sheets to adjust Transwestern's Gas Research Institute (GRI) surcharge rate pursuant to the Commission's Opinion No. 334, issued October 10, 1989 approving a GRI surcharge rate of $0.0130/Mcf, to be effective January 1, 1990. Subsequent to the December 1, 1989 filing, Transwestern discovered the revised GRI Surcharge was incorrectly stated. The instant filing is being made to reflect the correct GRI Surcharge of $0.0126/dth, as approved in Opinion No. 334.

Transwestern requests that the Commission grant any and all waivers of its rules, regulations, and orders as may be necessary so as to permit the above-listed tariff sheets to become effective on January 1, 1990.

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 N. Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 21, 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. 89–29624 Filed 12–20–89; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM90–2–1–000]

Alabama-Tennessee Natural Gas Co.; Proposed Changes in FERC Gas Tariff

December 14, 1989.

Take notice that on December 11, 1989, Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), Post Office Box 918, Florence, Alabama 35631, tendered for filing Third Revised Sheet No. 4A to its FERC Gas Tariff, First Revised Volume No. 1. Such tariff sheet is proposed to become effective January 1, 1990.

Alabama-Tennessee states that the filing is to adjust the currently effective take-or-pay surcharge rates to its customers to reflect increases in the amount being billed to by Tennessee Gas Pipeline Company. Alabama-Tennessee asserts that the allocation methodology utilized is that approvd by the Commission in Docket Nos. RP88–205–001, TM89–1–1–000 and TM89–5–1–000. Alabama-Tennessee further states that such filing is being made pursuant to § 26.1(a) of its tariff.

Alabama-Tennessee is amortizing the increased take-or-pay costs over a thirty-six (36) month period. According to Alabama-Tennessee, that is the maximum amortization period allowed by this Commission in FERC Docket No. RP88–191.

Alabama-Tennessee has requested any necessary waivers of the Commission's Regulations in order to permit the tariff sheets to become effective as proposed.

Alabama-Tennessee states that copies of the tariff filing have been mailed to all of its jurisdictional customers and affected State Regulatory Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 or Rule 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 December 21, 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 to the proceeding must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspections.

Lois D. Cashell,

Secretary.

[FR Doc. 89–29617 Filed 12–20–89; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TQ90–1–20–002]

Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

December 13, 1989.

Take notice that Algonquin Gas Transmision Company ("Algonquin") on December 7, 1989, tendered for filing proposed changes in its FERC Gas Tariff, Second Revised Volume No. 1, as set forth in the revised tariff sheets:

Proposed to be effective November 1, 1989

Third Substitute Thirty-sixth Revised Sheet No. 201
Third Substitute Thirty-seventh Revised Sheet No. 203
Third Substitute Thirty-third Revised Sheet No. 204
Fourth Substitute Thirtieth Revised Sheet No. 205

Algonquin states that on October 30, 1989 in Docket No. TQ90–1–20–000 and 001, Algonquin filed and Out-of-Cycle Purchased Gas Adjustment ("Out-of-Cycle PGA") to be effective on November 1, 1989. Algonquin states that in its Out-of-Cycle PGA that such filing was predicated upon the Commission's

acceptance of the underlying filings in Docket Nos. RP90–13–000 and RP86–41–000, and that should the Commission reject or modify those filings, Algonquin would refile to reflect the Commission's actions. The Commission accepted Algonquin's Out-of-Cycle PGA in its Letter Order issued November 30, 1989, subject to certain conditions. The Commission's acceptance of the Out-of-Cycle PGA was subject to the outcome and all orders issued in Docket No. RP86–41–000 and subject to Algonquin filing within fifteen days of the date of the November 30 Letter Order, revised rates consistent with the November 16 Letter Order.

Algonquin further maintains that the listed tariff sheets, which are proposed to be effective November 1, 1989, are filed pursuant to Algonquin's section 17, PGA Provision and in compliance with the Commission's Letter Order of November 30, 1989 reflecting the following:

(i) The conditions set forth in the Commission's Letter Order of November 16, 1989 which permits the incorporation of Standby charges as a PGA trackable item and

(ii) Incorporation of the conditions of acceptance found in the Commission's November 24, 1989 Order in Algonquin's Docket Nos. RP86–41–006 and RP87–14–005 Compliance filing.

Algonquin notes that copies of the filing were served upon each of the affected parties and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before December 21, 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 89–29618 Filed 12–20–89; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP89–239–014]

Boundary Gas, Inc.; Compliance Filing

December 13, 1989.

Take notice that on December 6, 1989, Boundary Gas, Inc. (Boundary) filed Second Revised Tariff Sheet No. 43 to its FERC Gas Tariff, First Revised Volume No. 1, to the effective December 6, 1989.

Boundary states that, pursuant to the Commission's letter order issued on October 25, 1989, this filing replaces First Revised Sheet No. 43 which stated incorrectly that National Fuel Supply Corporation (National Fuel) would pay the Gas Research Institute surcharge directly to the Commission. Boundary states that Second Revised Sheet No. 43 corrects this error, stating that National Fuel will pay the surcharge directly to the Gas Research Institute.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989)). All such protests should be filed on or before December 20, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89–29634 Filed 12–20–89; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP89–253–004]

Carnegie Natural Gas Co.; Compliance Filing

December 14, 1989.

Take notice that Carnegie Natural Gas Company ("Carnegie"), on December 12, 1989, refiled certain tariff sheets reflecting the removal of proposed section 26 of the General Terms and Conditions of its FERC Gas Tariff. Carnegie submitted this refiling in compliance with the letter order issued in this docket on November 29, 1989. Carnegie also refiled on December 12 the tariff sheets originally filed on November 15 in Docket Nos. RP89–253–000 and RP89–253–001 which do not pertain to section 26. Carnegie states that these non-section 26 tariff sheets are identical to those filed on November 15.

Carnegie states that it has served the filing upon the company's jurisdicitonal customers, applicable state commissions, and other parties that have intervened in these dockets.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commissions, 825 N. Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commissions Rules and Regulations. All such motions or protests should be filed on or before December 21, 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 89–29635 Filed 12–20–89; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP90–56–000]

CNG Transmission Corp.; Proposed Changes in FERC Gas Tariff

December 13, 1989

Take notice that CNG Transmission Corporation ("CNG"), on December 8, 1989, pursuant to section 4 of the Natural Gas Act, part 154 and § 2.104 of the Commisson's regulations, the Commisson's Order No. 500, as amended, and § 12.10 of the General Terms and Conditions of CNG's FERC Gas Tariff, filed the following revised tariff sheets to Original Volume No. 1 of its FERC Gas Tariff:

Substitute Fifteenth Revised Sheet No. 31
Substitute Eighth Revised Sheet No. 32
Second Revised Sheet No. 39

The filing is proposed to become effective on January 1, 1990.

CNG states that this filing reflects in rates take-or-pay-related payments made by CNG to its producer suppliers pursuant to settlement agreements entered into through November 30, 1989. These amounts were subject to litigation on March 31, 1989. CNG states that this filing is made in accordance with the terms and conditions of the Stipulation and Agreement approved by the Commission in Docket No. RP88–217, *et al.* by order issued October 6, 1989.

Copies of the filing were served upon CNG's customers as well as interested State commissions.

Any person desiring to be heard or to protest said filing should file a protest or motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure 18 CFR §§ 385.214 and 385.211). All motions or protests should be filed on or before December 20, 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. 89-29608 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP86-168-019]

Columbia Gas Transmission Corp.; Proposed Changes in FERC Gas Tariff

December 14, 1989.

Take notice that on December 11, 1989, Columbia Gas Transmission Corporation (Columbia) filed certain revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1, to be effective on November 1, 1989.

Columbia states that these tariff sheets are filed to administratively correct certain errors in its compliance filing of November 20, 1989. It states that the tariff sheets correct an ambiguity in the FTS Rate Schedule provisions, correct a typographical error in the CAP Rate Schedule, and modify the GIC provisions of the tariff to make two sentences consistent and avoid any possibility of ambiquity.

Columbia states that copies of the filing were served upon its jurisdictional customers, interested state regulatory commissions, and all parties on the official service list.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, Union Center Plaza Building, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before December 21, 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 proceedings. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29627 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ90-4-4-000]

Granite State Gas Transmission, Inc.; Proposed Changes in Rates

December 14, 1989.

Take notice that on December 11, 1989, Granite State Gas Transmission, Inc. (Granite State), 120 Royall Street, Canton, Massachusetts 02021 tendered for filing with the Commission Revised Thirty-First Revised Sheet No. 7 in its FERC Gas Tariff, First Revised Volume No. 1, containing changes in rates for effectiveness on December 8, 1989.

According to Granite State, it has experienced increased purchase gas costs not reflected in its current rates filed in Docket No. TQ89-3-4-000. It is stated that the current rates reflect substantial volumes of spot market purchases for system supply and now Granite State projects no further spot market purchases during the remainder of the fourth quarter and that it will purchase only from its firm supply sources during the period. Also, Granite State further states that the current costs for its firm supplies have increased since it made its last purchased gas cost adjustment filing and that it is exposed to undercollecting purchased gas costs, unless it adjusts its rates to reflect its current gas costs.

Granite State further states that copies of its filing were served upon its customers, Bay State Gas Company and Northern Utilities, Inc., and the regulatory commissions of the States of Maine, Massachusetts and New Hampshire.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with sections 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before December 21, 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. 89-29619 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-2-46-000]

Kentucky West Virginia Gas Co.; Proposed Change in FERC Gas Tariff

December 13, 1989.

Take notice that Kentucky West Virginia Gas Company (Kentucky West) on December 11, 1989, tendered for filing with the Federal Energy Regulatory Commission (Commission) Second Revised Sheet No. 44 to its FERC Gas Tariff, Second Revised Volume No. 1, to become effective January 1, 1990.

The revised tariff sheet amends Kentucky West's Gas Research Institute (GRI) funding charge to place into effect on January 1, 1990, the new Gas Research Institute funding unit of 12.6 mills per dekatherm as approved by FERC in Opinion No. 334, issued Octobrer 10, 1989, under Docket No. RP89-187-000. Kentucky West Virginia states that, by its filing, or any request or statement made therein, it does not waive any rights to collect amounts, nor the right to collect carrying charges applicable thereto, to which it is entitled pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit issued on March 6, 1986, in Kentucky West Virginia Gas Co. v. FERC, 780 F.2d 1231 (5th Cir. 1986), or to which it becomes entitled pursuant to any other judicial and/or administrative decisions.

Kentucky West Virginia states that a copy of its filing has been served upon each of its jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 21, 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. 89-29620 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP86-52-006, RP86-52-007, and RP86-109-003]

Kentucky West Virginia Gas Co.; Informal Settlement Conference

December 14, 1989.

Take notice that a conference will be convened in the above-captioned proceeding on December 21, 1989, at 11 a.m. at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, 20426, for the purpose of exploring the possible settlement of the above-referenced dockets.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information, please contact James Pederson at (202) 357-6570 or Joanne Leveque at (202) 357-8418.

Lois D. Cashel,

Secretary.

[FR Doc. 89-29625 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-191-010]

Northwest Pipeline Corp.; Proposed Change in FERC Gas Tariff

December 14, 1989.

Take notice that on December 11, 1989, Northwest Pipeline ("Northwest") tendered for filing and acceptance the following tariff sheets to be a part of its FERC Gas Tariff.

Original Volume No. 1-A

Third Revised Sheet No. 304
First Revised Sheet No. 305
Second Revised Sheet No. 316
First Revised Sheet No. 316-A

Northwest states that this filing revises its tariff provisions so that Northwest may install new taps, valves, and measurement equipment at its own expense as long as the estimated annual revenue to be generated by such facilities exceeds the annual cost of service associated with such facilities.

Northwest has determined that it would be beneficial to resolve the Commission's concerns that the determination of which party will pay for facilities at receipt and delivery points is made on a non-discriminatory basis as quickly as possible without regard to the ultimate disposition of the request for rehearing on lateral lines. Therefore, Northwest requests that the Commission treat the instant submission as a filing in compliance with the Commission's July 6, 1989 order in Docket No. RP89-191 and grant any waivers it may deem necessary to permit a July 1, 1989 effective date for the tendered tariff sheets.

A copy of this filing is being mailed to all jurisdictional sales customers and affected state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 21, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29631 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-47-028]

Northwest Pipeline Corp.; Amended Compliance Filing

December 14, 1989.

Take notice that on December 6, 1989, Northwest Pipeline Corporation (Northwest) filed certain tariff sheets to its FERC Gas Tariff as an amendment to its November 17, 1989 compliance filing.

Northwest states that this filing accommodates the change in the design of rates in compliance with the Commission's order of October 17, 1989.

Northwest states that a copy of this filing is being served on all parties of record and on all jurisdictional customers and affected state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1988)). All such protests should be filed on or before December 21, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29628 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-70-007]

Stingray Pipeline Co.; Compliance Filing

December 13, 1989.

Take notice that Stingray Pipeline Company (Stingray) on December 4, 1989 tendered for filing certain revised tariff sheets as listed in appendix A to the filing in compliance with Ordering Paragraph (2) of the Federal Energy Regulatory Commission's (Commission) order dated November 2, 1989.

Stingray states that copies of its filing have been served on all parties and customers.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules of Practice and Regulations. All such protests should be filed on or before December 20, 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 proceding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29629 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-113-002]

Tennessee Gas Pipeline Co.; Filing

December 13, 1989.

Take notice on December 6, 1989, Tennessee Gas Pipeline Company (Tennessee) tendered for filing the following revised tariff sheets in Second

Revised Volume No. 1 of its FERC Gas Tariff to be effective on September 26, 1989:

Third Substitute Second Revised Sheet No. 109
Third Substitute Original Sheet No. 109A
Original Sheet No. 109B
Second Substitute Alternate Fourth Revised Sheet No. 115
Second Substitute Alternate First Revised Sheet No. 115A.

Tennessee states that this filing complies with the Commission's order on November 21, 1989, which directed Tennessee (1) to provide that Tennessee will construct facilities for its shippers on a non-discriminatory basis in accordance with the criteria set forth in the tariff, (2) to provide that Tennessee will only construct facilities when the rate of return generated by the DCF analysis is the greater of three percentage points above Tennessee's allowed overall rate of return or 15 percent, and (3) to clarify the criteria which Tennessee will use to determine if a project is economical.

Tennessee stated that it was making the filing subject to its interpretation that the information required to be filed in future rate cases pursuant to Ordering Paragraph (B) of the Commission's November 21st order must only be filed for a particular facility in the first rate case in which Tennessee attempted to include the costs in its rate base and not in any subsequent rate case. Tennessee requested that the Commission rejected this compliance filing if the Commission interprets the condition in that ordering paragraph differently, and issue an order to refile the tariff sheets in accordance with the Commission's interpretation.

Tennessee states that copies of its filing are available for inspection at its principal place of business in the Tenneco Building, Houston, Texas, and have been mailed to all affected customers.

Any person desiring to protest said filing should file a 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 protests should be filed on or before December 20, 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29630 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP90-55-000]

Transwestern Pipeline Co.; Proposed Changes in FERC Gas Tariff

December 13, 1989.

Taken notice that Transwestern Pipeline Company (Transwestern) on December 7, 1989, tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets:

5th Revised Sheet No. 30
5th Revised Sheet No. 33

Transwestern states that the above listed tariff sheets were filed to revise its presently effective tariff to remove the restriction under Rate Schedules FTS-1 and ITS-1 that a shipper is required to reimburse Transwestern the cost of any facilities required to be installed in order to provide transportation service to the shipper. Transwestern would have an additional tool available to assist in maintaining throughput on its system from sources which, under the present tariff provision, would not be connected. It also provides a shipper or producer an outlet for its gas which was not previously available. The proposed tariff changes would allow Transwestern to evaluate each situation based on the factual circumstances and allow Transwestern to determine the amount of costs, if any, which would be required to be reimbursed. The proposed effective date is January 7, 1990.

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 N. Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before Dec. 20, 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. 89-29609 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

Federal Energy Regulatory Commission

[Docket No. RP89-140-006 & RP89-195-003]

Williams Natural Gas Co.; Proposed Changes in FERC Gas Tariff

December 14, 1989.

Take notice that on December 6, 1989, Williams Natural Gas Company (WNG) tendered for filing the following tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

Effective May 1, 1989
Original Sheet Nos. 6E1 and 6E2
First Revised Original Sheet No. 6F
Effective July 1, 1989
First Revised Sheet Nos. 6E1 and 6E2
First Revised Sheet No. 6F

WNG states that these tariff sheets are being filed in compliance with the Commission's Order issued November 21, 1989 in Docket Nos. RP89-140-005 and RP89-195-002.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such protests should be filed on or before December 21, 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 proceedings. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29632 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-183-005]

Williams Natural Gas Co., Proposed Changes in FERC Gas Tariff

December 14, 1989.

Take notice that Williams Natural Gas Company (WNG) on December 7, 1989, tendered for filing Revised Original

Sheet No. 5A to its FERC Gas Tariff, Original Volume No. 1.

The proposed effective date of this tariff sheet is December 1, 1989.

WNG states that revised Original Sheet No. 5A is being filed to conform identification numbers for WNG gathering areas shown on this sheet with those used in WNG's Interruptible Master Receipt Point List which has been provided to several hundred potential customers on WNG's system. WNG hereby amends the November 30 compliance filing made by WNG in this docket with this Revised Original Sheet No. 5A which replaces Original Sheet No. 5A, so that WNG's and its Master Receipt Point List conform, thereby eliminating any potential confusion to our customers.

Any person desiring to protest said motion should file a protest with the Federal Regulatory Commission, 825 N. Capitol St., NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such protests should be filed on or before December 21, 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 proceedings. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-29633 Filed 12-20-89; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-44544; FRL 3687-2]

TSCA Chemical Testing; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the receipt of test data on oleylamine (CAS No. 112-90-3), commercial hexane (CAS Nos. 96-37-7 and 110-54-3), cresols (CAS Nos. 95-48-7, 108-39-4, and 107-44-5) and 2,3,5,6-tetrachloro-2,5-cyclohexadiene1,4-dione (chloranil) (CAS No. 118-75-2) submitted pursuant to a final test rule under the Toxic Substances Control Act (TSCA). Publication of this notice is in compliance with section 4(d) of TSCA.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-543B, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: Section 4(d) of TSCA requires EPA to publish a notice in the **Federal Register** reporting the receipt of test data submitted pursuant to test rules promulgated under section 4(a) within 15 days after it is received.

I. Test Data Submissions

EPA received test data for oleylamine, submitted by the Chemical Manufacturers Association Oleylamine Panel pursuant to a test rule at 40 CFR 799.3175, on November 28 and 29, 1989. The November 28th submission describes acute in vivo cytogenetics assay in mice. The November 29th submission describes teratology studies in rats and rabbits with oleylamine. Cytogenetic and Developmental toxicity testing is required by this test rule.

EPA received test data for commercial hexane, submitted by the American Petroleum Institute pursuant to a test rule at 40 CFR 799.2155, on November 28, 1989. The submissions describe the developmental toxicity study of commercial hexane vapor in rats and mice. Developmental toxicity testing is required by this test rule.

EPA received test data for Cresols, submitted by the Chemical Manufacturers Association on behalf of the test sponsors and pursuant to a test rule at 40 CFR 799.1250, on December 7, 1989. The submissions describe the two-generation reproduction studies of o-,m-, and p-cresols administered by gavage to sprague-dawley (CD) rats. Two-generation reproductive effects studies are required by this test rule.

EPA received test date for chloranil, submitted by the Hoechst Celanese Corporation pursuant to a test rule at 40 CFR 766.25, on December 6, 1989. The submission describes the levels of 2,3,7,8-substituted tetra - through hepta chlorinated dibenzo-p-dioxins and dibenzofurans in chloranil. High resolution gas chromatography/highresolution mass spectrometry is required by this test rule.

EPA has initiated its review and evaluation process for these data submissions. At this time, the Agency is unable to provide any determination as to the completeness of the submissions.

II. Public Record

EPA has established a public record for this TSCA section 4(d) receipt of data notice (docket number OPTS-44544). This record includes copies of all studies reported in this notice. The record is available for inspection from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays, in the TSCA Public Docket Office, Rm. NE-G004, 401 M St., SW., Washington, DC 20460.

Authority: 15 U.S.C. 2603.

Dated: December 15, 1989.

Carl Mazza,

Acting Director, Existing Chemical Assessment Division, Office of Toxic Substances.

[FR Doc. 89-29691 Filed 12-20-89; 8:45 am]

BILLING CODE 6560-50-D

[OPTS-51743; FRL-3684-8]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA)requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1)premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). This notice announces receipt of 120 such PMNs and provides a summary of each.

DATES: Close of Review Periods:

P 90-23, January 8, 1990.

P 90-24, 90-25, 90-26, January 9, 1990.

P 90-27, January 14, 1990.

P 90-28, 90-29, January 13, 1990.

P 90-30, 90-31, 90-32, 90-33, 90-34, January 14, 1990.

P 90-35, January 15, 1990.

P 90-36, 90-37, 90-38, 90-39, 90-40,90-41, January 16, 1990.

P 90-42, 90-43, January 17, 1990.

P 90-45, 90-46, 90-47, 90-48, 90-49, 90-50, 90-51, January 20, 1990.

P 90-52, 90-53, January 21, 1990.

P 90-54, January 22, 1990.

P 90-55, 90-56, 90-57, 90-58, January 21, 1990.

P 90-59, 90-63, January 22, 1990.

P 90-64, 90-65, 90-66, 90-67, 90-68, 90-69, 90-70, 90-71, 90-72, 90-73, January 23, 1990.

P 90-74, January 24, 1990.

P 90-75, 90-76, 90-77, 90-78, 90-79, 90-80, 90-81, 90-82, January 27, 1990.

P 90–83, 90–84, 90–85, 90–86, 90–87, January 28, 1990.
P 90–88, January 29, 1990.
P 90–89, 90–90, 90–91, 90–92, 90–93, 90–94, 90–95, January 30, 1990.
P 90–97, 90–98, January 31, 1990.
P 90–110, 90–111, February 3, 1990.
P 90–112, 90–113, 90–114, 90–115, 90–116, 90–117, 90–118, February 4, 1990.
P 90–119, February 3, 1990.
P 90–120, 90–121, 90–122, 90–123, 90–124, February 4, 1990.
P 90–125, 90–126, February 6, 1990.
P 90–127, 90–128, February 5, 1990.
P 90–129, 90–130, February 6, 1990.
P 90–131, February 5, 1990.
P 90–132, February 6, 1990.
P 90–133, 90–134, 90–135, 90–136, 90–137, 90–138, 90–139, 90–140, 90–141, February 5, 1990.
P 90–142, February 6, 1990.
P 90–143, February 3, 1990.
P 90–145, February 6, 1990.
P 90–146, 90–147, 90–148, February 10, 1990.
P 90–149, 90–150, 90–152, 90–153, 90–154, 90–155, 90–157, February 11, 1990.
P 90–158, 90–159, 90–160, 90–161, February 12, 1990.

Written comments by:

P 90–23, December 9, 1989.
P 90–24, 90–25, 90–26, December 10, 1989.
P 90–27, December 15, 1989.
P 90–28, 90–29, December 14, 1989.
P 90–30, 90–31, 90–32, 90–33, 90–34, December 15, 1989.
P 90–35, December 16, 1989.
P 90–36, 90–37, 90–38, 90–39, 90–40, 90–41, December 17, 1989.
P 90–42, 90–43, December 18, 1989.
P 90–45, 90–46, 90–47, 90–48, 90–49, 90–50, 90–51, December 21, 1989.
P 90–52, 90–53, December 22, 1989.
P 90–54, December 23, 1989.
P 90–55, 90–56, 90–57, 90–58, December 22, 1989.
P 90–59, 90–63, December 23, 1989.
P 90–64, 90–65, 90–66, 90–67, 90–68, 90–69, 90–70, 90–71, 90–72, 90–73, December 24, 1989.
P 90–74, December 25, 1989.
P 90–75, 90–76, 90–77, 90–78, 90–79, 90–80, 90–81, 90–82, December 28, 1989.
P 90–83, 90–84, 90–85, 90–86, 90–87, December 29, 1989.
P 90–88, December 30, 1989.
P 90–89, 90–90, 90–91, 90–92, 90–93, 90–94, 90–95, December 31, 1989.
P 90–97, 90–98, January 1, 1990.
P 90–110, 90–111, January 4, 1990.
P 90–112, 90–113, 90–114, 90–115, 90–116, 90–117, 90–118, January 5, 1990.
P 90–119, January 4, 1990.
P 90–120, 90–121, 90–122, 90–123, 90–124, January 5, 1990.
P 90–125, 90–126, January 7, 1990.
P 90–127, 90–128, January 6, 1990.
P 90–129, 90–130, January 7, 1990.
P 90–131, January 6, 1990.
P 90–132, January 7, 1990.
P 90–133, 90–134, 90–135, 90–136, 90–137, 90–138, 90–139, 90–140, 90–141, January 8, 1990.
P 90–142, January 7, 1990.
P 90–143, January 4, 1990.
P 90–145, January 7, 1990.
P 90–146, 90–147, 90–148, January 11, 1990.
P 90–149, 90–150, 90–152, 90–153, 90–154, 90–155, 90–157, January 12, 1990.
P 90–158, 90–159, 90–160, 90–161, January 13, 1990.

ADDRESS: Written comments, identified by the document control number "(OPTS–51743)" and the specific PMN number should be sent to: Document Processing Center (TS–790), Office of Toxic Substances, Environmental Protection Agency, 401 M Street, SW., Room L–100, Washington, DC, 20460, (202) 382–3532.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, Rm. EB–44, 401 M Street, SW., Washington, DC 20460 (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the Public Reading Room NE–G004 at the above address between 8 a.m. and 4 p.m., Monday through Friday, excluding legal holidays.

P 90–23

Manufacturer. Confidential.
Chemical. (G) Alkylphenol, phenol and formaldehyde copolymer.
Use/Production. (G) Paraffin deposit inhibitor. Prod.range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 5.0 g/kg species(Rat). Acute dermal toxicity: LD50 < 2.0 g/kg species (Rabbit). Eye irritation: slight species (Rabbit). Skin irritation: slight species (Rabbit). Skin sensitization: negative species (Guinea pig).

P 90–24

Manufacturer. Confidential.
Chemical. (G) Copper organic acid salt.
Use/Production. (G) Petroleum additive. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species (Rat). Static acute toxicity: LC50 87.6 mg/l time 96 h species (Fathead minnow). Eye irritation: slight species (Rabbit). Skin irritation: moderatespecies (Rabbit).

P 90–25

Manufacturer. Confidential.
Chemical. (G) Copper organic acid salt.
Use/Production. (G) Chemical intermediate. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 156–625 mg/kg species (Rat). Acute dermal toxicity: LD50 < 2,000 mg/kg species (Rabbit). Eye irritation: slight species (Rabbit). Skin irritation: moderate species (Rabbit).

P 90–26

Manufacturer. Confidential.
Chemical. (G) Copper organic acid salt.
Use/Production. (G) Petroleum additive. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species (Rat). Static acute toxicity: LC50 87.6 mg/l time 96 h species (fathead minnow). Eye irritation: slight species (Rabbit). Skin irritation: slightspecies (Rabbit).

P 90–27

Manufacturer. Monsanto Chemical Co.
Chemical. (G) Polyolefin modified polyamide.
Use/Production. (S) Tubing automative parts. Prod. range: Confidential.

P 90–28

Manufacturer. Monsanto Chemical Co.
Chemical. (G) Polyolefin modified polyamide.
Use/Production. (S) Tubing and automotive parts. Prod. range: Confidential.

P 90–29

Importer. Hitachi Chemical Company America, Inc.
Chemical. (G) Acrylonitrile copolymer A.
Use/Import. (S) Used to produce molded parts for electronic, automotive, and construction applications. Import range: 40,000–60,000 kg/yr.

P 90–30

Manufacturer. Confidential.
Chemical. (G) Modified neutralized urethane polymer.
Use/Production. (G) Industrial coating. Prod. range: Confidential.

P 90–31

Manufacturer. Confidential.
Chemical. (G) Diaryl iodonium hexafluoroantimonate.

Use/Production. (S) Industrial coating application. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species (Rat). Mutagenicity: negative.

P 90-32

Manufacturer. Confidential.

Chemical. (G) Aryl iodoso tosylate.

Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 156–625 mg/kg species (Rat). Acute dermal toxicity: LD50 < 2,000 mg/kg species (Rabbit). Mutagenicity: negative.

P 90-33

Manufacturer. Confidential.

Chemical. (G) Diaryl iodionium tosylate.

Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 1,254 mg/kg species (Rat). Mutagenicity: negative.

P 90-34

Manufacturer. Westinghouse Electric Corporation.

Chemical. (G) Epoxy modified fatty acid polyester.

Use/Production. (S) Electric insulting varnish. Prod. range: 16,000–56,000 kg/yr.

P 90-35

Manufacturer. Unocal Chemicals Division.

Chemical. (G) Carbamide, carbonyl diamide.

Use/Production. (S) Pollution control ink. Prod. range: Confidential.

P 90-36

Importer. Sumitomo Chemical America, Inc.

Chemical. (G) Cyclohexyl substituted silicic acod ester.

Use/Import. (G) Catalyst for polymerization. Import range:Confidential.

P 90-37

Manufacturer. Chemco, Inc.

Chemical. (G) Amino resin.

Use/Production. (S) A flame retardant for pressure treating of wood for exterior purposes. Prod. range: 2,177,280–2,8,12,736 kg/yr.

P 90-38

Manufacturer. Confidential.

Chemical. (G) Polymer of ethenylbenzene, acrylates, methacrylates, an aliphatic acid and 2,2'–azobis(2–methylbutanenitrile).

Use/Production. (G) Dispesrively used in coating. Prod. range: 250,000–500,000 kg/yr.

P 90-39

Importer. Confidential.

Chemical. (G) Diester of pyridine dicarboxylic acid.

Use/Import. (G) Mining chemical. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 2 g/kg species (Rat). Acute dermal toxicity: LD50 < 2 ml/kg species (Rabbit). Eye irritation: slightspecies (Rabbit). Skin irritation: slight species (Rabbit). Skin sensitization: positive species (Guinea pig).

P 90-40

Importer. Confidential.

Chemical. (G) Mixed sodium/potassium salt of substituted naphthalene disulphonic acid.

Use/Import. (G) Dye. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 2000 g/kg species (Rat). Acute dermal toxicity: LD50 < 2000 mg/kg species (Rat). Static acute toxicity: LC < 100 mg/l 96h species: (Rainbow trout). Eye irritation: none species (Rabbit). Skin irritation: negligible species (Rabbit). Mutagenicity positive. Skin sensitization: negative species (Guinea pig).

P 90-41

Importer. Confidential.

Chemical. (G) Polyoxypropylene-polyoxyethylene block copolymer ester acyl caprolactum.

Use/Import. (S) Plastic parts made by reactive processing. Import range: Confidential.

P 90-42

Manufacturer. Confidential.

Chemical. (G) Potassium salt of organic acids.

Use/Production. (G) Anticorrosion agent. Prod. range: Confidential.

P 90-43

Manufacturer. Confidential.

Chemical. (G) Polybasic fatty acids.

Use/Production. (S) The function is a ph neutralizer for use with amido-amine corrosion inhibitor bases for oil and gas. Prod. range: Confidential.

P 90-45

Manufacturer. The Dow Chemical Company.

Chemical. (G) Unsaturated aromatic hydrocarbon.

Use/Production. (S) Intermediate for manufacturing a polymer that will be used in composites. Prod. range: Confidential.

P 90-46

Manufacturer. The B F Goodrich Company, SP&C Division.

Chemical. (S) Random copolymer of 1,3–butadiene with 2–propenenitrile alpha–(4–cyano–4–methylbutyricacid)–w–2,2– dimethylanenitrile.

Use/Production. (G) Elastromeric modifier for thermoset resins. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 34,600 mg/kg species (Rat). Acute dermal toxicity: LD50 < 3,000 mg/kg species (Rabbit). Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-47

Manufacturer. The B F Goodrich Company, SP&C Division.

Chemical. (S) Random copolymer of 1,3–butadiene with 2–propenenitrile–alpha–(4–cyano–4–methylbutyricacid)–w–2,2– dimethylbutyronitrile.

Use/Production. (G) Elastromeric modifier for thermoset resins. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 34,600 mg/kg species (Rat). Acute dermal toxicity: LD50 < 3,000 mg/kg species(Rabbit). Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-48

Manufacturer. The B F Goodrich Company SP&C Division.

Chemical. (S) Random copolymer of 1,3–butadiene with 2–propenenitrile a–N–(2–(1–piperaryl–ethyl)4–ayano–4–ethylbutyramide–w–2,2–dimethylethane–nitrile.

Use/Production. (G) Elastromeric modifier for thermoset resins. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 34,600 mg/kg species (Rat). Acute dermal toxicity: LD50 < 3,000 mg/kg species (Rabbit). Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-49

Manufacturer. The B F Goodrich Company, Sp&C Division.

Chemical. (S) Random copolymer of 1,3–butadiene with 2–propenenitrile a–N(2–(1–piperaryl))ethyl)4–cyano–4–methylbutyronitrile.

Use/Production. (G) Elastromeric modifier for thermoset resins.Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 34,600 mg/kg species(Rat). Acute dermal toxicity: LD50 < 3,000 mg/kg species(Rabbit). Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-50

Manufacturer. The B F Goodrich Company SP&C Division.
Chemical. (S) Homopolymer of 1,3-butadiene with 0c-(4-cyano-4-methylbutyric acid)-w-2,2-dimethylethanenitrile.
Use/Production. (G) Elastromeric modifier for thermoset resins.Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 34,600 mg/kg species (Rat). Acute dermal toxicity: LD50 < 3,000 mg/kg species(Rabbit). Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-51

Manufacturer. The B F Goodrich Company, SP&C Division.
Chemical. (S) Homopolymer of 1,3-butadiene 0c-(4-cyano-4-methylbutyric acid)-W-2-butyronitrile.
Toxicity Data. Acute oral toxicity: LD50 < 34,600 mg/kg species (Rat). Acute dermal toxicity: LD50 < 3,000 mg/kg species(Rabbit). Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-52

Importer. Confidential.
Chemical. (G) Tricarbomonocyclic substituted heteromonocycle.
Use/Import. (G) Light stabilizer. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 1,000 mg/kg species (Rat). Acute dermal toxicity: LD50 < 2,000 mg/kg species (Rabbit). Static acute toxicity: LC50 < 1,000 mg/l time 96 h species (Zebra fish). Eye irritation: none species (Rabbit). Mutagenicity: negative. Skin sensitization: negative species (Guinea pig).

P 90-53

Manufacturer. Confidential.
Chemical. (G) Polymeric alpha, omega dicarboxylic acid.
Use/Production. (G) Epoxy toughener. Prod. range: Confidential.

P 90-54

Manufacturer. Dover Chemical Corporation.
Chemical. (S) Tetrakis(isodecyl) 4,4'-isopropylidene diphenyl diphosphate or phosphorous acid(1-methylethyidene)di-phenylene tetraisodecyl ester.
Use/Production. (S) Polymer stabilizer plastic processing. Prod. range: 23,200 kg/yr.

P 90-55

Manufacturer. Confidential.
Chemical. (S) Tekrakis(isodecyl)4,4'-isopropylidene diphenyl diphospite or phosphorous acid(1-methylethylidene) di-4,1-phenylenetetraisodocyl ester.
Use/Production. (S) Polymer stabilizer for plastic processing. Prod. range: 23,000 kg/yr.

P 90-56

Importer. Ricoh Corporation.
Chemical. (G) Polyol resin.
Use/Import. (G) Binder for photocopying toner. Import range: Confidential.

P 90-57

Manufacturer. Dow Corning Corporation.
Chemical. (G) Alkoxy-functional poly(organo)siloxane.
Use/Production. (S) Adhesive promoter. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species(Rat). Eye irritation: slight species (Rabbit). Skin irritation: negligible species (Rabbit).

P 90-58

Manufacturer. Confidential.
Chemical. (G) Polyol ester of mixed normal and branched monocarboxylic acids.
Use/Production. (G) Dispersive use. Prod. range: Confidential.

P 90-59

Importer. Confidential.
Chemical. (G) Acrylic resin.
Use/Import. (G) Dispersive use. Import range: Confidential.

P 90-63

Importer. Kanedo Zeolite U.S.A., Inc.
Chemical. (G) Modified zeolite.
Use/Import. (G) Polymer for contained use. Import range: 1,000-10,000 kg/yr.

P 90-64

Manufacturer. Confidential.
Chemical. (G) Heterocyclic substituted amino triazole.
Use/Production. (G) Chemical intermediate. Prod. range: 250-1,000 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species (Rat). Skin irritation: slight species (Guinea pig).

P 90-65

Importer. Confidential.
Chemical. (G) Polyethersiloxane.
Use/Production. (G) Open, nondispersive use. Import range: Confidential.

P 90-66

Importer. Confidential.
Chemical. (G) Polyoxyalkylene polyester.
Use/Import. (G) Open, nondispersive use. Import range: Confidential.

P 90-67

Manufacturer. Confidential.
Chemical. (G) Diphenylmethane diisocyanate prepolymer.
Use/Production. (G) Electromeric systems. Prod. range: Confidential.

P 90-68

Manufacturer. Confidential.
Chemical. (G) Acrylic copolymer.
Use/Production. (G) Intermediate. Prod. range: Confidential.

P 90-69

Manufacturer. Confidential.
Chemical. (G) Acrylate arcylic polymer.
Use/Production. (G) Resin coating. Prod. range: Confidential.

P 90-70

Manufacturer. Air Products and Chemicals, Inc.
Chemical. (G) Modified alkyl acrylate polymer.
Use/Production. (S) Binder. Prod. range: Confidential.
Toxicity Data. Static acute toxicity: LC50 < 750 mg/l time 96 hspecies (Fathead minnow). Skin irritation: slight species (Rabbit).Skin sensitization: negative species (Human).

P 90-71

Manufacturer. The Dow Chemical Company.
Chemical. (G) Magnesium salt.
Use/Production. (S) Chemical intermediate. Prod. range: Confidential.

P 90-72

Manufacturer. Confidential.
Chemical. (G) Organosilazane.
Use/Production. (G) Contained use. Prod. range: Confidential.

P 90-73

Manufacturer. Confidential.
Chemical. (G) Aromatic isocyanate-based urethane prepolymer.
Use/Production. (S) Urethane adhesive for industrial laminating. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 2,200 mg/kg species (Rat). Acute dermal toxicity: LD50 < 7,900 mg/kg species (Rabbit). Inhalationtoxicity: LC50 178 mg/m3 species (Rat).

P 90-74

Importer. Confidential.
Chemical. (G) Sulfonic acids, alkyl benzenes, calcium salts, overbased.
Use/Import. (G) Rust preventative. Import range: Confidential.
Toxicity Data. Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-75

Manufacturer. Milliken & Company.
Chemical. (G) Cyanoacetic acid ester.
Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

P 90-76

Manufacturer. Milliken & Company.
Chemical. (G) Substituted polyoxyethylene aniline diacetyl ester.
Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

P 90-77

Manufacturer. GE Plastics.
Chemical. (G) Biphenol aromatic diether diimide.
Use/Production. (S) Chemical intermediate. Prod. range: Confidential.

P 90-78

Manufacturer. GE Plastics.
Chemical. (G) Phenolate sodium salt.
Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

P 90-79

Manufacturer. Confidential.
Chemical. (S) Cyclohexanemethanol, 2-methyl-4-(1-methyl)-1-(4-isopropylcyclohexyl)ethanol.
Production. (G) Dispersive use. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species (Rat). Eye irritation: moderate species(Rabbit). Skin irritation: moderate species (Rabbit). Skin sensitization: negative species (Guinea pig).Phototoxicity: positive.

P 90-80

Manufacturer. Monsanto Company.
Chemical. (G) Adduct of styrene/allyl alcohol. Use/Production. (G) Crosslinking coating resin. Prod. range: Confidential.

P 90-81

Manufacturer. R.T. Vanderbilt Company.
Chemical. (G) Thiadiazole derivative.
Use/Production. (S) Accelerate for synthetic rubber.
Prod.range:Confidential.
Toxicity Data. Acute oral toxicity: LD50 0.93 g/kg species (Rat). Eye irritation: strong species (Rabbit). Skin sensitization: negative species (Guinea pig).

P 90-82

Manufacturer. E.I. Du Pont & De Nemours & Co., Inc.
Chemical. (G) Waterborne poly acrylourethane.
Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

P 90-83

Manufacturer. Confidential.
Chemical. (G) Modified methylene diphenylidiisocyanate.
Use/Production. (G) Polymeric MDI additive. Prod. range: Confidential.

P 90-84

Manufacturer. Moses Lake Industries.
Chemical. (G) Quaternary ammonium compounds.
Use/Production. (G) For use in the production of a photo resist developer. Prod. range: 200,000-300,000 kg/yr.

P 90-85

Importer. Mitsubishi Yuka America, Inc.
Chemical. (G) Toluendiisocyanate, ethylene oxide, propylene oxidepolymer blocked with amine.
Use/Import. (S) Propolymer for perfume fixture. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 1,000 mg/kg species (Rat). Static acute toxicity: LC50 < 1,000 mg/l time 48 h species (Killfish). Skin irritation: moderate species (Rabbit). Mutagenicity: negative.

P 90-86

Manufacturer. Allied-Signal, Inc.
Chemical. (G) Modified olefin/carboxylic acid copolymer.
Use/Production. (S) Prepolymer for-fixative. Prod. range: 50,000-100.000 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 < 1,000 mg/kg species (Rat). Static acute toxicity: LC50 < 1,000 mg/l time 48H species (Killfish). Skin irritation: moderate species (Rabbit). Mutagenicity: negative.

P 90-87

Manufacturer. Allied-Signal, Inc.
Chemical. (G) Modified olefin/carboxylic acid copolymer.
Use/Production. (G) Component for color concentrates. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 2,500 mg/kg species (Rat). Eye irritation: none species (Rabbit). Skin irritation: negligible species (Rabbit).

P 90-88

Importer. Confidential.
Chemical. (G) Titanium containing phosphate and pyrophoshate reaction product.
Use/Import. (G) Metal pretreatment agent. Import range:Confidential.

P 90-89

Importer. Basf Corporation.
Chemical. (G) Monohalosubstituted polyheteromonocyclic derivative of a sulfonated bis-azo-dyestuff.
Use/Import. (S) Textile dye. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 2,200 mg/kg species (Rat). Acute dermal toxicity: LD50 < 2,000 mg/kg species (Rabbit). Static acute toxicity: EC50 < 500 mg/l time species (Daphnia magna). Eye irritation: none species (Rabbit). Skin irritation: negligible species (Rabbit). Mutagenicity: negative. Skin sensitization: negative species (Guinea pig).

P 90-90

Manufacturer. Confidential.
Chemical. (G) Alkaline stillbene condensation product.
Use/Production. (S) Liquid paper dye. Prod. range: Confidential.

P 90-91

Importer. Confidential.
Chemical. (G) Aryl novolac resin.
Use/Import. (G) Resin as a raw material for electrical devices. Import range: Confidential.

P 90-92

Importer. Confidential.
Chemical. (G) Quarternary bromide.
Use/Import. (G) Contained use. Import range: Confidential.

P 90-93

Importer. Huls America Inc.
Chemical. (G) Reaction product of aryl and alkyl dicarboxylicacids/alkanediol/ester polyester with an acrylate adduct.
Use/Import. (S) Radiation curable adhesive resins. Import range: 1,000-10,000 kg/yr.

P 90-94

Importer. Huls America Inc.
Chemical. (G) Reaction product of aryl and alkyl dicarboxylicacids/alkanediol/ester polyester with an acrylate adduct.
Use/Import. (S) Radiation curable adhesive resin. Import range: 1,000-10,000 kg/yr.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species (Rat). Skin irritation: slight species (Rabbit).

P 90-95

Importer. Huls America, Inc.
Chemical. (G) Reaction product of aryl and alkyl dicarboxylicacids/alkanediol/ester polyester with an acrylate adduct.

Use/Import. (S) Radiation curable adhesive resin. Import range: 1,000–10,000 kg/yr.

Toxicity Data. Skin irritation: slight species (Rabbit).

P 90–97

Manufacturer. Confidential.

Chemical. (G) Dithiophosphate amine salt.

Use/Production. (G) Metallic corrosion inhibitor. Prod. range: Confidential.

P 90–98

Manufacturer. Confidential.

Chemical. (G) Modified maleated rosin salts.

Use/Production. (S) The function is as a binder; the application is in publication gravure printing inks. Prod. range: Confidential.

P 90–110

Manufacturer. 3(M).

Chemical. (G) Fluoro chemical epoxide.

Use/Production. (G) Site-limited isolated intermediate. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 5 gm/kg species (Rat). Eye irritation: slight species (Rabbit). Skin irritation: slight species (Rabbit). Mutagenicity: negative.

P 90–111

Manufacturer. 3(M).

Chemical. (G) Fluorochemical urethane derivative.

Use/Production. (G) Anti soiling treatment. Prod. range:Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 5 gm/kg species (Rat). Static acute toxicity: LC50 < 1,000 mg/l time 48 h species (Daphnia magna). Eye irritation: slight species (Rabbit). Skin irritation: negligible species (Rabbit).

P 90–112

Manufacturer. Confidential.

Chemical. (G) Aromatic chloroformate.

Use/Production. (S) Chemical intermediate. Prod. range: Confidential.

P 90–113

Manufacturer. Telechemische, inc.

Chemical. (G) Toluene sulfonamide A epoxy adduct.

Use/Production. (G) Solid plasticizer for inks, paints, and varnishes. Prod. range: Confidential.

P 90–114

Manufacturer. The Polymer Corporation.

Chemical. (G) Poly[amine–1,4 butanediylimino (1.6–dioxo–1.6–hexanediyl).

Use/Production. (G) Use items include mechanical and electrical components such as gears & fasteners,. Prod. range: Confidential.

P 90–115

Manufacturer. Confidential.

Chemical. (G) Halogen substituted hexahydro pentaalkyl substitutedindene.

Use/Production. (S) Site-limited intermediate. Prod. range:Confidential.

P 90–116

Importer. Huls America Inc.

Chemical. (G) Reaction product of allydicarboxylic acids/alkanediol/ester polyester with anacrylate adduct.

Use/Import. (S) Radiation curable adhesive resins. Import range: 1,000–10,000 kg/yr.

P 90–117

Manufacturer. Confidential.

Chemical. (G) Modified epoxy polymer.

Use/Production. (G) Protective & decorative coatings. Prod. range: Confidential.

P 90–118

Importer. Basf Corporation Chemicals Division.

Chemical. (S) Cyclohexanemethanol, 4–[(ethanyloxy)methyl).

Use/Import. (S) Monomers. Import range: Confidential.

P 90–119

Importer. Confidential.

Chemical. (G) Heterocyclic dispersive dyestuff.

Use/Import. (S) Monomers. Import range: Confidential.

P 90–120

Importer. Cray Valley Products, Inc.

Chemical. (S) Thixatropically modified tall oil fatty acid alkyd resin.

Use/Import. (G) Paint additive. Import range: 3,500–11,800 kg/yr.

P 90–121

Importer. Ciba-Geigy Corporation.

Chemical. (G) Amines, alkyl, compounds with (2–benzolylthio)–butanedioic acids.

Use/Import. (S) Corrosion inhibitor. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 1,000–2,000 mg/kg species (Rat). Acute dermal toxicity: LD50 < 2,000 mg/kg species (Rat). Skin irritation: strong species (Rabbit). Skin sensitization: positive species (Guinea pig).

P 90–122

Manufacturer. Confidential.

Chemical. (G) Polyether polyol.

Use/Production. (S) Raw material for flexible mold foam production. Prod. range: Confidential.

P 90–123

Importer. Ciba-Giegy Corp.

Chemical. (S) 2,2'(oxybis(methane)bis(2–ethyl)1,3–propanediol; chloromethyloxirane.

Use/Import. (S) Protective coatings for exterior exposure. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 < 2,000 mg/kg species (Rat). Acute dermal toxicity: LD50 <2,000 mg/kg species (Rabbit). Skin irritation: negligible species (Rabbit). Mutagenicity: positive.

P 90–124

Importer. Guer-Tin Bros. Polymers.

Chemical. (G) Acrylate urethane cross linking polymer.

Use/Import. (S) A crosslinking agent for nco-free urethane coatings. Import range: 12,500–60,000 kg/yr.

P 90–125

Manufacturer. Confidential.

Chemical. (G) Disubstituted phenylaminobenzene azo substituted phenol.

Use/Production. (S) Crosslinking polymer. Prod. range: 100,000–500,000 kg/yr.

P 90–126

Manufacturer. Confidential.

Chemical. (G) Disubstituted phenylaminobenzene azo substituted phenol.

Use/Production. (S) Crosslinking polymer. Prod. range: 100,000–500,000 kg/yr.

P 90–127

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional acrylic resin.

Use/Production. (S) Coatings. Prod. range: Confidential.

P 90–128

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional acrylic resin.

Use/Production. (S) Coatings. Prod. range: Confidential.

P 90–129

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional acrylic resin.

Use/Production. (S) Coatings. Prod. range: Confidential.

P 90–130

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-131

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-132

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-133

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-134

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-135

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-136

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-137

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-138

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-139

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-140

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-141

Manufacturer. Confidential.
Chemical. (G) Hydroxy functional acrylic resin.
Use/Production. (S) Coatings. Prod. range: Confidential.

P 90-142

Manufacturer. Confidential.
Chemical. (G) Tris(disubstitutedalkyl)heterocycle.
Use/Production. (S) Minor component of photoresist forulations, used during manufacture of integrated circuits. Prod. range: Confidential.

P 90-143

Manufacturer. Confidential.
Chemical. (G) Cresol-aldehyde-aromatic reaction mixture.
Use/Production. (S) Resin for use in photoresist during the manufacture process of microelectronics circuits. Prod. range: Confidential.

P 90-145

Manufacturer. Confidential.
Chemical. (G) Disubstituted phenylaminobenzene azo substitued phenol compound with ammonia derivative.
Use/Production. (G) Open, nondispersive. Prod. range: Confidential.

P 90-146

Importer. Guer-Tin Bros. Polymers.
Chemical. (G) Acrylated urethane oligomer.
Use/Import. (S) Crosslinking agent. Import range: 12,500–60,000 kg/yr.

P 90-147

Manufacturer. Confidential.
Chemical. (G) Alkenyl phosphate ester.
Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

P 90-148

Manufacturer. Interplastic Corporation.
Chemical. (G) Unsaturated polyester resin.
Use/Production. (S) Molding resin. Prod. range: 1,000,000–14,000,000 kg/yr.

P 90-149

Importer. Confidential.
Chemical. (G) Metal, 4-((substituted phenyl)azoaaa0-4,5-dihydro-5-oxo-1-phenyl-1H-pyrazole-3-carboxylato(ι-)-, hydrogen.
Use/Import. (G) Dye. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 2,000 mg/kg species (Rat). Eye irritaition: none species (Rabbit). Mutagenicity: negative. Skin sensitization: negative species (Guinea pig).

P 90-150

Importer. Confidential.
Chemical. (G) 2-napthalene carboxamide, N<N'-substituted-1,4-phenylene)bis(1,4-(subtitutedphenyl)azo)-3-hydroxy-.
Use/Import. (S) Pigment for coloring of polyester. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg species (Rat). Eye irritaition: none species (Rabbit). Skin irritation: negligible species (Rabbit). Mutagenicity: negative.

P 90-152

Manufacturer. Confidential.
Chemical. (G) Acrylate copolymer.
Use/Production. (G) Coatings additive. Prod. range: Confidential.

P 90-153

Importer. NOF America Corporation.
Chemical. (G) Alkyl acrylate.
Use/Import. (G) Open, nondispersive use (solid). Import range: Confidential.

P 90-154

Importer. NOF America Corporation.
Chemical. (G) Modified polyethylene copolymer.
Use/Import. (G) Open, nondispersive use (solid). Import range: Confidential.

P 90-155

Manufacturer. Confidential.
Chemical. (G) Polyether MDI prepolymer.
Use/Production. (G) Molded flexible urethane foams. Prod. range: Confidential.

P 90-157

Importer. Confidential.
Chemical. (S) 1,4-Benzenedicarboxylic acids, polymer with 1,1'((1-methylidene)bis(4,1-phenyleneoxy))bis-2-propanol.
Use/Import. (G) Thermal print transfer chemical. Import range: Confidential.

P 90-158

Importer. Ameribrom Inc.
Chemical. (S) 1,2,4-Tribromo-5-ethenyl benzene.
Use/Import. (S) Flame retardant. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 4 g/kg species (Rat). Eye irritaition: none species (Rabbit). Skin

irritation: negligible species (Rabbit). Mutagenicity: negative.

P 90-159

Importer. Ameribrom Inc.
Chemical. (S) N-(2,4,6-tribromophenyl)maleimide.
Use/Import. (S) Flame retardant. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 5,000 mg/kg. Eye irritaition: strong species (Rabbit). Skin irritation: negligible species (Rabbit).

P 90-160

Manufacturer. Confidential.
Chemical. (G) An alkanolamine.
Use/Production. (G) Contrast promoting agent in film developer. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 < 1,645 mg/kg species (Rat). Acute dermal toxicity: < 2,000 mg/kg species (Rabbit). Skin irritation: strong species (Rabbit). Mutagenicity: negative.

P 90-161

Importer. Confidential.
Chemical. (G) Metal chlorides, methacrylate complex.
Use/Import. (G) Catalyst used in a closed system. Import range: Confidential.

Date: November 28, 1989.

Steven Newburg-Rinn,

Acting Director, Information Management Division, Office of Toxic Substances.

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Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of 10 such PMN(s) and provides a summary of each.

DATES: Close of Review Periods:

Y 90-17, 90-18, 90-19, 90-20, 90-21, November 26, 1989.
Y 90-22, 90-23, November 27, 1989.
Y 90-24, November 28, 1989.
Y 90-25, December 3, 1989.
Y 90-26, December 4, 1989.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-545, 401 M Street, SW., Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the Public Reading Room NE-G004 at the above address between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

Y 90-17
Manufacturer. Confidential.
Chemical. (G) Acrylic polymer.
Use/Production. (G) Dispersive use.
Prod. range: Confidential.

Y 90-18
Importer. C. Itoh Co. (America), Inc.
Chemical. (S) Epsilon-caprolactone-terephthalic acid-tetramethylene glycol copolymer.
Use/Import. (S) Extrusion molding process.
Import range: Confidential.

Y 90-19
Manufacturer. Air Product and Chemicals, Inc.
Chemical. (G) Styrene-acrylic acid polymer.
Use/Production. (G) Polymer modifiers.
Prod. range: Confidential.

Y 90-20
Manufacturer. Air Product and Chemicals, Inc.
Chemical. (G) Styrene-acrylic acid polymer.
Use/Production. (G) Polymer modifiers.
Prod. range: Confidential.

Y 90-21
Manufacturer. Air Product and Chemicals, Inc.
Chemical. (G) Styrene-acrylic acid polymer.
Use/Production. (G) Polymer modifiers.
Prod. range: Confidential.

Y 90-22
Manufacturer. Rohm & Haas Company.
Chemical. (S) Modified acrylic polymer.
Use/Production. (S) Processing additive for polyolefins.
Prod. range: Confidential.

Y 90-23
Manufacturer. Rohm & Haas Company.
Chemical. (S) Modified acrylic polymer.
Use/Production. (S) Processing additive for polyolefins.
Prod. range: Confidential.

Y 90-241
Manufacturer. Interplastic Corp.
Chemical. (G) Saturated polyester resin.
Use/Production. (S) Molding resin.
*Prod.range:*1000,000-1,000,000 kg/yr.

Y 90-25
Manufacturer. Confidential.
Chemical. (G) Blocked polyether polyurethane.
Use/Production. (S) Open, nondispersive.
Prod. range: Confidential.

Y 90-26
Manufacturer. Confidential.
Chemical. (G) Polymer of aromatic diacid, cycloaliphatic diacidand diol.
Use/Production. (G) Polymer for coating application.
Prod. range: Confidential.

Dated: December 6, 1989.

Douglas W. Sellers,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 89-29693 Filed 12-20-89; 8:45 am]
BILLING CODE 6560-50-M

[OPTS-59880; FRL-3686-9]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such

polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of 10 such PMN(s) and provides a summary of each.

DATES: Close of Review Periods:

Y 90-27, December 7, 1989.
Y 90-28, 90-29, December 14, 1989.
Y 90-30, 90-31, 90-32, 90-33, Y 90-34, 90-35, 90-36, December 18, 1989.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-545, 401 M Street, SW, Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the Public Reading Room NE-G004 at the above address between 8 a.m. and 4 p.m., Monday through Friday, excluding legal holidays.

90-27

Manufacturer. Freeman Chemical Corporation.
Chemical. (G) Long oil alkyd resin.
Use/Production. (S) Resin component for trade sales applications-paint.
Prod. range: 1200,000-400,000 kg/yr.

Y 90-28

Manufacturer. Freeman Chemical Corporation.
Chemical. (G) Unsaturated polyester resin.
Use/Production. (S) Resin component for water reducible paint.
Prod. range: 1200,000-400,000 kg/yr.

Y 90-29

Manufacturer. Freeman Chemical Corporation.
Chemical. (G) Unsaturated polyester resin.
Use/Production. (S) Resin component for peroxide cured paints.
Prod. range: 144,000-55,000 kg/yr.

Y 90-30

Importer. Confidential.
Chemical. (G) Ethylene acrylic terpolymer salt.
Use/Import. (G) Molded and extruded products, packing, textile,adhesives.
Import range: Confidential.

Y 90-31

Manufacturer. Allied-Signal, Inc.
Chemical. (G) Modified olefin carboxylic acid copolymer.
Use/Production. (G) Emulsions for polishes.
Prod. range: Confidential.
Toxicity Data. Acute oral toxicity LD50 >5 g/kg species (Rat).

Y 90-32

Manufacturer. Allied-Signal, Inc.
Chemical. (G) Modified olefin carboxylic acid copolymer.
Use/Production. (G) Emulsions for polishes.
Prod. range: Confidential.
Toxicity Data. Acute oral toxicity LD50 >5 g/kg species (Rat).

Y 90-33

Manufacturer. Allied-Signal, Inc.
Chemical. (G) Modified olefin carboxylic acid copolymer.
Use/Production. (G) Emulsions for polishes.
Prod. range: Confidential.
Toxicity Data. Acute oral toxicity LD50 >5 g/kg species (Rat).

Y 90-34

Manufacturer. Allied-Signal, Inc.
Chemical. (G) Modified olefin carboxylic acid copolymer.
Use/Production. (G) Emulsions for polishes.
Prod. range: Confidential.
Toxicity Data. Acute oral toxicity LD50 <5 g/kg species (Rat).

Y 90-35

Manufacturer. Confidential.
Chemical. (G) Polyester.
Use/Production. (G) Coating intermediate.
Prod. range: Confidential.

Y 90-36

Manufacturer. Confidential.
Chemical. (G) Polyester resin.
Use/Production. (G) Coating.
Prod. range: Confidential.

Dated: December 6, 1989.

Douglas W. Sellers,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 89-29694 Filed 12-20-89; 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 10220. 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.: 224-011049-004.
Title: Tampa Port Authority Terminal Agreement.
Parties:
Tampa Port Authority
Seagull Terminal & Stevedoring Co.
Synopsis: The Agreement extends the term of the basic lease Agreement (Agreement No. 224-011049 as amended) for an additional three (3) month period from January 1, 1990, through March 31, 1990. It also provides that either party may cancel the Agreement during the three (3) month period by giving a minimum of fifteen (15) day advance written notice.

Agreement No.: 224-200054-004.
Title: Tampa Port Authority Terminal Agreement.
Parties:
Tampa Port Authority
G & C Stevedoring Company (G&C).
Synopsis: The Agreement amends the term of the basic agreement. The term of the agreement shall be on a month-to-month basis commencing January 1, 1990, until March 31, 1990. G & C will pay the Port $25 per month commencing January 1, 1990, as consideration for the demised premises.

Agreement No.: 224-200057-003.
Title: Tampa Port Authority Terminal Agreement.
Parties:
Tampa Port Authority
Tampa Bay International Terminals (TBIT).
Synopsis: The Agreement amends the basic agreement and extends the lease term for three months, commencing January 1990. through March 31, 1990. Rent, dockage, wharfage and Minimum Annual Guarantee (MAG) shall remain in effect on a pro rata basis for the extended period. TBIT will be invoiced for MAG shortages or provided cash rebates for MAG excesses, however, cash rebates shall not exceed $12,500 during the pro rata period as adjusted.

Agreement No.: 224-200270-002.

Title: Port of Oakland Terminal Agreement.
Parties:
Port of Oakland
Mitsui OSK Lines, Ltd.
Nippon Liner System (North America, Inc.).
Synopsis: The Agreement amends the basic agreement to provide that if 500 export automobiles are handled on the terminal premises in a twelve month period, for the purposes of the TEU schedule in paragraph 4 of the basic agreement, two TEUs will be counted for every three automobiles loaded to 40 foot containers.
Agreement No.: 224-200309.
Title: South Carolina State Ports Agreement.
Parties:
South Carolina State Ports Authority (Port)
Associated Container Transportation (USA)(ACT)
Columbus Line, Inc. (Columbus).
Synopsis: The Agreement provides for ACT and Columbus to use 8 acres (4 acres each) of North Charleston Terminal for their container terminal operations. It also provides for a guaranteed minimum of 100,000 short tons of container cargo and discount wharfage for accumulated tonnage. This Agreement shall terminate on September 30, 1991.
Agreement No.: 224-200310.
Title: Puerto Rico Ports Authority Terminal Agreement.
Parties:
Puerto Rico Ports Authority
Antilles Shipping Corporation.
Synopsis: The Agreement provides for the three year lease and preferential use of terminal facilities at Pier 8, San Juan, Puerto Rico to be used for the berthing and loading/discharging of vessels, handling of cargo and passengers, and temporary storage of cargo.
Agreement No.: 224-200311.
Title: South Carolina State Ports Authority Terminal Agreement.
Parties:
South Carolina State Ports Authority
Lykes Bros. Steamship Co., Inc. (Lykes).
Synopsis: The Agreement provides Lykes with tariff discounts for wharfage and certain container/chassis terminal services. Lykes guarantees 50,000 short tons of cargo throughput per year. The Agreement's term is for three years.
Agreement No.: 224-200306-001.
Title: Strachan Shipping Company Terminal Handling Agreement.
Parties:
Strachan Shipping Company (Strachan)
South Atlantic Cargo Shipping N.V. (SACS).
Synopsis: The Agreement amends the basic agreement to add rates for certain specified cargoes handled at Port Everglades.
Agreement No.: 224-200052-004.
Title: Tampa Port Authority Terminal Agreement.
Parties:
Tampa Port Authority Terminal Agreement
Bay Terminal & Stevedoring Co., Inc.
Synopsis: The Agreement extends the term of the basic lease agreement on a month-to-month basis for a maximum of three months from January 1, 1990, through March 31, 1990.

By Order of the Federal Maritime Commission.

Dated: December 15, 1989.

Joseph C. Polking,

Secretary.

[FR Doc. 89-29644 Filed 12-20-89; 8:45 am]

BILLING CODE 6730-01-M

[Docket No. 89-26]

Government of the Territory of Guam v. Sea-Land Service, Inc. and American President Lines, Ltd.; Filing of Complaint and Assignment

Notice is given that a complaint filed by the Government of the Territory of Guam ("Complainant") against Sea-Land Service, Inc. and American President Lines, Ltd. (hereinafter referred to collectively as "Respondents") was served December 15, 1989. Complainant alleges that Respondents engaged in violations of sections 14 (Fourth), 16, 17, and 18(a) of the Shipping Act, 1916, U.S.C. app. 812, 815, 816 and 817, and sections 1, 2 and 4 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 843, 844, and 845, by charging unjust and unreasonable rates for the transportation of cargo between ports in the United States and Guam, varying rates and charges for similarly situated shippers and commodities and thus causing preferences to certain shippers and commodities and prejudice to others, charging unjustly and unreasonably for demurrage charges assessed at the port of Guam, assessing demurrage charges and engaging in practices resulting in preferences to certain shippers and commodiites and prejudice to others, and overcharging Complainant through unjust and unreasonable rate increases. In addition, Complainant charges respondent Sea-Land Service, Inc. with operating as an untariffed common carrier, charging unjust and unreasonable rates and assessing and collecting unjust and unreasonable charges for service from Hawaii to Guam and between the U.S. west coast and Guam, and varying untariffed charges for similarly situated shippers and commodities resulting in preferences to certain shippers and commodities and prejudice to others in the Hawaii-Guam and U.S. west coast-Guam trades.

This proceeding has been assigned to Administrative Law Judge Joseph N. Ingolia ("Presiding Officer"). Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the Presiding Officer in this proceeding shall be issued by December 17, 1990, and the final decision of the Commission shall be issued by April 17, 1991.

Joseph C. Polking,

Secretary.

[FR Doc. 89-29610 Filed 12-20-89; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Agency Forms under Review

December 13, 1989.

Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act of 1980, as per 5 CFR § 1320.9, "to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 C.F.R. § 1320.9." Board-approved collection of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the SF 83 and supporting statement and the approved collection of information instrument(s) will be placed into OMB's public docket files. The following report, which is being

handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority.

DATE: Comments must be received by December 26, 1989.

ADDRESS: Comments, which should refer to the OMB Docket number, should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or delivered to room B-2223 between 8:45 a.m. and 5:15 p.m. Comments received may be inspected in room B-1122 between 8:45 a.m. and 5:15 p.m. except as provided in section 261(a) of the Board's Rules Regarding Availability of Information, 12 CFR 261.6(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Gary Waxman, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the request for clearance (SF 83), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below. Federal Reserve Board Clearance Officer—Frederick J. Schroeder—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202-452-3822).

Proposal to approve under OMB delegated authority the discontinuance of the following report

1. *Report title:* Daily Report of When-Issued Commitments Outstanding.
Agency form number: FR 2080.
OMB Docket number: 7100-0184.
Frequency: Daily.
Reporters: Primary dealers in U.S. government securities.
Annual reporting hours: 4,320.
Estimated average hours per response: 0.3.
Number of respondents: 40.
Small businesses are not affected.
General description of report: This information collection is authorized by law (12 U.S.C. 248(a)(2) and 353-359(a)) and is given confidential treatment (5 U.S.C. 552(b)(4)).

This report collects information on significant "when-issued" commitments of the primary dealers that deal in U.S. government securities with the Federal Reserve Bank of New York.

Board of Governors of the Federal Reserve System, December 13, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89-29647 Filed 12-20-89; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration; Advisory Committee Meetings in January

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration, HHS.

ACTION: Notice of Meetings.

SUMMARY: This notice sets forth the schedule and proposed agendas of the forthcoming meetings of the agency's advisory committees in the month of January 1990.

The Extramural Science Advisory Board, NIMH, will discuss molecular genetics. Attendance by the public will be limited to space available.

The Advisory Panel on Alzheimer's Disease meeting will be open for discussion of the Panel's initial report and other business before the Panel. Attendance by the public will be limited to space available.

The initial review committee will be performing the initial review of applications for Federal assistance. Therefore, portions of the meeting will be closed to the public as determined by the Administrator, ADAMHA, in accordance with 5 U.S.C. 552(b)(6) and 5 U.S.C. app. 2 10(d).

Notice of these meetings is required under the Federal Advisory Committee Act, Public Law 92-463.

Committee Name: Extramural Science Advisory Board, NIMH.

Date and Time: January 22-23: 8:30 a.m.

Place: National Institutes of Health, Building 31, Conference Room 4, Bethesda, MD 20892.

Status of Meeting: Open.

Contact: Tony Pollitt, room 17C-26, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443-3657.

Purpose: The Committee advises the Secretary of Health and Human Services, the Administrator, Alcohol, Drug Abuse, and Mental Health Administration, and the Director, National Institute of Mental Health, on the direction, scope, balance, and emphasis of the Institute's extramural science programs.

Committee Name: Advisory Panel on Alzheimer's Disease, NIMH.

Date and Time: January 29: 9:00 a.m., January 30: 8:30 a.m.

Place: Sheraton Washington Hotel, Nathan Hale Room, 2660 Woodley Road, NW., Washington, DC 20008.

Status of Meeting: Open.

Contact: George Niederehe, room 11C-03, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443-1185.

Purpose: The Advisory Panel on Alzheimer's Disease assists the Secretary of Health and Human Services and the Council on Alzheimer's Disease in the identification of priorities and emerging issues with respect to Alzheimer's disease and related dementias and the care of individuals with such disease and dementias.

Committee Name: Epidemiology Research Subcommittee of the Epidemiologic and Services Research Review Committee, NIMH.

Date and Time: January 29-31: 9:00 a.m.

Place: Bethesda Holiday Inn, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Status of Meeting: Open—January 29: 9:00-10:00 a.m.; closed—Otherwise.

Contact: Gloria Yockelson, room 9C-14, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443-1367.

Purpose: The Subcommittee is charged with the initial review of applications for assistance from the National Institute of Mental Health for support of research and research training activities as they relate to mental health epidemiology, mental health service systems research, and evaluation of clinical mental health services, with recommendations to the National Advisory Mental Health Council for final review.

Substantive information, summaries of the meetings, and rosters of committee members may be obtained from Ms. Joanna Kieffer, NIMH Committee Management Officer, room 9-105, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-4333.

Dated: December 15, 1989.

Peggy W. Cockrill,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 89-29665 Filed 12-20-89; 8:45 am]

BILLING CODE 4160-20-M

Health Resources and Services Administration

Advisory Council; Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following National Advisory bodies scheduled to meet during the month of January 1990,

Name: Subcommittee on Physician Manpower of the Council on Graduate Medical Education.

Time: January 29, 1990, 2:00 p.m.–6:00 p.m.

Place: Parklawn Conference Center, Conference Room G, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

Open for entire meeting.

Purpose: The subcommittee reviews and analyzes currently applicable studies of under and oversupply of physician manpower giving special attention to number and distribution of specialists, primary care physicians and residents. It also is concerned with studies and recommendations regarding the number of undergraduate medical students as well as the need for improving physician manpower data.

Agenda: Briefing of contractor activities on project to reexamine the adequacy of physician personnel supply made in 1980 by GMENAC for six physician specialties. Briefing on DHHS request to State Governors for Health Manpower shortage information. In addition, the Subcommittee will hold a panel discussion on aging and physician manpower.

Anyone requiring information regarding the subject Subcommittee should contact Jerald M. Katzoff, Subcommittee Principal Staff Liaison, Division of Medicine, Bureau of Health Professions, room 4C–18, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–6326.

Name: Subcommittee on Minority Representation in Medicine of the Council on Graduate Medical Education.

Time: January 29, 1990, 9:00 a.m.–12:00 p.m.

Place: Parklawn Conference Center, Conference Room G, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

Open for entire meeting.

Purpose: To provide a forum for discussing participation of minority group members in medicine, to guard against regression from what has been achieved, and to expand efforts where possible.

Agenda: Develop an action plan for the next 1 to 3 years involving solutions and approaches to the problems and issues of the under representation of Black Americans, Native Americans, Mexican Americans and Mainland Puerto Ricans in medicine. These issues will relate to pathway problems, recruitment, enrollment, retention and graduation of under represented minorities in medical education. In addition, the Subcommittee will discuss the socioeconomic factors related to increasing the representation of minority physicians.

Anyone requiring information regarding the subject Subcommittee should contact Ronald L. Craig, Subcommittee Principal Staff Liaison, Division of Medicine, Bureau of Health Professions, room 4C–18, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–6326.

Name: Subcommittee on Medical Education Programs and Financing of the Council on Graduate Medical Education.

Time: January 29–31, 1990, 8:30 a.m.–5:00 p.m.

Place: Parklawn Conference Center, Conference Room G or H, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

Open for entire meeting.

Purpose: The subcommittee identifies the issues and problems in current methods of financing and support. Assesses the implications of alternative financing polices on medical education programs, service delivery, cost containment, physician supply & distribution, and shortages and excesses of physicians.

Analyzes existing information and data on current and alternative medical education programs of hospitals, schools of medicine and osteopathy, and accrediting bodies; federal policies regarding medical education programs; and their impact on the supply and distribution of physicians.

Agenda: January 29: Review of a draft proposed special report of the Council on the financial status of teaching hospitals in the United States, including review and discussion of extant narrative, conclusions and recommendations.

January 31: Medical education in the ambulatory setting and or financing of medical education.

Anyone requiring information regarding the subject Subcommittee should contact F. Lawrence Clare, M.D. Subcommittee Principal Staff Liaison, Division of Medicine, Bureau of Health Professions, room 4C–18, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–6326.

Name: Council on Graduate Medical Education.

Time: January 30–31, 1990, 8:30 a.m.—5:00 p.m.

Place: Parklawn Conference Center, Conference Rooms G & H, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

Open for entire meeting.

Purpose: Provides advice and recommendations to the Secretary and to the Committees on Labor and Human Resources, and Finance of the Senate and the Committees on Energy and Commerce and Ways and Means of the House of Representatives, with respect to (A) the supply and distribution of physicians in the United States: (B) current and future shortages of physicians in medical and surgical specialties and subspecialties: (C) issues relating to foreign medical graduates; (D) appropriate Federal policies regarding (A), (B), and (C) above; (E) appropriate efforts to be carried out by medical and osteopathic schools, public and private hospitals and accrediting bodies regarding matters in (A), (B), and (C) above; (F) deficiencies in the needs for improvements in, existing data bases concerning supply and distribution of, and training programs for physicians in the United States.

Agenda: The Council will receive legislative updates from HRSA, HCFA, and the VA. On January 30, the Council will focus on a proposed draft special report on "The Financial Status of Teaching Hospitals." There will be a report from the Physician Manpower Subcommittee, the Minority Representation in Medicine Subcommittee, and the Subcommittee on Medical Education Programs and Financing.

Anyone requiring information regarding the subject Council should contact Marilyn H. Gaston, M.D., Executive Secretary, Council on Graduate Medical Education. Health Resources and Services Administration, room 4C–18, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301)443–6190.

Agenda Items are subject to change as priorities dictate.

Dated: December 15, 1989.

Jackie E. Baum,

Advisory Committee Management Officer, HRSA.

[FR Doc. 89–29602 Filed 12–20–89; 8:45 am]

BILLING CODE 4160–15–M

DEPARTMENT OF THE INTERIOR

Performance Review Board Appointment

AGENCY: Department of the Interior.

ACTION: Notice of change in Performance Review Board Membership.

SUMMARY: This notice provides the name of the replacement individual to serve on one of the Department of the Interior Performance Review Boards. The publication of this appointment is required by section 405(a) of the Civil Service Reform Act of 1978 (Public Law 95–454, U.S.C. 4314(c)(4)).

DATE: This appointment is effective upon publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Morris A. Simms, Director of Personnel, Office of the Secretary, Department of the Interior, 1800 C Streets, NW., Washington, DC 20240. Telephone Number: 343–6761.

Department of the Interior, Performance Review Board (PRB), Changes as of December 6, 1989.

Assistant Secretary for Land and Minerals Management

Scott Sewell, LMM, (NC) (replaces Thomas Allen)
James Hughes, LMM, (NC)
Dean Stepanek, LLM, (CA)
Carson Culp, LLM, (CA)
Ed Cassidy, LMS, (NC)
Thomas Gernhofer, LMS, (CA)
Robert Fagin, LSM, (CA)

Dated: December 12, 1989.

Charles E. Kay,

Principal Deputy Assistant Secretary-Policy Budget and Administration.

[FR Doc. 89–29659 Filed 12–20–89; 8:45 am]

BILLING CODE 4310–10–M

Bureau of Indian Affairs

Office of Tribal Services; Tribal Self-Governance Demonstration Project

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Announcement to invite applications from federally recognized Indian tribes to participate in a five-year research and demonstration project.

SUMMARY: The Bureau of Indian Affairs by this announcement invites Indian tribes to participate in a multi-year demonstration project. Twenty tribes reflecting, to the greatest extent practicable, geographic representation will be selected to participate in this project from among all tribal applicants received. Tribal application and selection will be made under criteria and terms and conditions as provided for in the amendments to the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638. The Act, amended on October 5, 1988, contains a new section 209, entitled "Title III—Tribal Self-Governance Demonstration Project," which establishes and authorizes the project. The purpose of this title is to enhance the ability of tribal governments to plan for and deliver services appropriately designed to meet the needs of their members and to enhance the effectiveness and long-term financial stability of tribal governments. Participation is strictly voluntary for those tribes wishing to participate in a project which allows tribes to redesign programs and services as well as determine the level of services to be provided to their members. This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM8

DATES: The date for submission of applications under this announcement is February 20, 1990.

FOR FURTHER INFORMATION CONTACT: George Clark (202) 343-1708 or Mitchell L. Parks (202) 343-1705, Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, Room 4627, 18th and C Streets, NW., Washington, DC 20240.

SUPPLEMENTARY INFORMATION:

A. Purpose of the Project.

The purpose of this project is to invite proposals which reflect the requirements of title III of the Act and which may result in the redesign of programs, activities, and functions or services that the Secretary is authorized to administer for the benefit of Indians, and the reallocation of funds from such programs, activities or services based on the needs and priorities of the communities to be served. Selection of participants made pursuant to this announcement will allow approximately 20 tribal governing bodies to develop proposals for negotiation of possible funding agreements with the Bureau of Indian Affairs to plan, conduct, consolidate, and administer programs, services, and functions authorized under the Act of April 16, 1934 (48 Stat. 596), as amended, and this Act of November 2, 1921 (42 State. 208).

Project proposals received may not address funds provided pursuant to the Tribally Controlled Community College Assistance Act (Pub. L. 95-471), for elementary and secondary schools under the Indian School Equalization formula pursuant to title XI of Public Law 95-651, as amended, or for either the Flathead Agency Irrigation Division or the Flathead Agency Power Division. Nothing in this announcement affects the contractibility of such divisions under section 102 of the Act.

Project proposals received may be for a period not to exceed five years following the enactment of Public Law 100-472, and selection for the project awards will be based on meeting the eligibility criteria as set forth in title III of the Act and as contained in this announcement. In addition, while the project proposal may reflect a five-year plan of operation, the need for annual negotiations to complete funding and other ancillary activities with the Bureau of Indian Affairs must be reflected in the proposals received.

Selection of project participants shall be made competitively from a pool of qualified applicants, and to the greatest extent practicable in a manner so as to achieve geographic representation among tribes: except that;

1. tribes that successfully complete a Self-Governance Planning Grant, authorized by Conference Report 100-499 to accompany House Joint Resolution (H.J. Res.) 395, One Hundredth Congress, first session shall be selected to participate in the demonstration project without further competition; and

2. to achieve geographic representation a tribe in an area with no representation or an area with under-representation may be selected for participation in the demonstration project even though its application scores below a tribe from an area that is adequately represented or over-represented in the program, geographically.

B. Eligibility Criteria.

To qualify for the demonstration project, an applicant must be a federally recognized Indian tribe, and, either have successfully completed a Self-Governance Planning Grant as authorized by Conference Report 100–498 to accompany H.J. Res. 395, One Hundredth Congress, first session, or be in a pool of otherwise qualified applicants. In order to be included in a pool of qualified applicants:

The governing body of the applicant tribe shall request participation in this demonstration project through the execution of a tribal resolution that is specific to this announcement;

Such tribe shall have operated two or more mature contracts as defined in

Public Law 100–473, section 103(h) Definitions; and

Such tribe shall have demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by such tribe having no significant and material audit exceptions in the required annual audit of its self-determination contracts.

C. Content of Project Application

In addition to the authorizations provided by, or excluded, in paragraphs A and B, above, applications shall be submitted on a SF–424 and as otherwise provided by OMB Circular A–102. In addition, applications shall contain a proposal for a Self-Governance Demonstration project which includes:

1. The goals and objectives to be achieved through the demonstration project, and at a minimum:

a. Specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretary pursuant this announcement;

b. Demonstrate that the benefits to be derived through the proposed activities, functions, and programs in the application are clearly measurable and provide a tool(s) to be used for measurement purposes;

2. The objectives, activities, and functions proposed may be accomplished within the resources that could be made available:

a. The objectives, activities, and functions correlate directly with the proposed costs associated with carrying out the demonstration project; and

b. The proposed costs associated with carrying out the objectives, activities, and functions are reasonable, allowable, and allocable to the demonstration project as defined by OMB Circular A–87 standards;

3. The objectives contain milestones and identify, by title, responsible individuals within the tribe who are responsible for meeting such milestones; and

4. The applications contain the position descriptions of key project staff, resumes of responsible tribal employees to fill those positions, if available, or the knowledge, skills, and abilities that a successful applicant for such positions must possess in order to be hired by the tribe for this project.

D. Other Conditions

For the year in which, and to the extent to which, funding is provided to a tribe pursuant to and agreement negotiated under this announcement, such tribe:

1. Shall not be eligible to contract with the Secretary for such funds under section 102 of the Act, except that such tribe shall be eligible for new programs on the same basis as other tribes; and

2. Shall be responsible for the administration of programs, services and activities pursuant to agreements awarded through this announcement.

Further, each agreement subsequently awarded must clearly:

1. Specify the authority of the tribe and the Secretary, and the procedures to be used, to reallocate funds or modify budget allocations within any project year;

2. Provide for the payment by the Secretary to the tribe of funds from one or more programs exclusive of funds as may be identified in Public Law 100–472, section 303(a)(1)–(2), from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct and indirect costs, and for funds which are specifically related to the provision by the Secretary of services and benefits to the tribe and its members:

a. Provided, however, that funds for trust services to individual Indians are available under the project proposal only to the extent that the same services which would have been provided by the Secretary are provided to individual Indians by the tribe;

b. Shall not cause the Secretary to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exist under treaties, Executive orders, and Acts of Congress;

3. Shall allow for retrocession of programs or portions of programs pursuant to section 105(e) of the Act.

E. Incomplete Applications

Applications received with specific sections and/or documentations; e.g., tribal resolution missing, will not be considered under this announcement. An incomplete application will be returned to the applicant with a full explanation of the deficiency(ies) which caused the application to be refused. The applicant with an incomplete application shall have no appeal rights.

F. Rating Criteria

The following criteria shall be used by the Bureau of Indian Affairs in rating each application received through this announcement:

1. Statement of goals and objectives, 0–15 points;

2. Description of program activities to be accomplished, 0–10 points;

3. Descriptions of methodologies, including listing of key staff and their qualifications as well as a schedule of activities to be used to successfully accomplish the goals and objectives, 0–35 points;

4. Resource allocation, 0–5 points; and

5. Measurable benefits to be derived to tribal members, 0–35 points.

Each application received through this announcement will be reviewed by the Bureau of Indian Affairs for completeness, eligibility, content, and adherence ot title III of the Act and the conditions of this announcement.

Each application judged incomplete will be returned to the applicant with an explanation of why it did not meet minimum completion requirements. Each application not rated at 75 or more points, overall, will not be considered for acceptance and award.

Unsuccessful applicants will be notified of any deficiencies associated with the applications which kept each from being selected. The Bureau reserves the right to negotiate final conditions of a proposal with otherwise successful applicants including, but not limited to, the rewrite of specific functional or activity statements.

G. Appeals

Alleged violations of the receipt and processing provisions of this announcement are appealable to the Deputy to the Assistant Secretary—Indian Affairs (Tribal Services) whose findings are final for the Department. Such appeals shall be filed within 30 days of the actions that precipitated the appeal and shall be filed directly with the Office of the Deputy to the Assistant Secretary at:

Department of the Interior, Bureau of Indian Affairs, MS–4600–MIB, 18th and C Streets, NW., Washington, DC 20240.

Section 110 of the Act only applies to appeals generated from the actions taken on awarded agreements.

H. Submission of Applications

Applications received under this announcement must be:

1. Postmarked no later than midnight (February 20, 1990) if mailed;

2. Received in the Division of Self-Determination Services no later than the close of business (February 20, 1990) if hand-delivered.

Applications shall be mailed or hand-delivered to:

Department of the Interior, Bureau of Indian Affairs, Attention: Division of Self-Determination Services, MS–4627–MIB, 18th & C Streets, NW., Washington, DC 20240

Dated: November 30, 1989.

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 89-29660 Filed 12-20-89; 8:45 am]

BILLING CODE 4310-02-M

Bureau of Land Management

[CA-060-09-4332-10]

California Desert District, Emergency Closure of Sections 29, 32, 33, and E½ 31, T. 2 N., R. 5 E., San Bernardino County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Emergency closure notice for 3½ sections of public land in the Barstow Resource Area of San Bernardino County.

SUMMARY: This emergency closure notice affects 3½ sections of land in the southeast portion of the Bighorn Mountain Wilderness Study Area (WSA, CDCA #217), San Bernardino County, California under the administrative responsibility of the Barstow Resource Area, California Desert District. The closed area is located west of the community of Flamingo Heights and includes sections 29, 32, 33, and E½ 31, T. 2 N., R. 5 E., SBN. The area is closed to all motor vehicles under the authority of 43 CFR 8341.2 in order to protect cultural resources and wilderness values.

This emergency closure order is in affect and shall remain in effect until such time as it is determined that the adverse effects have been eliminated, other measures have been implemented to prevent recurrence, or formal route designation under 43 CFR 8342 is completed.

The closed area will be posted with "closed area" signs and the access routes leading into it will be fenced and posted with "closed route" signs. Access into the area will be permitted only to specifically authorized persons. A copy of the closure order and map showing the location of the closed area and routes is available from the Bureau of Land Management, 150 Coolwater Lane, Barstow, California 92311.

Any person who fails to comply with this closure order may be subject to a fine of up to $1,000.00 or imprisonment of up to 12 months, or both, under 43 CFR 8340.0-7.

Dated: December 8, 1989.

Gerald E. Hillier,

District Manager, California Desert District.

[FR Doc. 89-29639 Filed 12-20-89; 8:45 am]

BILLING CODE 4310-40-M

[ID-020-00-4212-08]

Burley District; Intent to Prepare a District-wide Land Use Plan Amendment for Land Tenure Adjustments

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent to prepare a land use plan amendment for land tenure adjustments.

SUMMARY: The Burley District is proposing to amend the Twin Falls and Malad Management Framework Plans (MFP) and the Cassia and Monument Resource Management Plans (RMP) to allow greater flexibility in making land tenure adjustments, especially land exchanges. The amendment would establish two land tenure areas; an adjustment area (potential disposal area), and a mangement area (retention area) for those portions of the public lands located in Jerome, Lincoln, Blaine, Minidoka, Power, Bannock, Twin Falls, Cassia, and Oneida Counties that lie within the Burley District.

DATES: The public, state and local governments, and other Federal agencies are invited to participate in the amendment process. Identification of issues, concerns or other written comments pertaining to this notice will be accepted until January 31, 1990. In addition, written or oral comments will be taken during public meetings that may be held at a later date.

SUPPLEMENTARY INFORMATION: The proposed plan amendment would designate the public lands in the Burley District as either a management area or an adjustment area. This would give management more flexibility in making land tenure adjustments, especially land exchanges in the Twin Falls and Malad MFP areas and the Cassia and Monument RMP areas.

Public lands identified as management areas would be retained in public ownership for the long term and managed under the principles of multiple use and sustained yield. These public lands are generally large blocks of public land in consolidated land patterns. They include, but are not limited to, lands having high natural resource value, lands having special designations such as Area of Critical Environmental Concern, Wilderness Study Areas, lands containing properly recorded mining claims, and lands withdrawn for BLM or other agencies.

Public lands identified as adjustment areas would be those lands that could potentially be transferred into private ownership. They could also be offered to private individuals in exchange for private lands that would adjoin and enhance the resource values of the management areas. Public lands within the adjustment area are generally fragmented, are difficult and uneconomical to manage as part of the public lands, are relatively inaccessible to the public, and do not contain any known important natural resource values.

The general types of issues anticipated as a result of the amendment process would be:

(1) Would there be a loss of important wildlife, recreation or other natural resource values on lands identified for transfer into private ownership.

(2) What studies would have to be done to assure that all resource values were considered prior to actual transfer into private ownership.

(3) What impacts would the two designations have on property values adjacent to adjustment areas or private land that would be identified as potential acquisition areas within or adjacent to the management areas.

Disciplines that will be used in the preparation and review of the plan amendment consist of natural resource specialists including, but not limited to, lands, recreation, wildlife, range, watershed, and cultural resource specialists.

Public participation in the amendment process will include publication of this notice in the Federal Register and local newspapers, letters to state and local governments, private idnividuals that were involved in the planning process, and other interested parties. Depending on the public interest, meetings may be held in Malad, Burley, American Falls, and Twin Falls, Idaho.

ADDRESS: Any comments on this notice should be mailed by January 31, 1990 to Bureau of Land Mangement, Burley District Office, Route 3, Box 1, Burley, ID 83318.

FOR FURTHER INFORMATION CONTACT: Karl Simonson, Burley District Realty Specialist, (208) 678-5514.

Dated: December 11, 1989.

Gerald L. Quinn,

District Manager.

[FR Doc. 89-29648 Filed 12-20-89; 8:45 am]

BILLING CODE 4310-66-M

[AZ-020-00-4212-13; A-23677]

Exchange of Public Lands, Lavapai County, AZ

The following described federal lands have been determined to be suitable for

disposal by exchange to Wayne and Sheree Pitrat or their nominees pursuant to section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716:

Gila and Salt River Meridian, Arizona

T. 16 N., R. 1 W., Sec. 1, lots 1–8, S½NW¼, SW¼, SW¼SE¼.
Comprising 585.85 acres, more or less.

In exchange for these public lands, the United States will acquire all of the following described private lands from Wayne and Sheree Pitrat.

Gila and Salt River Meridian, Arizona

T. 10 N., R. 14 W., Sec. 6, lots 6 and 7, E½SW¼, W½SE¼.
Comprising 235.94 acres of land owned by Mr. and Mrs. Pitrat.

The exchange is consistent with the Bureau's land use planning objectives.

In accordance with the regulations of 43 CFR 2201.1(b), publication of this Notice will segregate the affected public lands from appropriation under the public land laws, including the mining laws.

The United States will reserve a right-of-way for ditches and canals constructed by the authority of the United States, Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. 945.

Segregation of the above-described lands shall terminate upon issuance of a document conveying such lands or upon publication in the Federal Register of a notice of termination of the segregation; or the expiration of two years from the date of publication, whichever occurs first.

For a period of forty-five (45) days, interested parties may submit comments to the District Manager, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

Dated: December 12, 1989.

Henri R. Bisson,

District Manager.

[FR Doc. 89–29717 Filed 12–20–89; 8:45 am]

BILLING CODE 4310–32–M

[NV–930–00–4214–11; N–4592]

Proposed Continuation of Withdrawals; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Forest Service proposes that 666.78 acres of a withdrawal comprising 2,664.28 acres for the protection of campgrounds, a geological area and a cultural area be continued for an additional period of time. All the lands are within the Toiyabe National Forest. The lands will remain closed to surface entry and mining, but have been and will remain open to mineral leasing.

DATE: Comments should be received by March 21, 1990.

ADDRESS: Comments should be sent to: Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, P.O. Box 12000, Reno, Nevada 89520.

FOR FURTHER INFORMATION CONTACT: Vienna Wolder, Nevada State Office, 702–328–6326.

The U.S. Forest Service proposes that the existing land withdrawal made by Public Land Order 5073 be modified and continued in part pursuant to section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751, 43 U.S.C. 1714, the land is described as follows:

Mount Diablo Meridian

T. 16 N., R. 46 E.,
sec. 33, SW¼NE¼.
The area described (Toquima Petroglyph Cave) contains 40 acres in Lander County.

T. 8 N., R. 47 E.,
sec. 30, Lots 2–4, SE¼NW¼, W½SE¼, E½SW¼;
sec. 31, Lots 1–4, E½W½.
The area described (McCann Canyon Geological Area) contains 626.78 acres in Nye County.

All the lands are within the Toiyabe National Forest.

The withdrawal was made in aid of Department of Agriculture programs. The withdrawal is utilized to protect natural resource values in the Toquima Petroglyph Cave and the McCann Canyon Geological Area. The continuation of the withdrawal for Toquima is proposed for 50 years, the continuation for McCann is proposed for 40 years. The withdrawal segregates the land from operation of the public land laws generally, including the mining but not the mineral leasing laws. Mineral leases will not be approved without the concurrence of the U.S. Forest Service.

The remainder of the withdrawal is proposed for revocation.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with the proposed continuation of the withdrawal, may present their views in writing to the Chief, Branch of Lands and Minerals Operations, in the Nevada State Office.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. A report will also be prepared for consideration by the Secretary of the Interior, the President, and Congress, who will determine whether or not the withdrawal will be continued and if so, for how long. The final determination on the continuation of the withdrawal will be published in the **Federal Register**. The existing withdrawal will continue until such final determination is made.

Edward F. Spang,

State Director, Nevada.

[FR Doc. 89–29640 Filed 12–20–89; 8:45 am]

BILLING CODE 4310–NC–M

Office of Surface Mining Reclamation and Enforcement

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related form may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the proposal should be made directly to the bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029–0027), Washington, DC 20503, telephone 202–395–7340.

Title: General Requirements for Surface Coal Mining and Reclamation Operations on Federal Lands.

OMB Approval Number: 1029–0027.

Abstract: Section 522 of the Surface Mining Control and Reclamation Act of 1977 (Act) requires that a Federal lands program be established to govern surface coal mining and reclamation operations on Federal lands. The information requested is needed to assist the regulatory authority in determining compliance with the requirements of the Federal lands program.

Bureau Form Number: None.

Frequency: On occasion.

Description of Respondents: Coal mine operators and State regulatory authorities.

Estimated Completion Time: 41.

Annual Responses: 20.

Annual Burden Hours: 815.

Bureau Clearance Officer: Andrew F. DeVito, (202) 343–5954.

Dated: October 20, 1989.

Annetta L. Cheek,

Chief, Regulatory Development and Issues Management.

[FR Doc. 89-29650 Filed 12-20-89; 8:45 am]

BILLING CODE 4310-05-M

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related form may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the proposal should be made directly to the bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029-0097), Washington, DC 20503, telephone 202-395-7340.

Title: State Enforcement Activities, 30 CFR part 720.

OMB Approval Number: 1029-0097.

Abstract: Information collected in part 720 is used to monitor State permitting and inspection activities and to provide the Office of Surface Mining Reclamation and Enforcement with necessary information for purposes of conducting Federal mine inspection and enforcement activities under the initial regulatory program.

Bureau Form Number: None.

Frequency: On occasion.

Estimated Completion Time: One hour.

Description of Respondents: State regulatory authorities.

Annual Responses: One.

Annual Burden Hours: One.

Bureau Clearance Officer: Andrew F. DeVito, (202) 343-5954.

Dated: November 21, 1989.

Annetta L. Cheek,

Chief, Regulatory Development and Issues Management.

[FR Doc. 89-29658 Filed 12-20-89; 8:45 am]

BILLING CODE 4310-05-M

Valid Existing Rights Determination Within the Wayne National Forest, Ohio

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

ACTION: Notice of decision.

SUMMARY: This notice announces the decision of the Office of Surface Mining (OSM) regarding a determination of Valid Existing Rights (VER) under the provisions of section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

ADDRESSES: Documents comprising the administrative record are available for public review and copying during regular business hours at the Administrative Record Room, room 5131L, Office of Surface Mining, Department of the Interior, 1100 L Street NW., Washington, DC 20240. Copies of the Director's decision and of relevant notices may be obtained at the same location.

FOR FURTHER INFORMATION CONTACT: Richard Miller, Office of the Deputy Director for Operations and Technical Services Policy, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave. NW., Washington, DC 20240 (202) 343-3218.

SUPPLEMENTARY INFORMATION:

Background

I. VER Required

Section 522(e) of SMCRA provides that—

> After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted * * * on any federal lands within the boundaries of any national forest: * * *.

Under the Federal regulations at 30 CFR 740.4(a)(4) and 745.13(o), the Secretary of the Interior retains responsibility for making VER determinations on Federal lands within the boundaries of any areas specified in section 522 (e)(1) or (e)(2) of SMCRA. Under these rules, the Secretary may not delegate this responsibility to a State.

Consequently, the Office of Surface Mining must make determinations regarding whether parties seeking to undertake surface mining on Federal lands within the areas specified in sections 522(e)(1) and 522(e)(2) have VER to conduct surface coal mining operations within these areas. Under 30 CFR 740.11(a), the approved State regulatory program is applicable to Federal lands in a State. Therefore, OSM uses the State program definition of VER on section 522(e) (1) and (2) Federal lands in States within approved programs.

II. The Belville Mining Company VER Application

On September 4, 1985, BMC submitted an application for a VER determination on lands in the Wayne National Forest. The lands consisted of five properties known as "The McMullen Property", "The Jenkins Property", "The Bauer Property", "The Simmering Property" and "The Culbertson Property".

OSM reviewed the material submitted by BMC in support of its VER application and on December 3, 1986, notified BMC that based on the information provided, OSM was unable to grant VER on the lands applied for. The letter also requested BMC to provide additional information should it wish to pursue the matter further.

On August 15, 1988, BMC requested OSM to reconsider its December 3, 1986 decision. On December 23, 1988 OSM notified BMC that it had determined that BMC had a valid existing right (VER) to conduct surface coal mining activities on the five properties listed above. This decision effectively reversed the December 3, 1986 determination by OSM that earlier submissions by BMC were insufficient to establish VER for the five properties in question.

Following its December 23, 1988 determination that BMC had a valid existing right to mine on these properties, OSM reviewed recent actions it had taken concerning VER determinations and concluded that the administrative record of the December 23, 1988 VER determination did not provide sufficient information to assure that OSM's determination regarding BMC's possession of VER had been properly made. Consequently, OSM made the decision to review and reconsider its December 23, 1988 determination on BMC's VER application.

On August 24, 1989, OSM sent a letter to BMC outlining the reasons for reconsidering the determination of VER. In the letter, OSM stated that based on its review of OSM VER matters, indications existed that OSM may not have followed its own internal procedures for processing VER requests, that the December 23, 1988 decision was made without the development of a sufficient administrative record, and that there was no record of any opportunity for other parties to assert any competing property rights, claims, or interests in this matter.

The letter further stated that the record did not indicate the extent to which OSM considered substantive issues regarding the nature of the rights reserved in the deeds for the five properties or whether the agency had correctly applied the State standard for VER and whether OSM had expressly considered the issue of whether VER is transferable under Ohio law.

The letter also informed BMC that the effect of OSM's action to reconsider the decision of December 23, 1988 was to stay that decision and that OSM would consider the VER application as a whole, and would proceed with a determination regarding the land known as the "McMullen property" on an expedited basis. VER determinations for the remaining four properties would follow the initial decision on the McMullen property.

In a notice appearing in the Federal Register on August 30, 1989 (54 FR 35945), OSM announced its reconsideration of the 1988 VER determination and the reopening of the administrative record to receive additional information from the public. Any additional information received would be used to develop an administrative record which will support a final determination regarding Belville's VER.

Reopening the record did not have the effect of reinstating the original determination of December 3, 1986 which had denied BMC's request for VER.

On September 8, 1989, OSM requested BMC to provide additional information regarding its application for VER. At the same time, OSM requested that the United States Forest Service (USFS) and the Ohio Department of Natural Resources (ODNR) also provide additional information for the administrative record. On October 20, 1989, BMC provided additional information which has been included in the administrative record of this decision. (BMC Submission October 20, 1989.) On November 1, 1989, ODNR provided additional information concerning the Ohio VER standard (ODNR Nov. 1, 1989) and on November 13, 1989, the Forest Service provided a title opinion and report concerning BMC's interest in the McMullen and Culbertson properties. (USFS Title Report November 13, 1989.)

By further notice appearing in the Federal Register on November 14, 1989, (54 FR 4741) OSM extended the period in which the public could submit relevant information until such time as OSM made a determination regarding BMC's VER. Subsequently, a notice appeared in the Federal Register on November 17, 1989 which stated that the period for the public to submit information submitted on the BMC VER application would close on November 29, 1989 (54 FR 47861).

As stated in the August 30, 1989 Federal Register notice, OSM has expedited its decision concerning the "McMullen property", for which permit application No. D0773-1 is currently pending with the Ohio state regulatory authority and for which the underlying mineral reservation will expire on March 24, 1989. OSM has also reached a decision concerning the "Culbertson property," which was discussed in the USFS title opinion.

This determination addresses the request by BMC for a determination of VER on the "McMullen Property" and the "Culbertson Property." OSM's determination is based on the totality of the evidence, including SMCRA and its legislative history, the approved Ohio regulatory program, and the documents constituting the administrative record for this decision, including all information timely received. The determination takes into account both the inferences that may reasonably be drawn from those documents and the weight that may reasonably be assigned to those documents.

This notice constitutes the decision of OSM in the matter of VER on the McMullen and Culbertson properties and copies have been sent to Belville Mining Company, the U.S. Forest Service, and the State of Ohio. Subsequent OSM determinations will address the remaining lands for which BMC has requested a VER determination.

III. Property Descriptions

A. The McMullen Property

BMC seeks a VER determination for the McMullen property for which the legal description is: section 22 Township 4N Range 18 W the east half of the Northwest Quarter containing 81.32 acres, more or less, in Lawrence County, Ohio within the boundaries of the Wayne National Forest.

B. The Culbertson Property

The legal description of the Culbertson property is: All that certain parcel of land situated in the Township of Symmes, County of Lawrence, State of Ohio, being a part of the Ohio River Survey, and more particularly described as follows:

In section Five (5), N. Range Seventeen (17) W, the whole of the northeast quarter, the whole of the northwest quarter, the northest quarter of the southwest quarter (NE¼SW¼), the northwest quarter of the southwest quarter (NW¼SW¼), the southeast quarter of the southwest quarter (SE¼SW¼), the northwest quarter of the southeast quarter (NW¼SE¼), the southeast quarter of the southeast quarter (SW¼SE¼) containing in all Five Hundred Ninety-Two and Eighty Hundredth acres (592.80), more or less.

In section Six (6), Township Five (5) N. Range Seventeen (17), W., the whole of the northeast quarter, the whole of the northwest quarter, the northeast quarter of the southwest quarter, the southwest quarter of the southwest quarter, containing in all Four Hundred Twenty-One and Seventy Hundredths acres (411.70), more or less.

In section Seven (7), Township Five (5), N. Range Seventeen (17) W. the northwest quarter of the northeast quarter, the whole of the northwest quarter, the northeast quarter of the southwest quarter, the northwest quarter of the southwest quarter, the southwest quarter of the southwest quarter, the northwest quarter of the southeast quarter, the southwest quarter of the southwest quarter, containing in all Four Hundred Twenty-One and Seventy Hundredths acres (421.70) more or less.

In section Eight (8) township Five (5), N. Range Seventeen (17) W. the whole of the northeast quarter, the northeast quarter of the northwest quarter, the southeast quarter of the northwest quarter, containing in all Two Hundred Fifty-nine and Ninety-three Hundredths (259.93) acres, more or less.

In section Nine (9), Township Five (5) N. Range Seventeen (17), W. the southwest quarter of the northwest quarter, the southeast quarter of the northwest quarter, the whole of the southwest quarter, the northeast quarter of the southeast quarter, the northwest quarter of the southeast quarter, the southwest quarter of the southeast quarter, containing in all Three Hundred Ninety-One and Fourteen Hundredths (391.14) acres, more or less.

In section Ten (10), Township Five (5), N. Range Seventeen (17) West, the northwest quarter of the southwest quarter, containing Forty-Three and Five Hundredths (43.05) acres, more or less.

In section Eighteen (18) Township (5), Range Seventeen (17) W., the Northwest quarter of the northeast quarter, the southwest quarter of the northwest quarter, the northwest quarter of the southwest quarter, the southwest quarter of the southwest quarter, the southeast quarter of the southwest quarter, containing in all Two Hundred Nine and Eighty-Six Hundredths (209.86) acres, more or less.

The combined acreage of the above described parcels of land being Two Thousand, Three Hundred Forty-Eight and Eighty Hundredths (2,348.80) acres, more or less.

Said reservations of coal and oil and gas are for a period of Ninety-Nine (99) years from February 26, 1936, and subject to the rules and regulations set

out in the said deed, Volume 147, pages 346 through 349.

Also being the coal rights in and to the following described property, as reserved in the deed of E.S. and Alice C. Culbertson to the United States of America by deed of February 26, 1936, Volume 147, Page 350, of the Record of Deeds of Lawrence County, Ohio.

All that parcel of land situated in the Townships of Decatur and Washington, County of Lawrence, State of Ohio, being a part of the Ohio River Survey, and more particularly described as follows:

In section One (1), Township Three (3) N., Range Eighteen (18) W., the whole of the northeast quarter (NE¼), the whole of the northwest quarter (NW¼), the whole of the southwest quarter (SW¼), the northeast quarter of the southeast quarter (NE¼SE¼), the northwest quarter of the southeast quarter (NW¼SE¼) and the southeast quarter of the southeast quarter (SE¼SE¼), containing in all five hundred seventy-nine and fifty-three hundredths (579.53) acres, more or less.

In section Twenty-Five (25), Township Four (4) N., Range Eighteen (18) W., the northwest quarter of the northwest quarter (NW¼NW¼), the Southwest quarter of the northwest quarter (SW¼NW¼), the whole of the southwest quarter (SW¼), the northwest quarter of the southeast quarter (NW¼SE¼), the southwest quarter of the southeast quarter (SW¼SE¼), the southeast quarter of the southeast quarter (SE¼SE¼), containing in all three hundred ninety-six and forty-three hundredths (306.43) acres, more or less.

In section Twenty-Six (26) Township Four (4) N., Range Eighteen (18) W., the whole of the section, containing six hundred twenty-five and thirty hundredths (625.30) acres, more or less.

In section Twenty-Seven (27), Township Four (4) N., Range Eighteen (18) W., the whole of the section, containing six hundred twenty-two and sixty-four hundredths (622.64) acres, more or less. Less 70 A. conveyed to Charles A. Jenkins D.B. 147, Page 63, 7/30/36, net 552.64 acres.

In section Thirty-Five (35), Township Four (4) N., Range Eighteen (18) W., the whole of the northeast quarter (NE¼), the whole of the northwest quarter (NW¼), the whole of the southwest quarter (SW¼); the whole of the southeast quarter (SE¼), excepting the following described parcels:

EXCEPTION #1: A parcel of land more particularly described as follows: beginning at a point which bears from the Section corner common to Sections Thirty-Five (35) and Thirty-Six (36), Township Four (4) N., Range Eighteen (18) W., Ohio River Survey and on the line dividing Township Three (3) N., and Township Four (4) N., both in Range Eighteen (18) W: North fifty-one degrees and fifty-nine minutes West (N 51o-59'W), thirty three and sixty seven hundredths chains (33.67), thence North twenty-one degrees West (N 21o-00'W), sixty-eight hundredths chains (0.68), thence North forty-seven degrees East (N 47o 00'E), two and twenty-six hundredths chains (2.26), thence North Seventy-one degrees East (N 71o 00'E), eight and three hundredths chains (8.03), thence North fifty-four degrees East (N 54o-00'E), two and forty-one hundredths chains (2.41), thence South thirty-six degrees East (S 36o 00'E), four and seventy-hundredths chains (4.70), thence South fifty-five degrees West (S 55o 00'W), five and ninety-eight hundredths chains (5.98), thence South sixty-eight degrees West (S 68o 00'W), nine and twenty-seven hundredths chains (9.27), to the point of beginning, all of which contains seven and twenty-eight hundredths (7.28) acres, more or less.

EXCEPTION #2: The Southwest quarter of the southeast quarter (SW¼SE¼) which contains thirty-nine and fifty-four hundredths (39.54) acres, more or less. The total acreage in section Thirty-Five (35) after deducting the Exceptions being five hundred eighty-five and eighty-two hundredths (585.82) acres, more or less.

In section Thirty-six (36), Township Four (4) N., Range Eighteen (18) W, the whole of the northeast quarter (NE¼), the whole of the northwest quarter (NW¼), the whole of the southwest quarter (SW¼), the northeast quarter of the southeast quarter (NE¼SE¼), the northwest quarter of the southeast quarter (NW¼SE¼), the southwest quarter of the southeast quarter (SW¼SE¼), containing in all six hundred four and sixty-two hundredths (604.62) acres, more or less.

The combined acreage of the above described parcels of land being three thousand three hundred forty-four and thirty-four hundredths (3,344.34) acres, more or less, and being part of the same premises as conveyed by Certificate of Transfer from Alice C. Culbertson, Deceased, to Emily Lucy C. Burch aka Emily Lucy C. Wingert, dated May 12, 1964, recorded in Deed Book 304, Page 532, Deed Records of Lawrence County, Ohio.

IV. The Deeds

Copies of the deeds in the abstracts of title concerning the McMullen and Culbertson properties have been entered in the administrative record and were reviewed by the USFS.

V. USFS Title Reports

A. McMullen Property

In response to the August 30, 1989 **Federal Register** notice concerning BMC's request for a determination of VER on the McMullen property, the USFS prepared a title report dated November 13, 1989 and submitted it to OSM. Based on review of the title records and related documents, a legal opinion from the Department of Agriculture Office of General Counsel, and interviews with Agency employees involved in acquiring lands for the Forest Service in Ohio, the Forest Service title report stated that the minerals reservation on the McMullen property includes the right to surface mine.

This title report and accompanying documents from the Forest Service has been included in the Administrative Record for this determination.

B. Culbertson Property

The Culbertson property was acquired by the Forest Service in 1936 under two deed conveyances that year from E.S. Culbertson, one for 2348.80 acres and one for 3414.34 acres. The lands were acquired under the Authority of the Weeks Act and contained reservations of mineral rights which were subject to certain provisions in the deeds, including the 1911 rules and regulations of the Secretary of Agriculture.

The Forest Service report concluded that based on an examination of the reservations in the deeds, and the fact that surface mining was not practiced in Lawrence County at the time of the conveyance, it was not the intent of the grantor to allow surface mining, and that therefore the minerals reservations on the Culbertson property did not include the right to surface mine coal.

VI. Applicable VER Standard

As indicated above, the approach OSM now uses for the determination of VER may be summarized as follows:

As stated in OSM's Suspension Notice of November 20, 1986 (51 FR 47146), OSM will approach each VER determination on a case by case basis, and will examine the particular circumstances which surround individual determinations. With respect to VER determinations on Federal lands, OSM will use the definition of VER in the approved State regulatory program. In states which have an all permits test, OSM will apply the test to include the good faith modification suggested by the district court In Re: Permanent Surface Mining Regulation Litigation, No. 79–1144, Mem. Op. at 20 (D.D.C. February

26, 1980) (hereafter, In Re). In the case of the Ohio regulatory program, this means that OSM will apply all good faith-all permits test to the BMC requests. Use of the Ohio VER standard is also required by Article IV of OSM's cooperative agreement with Ohio, codified at 30 CFR 935.30.

VII. State VER Provisions

A. Ohio Regulatory Program History

On August 10, 1982, the Secretary of Interior conditionally approved the permanent program submission of the State of Ohio. This approval and the background on the Ohio program submission appeared in the Federal Register on August 10, 1982. (47 FR 34688–35718). The conditional approval stated that the Ohio regulation defining VER (ORC 1501:13–3–02(A)(1))20, as modified by the State, was consistent with the two-part test established under the Federal rules at 30 CFR 761.5, and no less effective than the Federal regulation.

Ohio resubmitted its regulatory program for approval on May 16, 1986 and on July 17, 1987, OSM reapproved the Ohio regulatory program (52 FR 26972), including the VER test.

B. The Ohio Regulatory Program Definition of VER

1. Ohio's definition of VER, which is currently codified at ORC 150l:13–1–02(FFFFFF) is as follows:

"Valid Existing Rights" means;

(1) Except for haul roads

(a) Those property rights of the applicant in existence on August 3, 1977 that were created by a legally binding conveyance, lease, deed, contract, or other document which authorizes the applicant, any subsidiary, affiliate or persons controlled by or under common control with the applicant, to produce coal by a mining operation; and

(b) The persons proposing to conduct surface coal mining operations on such lands either:

(i) Had been validly issued, on or before August 3, 1977, all state and federal permits necessary to conduct such operations on those lands; or

(ii) Can demonstrate to the chief that the coal is both needed for, and immediatley adjacent to, an ongoing surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977.

(2) For haul roads;

(a) A right-of-way or easement recorded prior to August 3, 1977, 1977 or a coal mining permit issued prior to August 3, 1977; or

(b) any road in existence as of August 3, 1977.

(3) Where an area comes under the protection of Division (d) of Section 1513.073 of the Revised Code, valid existing rights shall be found if, on the date the protection comes into existence, a validly authorized coal mining operation exists on that area.

(4) Interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

(5) "Valid Existing Rights" does not mean mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining. Examples of rights which alone do not constitute valid existing rights include, but are not limited to, coal exploration permits or licenses, applications or bids for leases, or when a person has only applied for a permit.

C. Ohio Policy on Transferability of VER

In its letter responding to OSM's letter of September 8, 1989 requesting information on the current interpretation and application of the State of Ohio rule for determining VER, the Ohio Department of Natural Resources replied that:

The Ohio Department of National Resources, Division of Reclamation has always tkaen the position that VER is not transferrable.

ODNR also stated that

Although at first glance VER may appear to be solely a property right, careful reading of the entire definition indicates that VER is a personal right in existence on August 3, 1977, which right runs to the applicant. Such a right is evaluated only at the time the potential coal operator becomes an applicant for a permit which, again, is based on a clear reading of the above language. [the language in the Ohio definition of VER] (ODNR Nov. 1, 1989)

Ohio argues that its "interpretation of its regulatory language is consistent with earlier OSM comments (See 44 FR 14991, March 1979) and is entirely consistent with legislative concern with the taking of property which could have occurred at the time of the enactment of SMCRA." Under Ohio's interpretation of its program, Ohio

Conceptualizes prohibitions and VER as it would zoning restrictions and nonconforming uses. An owner who possesses VER but does not exercise it could be viewed as having abandoned the nonconforming use. Once abandoned, any subsequent property owner must comply with the land use restrictions imposed by Chapter 1513.

(ODNR Nov. 1, 1989)

OSM will accept the Ohio policy on transferability of VER as a policy which may be more stringent than the analogous Federal provision, as provided in SMCRA sec. 505; and as an interpretation which is not inconsistent with the terms of the Ohio provision or with the Secretary's approval of the Ohio regulatory program. This VER determination does not reach the issue of whether VER is transferable under SMCRA sec. 522(e) and the Federal regulations. Ohio has requested an opinion from the Ohio Attorney General as to the States Authority for the policy of nontransferability. Because the McMullen mineral rights expire on March 24, 1990, OSM is issuing this determination immediately. However, OSM does not foresee the need to revisit this specific issue, whether or not the Ohio Attorney General opinion is that VER is lawfully nontransferable. That finding is unlikely to affect the outcome of this determination, as discussed below, because the determination for both tracts is supportable on alternative bases.

VII. Application of VER Standard To Properties

OSM has determined that the appropriate criteria for VER with respect to BMC's current request is the standard in the approved Ohio program, except that OSM intends to apply the Ohio VER test on Federal lands consistent with the District Court's 1980 suggestion in In re that a good faith effort to obtain all permits should suffice for meeting the VER test.

To meet the property rights portion of the test, BMC submitted copies of deeds and maps for the McMullen and Culbertson properties which it represents as property rights to surface mine coal that were in existence on August 3, 1977. For both the McMullen and Culbertson properties, OSM relies on the determinations by the USFS as the Federal agency with jurisdiction to make such determinations.

A. The McMullen Property

The USFS title opinion states that BMC has the property right to surface mine coal on the McMullen Property under the relevant deeds and conveyances. OSM therefore finds that BMC has demonstrated that it now has the necessary property rights to surface mine coal on the McMullen property. However, current property rights alone are insufficient to establish VER based on the Ohio State Program. Ohio's policy is that VER is nontransferable. Therefore, Belville must also demonstrate that (1) it had the property rights on August 3, 1977; and that (2) it either had obtained or had made a good faith effort to obtain the necessary permits to conduct surface coal mining operations on the properties identified by the deeds prior to August 3, 1977. Such permits probably would have included: (1) A State permit to mine

coal, (2) Mining or appropriate special use permit from the Forest Service, (3) National Pollutant Discharge Elimination System (NPDES) permit if point source discharges were planned, and (4) permit from the Corps of Engineers for discharge of dredge and fill material into navigable waters.

In this case, BMC does not claim and the record does not indicate that BMC, as of the date of the passage of SMCRA, owned the property rights, or possessed the necessary permits or had made a good faith effort to obtain permits for the McMullen or Culbertson properties.

BMC did not acquire the reserved mineral rights for the McMullen property until 1983. Accordingly, under the applicable VER standard, BMC has not demonstrated VER for the McMullen property because (1) BMC did not own the necessary property rights on August 3, 1977; (2) BMC had not applied for or obtained the necessary permits for a surface coal mining operation by August 3, 1977; and (3) even if VER were transferable under the Ohio VER provisions, BMC has not demonstrated that its predecessors in interest had obtained or attempted to obtain the necessary permits for a surface coal mining operation by August 3, 1977.

Consequently, OSM has determined that under the applicable VER standard, Belville has not demonstrated a valid existing right to surface mine coal on the McMullen property.

B. Culbertson Property

Although Belville asserts that the USFS is incorrect, the USFS title opinion states that BMC does not have the property right to surface mine coal on the Culbertson property under the relevant deeds and conveyances. It appears that a dispute exists between Belville and the USFS as to the nature of the property rights held by Belville on the Culbertson property. OSM is not authorized by SMCRA to adjudicate property rights disputes. Therefore, until this dispute is resolved, OSM finds that BMC has not demonstrated that BMC or its predecessor in interest now owns or owned on August 3, 1977 the property right to surface mine the coal on the Culbertson property. In addition, OSM concludes that even if BMC had demonstrated the necessary property rights to surface mine coal on the Culbertson property, BMC has not demonstrated that it or its predecessor in interest had obtained or had made a good faith effort to obtain the necessary permits for a surface coal mining operation as of the date of passage of SMCRA. Moreover, BMC did not acquire its interest in the coal rights on the Culbertson property until 1984 and 1988. Clearly, BMC did not satisfy the requirement under Ohio's nontransferability policy, that BMC own the property rights on August 3, 1977.

IX. Appeals

Any person who is or may be adversely affected by this decision may appeal to the Interior Board of Land Appeals under 43 CFR 4.1390 *et seq.* (1988). Notice of the intent to appeal must be filed within 30 days from the date of publication of this notice of decision in a local newspaper in the area of the Wayne National Forest.

Dated: December 14, 1989.

Harry M. Snyder,

Director.

[FR Doc. 89-29603 Filed 12-20-89; 8:45 am]

BILLING CODE 4310-05-M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

Public Information Collection Requirements Submitted to OMB for Review

The agency for International Development (A.I.D.) submitted the following public information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of the entry no later than ten days after publication. Comments may also be addressed to, and copies of the submissions obtained from the Reports Management Officer, John H. Elgin, (703) 875-1608, IRM/PE, Room 1100B, SA-14, Washington, DC 20523.

Date Submitted: December 7, 1989.

Submitting Agency: Agency for International Development.

OMB Number: 0412-0513.

Type of Submission: Renewal.

Title: Environmental Procedures 22 CFR part 216.

Purpose: A.I.D. has established policy to ensure that the enviromental consequences of A.I.D.-financed activities are identified and considered by A.I.D. and the host country prior to a final decision to proceed and that appropriate enviromental safeguards are adopted. An Initial Enviromental Examination (IEE) is the first review of the reasonably foreseeable effects of a proposed action of the environment. Its function is to provide a brief statement of the factual basis for a formal decision as to whether an Environmental Assessment or an Environmental Impact Statement will be required.

Reviewer: Donald Arbuckle (202) 395-7340, Office of Management and Budget, Room 3201, New Executive Office Building, Washington, DC 20503.

Dated: December 7, 1989.

Wayne H. Van Vehcten,

Planning and Evaluation Division.

[FR Doc. 89-29651 Filed 12-20-89; 8:45 am]

BILLING CODE 6116-01-M

Overseas Private Investment Corporation

Agency Report Forms Under OMB Review

AGENCY: Overseas Private Investment Corporation.

ACTION: Request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), agencies are required to submit information collection requests 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. The proposed form under review is summarized below.

DATE: Comments must be received within 14 calendar days of this notice. If you anticipate commenting on the form but find that time to prepare will prevent you from submitting comments promptly, you should advise the OMB Reviewer and the Agency Submitting Officer of your intent as early as possible.

ADDRESSES: Copies of the subject form and the request for review submitted to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the Agency Submitting Officer and the OMB Reviewer.

FOR FURTHER INFORMATION CONTACT:

OPIC Agency Submitting Officer

L. Jacqueline Brent, Office of Personnel and Administration, Overseas Private Investment Corporation, 1615 "M" Street NW., Suite 461, Washington, DC 20527, (202) 457-7151.

OMB Reviewer

Donald Arbuckle, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, (202) 395-7340.

Summary of Form(s) Under Review

Type of Respondent: Business or other institutions (except farms).

Standard Industrial Classification Codes: All.

Description of Affected Public: U.S. companies investing overseas.

Type of Request: New.

Form No. & Title: OPIC—91; Franchising Questionnaire.

Frequency of Use: Other—once per investor per project.

Number of Responses: 140.

Reporting Hours: 15 minutes.

Federal Cost: $150.00.

Authority for Information Collection: Section 234(a) of the Foreign Assistance Act of 1961, as amended.

Abstract (Needs and Uses): The Franchising Questionnaire will be used to determine the political risk insurance requirements for franchisors and to help OPIC develop an investment insurance program that meets those needs. The questionnaire will be sent to franchisors with international investments.

Dated: December 15, 1989.

James R. Offutt,

Office of the General Counsel.

[FR Doc. 89-29649 Filed 12-20-89; 8:45 am]

BILLING CODE 6116-01-M

INTERSTATE COMMERCE COMMISSION

Motor Passenger Carrier or Water Carrier Finance Applications Under 49 U.S.C. 11343-11344

The following applications seek approval to consolidate, purchase, merge, lease operating rights and properties of, or acquire control of motor passenger carriers or water carriers pursuant to 49 U.S.C. 11343-11344. The applications are governed by 49 CFR part 1182, as revised in *Pur., Merger & Cont.-Motor Passenger & Water Carriers,* 5 I.C.C. 2d 786 (1989). The findings for these applications are set forth at 49 CFR 1182.13. Persons wishing to oppose an application must follow the rules under 49 CFR 1182, subpart B. If no one timely opposes the application, this publication automatically will become the final action of the Commission.

MC-F-19558, filed December 7, 1989. J & M Holding Co., Inc.—Control—United Limo, Inc. Applicants' representative: Robert B. Walker, Suite 875, 1275 K Street NW., Washington, DC 20005. Applicant J & M Holding Co., Inc. (J & M), a noncarrier controlled by applicants John Shoup and Margaret Shoup (the Shoups), noncarrier individuals, seek approval for J & M's acquisition of control of United Limo, Inc. (United), through purchase of all its outstanding stock. As previously approved by the Commission, the Shoups are in control: (1) Of Tri-State Coach Lines, Inc. (MC-129038); (2) Shoup Buses, Inc. (MC-70384); and (3) Cardinal Buses, Inc. (MC-187339); common and contract carriers of passengers. United is primarily a common carrier of passengers, in interstate commerce, under No. MC-150365 and sub-nos thereto, and in intrastate commerce, under Indiana certificate No. 14290-A, 2. Approval of the transaction insofar as it involves the acquisition of control of intrastate authority is effected under 49 U.S.C. 11341(a). The business address of J & M Holding is 201 Winslow, P.O. Box 271, Middlebury, IN 46540 and the business address of United is P.O. Box, 287, Osceola, IN 46561. Upon consummation of the stock purchase transaction, the Shoups will be in control of four passenger carriers.

Decided: December 14, 1989.

By the Commission, the Motor Carrier Board.

Noreta R. McGee,

Secretary.

[FR Doc. 89-29679 Filed 12-20-89; 8:45 am]

BILLING CODE 7035-01-M

[Ex Parte No. 394 (Sub-No. 6)]

Cost Ratio for Recyclables—1989 Determination

AGENCY: Interstate Commerce Commission.

ACTION: Notice of proposed determination of maximum rate ceiling for rates on nonferrous recyclable commodities for the year 1989.

SUMMARY: The Commission has calculated the proposed 1989 revenue-to-variable cost (R/VC) ratio for rates on nonferrous recyclables under the statutory standard of 49 U.S.C. 10731(e). The calculation was made in accordance with the procedures outlined in our decision in Ex Parte No. 394 (Sub-No. 1), Cost Ratio for Recyclables—1983 determination, 3 I.C.C.2d 407 (1985). The proposed R/VC ratio for 1989 is 145.1 percent. That R/VC ratio was calculated using the new Uniform Railroad Costing System (URCS) as adopted in Ex Parte No. 431 (Sub-No. 1), Adoption of the Uniform Railroad Costing System As A General Purpose Costing System For All Regulatory Purposes, 5 I.C.C.2d 894 (1989) and modified by Ex Parte No. 477, Modifications To General Purpose Costing System—GPCS, 5 I.C.C.2d 860 (1989). Since URCS has replaced Rail Form A as a costing system for all regulatory purposes including the Cost Ratio for Recyclables, all future determinations including compliance must be made using URCS. The new ratio will apply to all nonferrous recyclables during the 1989 calendar year.

EFFECTIVE DATE: January 10, 1990, unless within that time comments are received challenging the accuracy of the new ratio, in which case an additional decision will be issued.

ADDRESSES: An original and 10 copies of comments should be sent to: Case Control Branch, Office of the Secretary, Interstate Commerce Commission, 12th St. and Constitution Avenue, NW., Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: William T. Bono (202) 275-7354 (TDD for hearing impaired (202) 275-1721).

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision write to, call or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or telephone (202) 289-4357 or 4359. Assistance for the hearing impaired is available through TDD services (202) 275-1721.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

This decision will not have a significant economic impact on a substantial number of small enitities because it does not change any rules but merely updates the rate ceiling calculated under existing rules. Thus, the impact on small business remains unchanged.

Authority: 49 U.S.C. 10321(a), 10731, 5 U.S.C. 553.

Decided: December 13, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Lamboley, Phillips, and Emmett.

Noreta R. McGee,

Secretary.

[FR Doc. 89-29681 Filed 12-20-89; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 30186 (Sub No. 2)]

Tongue River Railroad Co.—Construction and Operation of Additional Rail Line From Ashland to Decker, In Rosebud and Big Horn Counties, MT

AGENCY: Interstate Commerce Commission.

ACTION: Extension of time.

SUMMARY: Comments on the scope of the environmental impact statement (EIS) to be prepared by the ICC in this

proceeding were to be filed by January 19, 1990. Because of the importance of the scoping process in establishing the foundation and parameters of the EIS, the public has requested an extension of time for filing comments.

DATES: The time for filing comments on the scope of the EIS has been extended to February 1, 1990.

ADDRESSES: Written comments should be sent to: Dana White, Section of Energy and Environment, Interstate Commerce Commission, Room 3214, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Dana White (202) 275–6869 or Elaine K. Kaiser, Section Chief, (202) 275–7684. (TDD for hearing impaired: (202) 275–1721).

By the Commission, John F. Hennigan, Jr., Director, Office of Transportation Analysis.

Noreta R. McGee,

Secretary.

[FR Doc. 89–29682 Filed 12–20–89; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree

In accordance with the policy of the Department of Justice, 28 CFR 50.7, notice is hereby given that a complaint was filed on May 11, 1987, in *United States* v. *Roberson Enterprises. Inc., et al.*, Civil Action No. 87–4054, in the United States District Court for the Western District of Arkansas. On October 23, 1989, a proposed consent decree between the United States and the defendants was lodged with the court. This consent decree settles the claims alleged in the complaint pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.*, for injunctive relief and civil penalties for violations of the Clean Water Act resulting from unpermitted discharges of pollutants to navigable waters of the United States.

Under the terms of the proposed consent decree, the defendants have agreed to cease all discharges of pollutants into navigable waters, to attain and maintain compliance with the Clean Water Act, to submit non-compliance reports to EPA, and to pay a civil penalty of $20,000 for past violations of the Clean Water Act.

The Department of Justice will receive comments relating to the proposed consent decree for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. All comments should refer to United States v. *Roberson Enterprises, Inc., et al.*, D.J. Ref. 90–5–1–1–2530.

The proposed consent decree may be examined at the following offices of the United States Attorney and the Environmental Protection Agency ("EPA"):

EPA Region VI
Contact: Jim Collins,
Office of Regional Counsel,
U.S. Environmental Protection Agency,
1445 Ross Avenue,
Dallas, Texas 75202,
(214) 655–2129.
United States Attorney's Office
Claude S. Hawkins, Jr.,
Assistant United States Attorney,
U.S. Post Office and Courthouse,
6th & Rogers,
Fort Smith, Arkansas 72901,
(501) 783–5125.

Copies of the proposed consent decree may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, room 1515, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed consent decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy of the decree, please enclose a check for copying costs in the amount of $2.00 payable to Treasurer of the United States.

George W. Van Cleve,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 29656 Filed 12–20–89; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Consent Decree Pursuant to the Clean Water Act and State Law

Notice is hereby given that on November 29, 1989 a proposed consent decree in *United States et al.* v. *Shell Oil Company*, Civil Action No. C–89–4220–CAL, was lodged with the United States District Court for the Northern District of California. The complaint was filed for causes of action arising from a 1988 oil spill from Shell Oil Company's ("Shell") facility in Martinez, California by the United States, the State of California, Contra Costa and Solano Counties, the cities of Benicia and Martinez, and the East Bay Regional Park. Pursuant to Section 311 of the Clean Water Act, as amended, The United States, on behalf of the U.S. Department of Commerce, the U.S. Department of Interior, and the U.S. Department of the Navy, seeks recovery for damages caused by the Oil Spill to natural resources under the trusteeship of these departments. On behalf of the U.S. Environmental Protection Agency ("EPA"), the United States seeks assessment of penalties under section 309 of the Act for National Pollutant Discharge Elimination System ("NPDES") permit violations caused by the Oil Spill. The State of California seeks recovery of natural resource damages pursuant to section 311 of the Act and various state law claims, as well as penalties, costs, and damages under state law claims. The counties, cities, and East Bay Regional Park District seek recovery of penalties, costs, and damages under various state law claims.

The Complaint alleges that on or about April 22 through April 23, 1988 Shell negligently, and without a permit, discharged at least 432,264 gallons of crude oil from its on shore oil refinery complex in Martinez, California ("Complex") on to the lands and waters, including wetlands, surrounding the Complex ("the Oil Spill"). The Complaint further alleges that the Oil Spill inundated Shell Marsh and entered the waters of the San Francisco Bay/Delta Estuary and caused damage to the natural resources of the Estuary. The Complaint also alleges that the plaintiffs incurred costs and damages and that Shell is liable for penalties.

The Consent Decree, which would settle the action, requires that Shell pay the plaintiffs a total of $19.75 million upon lodging of the decree. $11,588,000 plus all interest accrued during the lodging period represents compensation for damages to natural resources, and $1,312,000 will pay for studies relating to oil spills. This settlement amount also includes $4,500,000 in penalties. Shell will pay: to the United States, $50,000 for penalties for NPDES permit violations and $2,000,000 to settle an administrative action initiated by EPA for violations of SPCC regulations; to the State of California, $2,100,000 in civil penalties; and to Solano and Contra Costa Counties, $500,000. Shell will also pay $500,000 to reimburse plaintiffs for response costs and $1,700,000 in damages to local governments. Under the consent decree each plaintiff will provide Shell a covenant not to sue.

The U.S. Department of Justice and the California Attorney General's office will receive, for a period of forty five (45) days from the date of this publication, comments relating to the proposed consent decree. Comments should refer to *United States, et al.* v. *Shell Oil Company*, (Shell Oil Spill) D.J. Ref. 90–5–1–1–3177 and should be

addressed to the Chief, Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044, or Sara Russell, Deputy Attorney General, California Attorney General's Office, 455 Golden Gate Avenue, 6th Floor, San Francisco, California, 94102.

A copy of the proposed consent decree may be examined at the California Attorney General's Office, c/o Sara Russell, Deputy Attorney General, 455 Golden Gate Avenue, Room 6000, San Francisco, California, 94102 and at the Environmental Enforcement Section, Land and Natural Resources Division, U.S. Department of Justice, Room 1517, Ninth Street and Pennsylvania Avenue, NW., Washington, DC. A copy of the proposed consent decree may be obtained in person from the California Attorney General's Office or from the U.S. Department of Justice at the above addresses. Copies may also be obtained by mail from California Attorney General's Office at the address noted above, or from the U.S. Department of Justice at the following address: Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044. When requesting a copy from the California Attorney General's Office, please refer to *United States et al.* v. *Shell Oil Company,* (Shell Oil Spill) D.J. Ref. 90-5-1-1-3177 and enclose a check in the amount of $19.20 (30 cents per page reproduction cost) payable to the California Department of Justice. When requesting a copy from the U.S. Department of Justice, please refer to *United States et al.* v. *Shell Oil Company,* (Shell Oil Spill) D.J. Ref. 90-5-1-1-3177 and enclose a check in the amount of $6.40 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Richard B. Stewart,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-29655 Filed 12-20-89; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[Docket No. M-89-172-C]

Arch of Kentucky, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Arch of Kentucky, Inc., P.O. Box 787, Lynch, Kentucky 40855 has filed a petition to modify the application of 30 CFR 75.1100-2(b) (belt conveyors) to its 37 Mine (I.D. No. 15-04670) located in Harlan County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that waterlines be installed parallel to the entire length of belt conveyors and be equipped with firehose outlets with valves at 300-foot intervals along each belt conveyor and at tailpieces.

2. The intake airway which is also the travelway for the mine is adjacent to the belt entry. The belt entry air movement is restricted and vented to the return. If a fire occured on the beltline, it would be difficult to get to the fire outlets. Also, the waterline could be damaged by the fire.

3. As an alternate method, petitioner proposes to have the entire waterline, including the fire outlets, located in the intake travelway with mandoors installed in the permanent stoppings directly across from the fire outlets.

4. In support of this request, petitioner states that this method would isolate the beltline from the intake travelway and allow direct access to the beltline at fire outlet locations.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 22, 1990. Copies of the petition are available for inspection at that address.

Dated: December 14, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-29705 Filed 12-20-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-176-C]

Hansford Smokeless Collieries, Inc., Petition for Modification of Application of Mandatory Safety Standard

Hansford Smokeless Collieries, Inc., 41 Eagles Road, Beckley, West Virginia 25801 has filed a petition to modify the application of 30 CFR 75.1103-4(a)(1) (automatic fire sensor and warning device systems; installation; minimum requirements) to its No. 4 Mine (I.D. No. 46-04388) located in Raleigh County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that automatic fire sensor and warning device systems be installed at the beginning and end of each belt flight.

2. The ventilating current being coursed across both sensors is common, thus creating a duplication in sensors at each location where one belt flight ends and the other begins.

3. As an alternate method, petitioner proposes to place one sensor at a point on the inby belt head at locations where one belt ends and the other begins, above the elevation of the top belt, thus eliminating the duplicate sensors.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 22, 1990. Copies of the petition are available for inspection at that address.

Dated: December 14, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-29706 Filed 12-20-89; 8:45 am]

BILLING CODE 4510-43-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[89-86]

NASA Advisory Council (NAC), Aeronautics Advisory Committee (AAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aeronautics Advisory Committee and the Aerospace Research and Technology Subcommittee.

DATES: January 23, 1990, 8:30 a.m. to 5:15 p.m.; January 24, 1990, 8 a.m. to 5 p.m.; and January 25, 1990, 8 a.m. to 2:30 p.m.

ADDRESSES: National Aeronautics and Space Administration, Ames Research Center, Building 201, Moffett Field, CA 90435.

FOR FURTHER INFORMATION CONTACT: Ms. Catherine L. Smith, Office of Aeronautics and Space Technology, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-2367.

SUPPLEMENTARY INFORMATION: The NAC Aeronautics Advisory Committee (AAC) was established to provide overall guidance to the Office of Aeronautics and Space Technology (OAST) on aeronautics research and technology activities. The Aerospace Research and Technology Informal Subcommittee was formed to provide technical support for the AAC and to conduct ad hoc interdisciplinary studies and assessments. The Committee, chaired by Mr. Philip M. Condit, is comprised of 23 members. The Subcommittee is comprised of 43 members. The meeting will be open to the public up to the seating capacity of the room (approximately 150 persons including the Subcommittee members and other participants).

Type of meeting: Open.

Agenda

January 23, 1990

8:30 a.m.—Opening Remarks.
8:50 a.m.—Welcome/Center Overview by Center Director.
9:35 a.m.—Aeronautics Overview.
10:30 a.m.—Parallel Vehicle Program Overviews.
1 p.m.—Facility Tour.
2 p.m.—Wrap-up of Vehicle Program Overviews.
3:15 p.m.—Parallel Discipline Program Reviews.
5:15 p.m.—Adjourn.

January 24, 1990

8 a.m.—Discipline Program Reviews Continued.
1 p.m.—Facility Tour.
2 p.m.—Discipline Program Reviews Continued.
4:30 p.m.—Plenary Session.
5 p.m.—Adjourn.

January 25, 1990

8 a.m.—Opening Remarks.
8:20 a.m.—Update of Aeronautics and National Aerospace Plane Budget and Planning Issues.
8:45 a.m.—Discussion of Key Points from Aeronautics Advisory Committee/Aerospace Research and Technology Subcommittee Meeting.
10:30 a.m.—Progress Report of Advanced Cockpit Technology.
10:50 a.m.—NASA Responses to Ad Hoc Team Recommendations.
1 p.m.—Discussion of Issues and Recommendations.
2 p.m.—Summary Session.
2:30 p.m.—Adjourn.

Dated: December 15, 1989.

John W. Gaff,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 89-29668 Filed 12-20-89; 8:45 am]

BILLING CODE 7510-01-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meeting; Media Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Media Arts Advisory Panel (Film/Video Production Pre-screening #1 Section) to the National Council on the Arts will be held on January 9-11, 1990, from 9 a.m.-5:30 p.m. in Room 716 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

This meeting is for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the Agency by grant applicants. In accordance with the determination of the Chairman published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c) (4), (6) and (9)(B) of section 552b of title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: December 15, 1989.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 89-29652 Filed 12-20-89; 8:45 am]

BILLING CODE 7537-01-M

Meeting; Media Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Media Arts Advisory Panel (Film/Video Production Pre-screening #2 Section) to the National Council on the Arts will be held on January 23-25, 1990, from 9 a.m.-5:30 p.m. in room 716 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

This meeting is for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the Agency by grant applicants. In accordance with the determination of the Chairman published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c) (4), (6) and (9)(B) of section 552b of title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: December 15, 1989.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 89-29653 Filed 12-20-89; 8:45 am]

BILLING CODE 7537-01-M

National Foundation on the Arts and the Humanities

Meeting; Music Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Music Advisory Panel (Chamber Music/New Music Ensembles Section) to the National Council on the Arts will be held on January 9-11, 1990 from 9 a.m.-6 p.m. and on January 12 from 9 a.m.-4 p.m. in room M14 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on January 12, 1990, from 2 p.m.-4 p.m. The topics for discussion will be policy issues and guideline revisions.

The remaining portions of this meeting on January 9-11, 1990, from 9 a.m.-6 p.m. and on January 12, 1990, from 9 a.m.-2 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended,

including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c) (4), (6) and (9)(B) of section 552b of title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682-5433.

Dated: December 15, 1989.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 89-29654 Filed 12-20-89; 8:45 am]

BILLING CODE 7537-01-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meeting; Media Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Media Arts Advisory Panel (American Film Institute Section) to the National Council on the Arts will be held on January 10, 1990, from 9:00 a.m.-5:30 p.m. in Room 716 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

This meeting is for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the Agency by grant applicants. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: December 13, 1989.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 89-29641 Filed 12-20-89; 8:45 am]

BILLING CODE 7537-01-M

Meeting; Visual Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Visual Arts Advisory Panel (Advancement Section) to the National Council on the Arts will be held on January 11, 1990, from 9:30 a.m.-5:30 p.m. and on January 12, 1990, from 9:30 a.m.-2:30 p.m. in room 730 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on January 12, 1990, from 1:00 p.m.-2:30 p.m. The topics for discussion will be policy issues, guidelines, and recommendations regarding the Advancement Program.

The remaining portions of this meeting on January 11, 1990, from 9:30 a.m.-5:30 p.m. and on January 12, 1990, from 9:30 a.m.-1:00 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: December 13, 1989.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 89-29642 Filed 12-20-89; 8:45 am]

BILLING CODE 7537-01-M

NUCLEAR REGULATORY COMMISSION

Illinois Power Co., et al.; Environmental Assessment and Finding of No Significant Impact

[Docket No. 50-461]

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to the Ilinois Power Company (IP), and Soyland Power Cooperative, Inc. (the licensees) for Clinton Power Station, Unit 1, located in DeWitt County, Illinois.

Environmental Assessment

Identification of Proposed Action

The licensees have requested a license amendment that would revise the Technical Specifications (TS) to remove the cycle-specific parameter limits from the Technical Specifications. These cycle-specific limits will be maintained in a "Core Operating Limits Report," and the Technical Specifications will be revised to reference this report. The Technical Specifications will also be revised to add administrative controls for the Core Operating Limits Report. These administrative controls will require that that value in the report be established using NRC approved methodologies, and that copies of the report be supplied to the NRC upon issuance. This action is in response to NRC Generic Letter 88-16.

This revision to the Clinton Power Station license would be made in response to the licensees' application for amendment dated June 12, 1989 as amended August 17, 1989.

The Need for the Proposed Action

Under the current Technical Specifications, a facility must have a license amendment processed to support each refueling (and the subsequent cycle of reactor operation) due to changes in cycle-specific parameters. NRC Generic Letter 88-16, "Removal of Cycle-Specific Parameter Limits from Technical Specifications," proposed an alternative which eliminates the need to process a license amendment to support each refueling. Generic Letter 88-16 lists three actions which are required to support the removal of cycle-specific parameter

limits from the Technical Specifications. The first action requires the addition of a formal report that includes the values of cycle-specific parameter limits that have been established using an NRC-approved methodology and that are consistent with all applicable limits of the safety analysis. The second requires the addition of an administrative reporting requirement to submit the formal report of cycle-specific parameter limits to the NRC. The third requires the modification of the individual Technical Specifications to note that cycle-specific parameters shall be maintained within the limits provided in the defined formal report. Pursuant to 10 CFR 50.90, IP, et al., have proposed an amendment to Facility Operating License No. NPF–62 which consists of changes to the Technical Specifications. The changes establish a "Core Operating Limits Report," provide administrative controls for that report, and modify the TS that contain cycle-specific parameters to reference that report.

Environmental Impacts of the Proposed Action

The proposed changes provide an acceptable response to the NRC guidance provided in NRC Generic Letter 88–16 on modifying cycle-specific parameter limits in TS. Plant operations will continue to be limited to accordance with the values of cycle-specific parameter limits that are established using NRC approved methodologies. The change is administrative in nature and has no impact on plant safety.

The Commission has concluded that these changes do not significantly increase the probability or consequences of any accident and that potential radiological releases during normal operations or transients would not be increased. With regard to non-radiological impacts, the proposed amendment involves systems located within the restricted area as defined in 10 CFR part 20. They do not affect non-radiological plant effluents and have no other environmental impact. Therefore, the staff also concludes that there are no significant non-radiological environmental impacts associated with the proposed amendment.

Accordingly, the Commission findings in the "Final Environmental Statement related to the operation of Clinton Power Station, Unit No. 1" dated May 1982 regarding radiological environmental impacts from the plant during normal operation or after accident conditions, are not adversely altered by this action. IP is committed to operate Clinton, Unit 1 in accordance with standards and regulations to maintain occupational exposure levels "as low as reasonably achievable."

Alternative to the Proposed Actions

Since the Commission has concluded that there are no significant environmental effects that would result from the proposed action, any alternative with equal or greater environmental impact need not be evaluated.

The principal alternative would be to deny the requested amendment. This would not reduce environmental impacts of plant operation and would result in reduced operational flexibility.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in the Final Environmental Statement for the Clinton Station, Unit 1, dated May 1982.

Agencies and Persons Consulted

The NRC staff reviewed the licensees' request of June 12, 1989 as amended August 17, 1989 and did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed license amendment.

Based upon this environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment.

The Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** on August 2, 1989 (54 FR 31900). No request for hearing or petition for leave to intervene was filed following this notice.

For further details with respect to this action, see the request for amendment dated June 12, 1989 as amended August 17, 1989 and the Final Environmental Statement for the Clinton Power Station dated May 1982, which are available for public inspection at the Commission Public Document Room, 2120 L Street, NW., Washington, DC 20555 and at the Vespasian Warner Public Library, 120 West Johnson Street, Clinton, Illinois 61727.

Dated at Rockville, Maryland this 14th day of December 1989.

For the Nuclear Regulatory Commission.

John W. Craig,

Project Director, Project Directorate III–2, Division of Reactor Projects—III, IV, V and Special Projects.

[FR Doc. 89–29689 Filed 12–20–89; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards Subcommittee on Advanced Pressurized Water Reactors; Meeting

The Subcommittee on Advanced Pressurized Water Reactors will hold a meeting on January 9, 1990, Room P–110, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows: *Tuesday, January 9, 1990—8:30 a.m. until the Conclusion of Business.*

The Subcommittee will continue its review of the Westinghouse Evolutionary Light Water Reactor SP/90 design.

Oral statements may be presented by members of he public with the concurence of he Subcommittee Chairman, written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting open to the public, and questions may be asked only by members of the Subcommittee, its consultants, and staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC staff, their consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on reqests for the opportunity to present oral statements and the time allotted therefore can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Medhat Mr. El-Zeftawy (telephone 301/492–9901) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are

urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Dated: December 14, 1989.

Gary R. Quittschreiber,

Project Review Branch No. 2.

[FR Doc. 89-29678 Filed 12-20-89; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-27537; File No. SR-OCC-85-13]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Withdrawal of a Proposed Rule Change Regarding International Foreign Currency Options

On August 9, 1985, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934,[1] a proposal to establish a system for the clearance and settlement of internationally traded foreign currency options.

Notice of the proposal was published in the Federal Register on August 30, 1985 to solicit comments from interested parties.[2] No comments were received. On December 6, 1989, OCC withdrew the proposal.[3]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: December 14, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-29677 Filed 12-20-89; 8:45 am]

BILLING CODE 8010-01-M

[File No. 1-7463]

Issuer Delisting; Notice of Application to Withdraw from Listing and Registration; Jacobs Engineering Group, Inc., Common Stock, $1.00 Par Value

December 15, 1989.

Jacobs Engineering Group Inc. ("Company"), has filed an application with the Securities and Exchange Commission ("Commission") pursuant to section 12(d) of the Securities Exchange Act of 1934 and Rule 12d2-2(d) promulgated thereunder to withdraw the above specified security from listing and registration on the American Stock Exchange, Inc. ("AMEX").

The reasons alleged in the application for withdrawing this security from listing and registration include the following:

The Company's common stock recently was listed on the New York Stock Exchange ("NYSE"). Trading in the Company's stock on the NYSE commenced on December 15, 1989. In making the decision to withdraw its common stock from listing on the AMEX, the Company considered the direct and indirect costs and expenses attendant on maintaining the dual listing of its common stock on the NYSE and the AMEX. The Company does not see any particular advantage in the dual trading of its stock and believes that dual listing would fragment the market for its common stock.

And interested person may, on or before January 9, 1990, submit by letter to the Secretary of the Commission, 450 Fifth Street, NW., Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the Exchanges and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-29676 Filed 12-20-89; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

Office of International Conferences

[Public Notice 1144]

Participation of Private-Sector Representatives on U.S. Delegations

As announced in Public Notice No. 655 (44 FR 17846), March 23, 1979, the Department is submitting its January-November 1989 list of U.S. accredited Delegations which included private-sector representatives.

Publication of this list is required by Article III(c)(5) of the guidelines published in the Federal Register on March 23, 1979.

Dated: December 4, 1989.

Frank R. Provyn,

Director, Office of International Conferences.

United States Delegation to the International Telecommunication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group XVIII (Digital Networks, Including ISDN), Meeting of Experts on Broadband Aspects of ISDN and ISDN, San Diego, California, January 23-February 3, 1989

Representative

William F. Utlaut, Director, Institute for Telecommunication Sciences, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado

Alternate Representative

Gary M. Fereno, Deputy Director, Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Advisers

Earl S. Barbely, Director, Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Gerald T. Keeler, Office of International Affairs, National Telecommunications and Information Administration, Department of Commerce

Frank M. McCelland, Office of Technical Standards, National Communications System

Private Sector Advisers

William Buckley, Vice President, Verilink Corporation, San Jose, California

David Cairns, Director of Technology, Northern Telecom Inc., Mountain View, California

James A. Dahl, U.S. West, Englewood, Colorado

Michael W. Durrwachter, Computer Sciences Corporation, Falls Church, Virginia

Gary Fishman, District Manager, Technical Industry Standards, AT&T, Bedminster, New Jersey

Steven Klonsky, Pulsecom Division, Harvey Hubbell Incorporated, Herndon, Virginia

Demosthenes J. Kostas, Manager, Technical Standards, GTE Service Corporation, Stamford, Connecticut

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[1] 15 U.S.C. 78s(b)(1) (1931).

[2] *See* Securities Exchange Act Release No. 22354 (August 23, 1985), 50 FR 35340.

[3] *See* letter from James C. Yong, Deputy General Counsel, OCC, to Judith C. Poppalardo, Branch Chief, Division of Market Regulation, Commission, dated December 6, 1989.

Kenneth R. Krechmer, Consultant, Action Consulting, Palo Alto, California
Carl A. Sederquest, Principal Standards Engineer, COMSAT Corporation, Clarksburg, Maryland
Randall Spusta, Manager, Network Standards, Bell Communications Research, Inc., Red Bank, New Jersey
Michael E. Varrassi, Technical Adviser, Federal Express Corporation, Memphis, Tennessee

United States Delegation to the International Telecommunication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group II (Network Operation), Geneva, Switzerland, February 21–March 1, 1989

Representative

Gerard T. Keeler, Telecommunications Policy Specialist, National Telecommunications and Information Administration, Department of Commerce

Private Sector Advisers

Lawrence F. Chesto, Director, Telecommunications Systems, Aeronautical Radion, Inc., Annapolis, Maryland
Robert G. Keevers, District Manager, Special Switching Requirements, Bellcore, Red Bank, New Jersey
Robert W. Madden, Manager, American Telephone and Telephone Company, Morristown, New Jersey
Mark Neibert, Manager, International Digital and Protocol Standards, COMSAT, Washington, DC

United States Delegation to the World Intellectual Property Organization, First Session of the Committee of Experts on Model Provisions for Legislation in the Field of Copyright, Geneva, Switzerland, February 20—March 3, 1989

Representative

Ralph Oman, Register of Copyrights, Library of Congress

Alternative Representatives

Lewis Flacks, Policy Planning Adviser, Copyright Office, Library of Congress
Dorothy Schrader, General Counsel, Library of Congress

Congressional Staff Adviser

Ed Baxter, Chief Counsel/Staff Director, Subcommittee on Patents, Copywrights and Trademarks, Judiciary Committee, United States Senate

Advisers

Richard Owens, Attorney Adviser, Office of Legislation and International Affairs, Patent and Trademark Office, Department of Commerce
Emery Simon, Director of Intellectual Property, Office of the United States Trade Representative, Executive Office of the President

Private Sector Adviser

Jon Baumgarten, Proskauer, Rose, Goetz, and Mendolsohn, Washington, D.C.

United States Delegation to the Sixth Annual Meeting of the North American Commission of the North Atlantic Salmon Conservation Organization (NASCO), Hilton Head, South Carolina, February 14–16, 1989

Commissioners

The Honorable Allen E. Peterson, Jr., Director, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Woods Hole, Massachusetts
The Honorable Richard A. Buck, Chairman, Restoration of Atlantic Salmon in America, Inc., Hancock, New Hampshire
The Honorable Frank E. Carlton, Vice President, National Coalition for Marine Conservation, Inc., Savannah, Georgia

Advisers

Vaughn C. Anthony, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Williams Gibbons-Fly, Foreign Relations Officer, Office of International Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Howard N. Larsen, Special Advisor to the Regional Director, U.S. Fish and Wildlife Service, Department of the Interior, Gainesville, Florida
H. Stetson Tinkham, Atlantic Fisheries Officer, Office of Fisheries Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
James Weaver, U.S. Fish and Wildlife Service, Department of the Interior

Private Sector Advisers

Edward T. Baum, Program Analyst, Maine Atlantic Sea Run Salmon Commission, Bangor, Maine
Davis F. Egan, Chairman, Connecticut River Atlantic Salmon Commission, Hartford, Connecticut

United States Delegation to the International Telecommunication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group XI (ISDN and Telephone Switching and Signalling), Geneva, Switzerland, March 29—April 11, 1989

Representative

Otto J. Gusella, Executive Director, Exchange Carrier Standards Association, Bethesda, Maryland

Alternative Representative

Milton Weiner, Lead Engineer, The Mitre Corporation, McLean, Virginia

Private Sector Advisers

Catherine P. Addison, Associate Research Engineer, Bell South Services, Atlanta, Georgia
Diwaker G. Gan, Department Manager, Computer Sciences Corporation, Falls Church, Virginia
Elmer R. Hapeman, Bellcore, Red Bank, New Jersey
Jay R. Hilton, Engineering Manager, GTE Service Corporation, D/FW Airport, Texas
Ben C. Levitan, COMSAT Corporation, Washington, D.C. COMSAT Corporation, Washington, D.C.
Vladimir G. Nikanorov, Computer Sciences Corporation, Falls Church, Virginia
Michael E. Varrassi, Technical Adviser, Federal Express Corporation, Memphis, Tennessee

United States Delegation to the Council and Committee Meetings, International Natural Rubber Organization (INRO), Kuala Lumpur, March 29—April 6, 1989

Meeting of the INRO Council and Committee on Buffer Stock Operations, Committee on Statistics, and Committee on Other Measures

Representative

Frederic W. Siesseger, Director, Primary Commodities Division, Department of Commerce

Alternate Representative

Jeffrey Cunningham, Industrial and Strategic Materials Division, Office of International Commodities, Bureau of Economic and Business Affairs, Department of State

Adviser

David Miller, Economic Officer, U.S. Embassy, Kuala Lumpur

Private Sector Advisers

Harold Ross Miller, Managing Director, Goodrich Company Private, Ltd., Singapore

Charles B Pettit, Manager, Firestone Singapore Private Ltd., Singapore
Peter W. C. Tan, Managing Director, Goodyear Orient Private Ltd., Singapore
James N. Walsh, Purchasing, Manager, Goodyear Tire and Rubber Company, Akron, Ohio

Committees on Administration

Representative

Jeffrey Cunningham, Industrial and Strategic Materials Division, Office of International Commodities, Bureau of Economic and Business Affairs, Department of State

Alternate Representative

David Miller, Economic Officer, U.S. Embassy, Kuala Lumpur

Private Sector Advisers

Harold Ross Miller, Managing Director, Goodrich Company Private, Ltd., Singapore
Charles B Pettit, Manager, Firestone Singapore Private Ltd., Singapore
Peter W. C. Tan, Managing Director, Goodyear Orient Private Ltd., Singapore
James N. Walsh, Purchasing, Manager, Goodyear Tire and Rubber Company, Akron, Ohio

United States Delegation to the Second Meeting of the Aeronautical Mobile-Satellite Service Panel, International Civil Aviation Organization (ICAO), Montreal, March 28–April 7, 1989

Member

Clyde A. Miller, Manager, Requirements and Concepts Development Division, Advanced System Design Service, Federal Aviation Administration, Department of Transportation

Alternate Member

Keith McDonald, Program Manager, Satellite Technology and Application, Requirements and Concepts Branch, Advanced System Design Service, Federal Aviation Administration, Department of Transportation

Advisers

Victor E. Foose, Manager, Frequency Engineering Branch, Federal Aviation Administration, Department of Transportation
Larry Reed, Electronics Engineer, International Liaison Staff, Private Radio Bureau, Federal Aviation Administration, Department of Transportation
George K. Sakai, Acting Manager, Spectrum Engineering, Federal Aviation Administration
Robert D. Till, Technical Program Manager, Airborne Systems Technology Branch, Federal Aviation Administration, Department of Transportation, Atlantic City, New Jersey

Private Sector Advisers

Richard L. Bowers, Manager, Navigation and Flight Systems, Air Transportation Association of America, Washington, D.C.
Walter Scales, MITRE Corporation, McLean, Virginia

United States Delegation to the 28th Session of the Working Party on Facilitation of International Trade Procedures, Economic Commission For Europe (ECE), Geneva, March 13–17, 1989

Representative

Bruce Butterworth, Chief, Trade, Facilitation and Technical Issues Division, Office of International Transportation and Trade, Department of Transportation

Advisers

Vicki Hodziewich, Acting Director, Day One Task Force, United States Customs Service, Department of the Treasury
William H. Kenworthey, Jr., Data Systems Manager, Office of the Deputy Assistant Secretary of Defense for Management Systems, Department of Defense
Donna Jean Leiber, Office of Data Systems, United States Customs Service, Department of the Treasury
Alice Rigdon, Customs Attache, United States Mission to the European Communities, Brussels

Private Sector Advisers

Earl J. Bass, IDI, Inc., Gaithersburg, Maryland
Eugene A. Hemley, Executive Director, National Council on International Trade Documentation, New York, New York
Robert Hurd, International Project Manager, Data Interchange Standards Association, Alexandria, Virginia
Jennifer Kandel, Vice President, ACS Network Systems, Concord, California
Jeff Sturrock, Director, EDI Systems, Texas Instruments, Inc., Plano, Texas
Nicole Willenz, Price Waterhouse, Chicago, Illinois

United States Delegation to the CSCE Information Forum, London, April 18–May 12, 1989

Chairman of Delegation

The Honorable Leonard H. Marks, Washington, DC

Co-Chairman of Delegation

The Honorable Steny H. Hoyer, U.S. House of Representatives

Deputy Head of Delegation

Rudolf V. Perina, Bureau of European and Canadian Affairs, Department of State

Senior Adviser

The Honorable, Henry E. Cotto, Ambassador, U.S. Embassy, London

Members of Congress

The Honorable Benjamin L. Cardin, U.S. House of Representatives
The Honorable Peter H. Kostmayer, U.S. House of Representatives
The Honorable Edward J. Markey, U.S. House of Representatives
The Honorable Louise M. Slaughter, U.S. House of Representatives

Congressional Staff Advisers

Jane Sharp Fisher, Deputy Staff Director, Commission on Security and Cooperation in Europe
Judith Ingram, Staff Assistant, Commission on Security and Cooperation in Europe
Mary Sue Hafner, Deputy Director & General Counsel, Commission on Security and Cooperation in Europe
Ronald J. McNamara, Staff Assistant, Commission on Security and Cooperation in Europe
Beth L. Ritchie, Press Officer, Commission on Security and Cooperation in Europe
Samuel G. Wise, Staff Assistant, Commission on Security and Cooperation in Europe

Advisers

Joan K. Benziger, Senior Policy Officer, U.S. Information Agency
Sigmund Cohen, Public Affairs Adviser, U.S. Information Agency
Charles E. Courtney, Public Affairs Officer, U.S. Information Service, London
Bruce S. Gelb, Director Designate, U.S. Information Agency
Henry E. Hockeimer, Associate Director, U.S. Information Agency
James J. Hogan, Deputy Public Affairs Officer, U.S. Information Service, London
J. Michael Lekson, Political Officer, U.S. Embassy, London
John A. Lindberg, General Counsel, Board for International Broadcasting
Cynthia J. Miller, Deputy Director, Office of European Affairs, U.S. Information Agency
Joseph A. Mussomeli, Bureau of European and Canadian Affairs, Department of State

Michael Pistor, Counselor of the Agency, U.S. Information Agency
Mark G. Pomar, Deputy Executive Director, Board for International Broadcasting
Bruce D. Porter, Executive Director, Board for International Broadcasting
Charla Saylor-Hatton, Assistant Information Officer, U.S. Information Service, London
Raymond Sietz, Minister Counselor, U.S. Embassy, London
Bernard F. Shinkman, Country Affairs Officers, Office of European Affairs, U.S. Information Agency
Lester P. Slezak, Labor Attache, U.S. Embassy, London
Daniel B. Smith, Country Officer for Czechoslovakia, Bureau of European and Canadian Affairs, Department of State
Marvin L. Stone, Deputy Director, U.S. Information Agency
Richard H. Swan, Assistant General Counsel, U.S. Information Agency
John C. Thomson, Policy Officer, Office of European Affairs, U.S. Information Agency

Private Sector Advisers

Dana R. Bullen, II, Executive Director, World Press Freedom Center, Washington, DC
Paul E. Feffer, Chairman, Baker and Taylor International, New York, NY
Edwin J. Feulner, Jr., President, Heritage Foundation, Washington, DC
Alan R. Finberg, The Washington Post Company, Washington, DC
Malcolm Forbes, Jr., Chairman, Board for International Broadcasting, Washington, DC
Murray Fromson, Center for International Journalism, University of Southern California, Los Angeles, California
K. Prescott How, Publisher, The Partriot Ledger, Quincy, Massachusetts
Harlan Glenn Moen, Motion Picture Export Association of America, London
Ernest Eugene Pell, President, Radio Free Europe, Munich, West Germany
Charles A. Perlik, Former President, American Newspaper Guild, Washington, DC
William Reed, Senior Vice President, Education Public Broadcasting Service, Alexandria, Virginia
Anthony Salvia, Executive Assistant to the President, Radio Free Europe, Munich, West Germany
Leonard R. Sussman, Senior Scholar in International Communciations, Freedom House, New York City, NY
The Honorable Nicholas A. Veliotes, President, Association of American Publishers, Inc., Washington, DC
Gerald Warren, Editor, San Diego Union, San Diego, California

United States Delegation to the Commission on Plant Genetic Resources, Third Session Food and Agriculture Organization, Rome, April 17–21, 1989

Principal Observer

E. Wayne Denney, International Relations Adviser, International Organization Affairs, Office of International Cooperation and Development, Department of Agriculture.

Observers

Henry L. Shands, National Program Leader for Plant Germplasm, Agricultural Research Service, Department of Agriculture
Roberta van Haeften, Agricultural Attache, United States Mission to the United Nations Agencies for Food and Agriculture, Rome

Private Industry Observer

William T. Schapaugh, Executive Vice President, American Seed Trade Association, 1030 15th Street, NW., Washington, DC

United States Delegation to the International Telecommunication Union (ITU), Follow-Up of WATTC–88 Resolution PL/3 "Apportionment of Revenues in Providing International Telecommunication Services," Geneva, Switzerland, April 17–18, 1989

Representative

Earl S. Barbely, Director, Office of Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Private Sector Advisers

Wanda G. Glanzman, Regulatory Manager, Telenet Communications Corporation, Reston, Virginia
Michael L. Goetz, President, PNR and Associates, Inc., Jenkintown, Pennsylvania
Thomas Luciano, District Manager, American Telephone and Telegraph Company, Morristown, New Jersey
Marcel Scheidegger, Manager, International Finance, MCI International Telecommunications
Francis S. Urbany, Director, International and Agency Relations, BellSouth Corporation, Washington, DC

United States Delegation to the International Communication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group VIII, Geneva, Switzerland, April 12–20, 1989

Representative

Gary M. Fereno, Deputy Director, Office of Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Advisers

Dennis Bodson, Manager, Technical Standards, National Communications System
Douglas V. Davis, Attorney/Advisor, Common Carrier Bureau, Federal Communications Commission
Stephen Perschau, Technical Standards Engineer, National Communications System

Private Sector Advisers

Ralph E. Grant, 3M Corporation, St. Paul, Minnesota
Herman R. Silbiger, Supervisor, Standards Planning, AT&T Bell Laboratories, Holmdel, New Jersey
Cornelius J. Starkey, IV, Vice President, Databeam Corporation, Lexington, Kentucky
Charles F. Touchton, Manager, Information Systems Planning, IBM Corporation, Tampa, Florida
Stephen J. Urban, Vice President, Delta Information Systems, Horsham, Pennsylvania

United States Delegation to the Fourth Meeting of the Secondary Surveillance Radar Improvements and Collision Avoidance Systems Panel (SICASP), International Civil Aviation Organization (ICAO), Montreal, April 10–28, 1989

Panel Member

Joseph J. Fee, Manager ACADS Program Branch, Federal Aviation Administration, Department of Transportation

Advisers

Dennis B. Cooper, International Technical Staff, Federal Aviation Administration, Department of Transportation
Ronald Jones, ACADS Program Branch, Federal Aviation Administration, Department of Transportation
Hugh McLaurin, ACADS Program Branch, Federal Aviation Administration, Department of Transportation

Frank Rock, Aircraft Engineering Division, Federal Aviation Administration, Department of Transportation
James P. Witeck, Program Management Division, Federal Aviation Administration, Department of Transportation

Private Sector Advisers

Ann Drumm, Lincoln Laboratory, Massachusetts Institute of Technology, Lexington, Massachusetts
David J. Lubkowski, MITRE Corporation, McLean, Virginia
Vincent Orlando, Lincoln Laboratory, Massachusetts Institute of Technology, Lexington, Massachusetts
Ronald Sandholm, Lincoln Laboratory, Massachusetts Institute of Technology, Lexington, Massachusetts
Jerry Welch, Lincoln Laboratory, Massachusetts Institute of Technology, Lexington, Massachusetts

United States Delegation to the World Intellectual Property Organization (WIPO), Diplomatic Conference for the Conclusion of a Treaty on the International Registration of Audiovisual Works, Geneva, Switzerland, April 10–21, 1989

Representative

Harvey J. Winter, Director, Office of Business Practices, Bureau of Economic and Business Affairs, Department of State

Alternate Representative

Marybeth Peters, Policy Planning Adviser, Copyright Office, Library of Congress

Advisers

David Patterson, United States Mission, Geneva, Switzerland
Joseph Richardson, United States Mission, Geneva, Switzerland

Private Sector Advisers

Lorin Brennan, Counsel, American Film Marketing Association, Los Angeles, California
Jonas Rosenfield, President, American Film Marketing Association, Culver City, California

United States Delegation to the International Telecommunication Union (ITU), World Numbering Zone 1 Committee, 1st Session, Orlando, Florida, April 10–12, 1989

Representative

Earl S. Barbely, Director, Office of Telecommunications and Information Standards, International Communications and Information Policy, Department of State.

Private Sector Advisers

Henry L. Marchese, AT&T Communications, Bedminster, New Jersey
Robert J. Smith, NYNEX Corporation, Boston, Massachusetts
Mary Ann Sullivan, Bellcore, Livingston, New Jersey

United States Delegation to the Council Meeting and the Conference on the Renegotiation on the International Coffee Agreement (ICA), International Coffee Organization (ICO), London, April 3–14, 1989

Representative

Jon Rosenbaum, Assistant U.S. Trade Representative, Office of the U.S. Trade Representative, Executive Office of the President

Alternate Representative

Ralph Ives, Director for Commodity Policy, Office of U.S. Trade Representative, Executive Office of the President

Advisers

William R. Brew, Director, Office of Food Policy Programs, Bureau of Economic and Business Affairs, Department of State
James Burkhart, Resources Officer, U.S. Embassy, London
Caterina Littleton, Primary Commodities Division, Department of Commerce
Scott Monier, Resource Officer, U.S. Embassy, London

Private Sector Advisers

John Berderka, Woodhouse, Drake and Carey, 127 John Street, New York, New York
George Boecklin, National Coffee Association, 110 Wall Street, New York, New York
Dave Brown, General Foods Corporation, 120 Wall Street, New York, New York
John C.K. Buckley, Nestle Foods Corporation, 100 Manhattanville Rd., Purchase, New York
Kenneth R. Dunnivant, Procter & Gamble Company, P.O. Box 599, Cincinnati, Ohio
John T. Hays, President, Coffees of Hawaii, P.O. Box 1855, Honolulu, Hawaii
John Heuman, Dine-mor Foods, 790 Merus Court, Fenton, Missouri
Howard Katz, J. Aron & Company, 85 Broad Street, New York, New York
Buford Kindred, Pontiac Foods/Kroeger Company, 231 Bookman Rd., Elgin, South Carolina
William Lifland, Cahill, Gordon & Reindel, 80 Pine Street, New York, New York
Andrew Scholtz, Cargill & Company, 45 Atrium, New York, New York
Jack Sutherland, Continental Coffee Products, Quaker Tower, 321 N. Clark Street, Chicago, Illinois

United States Delegation to the 10th Session of the Commission for Climatology, World Meteorological Organization (WMO), Lisbon, April 3–14, 1989

Principal Delegate

David R. Rodenhuis, Director, Climate Analysis Center, National Weather Service, National Oceanic and Atmospheric Administration, Department of Commerce

Alternate Principal Delegate

Kenneth D. Hadeen, Director, National Climatic Data Center, National Environmental Satellite, Data and Information Service, National Oceanic and Atmospheric Administration, Department of Commerce

Delegates

Jay Fein, Program Director, Climate Dynamics Program, National Science Foundation
Sharon LeDuc, Atmospheric Research and Exposure Assessment Laboratory, Environmental Protection Agency

Private Sector Adviser

Kenneth Kunkel, Director, Midwest Regional Climatic Center, Illinois State Water Survey, Champaign, Illinois

United States Delegation to the 57th Session of the Maritime Safety Committee, International Maritime Organziation (IMO), London, April 3–13, 1989

Representative

Joel D. Sipes, Rear Admiral, Chief, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Department of Transportation

Alternate Representative

Daniel F. Sheehan, Technical Adviser, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Department of Transportation

Advisers

Michael C. Grace, Captain, Chief, International Affairs Staff, United States Coast Guard, Department of Transportation
David M. Hardy, Commander, Special Assistant for Oceans Policy Affairs, Office of the Assistant Secretary of

Defense for International Security Affairs, Department of Defense
Brian J. Hoyle, Director, Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
James W. MacDonald, Captain, Chief, Merchant Vessel Inspection Division, Office of Marine Safety, Security, and Environmental Protection, United States Coast Guard, Department of Transportation
John S. Spencer, Chief, Naval Achitecture Branch, Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Department of Transportation

Private Sector Advisers

Joseph J. Cox, Vice President, American Institute of Merchant Shipping, Washington, DC
William S. Griffin, Jr., Phillips Petroleum Company, Bartlesville, Oklahoma
Donald C. Hintze, Captain, USCG (Ret.), National Ocean Industries Association, Washington, DC

United States Delegation to the CSCE—First Conference on the Human Dimension, Paris, May 30–June 23, 1989

Representative

The Honorable Morris B. Abram, Ambassador, United States Representative to the European Office of the United Nations and other International Organziations, Geneva

Alternate Representative

Rudolf Perina, Bureau of European and Canadian Affairs, Department of State

Congressional Representatives

The Honorable Dennis DeConcini, United States Senate
The Honorable Steny H. Hoyer, United States House of Representatives

Senior Adviser

Mark Lissfelt, Charge d' Affaires, A.I., United States Embassy, Paris

Congressional Advisers

Ann Banchoff, Staff Member, Commission on Security and Cooperation in Europe
Catherine Cosman, Staff Member, Commission in Security and Cooperation in Europe
Orest Deychakiwosky, Staff Member, Commission on Security and Cooperation in Europe
Jane Sharp Fisher, Deputy Staff Director, Commission on Security and Cooperation in Europe
Stephen Goldfein, Major, U.S. Air Force, Air Force Liaison, United States Senate
Mary Sue Hafner, Deputy Staff Director, Commission on Security and Cooperation in Europe
Robert Hand, Staff Member, Commission on Security and Cooperation in Europe
Jesse Jacobs, Staff Member, Commission on Security and Cooperation in Europe
Spencer Oliver, Senior Staff Consultant, Commission on Security and Cooperation in Europe
Erika Schlager, Staff Member, Commission on Security and Cooperation in Europe
Maritin Sletzinger, Staff Member, Committee on Foreign Affairs, United States House of Representatives
Ceceli Swensen, Staff Member, Office of Senator Dennis DeConcini
Howard L. Walgren, Staff Member, Office of Senator Dennis DeConcini
Samuel Wise, Staff Director, Commission on Security and Cooperation in Europe

Advisers

Frederick Becker, Office of Eastern European and Yugoslav Affairs, Department of State
Paula Dobriansky, Deputy Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State
John Evans, Deputy Director, Office of Soviet Union Affairs, Department of State
Patricia McMahon, Public Affairs Adviser, United States Information Agency
Susan Richwagen, Office of European Security and Political Affairs, Department of State
Steven Vanous, Captain, U.S. Air Force, Air Force Liaison Inquiries, Department of Defense

Private Sector Advisers

Ludmilla Alexeeva, Consultant, Helsinki Watch, Washington, DC
John Elliott, Senior Partner, Baskin, Flaherty, Elliott & Mannino, Philadelphia, Pennsylvania
Alice Henkin, Director, Justice and Society Program, Aspen Institute, New York, New York
Max Kampalman, Fried, Frank, Harris, Shriver and Jacobson, Washington, DC
Frank Koszorus, Laxalt, Washington, Perito and Dibuc, Washington, DC

United States Delegation to the Insurance Committee and It's Working Group on Statistics, Organization for Economic Cooperation and Development (OECD), Paris, May 24–26, 1989

Representative

Wray O. Candilis, Director, Finance and Management Industries Division, Office of Service Industries, Department of Commerce

Adviser

Appropriate USOECD, Mission Officer, Paris

Private Sector Advisers

Harold Skipper, Georgia State University, Center for Insurance Research, Atlanta, Georgia
James Corcoran, Superintendent of Insurance, State of New York, New York, New York
John Washburn, Director of Insurance, State of Illinois, Springfield, Illinois
Steve A. Schleisman, Chief Executive Officer, AIG Companies Europe, Tour American International, France
L. Oakley Johnson, Vice President, International Affairs, American International Group, Washington, DC

United States Delegation to the United Nations, Commission on International Trade Law (Uncitral), 22nd Plenary Session, Vienna, Austria, May 16–June 2, 1989

Representative

Peter H. Pfund, Assistant Legal Adviser for Private International Law, Office of the Legal Adviser, Department of State

Alternate Representatives

Paul B. Larsen, Office of the General Counsel, Department of Transportation
Joseph C. Sweeney, Professor, School of Law, Fordham University, New York, New York

Private Sector Advisers

David G. Davies, Ray, Robinson, Hanninen, & Carle, Cleveland, Ohio
Patrick J. Falvey, General Counsel and Executive Director, The Port of New York Authority, New York, New York

United States Delegation to the 131st Session of the Executive Board, United Nations Educational, Scientific and Cultural Organizations (UNESCO), Paris, May 17 to June 23, 1989

Principal Observer

Richard T. Miller, United States Observer to the United Nations

Educational, Scientific and Cultural Organization, Paris

Observers

Elizabeth Kimber, United States Observer to the United Nations Educational, Scientific and Culutral Organization, Paris
Hazel Reitz, United States Observer to the United Nations Educational, Scientific and Cultural Organization, Paris

Private Sector Observer

Jacques Torczyner, New York

United States Delegation to the International Telecommunications Union (ITU), Plenipotentiary Conference, Nice, France, May 23–June 29, 1989

Representative

The Honorable, C. Travis Marshall (Chairman), Ambassador, Senior Vice President, Motorola, Inc., Washington, DC

Alternate Representatives

Daniel H. Clare (Vice Chairman), Executive Director, Bureau for International Communication and Information Policy, Department of State
Michael Fitch (Vice Chairman), Senior Adviser to the Chairman, Federal Communications Commission
Harold G. Kimball (Vice Chairman), Deputy Director, Office of International Affairs, National Telecommunications and Information Administration, Department of Commerce
Frances S. Urbany (Vice Chairman), BellSouth, Washington, DC

Senior Adviser

The Honorable, Sonia Landau, Ambassador, Coordinator for Communications and Information Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

Dexter Anderson, Voice of America, United States Information Agency
Earl S. Barbely, Director, Office of Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State
Bohdan Bulawka, Office of the Coordinator, Bureau of International Communications and Information Policy, Department of State
William J. Cook, Director, Electromagnetic Spectrum Management, Office of the Chief of Naval Operations, Department of the Navy
Douglas V. Davis, Senior Attorney Adviser, Common Carrier Bureau, International Conference Staff, Federal Communications Commission
James D. Earl, Attorney Adviser, Office of the Assistant Legal Adviser for Economic Business and Communications Affairs, Office of the Legal Adviser, Department of State
Wendell R. Harris, Assistant Bureau Chief-International, Common Carrier Bureau, Federal Communications Commission
William H. Jahn, Deputy Director, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State
Barbara Miller, Office of Industrial and Communications Programs, Bureau of International Organizations Affairs, Department of State
William Moran, Office of International Affairs, National Telecommunications and Information Administration, Department of Commerce
Clark Norton, Office of Diplomatic and Public Initiatives, Bureau of International Communications and Information Policy, Department of State
Larry Palmer, Program Manager, Radio Conferences, National Telecommunications and Information Administration, Department of Commerce
Richard Parlow, Associate Administrator, Spectrum Management, National Telecommunications and Information Administration, Department of Commerce
Anne Patterson, United States Mission, Geneva, Switzerland
Richard E. Shrum, Director, Office of Radio Spectrum Policy, Bureau of International Communication and Information Policy, Department of State
Francis K. Williams, Treaty Branch, Federal Communications Commission

Private Sector Advisers

William M. Borman, Vice President and Director, Motorola, Inc., Washington, DC
Raymond B. Crowell, Director, Strategic Planning, COMSAT, Washington, DC
Cecil R. Crump, International District Manager, AT&T, Morristown, New Jersey
Ben C. Fisher, Partner, Fisher, Wayland, Cooper & Leader, Washington, DC
Richard J. Holleman, Director of Standards Practices, IBM Corporation, Purchase, New York
Anita F. Kaufman, MCI International, Inc., Rye Brook, New York
Philip C. Onstad, Director, Telecommunications and Information Policy, Control Data Corporation, Edison, New Jersey
Samuel E. Probst, Atlantic Research Corporation, Inc., Herndon, Virginia
Lee Schmidt, Vice President, Industry Affairs, GTE, Stamford, Connecticut.
Robert Smith, Associate Director, NYNEX Corporation, White Plains, New York

United States Delegation to the International Tropical Timber Council and Committees, International Tropical Timber Organization (ITTO), Abidjan, May 16, 1989

Representative

John Medeiros, Director, Office of International Commodities, Bureau of Economic and Business Affairs, Department of State

Alternate

Diana Tasnadi, Primary Commodities Division, Department of Commerce

Advisers

Simon Henshaw, Political/Economic Officer, American Embassy, Abidjan
Samuel H. Kunkle, International Forestry, USDA Forest Service, Department of Agriculture

Private Sector Advisers

Robert Buschbacher, Director, International Forestry, World Wildlife Fund, Washington, DC.
Frank Sheridan, President, Afrasian Woods, 39 E. Jericho Turnpike, Mineola, New York

United States Delegation to the Group on Urban Affairs—14th Session Organization for Economic Cooperation and Development (OECD), Paris, May 17–19, 1989

Representative

The Honorable Theodore R. Britton, Jr., Assistant to the Secretary for International Affairs, Department of Housing and Urban Development

Adviser

Appropriate USOECD, Mission Officer, Paris

Private Sector Adviser

Richard Zelinski, Vice President, Public Technology, Inc., Washington, DC.

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Extraordinary Meeting of Study Group 11, Geneva, Switzerland, May 10–16, 1989

Representative

Warren G. Richards, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State

Alternate Representative

John Reiser, Mass Media Bureau, Federal Communications Commission

Advisers

Brad Holmes, Chief, Policy and Rules, Mass Media Bureau, Federal Communications Commission
Paul E. Misener, National Telecommunications and Information Administration, Department of Commerce
Charles Rush, Chief Scientist, National Telecommunications and Information Administration, Department of Commerce

Private Sector Advisers

Stanley N. Baron, Director, Technical Development, National Broadcasting Company, New York, New York
William Connolly, Sony Advanced Systems, Teaneck, New Jersey
Craig D. Cuttner, Home Box Office, New York, New York
Bernard L. Dickens, Senior Staff Scientist, CBS, Inc., New York, New York
Ronald J. Gnidziejko, Director, Advanced Television, National Broadcasting Company, New York, New York
Richard G. Gould, Telecommunications Systems, Washington, DC.
Richard R. Green, Cable Television Laboratories, Inc., Cambridge, Massachusetts
Robert S. Hopkins, Jr., Executive Director, Avanced TV Systems Committee, Washington, DC.
Richard J. Iredale, The Del Ray Group, Thousand Oaks, California
Donald M. Jansky, Jansky-Barmat, Washington, DC.
Bronwen L. Jones, CBS Technology Center, Stamford, Connecticut
Bernard J. Lechner, Princeton, New Jersey
Louis Libin, National Broadcasting Company, New York, New York
Andrew B. Lippman, MIT Media Laboratory, Cambridge, Massachusetts
William Loveless, Bonneville International, Salt Lake City, Utah
Robert McFarlane, Philips Laboratories, Brier Cliff Manor, New York
James C. McKinney, Chairman, Advanced TV Systems Committee, Washington, DC.
Suzanne C. Neil, MIT Media Laboratory, Cambridge, Massachusetts
Edward E. Reinhart, Telecommunications Consultant, McLean, Virginia
Bruce Sidran, BELCORE, Red Bank, New Jersey
Richard J. Solomon, MIT Media Laboratory, Cambridge, Massachusetts
Victor Tawil, MST, Washington, DC.
Antoon G. Uyttendaele, Capital Cities-ABC, Inc., New York, New York
Roland J. Zavada, Eastman Kodak Company, Rochester, New York

United States Delegation to the Intergovernmental Group on Tea, 7th Session Food, and Agriculture Organization (FAO), Rome, May 9–12, 1989

Representative

Roberta van Haeften, Agricultural Attache, United States Mission to the United Nations Agencies for Food and Agriculture, Rome

Public Sector Advisers

Alan Davies, Tetley Tea Company, Reach and Quality Streets, Williamsport, Pa.
Norman A. Langer, Harrison Trading Company, 1 Stone Place, P.O. Box 310, Bronxville, New York
Joseph Wortheim, Tea Importers, Inc., 47 Riverside Ave., Westport, Connecticut

United States Delegation to the World Intellectual Property Organization (WIPO), Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits, Washington, DC, May 8–26, 1989

Representative

Ralph Oman (U.S. Delegate), Register of Copyrights, Library of Congress

Alternate Representatives

Michael Keplinger (U.S. Alternate Delegate), Attorney Adviser, Office of Legislation and International Affairs, Patent and Trademark Office, Department of Commerce
Dorothy Schrader (U.S. Alternate Delegate), General Counsel, Copyright Office, Library of Congress

Congressional Advisers

The Honorable Hamilton Fish, Jr., Judiciary Committee, United States House of Representatives
The Honorable Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Judiciary Committee, United States House of Representatives
The Honorable Carlos J. Moorhead, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Judiciary Committee, United States House of Representatives
Congressional Staff Advisers
David Keaney, Chief Counsel, Senate Foreign Relations Committee, United States Senate
Michael Remington, Counsel, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Judiciary Committee, United States House of Representatives
Joseph Wolfe, Associate Counsel, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Judiciary Committee, United States House of Representatives

Advisers

Catherine Field, Assistant General Counsel, Office of the United States Trade Representative, Executive Office of the President
Hilton Lee Graham, Office of Business Practices, Bureau of Economic and Business Affairs, Department of State
Richard Owens, Attorney Adviser, Office of Legislation and International Affairs, Patent and Trademark Office, Department of Commerce
William Patry, Policy Planning Adviser, Copyright Office, Library of Congress
Emery Simon, Director for Intellectual Property, Office of the United States Trade Representative, Executive Office of the President
William H. Skok, Office of Business Practices, Bureau of Economic and Business Affairs, Department of State
George Taft, Office of the Assistant Legal Adviser for Treaty Affairs, Office of the Legal Adviser, Department of State
Harvey J. Winter (Executive Secretary of the U.S. Delegation), Director, Office of Business Practices, Bureau of Economic and Business Affairs, Department of State

Private Sector Adviser

Edward W. Brown, Computer and Business Equipment Manufacturer's Association, Washington, DC.
William C. Cray, Semiconductor Industry Association, Washington, DC.
R. Michael Gadbaw, Semiconductor Industry Association, Washington, DC.

United States Delegation to the Forty-Second World Health Assembly of the World Health Organization (WHO), Geneva, May 8–19, 1989

Delegates

The Honorable Louis W. Sullivan, M.D. (Chief Delegate), Secretary, Department of Health and Human Services
James O. Mason, M.D. (Deputy Chief Delegate), Assistant Secretary for Health, U.S. Public Health Service, Department of Health and Human Services
John R. Bolton (Deputy Chief Delegate), Assistant Secretary of State-Designate, for International Organization Affairs, Department of State

Alternate Delegates

The Honorable C. Everett Koop, M.D., Surgeon General, U.S. Public Health Service, Department of Health and Human Services
The Honorable Joseph C. Petrone, Ambassador, United States Permanent Representative to the United Nations Office and the Other International Organizations, Geneva,
Neil A. Boyer, Director, Health and Transportation Programs, Bureau of International Organization Affairs, Department of State
Nyle C. Brady, Senior Assistant Administrator, Bureau for Science and Technology, U.S. Agency for International Development
Frank E. Young, M.D., Commissioner of Food and Drugs, Food and Drug Administration, U.S. Public Health Service, Department of Health and Human Services

Advisers

Kenneth J. Bart, M.D., Director for Health, Bureau for Science and Technology, U.S. Agency for International Development
Rose Belmont, Associate Director for Multilateral Programs, Office of International Health, U.S. Public Health Service, Department of Health and Human Services
Joe H. Davis, M.D., Director, International Health Program Office, Centers for Disease Control, U.S. Public Health Service, Department of Health and Human Services
Billy Griggs, Assistant Director for International Health, Centers for Disease Control, U.S. Public Health Service, Department of Health and Human Services
Marie Henry, D.N.Sc., Chief Nurse Officer, U.S. Public Health Service, Department of Health and Human Services
Dennis O. Johnsen, International Health and Science Attache, U.S. Mission, Geneva
Thomas A. Johnson, Counsellor for Legal Affairs, U.S. Mission, Geneva
Stuart H. Lippe, Counsellor for Political Affairs, U.S. Mission, Geneva
William H. Marsh, Minister Counsellor, Deputy Chief of Mission, Geneva
Anne W. Patterson, First Secretary, U.S. Mission, Geneva
Joseph P. Richardson, International Resources Management Officer, U.S. Mission, Geneva
Philip Schambra, Director, Fogarty International Center, National Institutes of Health, U.S. Public Health Service, Department of Health and Human Services
Harold P. Thompson, Director, Office of International Health, U.S. Public Health Service, Department of Health and Human Services
Sandra L. Vogelgesang, Deputy Assistant Secretary, International Organization Affairs, Department of State

Private Sector Advisers

Vivian W. Pinn-Wiggins, M.D., President-elect, National Medical Association, Howard University College of Medicine, Washington, DC.
William Walsh, M.D., Director, Project Hope, Washington, DC.

United States Delegation to the Preparatory Meeting for the Fifteenth Antarctic Treaty Consultative Meeting, Paris, May 8–12, 1989

Representative

R. Tucker Scully, Director, Office of Oceans and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Advisers

Raymond V. Arnaudo, Office of Oceans and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Grace Bay, United States Embassy, Paris
Robert Hofman, Scientific Program Director, Marine Mammal Commission
Thomas Laughlin, National Oceanic and Atmospheric Administration, Department of Commerce
Jack Talmadge, Division of Polar Programs, National Science Foundation

Private Sector Adviser

Lee Kimball, World Resources Institute, Washington, DC.

United States Delegation to the International Telecommunication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group I (Services), Geneva, Switzerland, May 2–12, 1989

Representative

Douglas V. Davis, Attorney-Adviser, International Common Carrier Bureau, International Conference Staff, Federal Communications Commission

Advisers

K. Granger Kelley, Defense Communications Agency, Department of Defense, Reston, Virginia
Milton Weiner, Office of Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Private Sector Advisers

Michael W. Durrwachter, Computer Sciences Corporation, Falls Church, Virginia
Stephen Engleman, Manager, Engineering, Communication Satellite Corporation, Clarksburg, Maryland
Joseph T. Morris, Senior Consultant Systems Analyst, Western Union Telegraph Company, Mahwah, New Jersey
Orni Petruschka, Senior Engineer, Bell Communications Research, Inc., Red Bank, New Jersey
Robert S. Powers, MCI Telecommunications, Inc., Washington, DC.
Herman Silbiger, Supervisor, Standards Planning, AT&T Bell Laboratories, Holmdel, New Jersey
Robert Smith, Associate Director, NYNEX Corporation, Boston, Massachusetts
Blake L. Wattenbarger, Supervisor, Consumer Products, Consumer Products Laboratories, American Telephone and Telegraph Company, Holmdel, New Jersey

United States Delegation to the Second Caribbean/South American Regional Air Navigation Meeting of the International Civil Aviation Organization (ICAO), Santiago, May 2–20, 1989

Chief Delegate

Garland P. Castleberry, Regional Administrator, Southern Region, Federal Aviation Administration, Department of Transportation, Atlanta, Georgia

Alternate Delegate

Bill F. Jeffers, Manager, International Staff, Southern Region, Federal

Aviation Administration, Department of Transportation, Atlanta, Georgia

Advisers

Mark Adams, Program Analyst, MLS Program Office, Federal Aviation Administration, Department of Transportation
Calvin T. Betz, Lieutenant Colonel, Air Force Representative, Federal Aviation Administration (Southern Region), Department of the Air Force, Atlanta, Georgia
Robert J. Howard, Assistant Manager, International Operations, New York Air Route Traffic Control Center, Federal Aviation Administration, Department of Transportation, Ronkonkoma, New York
D.E. Lemon, Chief, Search and Rescue Coordination, United States Coast Guard, Department of Transportation
Thomas T. Martin, International Field Office, Federal Aviation Administration, Department of Transportation, Miami, Florida
Gerald L. Richard, International Program Specialist, Federal Aviation Administration Department of Transportation
William H. Titus, International Program Analysis, Federal Aviation Administration, Department of Transportation
Jerald Uecker, International Aviation Program Leader, National Weather Service, National Oceanic and Atmospheric Administration, Department of Commerce

Private Sector Advisers

Richard K. Covell, Manager, Air Ground Operations, Aeronautical Radio, Inc., Annapolis, Maryland
Paul C. Leonard, Regional Vice President, Air Transport Association of America, Chicago, Illinois

United States Delegation to the Steel Committee Working Party Organization For Economic Cooperation and Development (OECD), Paris, April 25–26, 1989

Representative

Ralph Thompson, Director, Iron and Steel Division, Bureau of Industrial Economics, International Trade Administration, Department of Commerce

Advisers

Jane Richards, Office of International Economic Affairs, Bureau of International Labor Affairs, Department of Labor
Appropriate USOECD, Mission Officer, Paris

Private Sector Advisers

Frank Fenton, Vice President, International Trade and Economics, American Iron and Steel Institute, Washington, DC
Peter B. Mulloney, Vice President and Assistant to the Chairman, United States Steel Corporation, Pittsburgh, Pennsylvania
John J. Sheehan, Assistant to the President and Director of Legislative Affairs, United Steelworkers of America, Washington, DC

United States Delegation to the Steel Committee Working Party Organization For Economic Cooperation and Development (OECD), Paris, April 25–26, 1989

Representative

Ralph Thompson, Director, Iron and Steel Division, Bureau of Industrial Economics, International Trade Administration, Department of Commerce

Advisers

Jane Richards, Office of International Economic Affairs, Bureau of International Labor Affairs, Department of Labor
Appropriate USOECD, Mission Officer, Paris,

Private Sector Advisers

Frank Fenton, Vice President, International Trade and Economics, American Iron and Steel Institute, Washington, DC
Peter B. Mulloney, Vice President and Assistant to the Chairman, United States Steel Corporation, Pittsburgh, Pennsylvania
John J. Sheehan, Assistant to the President and Director of Legislative Affairs, United Steelworkers of America, Washington, DC

United States Delegation to the 12th Session of the UN Commission on Human Settlements, Cartagena, Colombia, April 24–May 3, 1989 (Amendment #3)

Representative

Fredrik A. Hansen, Deputy Director, Office of Housing and Urban Programs, US Agency for International Development, Washington

Alternate Representatives

Daniel W. Figgins, Jr., US Permanent Representative to the U.N. Center for Human Settlements, Nairobi, Kenya

Advisers

Lawrence E. Birch, Office of Housing and Urban Programs, US Agency for International Development, Washington
Edward J. Ramotowski, American Embassy, Bogota, Colombia

Private Sector Advisers

John T. Howley, Vice President for International Affairs, National Association of Realtors, Washington
Miriam Meyer, National Association of Realtors, Washington
Ralph W. Pritchard, Chairman, International Policy Committee, National Association of Realtors, Washington

United States Delegation to the International Telecommunication Union, International Telegraph and Telephone Consultative Committee (CCITT) Study Group III (Tariff Principles, Including Accounting), Geneva, Switzerland, April 24–28, 1989

Representative

Earl S. Barbely, Director, Office of Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Advisers

Jack E. Cole, Program Manager, National Telecommunications and Information Administration, Department of Commerce
William Kirsch, Deputy Assistant Chief/ International, Common Carrier Bureau, Federal Communications Commission

Private Sector Advisers

Donald P. Casey, Assistant Vice President, ITT Communications Services, Secaucus, New Jersey
Wanda G. Glanzman, Regulatory Manager, Telenet Communications Corporation, Reston, Virginia
Stephen Lidd, Manager, Business Development, Communications Satellite Corporation, Washington, DC
Robert W. Madden, Manager, American Telephone and Telegraph Company, Morristown, New Jersey
John O'Boyle, Director, Facilities Management, WorldCom Incorporated, New York, New York
Marcel Scheidegger, Manager, International Finance, MCI International Telecommunications, Rye Brook, New York

United States Delegation to the International Conference on Salvage, International Maritime Organization (IMO), London, April 17–28, 1989

Representative

Joseph E. Vorbach, Rear Admiral, Chief Counsel, United States Coast Guard, Department of Transportation

Alternate Representative

Frederick F. Burgess, Jr., Captain, Chief, Maritime and International Law Division, Office of Chief Counsel, United States Coast Guard, Department of Transportation

Congressional Staff Adviser

Richard Innes, Staff Member, Committee on Environment and Public Works, United States Senate

Advisers

Robert C. Blumberg, Deputy Director, Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
David P. Howe, Assistant Supervisor of Salvage (Admiralty), Naval Sea Systems Command, Department of the Navy
Thomas L. Jones, Senior Admiralty Counsel, Civil Division, Department of Justice
Frederick M. Rosa, Jr., Lieutenant Commander, Maritime and International Law Division, Office of Chief Counsel, United States Coast Guard, Department of Transportation
Robert L. Storch, Captain, Commanding Office, Coast Guard Marine Safety Office, United States Coast Guard, Department of Transportation, Charleston, South Carolina
Gerard P. Yoest, Assistant Chief, International Affairs Staff, Office of the Commandant, United States Coast Guard, Department of Transportation

Private Sector Advisers

Ernest J. Corrado, President, American Institute of Merchant Shipping, Washington, DC
Geoffrey C. Jones, Senior Vice President, American International Marine Agency, New York, New York
Edward C. Kalaidjian, Legal Consultant, Vero Beach, Florida
Sam V. Tranchina, American Institute of Marine Underwriters, New York, New York

United States Delegation to the Executive Board Meeting United Nations Children's Fund (UNICEF), New York, April 17–28, 1989 (Amendment #1)

Representative

Rita DiMartino, United States Representative to UNICEF, New York

Alternate Representative

Claudine B. Cox, Alternate United States Representative to UNICEF, Springfield, Missouri
Sandra L. Vogelgesang, Deputy Assistant Secretary for International Development and Technical Specialized Agency Affairs, Bureau of International Organization Affairs, Department of State, Washington

Advisers

David A. Balton, Office of United Nations Affairs, Office of the Legal Adviser, Department of State, Washington
Mary Louise Becker, Office of Donor Coordination, Bureau for Program and Policy Coordination, US Agency for International Development, Washington
Gordon MacArthur, United States Mission to the UN, New York
Susan Shearouse, United States Mission to the UN, New York
Sylvia Stanfield, Office of International Development Assistance, Bureau of International Organization Affairs, Department of State, Washington
Linda Vogel, Associate Director for Management and Program Coordination, Office of International Health, Public Health Service, Department of Health and Human Services, Washington

Public Sector Adviser

Lawrence E. Bruce, Jr., President, US Committee for UNICEF, New York

United States Delegation to the Working Group of the Maritime Transport Committee and the Maritime Transport Committee, Organization for Economic Cooperation and Development (OECD), Paris, June 27–29, 1989

Representative

Thomas J. Wajda, Director, Office of Maritime and Land Transport, Bureau of Economic Affairs, Department of State

Alternate Representative

Greg Hall, Office of International Affairs, Maritime Administration, Department of Transportation

Adviser

Appropriate USOECD, Mission Office, Paris

Private Sector Advisers

Donald O'Hare, Director, Public Affairs, Sea-Land Corporation, Washington DC
Peter D. Prowitt, Director, Government Affairs, American President Lines, Washington, DC

United States Delegation to the Third Session of the Technical Committee for Ocean Processes and Climate, Intergovernmental Oceanographic Commission (IOC)/United Nations Educational, Scientific and Cultural Organization (UNESCO), Paris, June 27–29, 1989

Representative

Thomas Spence, Program Director, National Science Foundation

Alternate Representative

David Goodrich, Director, Ocean Circulation Studies, National Ocean.c and Atmospheric Administration, Department of Commerce

Advisers

Louis Brown, Science Associate, Division of Ocean Sciences, National Science Foundation
William Woodward, Chief, Ocean Observations Division, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce

Private Sector Adviser

D. James Baker, President, Joint Oceanographic Institution, Inc., Washington, DC

United States Delegation to the Committee on Information, Computers and Communications Policy (ICCP), and Working Party on Telecommunications and Information Services Policy (TISP), Organization for Economic Cooperation and Development (OECD), Paris, June 20–21, 1989

Representative

Lucy H. Richards, Director, Office of Industrialized Country Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

Timothy C. Finton, Office of Industrialized Country Policy, Bureau of International Communications and Information Policy, Department of State
Mary Inoussa, Office of Service Industries, International Trade Administration, Department of Commerce

Private Sector Advisers

Kathy Slesinger, NYNEX Corporation, Washington, DC
Kathy Stewart, American Telephone and Telegraph, Morristown, New Jersey
Dana Theus, Electronic Data Systems, Washington, DC

United States Delegation to the International Telecommunications Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group XVIII (Digital Networks, Including ISDN), Geneva, Switzerland, June 19–30, 1989

Representative

William F. Utlaut, Director, Institute for Telecommunications Sciences, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado

Alternate Representative

Gary M. Fereno, Deputy Director, Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Adviser

Neil Seitz, Deputy Director, Systems and Networks Development, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado

Private Sector Advisers

David Cairns, Director, Technology Standards and Technical Requirements, Northern Telecom, Inc., San Ramon, California
Gary Fishman, District Manager, Technical Industry Standards, AT&T, Bedminster, New Jersey
Thomas J. Garcia, Associate Director, Pacific Bell, San Ramon, California
Gerard T. Keeler, Senior Digital Engineer, COMSAT, Washington, DC
Demosthenes J. Kostas, Manager, Technical Standards, GTE Service Corporation, Stamford, Connecticut
Yi-Shang Shen, Senior Engineer, MCI Telecommunications Corp., McLean, Virginia
Randall Spusta, Manager, Network Standards, Bell Communications Research, Inc., Red Bank, New Jersey
Michael E. Varrassi, Standards Engineer, Federal Express Corporation, Memphis, Tennessee
Richard E. Weadon, Senior Technologist, Southwestern Bell Corp., St. Louis, Missouri

United States Delegation to the International Conference on Indochinese Refugees, United Nations High Commissioner for Refugees (UNHCR) Geneva, June 13–14, 1989

Representative

The Honorable Lawrence S. Eagleburger, Deputy Secretary, Department of State

Alternate Representatives

The Honorable Ivan Selin, Under Secretary for Management, Department of State
The Honorable Jonathan Moore, United States Coordinator for Refugee Affairs and Ambassador-at-Large, Director, Bureau for Refugee Programs, Department of State
The Honorable John R. Bolton, Assistant Secretary of State for International Organization Affairs, Department of State
The Honorable Joseph C. Petrone, Permanent Representative to the International Organizations in Geneva, United States Mission, Geneva
Sichan Siv, Deputy Assistant to the President, Office of the President

Congressional Advisers

The Honorable Robert K. Dornan, United States House of Representatives

Congressional Staff Advisers

Susan Andross, Staff Member, Committee on Foreign Affairs, United States House of Representatives
Richard W. Day, Staff Member, Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, United States Senate
Nora Engel, Staff Member, Committee on the Judiciary, United States House of Representatives
Lisa Heyes, Staff Member, Committee on Foreign Affairs, United States House of Representatives
Leslie Megyeri, Staff Member, Committee on the Judiciary, United States House of Representatives
Kennon Nakamura, Staff Member, Committee on Foreign Affairs, United States House of Representatives
Eric Schwartz, Staff Member, Committee on Foreign Affairs, United States House of Representatives
Jerry M. Tinker, Staff Member, Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, United States Senate

Advisers

Nancy Boshoven, Office of Thailand and Burma Affairs, Bureau of East Asian and Pacific Affairs, Department of State
Michael Carpenter, Counselor for Refugee and Migration Affairs, United States Mission, Geneva
Lisa Carty, Office of Asian Refugee Assistance, Bureau for Refugee Programs, Department of State
Nancy Bearg Dyke, Staff Member, National Security Council
James B. Foster, District Director, Immigration and Naturalization Service, Department of Justice, Bangkok, Thailand
Robert L. Funseth, Senior Deputy Assistant Secretary, Bureau for Refugee Programs, Department of State
Douglas R. Hunter, Director, Office of Policy and Program Coordination, Bureau for Refugee Programs, Department of State
Jeffrey D. Kovar, Assistant Legal Adviser for Human Rights and Refugees, Office of the Legal Adviser, Department of State
David Lambertson, Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, Department of State
Joyce Leader, United States Mission, Geneva
Mary Chi Ray, Deputy Director, Office of Refugee Resettlement, Family Support Administration, Department of Health and Human Services
Lee Richardson, National Security and International Affairs Division, General Accounting Office
David Walker, Office of Regional Affairs, Bureau of East Asian and Pacific Affairs, Department of State

Private Sector Advisers

Michael D. Antonovich, Supervisor, Los Angeles County, Los Angeles, California
Donald Larsen, Executive Director, Lutheran Immigration and Refugee Service, Chairman, Inter-Action Committee on Refugee and Migration Affairs, New York, New York
Susan Molinari, Councilwoman, New York City Council, New York, New York
Frank Vinh Noan, President, Vietnam Resettlement Organization, Washington, DC
Anthony T. K. Vang, Indochina Resource Action Center, Fresno, California

United States Delegation to the Fifth Session of the Operations Panel, International Civil Aviation Organization (ICAO), Montreal, June 12–23, 1989

Panel Member

Thomas Imrich, National Resource Specialist, Air Carrier Operations, Northwest Mountain Region, Federal Aviation Administration, Department of Transportation, Seattle, Washington

Advisers

Thomas H. Quinlan, Air Space Systems Inspection Pilot/Procedure Specialist, Flight Safety Standards Branch,

Federal Aviation Administration, Department of Transportation
James P. Witeck, Program Management Division, Federal Aviation Administration, Department of Transportation

Private Sector Advisers

Peter R. Rach, Air Carrier Representative, Air Transport Association of America, Washington, D.C.
William M. Russell, Air Carrier Representative, Air Transport Association of America, Washington, D.C.

United States Delegation to the 41st Annual Meeting and Associated Meetings, International Whaling Commission (IWC), San Diego, June 5–16, 1989

Representative

The Honorable William E. Evans, United States Commissioner and Under Secretary of Commerce for Oceans and Atmosphere, Department of Commerce

Alternate Representative

The Honorable Norman Roberts, Deputy United States Commissioner

Congressional Staff Adviser

Lori Williams, Staff Member, Committee on Merchant Marine and Fisheries, United States House of Representatives

Advisers

Daniel Bodandsky, Office of the Legal Adviser, Department of State
James Brennan, Deputy General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce
Joseph Casper, Deputy Assistant to the Chief of Staff, Office of the Secretary, Department of Commerce
Kevin Chu, Office of Science and Techology Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Anne Crichton, Office of the Solicitor, Department of the Interior
Timonthy R. E. Keeney, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce
Claudia Kendrew, Office of Economic Policy, Bureau of East Asian and Pacific Affairs, Department of State
Eileen Sobeck, Wildlife and Marine Resource Services Unit, Department of Justice
Dean Swanson, Office of International Affairs, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Michael F. Tillman, Senior Scientist, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce

Private Sector Advisers

Nancy Azzam, Windstar Foundation, Golden Valley, Minnesota
Barbara Britten, American Cetacean Society, Arlington, Virginia
Richard Ellis, Oceanic Society, New York, New York
Jeff Haun, International Marine Animals Trainers Association, Kaneohe Place, Hawaii
Edward Hopson, Chairman, Alaska Eskimo Whaling Commission, Barrow Alaska
John Prescott, American Association of Zoological Parks and Aquariums, Weston, Massachusetts
LKee J. Weddig, Executive Vice President, National Fisheries Institute, Washington, D.C.

United States Delegation to the Special Meeting of the Council on the Renegotiation of the International Coffee Agreement (ICA), International Coffee Organization (ICO), London, June 5–12, 1989

Representative

Jon Rosenbaum, Assistant U.S. Trade Representative for Latin America, the Caribbean, Africa and Commodity Policy, Office of the U.S. Trade Representative, Executive Office of the President

Alternate Representative

Ralph Ives, Director for Commodity Policy, Office of the U.S. Trade Representative, Executive Office of the President

Advisers

William R. Brew, Director, Office of Food Policy and Programs, Bureau of Economic and Business Affairs, Department of State
James Burkhart, Resources Officer, U.S. Embassy, London
Caterina Littleton, Primary Commodities Division, Department of Commerce
Scott Monier, Resources Officer, U.S. Embassy, London

Private Sector Advisers

Dave Brown, General Foods Corporation, 120 Wall Street, New York, New York
John C.K. Buckley, Nestle Foods Corporation, 100 Manhattanville Road, Purchase, New York
Kenneth R. Dunnivant, Procter & Gamble Company, P.O. Box 599, Cincinnati, Ohio
Kirsten Emigholz, Cahill, Gordon and Reindel, New York, New York
Andrew Scholtz, Cargill & Company, New York, New York
Henry Grady Tiller, Maryland Club Foods, Inc., Houston, Texas

United States Delegation to the Working Party Number Six on Shipbuilding Organization for Economic Cooperation and Development (OECD), Paris, June 5–6, 1989

Representative

Thomas J. Wajda, Director, Office of Maritime and Land Transport, Bureau of Economic Affairs, Department of State

Adviser

Appropriate USOECD, Mission Officer, Paris

Private Sector Adviser

David Klinges, President, Marine Construction Group, Bethlehem Steel Corporation, Bethlehem, Pennsylvania

United States Delegation to the 22nd Session of the Executive Council and the 15th Assembly of the International Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (UNESCO/IOC), Paris, July 3–19, 1989

Representative

Robert Corell, Assistant Director for Geosciences, National Science Foundation

Alternate Representatives

William Erb, Director, Office of Marine Science and Technology Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Thomas Maginnis, Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration, Department of Commerce

Advisers

Neil Anderson, Director, Chemical Oceanography Program, National Science Foundation
Dorothy Bergamashci, Office of Marine Science and Technology Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Louis B. Brown, Science Associate, Division of Ocean Science, National Science Foundation
Candyce Clark, Office of International Affairs, Oceanic and Atmospheric Research, National Oceanic and

Atmospheric Administration, Department of Commerce
Melvin N.A. Peterson, Chief Scientist, National Ocean and Atmospheric Administration, Department of Commerce
Richard Podgorny, Chief, International Affairs, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce
Sharon Smith, Biological Oceanography Program, National Science Foundation
Gregory Withee, Director, National Oceanographic Data Center, Northeastern District, National Oceanic and Atmospheric Administration, Department of Commerce

Private Sector Advisers

D. James Baker, President, Joint Oceanographic Institutions, Inc., Washington, DC
Mary Hope Katsouros, Senior Staff Officer, Ocean Studies Board, National Academy of Sciences

United States Delegation to the 22nd Session of the Executive Council and the 15th Assembly of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (UNESCO/IOC), Paris, July 3–19

Representative

Robert Corell, Assistant Director for Geosciences, National Science Foundation

Alternate Representatives

William Erb, Director, Office of Marine Science and Technology Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Thomas Maginnis, Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration, Department of Commerce

Advisers

Neil Anderson, Director, Chemical Oceanography Program, National Science Foundation
Dorothy Bergamashci, Office of Marine Science and Technology Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Louis B. Brown, Science Associate, Division of Ocean Sciences, National Science Foundation
Candyce Clark, Office of International Affairs, Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration, Department of Commerce
Richard Podgorny, Chief, International Affairs, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce
Sharon Smith, Biological Oceanography Program, National Science Foundation
Gregory Withee, Director, National Oceanographic Data Center, Northeastern District, National Oceanic and Atmospheric Administration, Department of Commerce

Private Sector Advisers

D. James Baker, President, Joint Oceanographic Institutions, Inc., Washington, DC
Mary Hope Katsouros, Senior Staff Officer, Ocean Studies Board, National Academy of Sciences

United States Delegation to the International Telecommunication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group XVII, Geneva, Switzerland, July 3–July 13, 1989

Representative

Gary M. Fereno, Deputy Director, Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Adviser

Stephan Perschau, Telecommunication Standards Engineer, National Communications System
Dale L. Walters, Office of Systems and Architecture Network Division, National Bureau of Standards, Department of Commerce, Gaithersburg, Maryland

Private Sector Advisers

Alyson L. Abramowitz, Network Architect, Hewlett-Packard Company, Cupertino, California
Edmond J. Blausten, Vice President, Telecommunication Data Services, Irvine, California
Fred M. Burg, Supervisor, AT&T Laboratories, Holmdel, New Jersey
Lawrence F. Chesto, Director, Telecommunication Systems, Aeronautical Radio, Inc., Annapolis, Maryland
James R. Moulton, District Manager, Bell Communications Research, Red Bank, New Jersey
Theodore H. Myer, Rapport Communications, Inc., Washington, DC
Mark Neibert, Senior Engineer, COMSAT Corp., Washington, DC
Ranjan Pant, Principal Engineer, Germantown, Maryland
John R. Sergo, Jr., Vice President, Broadband Systems, Northern Telecom, Inc., Norcross, Georgia
Ronald A. Wheeler, Technology Consultant, Pacific Bell, San Ramon, California

United States Delegation to the International Telecommunication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Meeting of the Plan Committee For Latin America, San Jose, Costa Rica, August 30–September 6, 1989

Representative

Gary M. Fereno, Deputy Director, Office of Telecommunication and Information Standards, Bureau of International Communications and Information Policy, Department of State

Private Sector Advisers

Cecil Crump, District Manager, American Telephone and Telegraph Company, Morristown, New Jersey
Ivor N. Knight, Director, Regulatory Affairs, COMSAT, Washington, DC
Mark Neibert, Senior Engineer, COMSAT Corporation, Washington, D.C.
Carmine Taglialatela, Jr., Advisory Engineer, MCI Telecommunications Corporation, McLean, Virginia

United States Delegation to the Group of Experts on the Transport of Perishable Foodstuffs, 45th Session, Economic Commission for Europe (ECE), Geneva, September 25–28, 1989

Representative

Brian M. McGregor, ATP Manager, Office of Transportation, Department of Agriculture

Advisers

David Patterson, United States Mission, Geneva
James A. Truran, United States Mission, Geneva

Private Sector Adviser

Charles Grogen, Manager, Equipment Engineering, Sea-Land Service Inc., Edison, New York

United States Delegation to the World Tourism Organization (WTO), Thirty Sixth Session of the Executive Council, Eighth Session of the General Assembly, Paris, August 25-September 2, 1989

Representative

The Honorable Rockwell A. Schnabel, Undersecretary of Commerce for Travel and Tourism, Department of Commerce

Alternate Representatives

Robert Bentley, Office of Policy and Planning, United States Travel and Tourism Administration, Department of Commerce
The Honorable John R. Bolton, Assistant Secretary of State for International Organization Affairs, Department of State
Mary Ann Kekich, Office of Technical Specialized Agencies, Bureau of International Organization Affairs, Department of State
Jean G. O'Brien, Deputy Director, Office of Policy and Planning, United States Travel and Tourism Administration, Department of Commerce

Advisers

Pierce Bullen, Economic Counselor, American Embassy, Madrid, Spain
David Edgell, Director for Policy and Planning, United States Travel and Tourism Administration, Department of Commerce
Thomas Johnson, Legal Adviser, United States Mission, Geneva
Richard T. Miller, United States Embassy, Paris
Bruce C. Rashkow, Assistant Legal Adviser for United Nations Affairs, Office of the Legal Adviser, Department of State
William Tappe, Regional Director, United States Travel and Tourism Administration, United States Embassy, Paris

Private Sector Adviser

Chuck Y. Gee, Dean, School of Travel Industry Management, University of Hawaii, Honolulu, Hawaii

United States Delegation to the 61st Session of the Legal Committee, International Maritime Organization (IMO), London, September 28–29, 1989

Representative

Jonathan Collom, Captain, Chief, Maritime and International Law Division, Office of Chief Counsel, United States Coast Guard, Department of Transportation

Alternate Representatives

Robert C. Blumberg, Deputy Director, Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Frederick M. Rosa, Jr., Lieutenant Commander, Maritime and International Law Division, Office of Chief Counsel, United States Coast Guard, Department of Transportation

Private Sector Adviser

Ernest J. Corrado, President, American Institute of Merchant Shipping, Washington, D.C.

United States Delegation International Telecommunication Union (ITU), International Telegraph and Telephone Consultative Committee (CCITT), Study Group XVII (Data Transmission Over the Telephone Network), and its Working Parties, Geneva, Switzerland, September 26–29, 1989

Representative

Gary M. Fereno, Deputy Director, Office of Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Advisers

Robert Fenichel, Electronics Engineer, National Communications Systems
Vernon McConnell, Spectrum Manager, Military Communications, Electronics Board, The Pentagon

Private Sector Advisers

John A.E. Bingham, Senior Scientist, Telebit Coropration, Mountain View, California
Richard P. Brandt, Manager, AT&T Communication Systems, Bedminister, New Jersey
John E. MacCriskin, Computer Scientist, Adoptive Computer Technologies, Inc., Palo Alto, California
Richard L. Stuart, Vice President, Pernil Data Communications, Gaithersburg, Maryland

United States Delegation to the 33rd Session of the General Conference of the International Atomic Energy Agency (IAEA), Vienna, September 25–29, 1989

Representatives

The Honorable Richard T. Kennedy, Ambassador, United States Representative to the IAEA, Department of State

Alterate Representative

The Michael H. Newlin, Ambassador, United States Representative to the IAEA, Vienna

Senior Advisers

The Honorable Norman Wulf, Acting Assistant Director, Nuclear Weapons Control Bureau, Arms Control and Disarmament Agency
The Honorable John Easton, Principal Deputy Assistant Secretary, International Affairs and Energy Emergencies, Department of Energy

Advisers

Ronald Bartell, Science Adviser, United States Mission, Vienna
John A. Buche, Deputy Chief of Mission, United States Mission, Vienna
Salvador Ceja, Acting Director, Nuclear Non-Proliferation Policy, Office of International Affairs Department of Energy
James Hall, Executive Assistant to the Ambassador-at-Large, Department of State
Maurice Katz, Counselor, United States Mission, Vienna
Francis Kinnelly, Director, Office of Nuclear Technology And Safeguards, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Frederick F. McGoldrick, Counselor, United States Mission, Vienna
John McGuiness, Director, Office of Science and Technology, Bureau of International Organization Affairs, Department of State
Brian Sapsford, Political Officer, United States Mission, Vienna
Carol Schwab, Attorney Adviser, Office of the Assistant Legal Adviser, Department of State
James Shea, Director of International Programs, Office of Governmental and Public Affairs, Nuclear Regulatory Commission
Theodore Sherr, Science Adviser, United States Mission, Vienna
Richard Stratford, Deputy Assistant Secretary for Nuclear Energy and Energy Technology Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Private Sector Advisers

William O. Doub, Doub, Muntzing and Glasgow, Washington, D.C.
James R. Schlesinger, Center for Stategic and International Studies, Washington, D.C.

United States Delegation to the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects, International Maritime Organization (IMO), London, September 25–29, 1989

Representative

Jonathan Collom, Captain, Chief, Maritime and International Law Division, Office of Chief Counsel, United States Coast Guard, Department of Transportation

Alternate Representative

Frederick M. Rosa, Jr. Lieutenant Commander, Maritime and International Law Division, Office of Chief Counsel, United States Coast Guard, Department of Transportation

Private Sector Advisers

Ernest J. Corrado, President, American Institute of Merchant Shipping, Washington, D.C.

Emery W. Harper, Maritime Law Association of the United States, New York, New York

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 9, Fixed Service/Radio-Relay Systems, Geneva, Switzerland, September 20–October 5, 1989

Representative

Alex C. Latker, Engineer, Common Carrier Bureau, Federal Communications Commission

Adviser

Gerald F. Hurt, National Telecommunications and Information Administration, Department of Commerce, Annapolis, Maryland

Private Sector Advisers

Adolf J. Giger, AT&T Bell Laboratories, Andover, Massachusetts
Sing H. Lin, Bell Communications Research, Red Bank, New Jersey
Robert F. McLaughlin, AT&T Communications, Bedminster, New Jersey
Michael J. Pagones, AT&T Bell Laboratories, Holmdel, New Jersey
William D. Rummler, AT&T Bell Laboratories, Holmdel, New Jersey
Richard P. Slade, AT&T Bell Laboratories, North Andover, Massachusetts

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 5, Propagation in Non-Ionized Media, Geneva, Switzerland, September 19–October 5, 1989

Representative

John F. Cavanagh, Physicist, Naval Surface Warfare Center, Department of the Navy, Dahlgren, Virginia

Advisers

William A. Daniel, Office of Engineering and Technology, Federal Communications Commission
William Frazier, National Telecommunications and Information Administration, Department of Commerce, Annapolis, Maryland
Eldon Haakinson, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado

Private Sector Advisers

Robert K. Crane, Thayer School of Engineering, Dartmouth University, Hanover, New Hempshire
Faramaz Davarian, Jet Propulsion Laboratory, California Institute of Technology, Pasadena, California
David V. Rogers, COMSAT Laboratories, Clarksburg, Maryland
Howard J. Sartori, Consultant, Garland, Texas

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 4, Fixed Satellite Service, Geneva, Switzerland, September 20–October 6, 1989

Representatives

Richard E. Parlow, Associate Administrator, National Telecommunications and Information Administration, Department of Commerce
Hans J. Weiss, Vice President, Technical Policy, Communications Satellite Corporation, Washington, D.C.

Advisers

William Hatch, Program Manager, National Telecommunications and Information Administration, Department of Commerce
Raymond D. Jennings, Electronics Engineer, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado
Steven W. Lett, International Staff, Federal Communications Commission
William G. Long, Assistant for Spectrum Utilization, Defense Communications Agency, Department of Defense
Harry Ng, Engineer, Satellite Radio Branch, Federal Communications Commission
Thomas S. Tycz, Deputy Chief, Domestic Facilities, Federal Communications Commission

Private Sector Advisers

Jeffrey Binckes, Manager, Space Studies and Technology, Communications Satellite Corporation, Washington, D.C.
Henrique Cuevas, AT&T Bell Laboratories, Holmdel, New Jersey
Robert A. Hedinger, Technical Supervisor, Advanced Communications Systems, AT&T Bell Laboratories, Holmdel, New Jersey
Donald M. Jansky, President, Jansky-Barmat Telecommunications, Inc., Washington, D.C.
William P. Kinsella, Manager, Communication System Analysis, GTE Spacenet, McLean, Virginia
Michael Mitchell, Consultant, Vienna, Virginia
Robert F. McLaughlin, Staff Engineer, Industry Standards, AT&T Communications, Bedminster, New Jersey
James B. Potts, Consultant, Gaithersburg, Maryland
David E. Weinreich, Department Manager, Communications Satellite Corporation Laboratories, Clarksburg, Maryland

United States Delegation to the Twenty Seventh (Ordinary) Session of the Triennial Assembly of the International Civil Aviation Organization (ICAO), Montreal, September 19–October 6, 1989

Chief Delegate

Edmund P.C. Stohr, United States Representative to the International Civil Aviation Organization, Montreal, Canada

Delegates

Anthony J. Broderick, Associate Administrator for Aviation Standards, Federal Aviation Administration, Department of Transportation
James J. Gansle, Office of International Aviation, Department of Transportation
Joan S. Gravatt, Ofice of Aviation Programs and Policy, Bureau of Economic and Business Affairs, Department of State
Robert K. Harris, Office of the Legal Adviser, Department of State
Irene E. Howie, Assistant Chief Counsel, International Affairs and Legal Policy Staff, Office of the Chief Council, Federal Aviation Administration, Department of Transportation
J. Stuart Jamison, Alternate United States Representative to the International Civil Aviation Organization and Member of the ICAO Air Navigation Commission, Montreal, Canada
John H. Kiser, Office of International Aviation, Department of Transportation
David C. Leach, Special Assistant to the Deputy Director, Office of Civil Aviation Security, Federal Aviation Administration, Department of Transportation
David A. Leis, Office of UN System Budgets, Bureau of International Organization Affairs, Department of State
David L. Schiele, United States Member of the International Civil Aviation Organization Finance Committee, Montreal, Canada

Private Sector Adviser

Thomas V. Lydon, Manager, International Services, Air Transport Association of America, Washington, D.C.

United States Delegation to the 30th Session of the Working Party on Facilitation of International Trade Procedures Economic Commission for Europe (ECE), Geneva, September 18–22, 1989

Representative

Bruce Butterworth, Chief, Trade, Facilitation and Technical Issues Division, Office of International Transportation and Trade, Department of Transportation

Advisers

William H. Kenworthey, Jr., Data Systems Manager, Office of the Deputy Assistant Secretary of Defense for Management Systems, Department of Defense
Alice Rigdon, Customs Attache, United States Mission to the European Communities, Brussels
Roy Saltman, National Computer Systems Laboratory, National Institute of Standards and Technology, Department of Commerce

Private Sector Advisers

Earl J. Bass, IDI, Inc., Gaithersburg, Maryland
Irvin Chmielewski, Associate Director, Automotive Industry Action Group, Southfield, Michigan
Eugene A. Hemley, Executive Director, National Council on International Trade Documentation, New York, New York
Robert Hurd, International Project Manager, Data Interchange Standards Association, Alexandria, Virginia
Harriet Rusk, President, Data Interchange Standards Association, Alexandria Virginia
Jeffrey Sturrock, Director, EDI Systems, Texas Instruments, Inc., Plano, Texas
Hans Weiting, Sea-Land Service, Inc., Elizabeth, New Jersey
Nicole Willenz, Price Waterhouse, Chicago, Illinois

United States Delegation to the 50th Session, Committee on Housing, Building, and Planning Economic Commission for Europe (ECE), Geneva, September 12–15, 1989

Representative

David Patterson, U.S. Mission, Geneva

Private Sector Advisers

Kate Griffin, Director of Planning and Development, City Government, Chicopee, Massachusetts 01013
Mary E. Paumen, Urban Planner, Anthony J. Dunleavy Associates, Inc., Upper Darby, Pennsylvania
Ralph Pritchard, President, Pritchard Enterprises, LaGrange, Illinois

United States Delegation to the 19th Session of the Subcommittee on Bulk Chemicals, International Maritime Organization (IMO), London, September 11–15, 1989

Representative

Ronald W. Tanner, Commander, Chief, Hazardous Materials Branch, Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security, and Environmental Protection, United States Coast Guard, Department of Transportation

Alternate Representative

Emmanuel P. Pfersich, Chief, Packaged Cargo Section, Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security, and Environmental Protection, United States Coast Guard, Department of Transportation

Advisers

Gordon D. Marsh, Chief, Ship Design Branch, Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security, and Environmental Protection, United States Coast Guard, Department of Transportation
Michael D. Morrissette, Chief, Hazard Evaluation Section, Marine Technical and Hazardous Materials Division, Office of Safety, Security, and Environmental Protection, United States Coast Guard, Department of Transportation
Robert H. Fitch, Lieutenant Commander, Bulk Cargo Section, Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security, and Environmental Protection, United States Coast Guard, Department of Transportation

Private Sector Adviser

Dennis M. Arnett, Chevron Shipping Company, San Francisco, California

United States Delegation to the Intergovernmental Group on Citrus Fruit, Food and Agriculture Organization (FAO), Montevideo, September 11–15, 1989

Representative

Edmond Missiaen, Deputy Director, Horticultural and Tropical Division, Foreign Agricultural Service, Department of Agriculture

Private Sector Adviser

Ronald P. Muraro, Extension Farm Management Economist, University of Florida, Citrus Research and Education Center, Lake Alfred, Florida

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 6, Propagation in Ionized Media, Geneva, Switzerland, September 6–19, 1989

Representative

Charles M. Rush, Chief Scientist, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado

Advisers

Haim Soicher, Center for C3 Systems, United States Army, Fort Monmouth, New Jersey
Arthur D. Spaulding, Chief, Propagation Model Group, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado
Mary Sowers, National Telecommunications and Information Administration, Department of Commerce, Boulder, Colorado
John C. Wang, Office of Engineering and Technology, Federal Communications Commission

Private Sector Adviser

Dickson J. Fang, Director, Washington Division, Massachusetts Technological Laboratories, Bethesda, Maryland

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 2, Space Research and Radioastronomy, Geneva, Switzerland, September 6–13, 1989

Representative

Harold G. Kimball, Acting Associate Administrator, National Telecommunications and Information Administration, Department of Commerce

Advisers

James Fisher, National Oceanic and Atmospheric Administration, Department of Commerce
John W. Kiebler, National Aeronautics and Space Administration
Donald B. Miller, National Oceanic and Atmospheric Administration, Department of Commerce, Camp Springs, Maryland
Melvin Murray, National Telecommunications and Information Administration, Department of Commerce
James N. Scott, Goddard Space Flight Center, National Aeronautics and

Space Administration, Greenbelt, Maryland
David Struba, Manager, Spectrum Management Program, National Aeronautics and Space Administration
Robert Taylor, National Aeronautics and Space Administration

Private Sector Advisers

Norman F. de Groot, Technical Staff, Jet Propulsion Laboratory, California Institute of Technology, Pasadena, California
John Postelle, ARC Professional Services Group, Herndon, Virginia
Thomas M. Sullivan, Senior Program Director, Atlantic Research Corporation, Landover, Maryland
Anthony R. Thompson, Systems Engineer and Frequency Coordinator, National Radio Astronomy Observatory, Charlottesville, Virginia

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 7, Standard Frequencies and Time-Signals, Geneva, Switzerland, September 5–12, 1989

Representative

Roger E. Beehler, Manager, NBS Broadcast Services, National Institute of Standards and Technology, Department of Commerce, Boulder, Colorado

Advisers

David W. Allen, Chief, Time Scale and Coordination Group, National Institute of Standards and Technology, Department of Commerce, Boulder, Colorado
Gernot M. R. Winkler, Director, Time Service Division, United States Naval Observatory, Department of the Navy

Private Sector Advisers

Alvin G. Bates, Supervisor, Time and Frequency Section, Applied Physics Laboratory, Johns Hopkins University, Laurel, Maryland
Richard L. Sydnor, Group Supervisor, Time and Frequency Research, Jet Propulsion Laboratory, California Institute of Technology, Pasadena, California

United States Delegation to the 7th Session of the Assembly of Parties, International Maritime Satellite Organization (Inmarsat), Lisbon, October 31–November 2, 1989

Representative

Randolph C. Earnest, Director, Office of Satellite and Cable Policies, Bureau of International Communications and Information Policy, Department of State

Advisers

James L. Ball, Assistant Bureau Chief, International Common Carrier Bureau, Federal Communications Commission
Gregg Daffner, Program Manager, National Telecommunications and Information Administration, Department of Commerce
James Earl, Office of the Legal Adviser, Department of State
Ronald Lebaron, United States Embassy, Lisbon
D. Clark Norton, Office of Satellite and Cable Policies, Bureau of International Communications and Information Policy, Department of State
Timothy Shea, Telecom Policy Specialist, National Telecommunications and Information Administration, Department of Commerce
Dana Starkweather, Captain, Commanding Officer, United States Coast Guard Activities for Europe, United States Coast Guard, Department of Transportation, London, England

Private Sector Advisers

William Coulter, Vice President, Office of Government Affairs, Communications Satellite Corporation, Washington, DC
Robert J. Oslund, Director, INMARSAT Relations, Communications Satellite Corporation, Washington, DC

United States Delegation to the International Tropical Timber Organization, Yokohama, October 30–November 7, 1989

Representative

Jeffrey R. Cunningham, Deputy Director, Office of International Commodities, Bureau of Economic and Business Affairs, Department of State

Alternate Representative

Diana Tasnadi, International Economist, Primary Commodities Division, Department of Commerce

Advisers

Thomas Engle, Economic Officer, American Embassy, Tokyo
Gary R. Lindell, Program Manager, Forest Products Laboratories, U.S. Department of Agriculture

Private Sector Advisers

Robert Buschbacher, Director, Tropical Forestry Program, World Wildlife Fund, Washington, D.C.
Lee J. Jimerson, Director Environmental Affairs, Contact International, Inc., Portland, Oregon

United States Delegation to the 85th Session of the Coal Committee Economic Commission For Europe (ECE), Geneva, October 30–November 2, 1989

Representative

George Ziegler, Office of International Affairs, Department of Energy

Alternate Representative

Ralph Anske, Office of Energy Consuming Country Affairs, Bureau of Economic and Business Affairs, Department of State

Adviser

Miles Greenbaum, Office of Fossil Energy, Department of Energy

Private Sector Advisers

Gary Rathburn, General Manager, International Sales, Mapco Coals, Inc. Tulsa, Oklahoma
Susan Wingfield, President, Mississippi Valley Coal Exporters Council, New Orleans, Louisiana

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 1 (Spectrum Utilization and Monitoring), Geneva, Switzerland, October 26–November 8, 1989

Representatives

William F. Utlaut, Director, Institute for Telecommunication Sciences, National Telecommunications Information Administration, Department of Commerce
Richard E. Shrum, Director, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

Leslie A. Berry, Institute for Telecommunication Sciences, National Telecommunications Information Administration, Department of Commerce
Warren S. F. Chu, NAVEMSCEN, Department of the Navy
David J. Cohen, National Telecommunications Information Administration, Department of Commerce, Annapolis, Maryland
William L. Kilpatrick, Federal Communications Commission, Powder Springs, Georgia
William A. Luther, Field Operations Bureau, Federal Communications Commission
Robert J. Mayher (International Vice

Chairman), National Telecommunications Information Administration, Department of Commerce
Robert P. Moore, Deputy Director, Office of Naval Technology, Department of the Navy

Private Sector Adviser

Richard Lancaster, Milcom Systems Corporation, Arlington, Virginia

United States Delegation to the Insurance Committee and the Working Group on Statistics, Organization For Economic Cooperation and Development (OECD), Paris, October 25–27, 1989

Representative

Wray O. Candilis, Director, Finance & Management Industries Division, Office of Service Industries, Department of Commerce

Adviser

Appropriate USOECD, Mission Officer, Paris

Private Sector Advisers

James Corcoran, Superintendent of Insurance, State of New York, 160 West Broadway, New York
Brant W. Free, Vice President, The Prudential Insurance Company of America, Four Gateway Center, 5th Floor, Newark
Professor Harold Skipper, Georgia State University, Center for Insurance Research, Atlanta

United States Delegation to the International Telecommunication Union (ITU), International Telegraph & Telephone Consultative Committee (CCITT), Study Group II, Working Paties 1, 2, and 3, Geneva, Switzerland, October 24–November 3, 1989

Representative

Milton Weiner, Lead Engineer, The Mitre Corporation, McLean, Virginia

Private Sector Advisers

Robert J. Keevers, District Manager, Special Switching Requirements, Bellcore, Red Bank, New Jersey
Ivor Knight, Director, International System Standards, Communications Satellite Corporation
Robert W. Madden, Manager, American Telephone & Telegraph Company, Morristown, New Jersey

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 8 (Mobile, Radiodetermination and Amateur Services), Geneva, Switzerland, October 23–November 8, 1989

Representatives

Herbert T. Blaker, Manager, Standards and Certification, Rockwell International, Arlington, Virginia
John T. Gilsenan, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

Paul Arnestein, Marine Radio Policy Branch, United States Coast Guard
Victor E. Foose, Spectrum Engineering Division, Federal Aviation Administration
Robert A. Frazier, Spectrum Engineering Division, Federal Aviation Administration
Tomas E. Gergely, Electromagnetic Spectrum Manager, National Science Foundation
Joseph D. Hersey, Chief, Marine Radio Policy Branch, United States Coast Guard
Robert C. Hinkle, National Telecommunications and Information Administration, Department of Commerce, Annapolis, Maryland
Earl J. Holliman, Army Spectrum Manager, Department of the Army
Henry W. Holsopple, Director, NAVEMSCEN, Department of the Navy
William A. Luther, Field Operation Bureau, Federal Communications Commission
Robert C. McIntyre (International Vice Chairman), International Adviser, PRB, Federal Communications Commission
Karl Nebbia, National Telecommunications and Information Administration, Department of Commerce, Annapolis, Maryland
Harry Ng, Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission
Bruno Pattan, Office of Engineering Technology, Federal Communications Commission
Frank L. Rose, International Liaison Staff, PRB, Federal Communications Commission
George K. Sakai, Spectrum Engineering Division, Federal Aviation Administration
Louis P. Shu, AT&T Bell Laboratories, Whippany, New Jersey
Richard E. Shrum, Director, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State
Richard L. Swanson, National Telecommunications and Information Administration, Department of Commerce
James T. Vorhies, National Telecommunications and Information Administration, Department of Commerce

Private Sector Advisers

Roy E. Anderson, Anderson Associates, Glenville, New York
Hamilton W. Arnold, Bell Communications Research, Inc., Red Bank, New Jersey
William M. Borman, Government Relations, Motorola, Inc., Washington, DC
James R. Carroll, Sachs-Freeman Associates, Inc., Landover, Maryland
Edward Chien, SBC Technical Resources, Inc., St. Louis, Missouri
Kris E. Hutchinson, Aeronautical Radio, Inc., Annapolis, Maryland
Yaroslav Kaminsky, The Mitre Corporation, McLean, Virginia
Walter Pappas, Consultant, Falls Church, Virginia
Philip T. Porter, Bell Communications Research, Inc., Red Bank, New Jersey
Edward E. Reinhart, Consultant, McLean, Virginia
Paul L. Rinaldo, American Radio Relay League, Inc., Newington, Connecticut
Mortimer Rogoff, President, Digital Directions Company, Inc., Washington, DC
Jesse E. Russell, Director, Cellular Transmission Lab/ATT BellLabs, Whippany, New Jersey
Allen Salmasi, Vice President, Qualcomm, Inc., San Diego, California
Eric J. Schimmel, Vice President, Telecommunications Industry Assoc., Washington, DC
Louis P. Shu, AT&T Bell Laboratories, Whippany, New Jersey
Cris Simpson, Qualcomm, Inc., San Diego, California
Thomas M. Sullivan, Atlantic Research Corporation, Landover, Maryland

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 1 (Rapporteur Groups of Working Party 1/3), Boston, Massachusetts, October 23–November 1, 1989

Representative

Douglas Davis, Attorney-Adviser (International), Common Carrier

Bureau, Federal Communications Commission

Alternate Representative

Earl S. Barbely, Director, Office of Telecommunications and Information Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

Michael Durrwachter, Defense Communications Agency
K.G. Kelly, Defense Communications Agency

Private Sector Advisers

Billie Cool, Senior Standards Engineer, COMSAT, Washington, DC.
Robert J. Smith, Associate Director, NYNEX Corporation, White Plains, New York
Carmine Taglialatela, Jr., Advisory Engineer, MCI Telecommunications Corporation, McLean, Virginia
Wayne R. Zeuch, Systems Engineer, AT&T Bell Laboratories, Naperville, Illinois

United States Delegation to the 25th General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), Paris, October 17–November 16, 1989

Principal Observer

Richard T. Miller, U.S. Observer at UNESCO, Paris

Observers

Patrick Johnson, United States Embassy, Paris
Elizabeth Kimber, U.S. Observer Mission at UNESCO, Paris
Hazel M. Reitz, U.S. Observer Mission at UNESCO, Paris

Private Sector Observer

Jacques Torczyner

United States Delegation to the Intergovernmental Group on Bananas, 11th Session Food and Agriculture Organization (FAO), Rome, October 16–20, 1989

Representative

Elizabeth Berry, Agricultural Attache, American Embassy, Quito

Alternate Representative

Diana Tasnadi, Primary Commodities Division, Department of Commerce

Adviser

Ray McGrath, Economic Officer, American Embassy, Quito

Private Sector Advisers

Warren G. Breck, International Banana Specialist, Interntional Banana Association, Inc., 1101 Vermont Ave., NW., Suite 306, Washington, DC.
Robert M. Moore, President, International Banana Association, Inc., 1101 Vermont Ave., NW., Suite 306, Washington, DC.

Unites States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 11 (Broadcasting Service—Television), Geneva, Switzerland, October 9–25, 1989

Representatives

John Reiser, Mass Media Bureau, Federal Communications Commission
Warren G. Richards, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

Bradley Holmes, Chief, Policy and Rules, Mass Media Bureau, Federal Communications Commission
Charles Rush, Chief Scientist, National Telecommunications and Information Administration, Department of Commerce

Private Sector Advisers

Stanley N. Baron, Director, Technical Development, National Broadcasting Company, New York, New York
Bernard L. Dickens, Senior Staff Scientist, CBS Inc., New York, New York
Ronald J. Gnidziesjko, Director, Advanced Television, National Broadcasting Company, New York, New York
Richard G. Gould, Telecommunications System, Washignton, DC.
Richard R. Green, President, Cable Television Laboratories, Inc., Boulder, Colorado
Robert S. Hopkins, Jr., Executive Director, Advanced TV Systems Committee, Washington, DC.
Donald M. Jansky, Jansky-Barmat Telecommunications, Washington, DC.
Bronwen Jones, Norwalk, Connecticut
Bernard J. Lechner, Princeton, New Jersey
Louis Libin, National Broadcasting Company, New York, New York
William Loveless, Bonneville International, Salt Lake City, Utah
John Miller, Stanford Telecommunications, Inc., Seabrook, Maryland
Suzanne Neil, MIT Media Laboratory, Cambridge, Massachusetts
Edward E. Reinhart, McLean, Virginia
Bruce Sidran, Bell Communications Research, Red Bank, New Jersey
Richard Solomon, MIT Media Laboratory, Cambridge, Massachusetts
Antoon Uyttendale, Capital Cities-ABC, Inc., New York, New York

United States Delegation to the International Telecommunications Union (ITU), International Radio Consultative Committee/International Telegraph and Telephone Consultative Committee (CCIR/CCITT), Joint Study Group for Television and Sound Transmission (CMITT), Geneva, Switzerland, October 9–23, 1989

Representatives

John McGrath, GE Americom, Inc., Princeton, New Jersey
Warren G. Richards, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State

Adviser

John Reiser, Mass Media Bureau, Federal Communications Commission

Private Sector Advisers

Gerry Clement, Bell Communications Research, Inc., Red Bank, New Jersey
Ronald J. Gnidziejko, Director, Advanced Television, National Broadcasting Company, New York, New York
David E. Weinreich, Department Manager, COMSAT Laboratories, Clarksburg, Maryland
Antoon Uyttendaele, Capital Cities/ABC, Inc., New York, New York

United States Delegation to the International Telecommunication Union (ITU), International Radio Consultative Committee (CCIR), Study Group 10, Broadcasting Service (Sound), Geneva, Switzerland, October 9–23, 1989

Representatives

John W. Reiser, Mass Media Bureau, Federal Communications Commission
Warren G. Richards, Deputy Director, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

William Luther, Field Operations Bureau, Federal Communications Commission
Norbert W. Schroeder, Chief, Regulatory Branch, Voice of America, United States Information Agency

Private Sector Advisers

Benjamin F. Dawson, Hatfriield & Dawson, Engineers, Seattle, Washington
Richard G. Gould, Telecommunications Systems, Washington, D.C.
Donald M. Jansky, Jansky/Barmat Telecommunications, Washington, D.C.
Bronwen Jones, Norwalk, Connecticut
William Loveless, Bonneville International, Salt Lake City, Utah
John Miller, Stanford Telecommunciations, Inc., Seabrook, Maryland
Edward E. Reinhart, McLean, Virginia
Robert G. Rullman, AT&E Laboratories, Inc., Portland, Oregon
Eric Small, Modulation Sciences, Inc., Brooklyn, New York
Emil L. Torick, Broadcast Technology Partners, Darien, Connecticut

United States Delegation to the 16th Session of the Assembly and 28th Session of the Marine Environment Protection Committee, International Maritime Organization (IMO), London, October 9–20, 1989

16th Session of the Assembly, (October 9–20, 1989)

Representative

Paul A. Yost, Jr., Admiral, Commandant, United States Coast Guard; Department of Transportation

Alternate Representatives

Mary Ann Kekich, Office of Technical Specialized Agencies, Bureau of International Organization Affairs, Department of State
Joel D. Sipes, Rear Admiral, Chief, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Department of Transportation

Advisers

Joseph J. Angelo, Assistant Chief, Merchant Vessel Inspection and Documentation Division, United States Coast Guard, Department of Transportation
Mark C. Glyptis, Office of United Nations System Budgets, Bureau of International Organization Affairs, Department of State
Michael C. Grace, Captain, Chief, International Affairs Staff, United States Coast Guard, Department of Transportation
Brian Hoyle, Director, Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Gary Larson, Unite States Embassy, London
Jean C. Neitzke, Shipping Attache, United States Embassy, London
Frederick M. Rosa, Jr., Lieutenant Commander, Maritime and International Law Division, Office of Chief Counsel, United States Coast Guard, Department of Transportation
Daniel F. Sheehan, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Department of Transportation

Private Sector Advisers

William S. Griffin, Jr., Phillips Petroleum Company, Bartlesville, Oklahoma
Donald C. Hintze, Captain, USCG, (Ret.), National Ocean Industries Association, Washington, D.C.
Sidney A. Wallace, Rear Admiral, (Ret.), Chairman, Marine Board, National Academy of Sciences, Washington, D.C.

28th Session of the Marine Environment Protection Committee, (October 17, 1989)

Representative

Joel D. Sipes, Rear Admiral, Chief, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Department of Transportation

Alternate Representatives

Joseph J. Angelo, Assistant Chief, Merchant Vessel Inspection and Documentation Division, United States Coast Guard, Department of Transportation
Daniel F. Sheehan, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Department of Transportation
Sydney A. Wallace, Rear Admiral, (Ret.), Chairman, Marine Board, National Academy of Sciences, Washington, D.C.

United States Delegation to the Fifteenth Antarctic Treaty Consultative Meeting, Paris, France, October 9–20, 1989

Representative

R. Tucker Scully, Director, Office of Oceans and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Congressional Staff Adviser

Joan M. Bondareff, Counsel, Committee on Merchant Marine and Fisheries, United States House of Representatives

Advisers

Raymond V. Arnaudo, Office of Oceans and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
John Behrendt, Geologic Division Coordinator for Antarctic Research, United States Geological Survey, Reston, Virginia
Robert Hofman, Scientific Program Director, Marine Mammal Commission
Thomas Laughlin, National Oceanic and Atmospheric Administration, Department of Commerce
Carole Roberts, Deputy Director, Division of Polar Programs, National Science Foundation
Jack Talmadge, Division of Polar Programs, National Science Foundation
Edward Yates, Council on Environmental Quality, Executive Office of the President

Private Sector Adviser

Lee Kimball, International Institute for Environment and Development, Washington, D.C.

United States Delegation to the 12th Meeting of the Dangerous Goods Panel, International Civil Aviation Organization (ICAO), Montreal, October 9–20, 1989

Panel Member

Frits Wybenga, International Standards Coordinator, Office of Hazardous Materials Transportation, Research and Special Programs Administration, Department of Transportation

Alternate Panel Member

Dana J. Hunt, Aviation Security Specialist, Office of Civil Aviation Security, Federal Aviation Administration, Department of Transportation

Private Sector Advisers

Edward A. Altemos, Technical Adviser, Conference on the Safe Transport of Hazardous Articles Inc., Washington, D.C.
Richard C. Barlow, Environmental and Safety Design, Inc., Memphis, Tennessee
Samuel S. Elkind, Manager, Cargo Services and Secretary, Restricted Articles Board, Air Transport Association of America, Washington, D.C.

United States Delegation to the Standing Committee and Seventh Meeting of the Conference of Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Lausanne, October 8–20, 1989

Standing Committee, (October 8, 1989)

Representative

Ralph Morgenweck, Assistant Director for Fish and Wildlife Enhancement,

United States Fish and Wildlife Service, Department of the Interior

Alternate Representative

Marshall Jones, Chief, Office of Management Authority, United States Fish and Wildlife Service, Department of the Interior

Advisers

Arthur Lazarowitz, Chief of Operations, Office of Management Authority, United States Fish and Wildlife Service, Department of the Interior
Mark Willis, Office of Ecology and Natural Resources, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Seventh Meeting of the Conference of Parties to the Convention on International Trade in Endangered Species of Wild Flora and Fauna, (October 9–20, 1989)

Representative

The Honorable Constance Harriman, Assistant Secretary of Interior for Fish and Wildlife and Parks, Department of the Interior

Alternate Representatives

Marshall Jones, Chief, Office of Management Authority, United States Fish and Wildlife Service, Department of the Interior
Ralph Morgenweck, Assistant Director for Fish and Wildlife Enhancement, United States Fish and Wildlife Service, Department of the Interior

Congressional Staff Advisers

Donald J. Barry, Majority Counsel for Fisheries and Wildlife, Committee on Merchant Marine and Fisheries, United States House of Representatives
Gina De Ferrari, Staff Member, Subcommittee on Fisheries and Wildlife Conservation, Committee on Merchant Marine and Fisheries, United States House of Representatives
Thomas O. Melius, Staff Member, Committee on Merchant Marine and Fisheries, United States House of Representatives

Advisers

Frank Bracken, Undersecretary of Interior, Department of the Interior
Georgia Creekmore, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Charles Dane, Chief, Office of Scientific Authority, United States Fish and Wildlife Service, Department of the Interior
Nancy Foster, Director, Office of Protected Species, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Arthur Lazarowitz, Chief of Operations, Office of Management Authority, United States Fish and Wildlife Service, Department of the Interior
Bruce MacBryde, Office of Scientific Authority, United States Fish and Wildlife Service, Department of the Interior
Frank McGilvrey, African Elephant Coordinator, Office of Management Authority, United States Fish and Wildlife Service, Department of the Interior
Martin Morin, Deputy Director, Office of Animal Care and Use, National Institutes of Health
Richard Robinson, Chief of Permits, Office of Management Authority, United States Fish and Wildlife Service, Department of the Interior
Jerome Smith, Deputy Chief, Division of Law Enforcement, United States Fish and Wildlife Service, Department of the Interior
Don Thompson, Field Operations Support Staff, Animal and Plant Health Inspection Service, Department of Agriculture
Mark Willis, Office of Ecology and Natural Resources, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Private Sector Adviser

Carroll Besadny, International Association of Fish and Wildlife Agencies, Madison, Wisconsin

United States Delegation to the Committee For the Coordination of Offshore Prospecting For Mineral Resources in the South Pacific (CCOP/SOPAC), 18th Session, Economic and Social Commission for Asia and the Pacific (ESCAP), Canberra, October 2–13, 1989

Representative

William A. Erb, Director, Office of Marine Science and Technology Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Advisers

H. Gary Greene, Branch of Pacific Marine Geology, United States Geological Survey, Menlo Park, California
Richard Podgorny, Chief, International Affairs, National Oceanic and Atmospheric Administration

Private Sector Advisers

Barbara Keating, Associate Geophysicist, University of Hawaii, Honolulu, Hawaii

United States Delegation to the Group of Experts on Periodic Survey of the Chemical Industry, 15th Session, and Chemical Industry Committee Meeting, 22nd Session, Economic Commission For Europe (ECE), Geneva, October 2–6, 1989

Representatives

Vincent J. Kamenicky, Director, Office of Chemicals, Department of Commerce
Alan M. Dunn, Deputy Assistant Secretary for Basic Industries, Department of Commerce

Alternate Representative

David Patterson, U.S. Mission, Geneva

Private Sector Adviser

K. James O'Connor, Jr., Associate Director of International Trade, Chemical Manufacturers Association, Washington, D.C.

United States Delegation to the International Telecommunications Union (ITU), International Radio Consultative Committee (CCIR), Interim Working Party 11/6, Geneva, Switzerland, October 2–6, 1989

Representatives

Robert S. Hopkins, Jr., Executive Director, Advanced TV Systems Committee, Washington, D.C.
Warren G. Richards, Office of Radio Spectrum Policy, Bureau of International Communications and Information Policy, Department of State

Advisers

Bradley Holmes, Chief, Policy and Rules, Mass Media Bureau, Federal Communications Commission
Paul E. Misener, National Telecommunications and Information Administration, Department of Commerce

Private Sector Advisers

Stanley N. Baron, Director, Technical Development, National Broadcasting Company, New York, New York
Bernard L. Dickens, Senior Staff Scientist, CBS, Inc., New York, New York
Richard G. Gould, Telecommunications System, Washington, D.C.
Richard R. Green, President, Cable Television Laboratories, Inc., Boulder, Colorado
Donald M. Jansky, Jansky-Barmat Telecommunications, Washington, D.C.
Bernard J. Lechner, Princeton, New Jersey
Suzanne Neil, MIT Media Laboratory, Cambridge, Massachusetts

Richard Solomon, MIT Media Laboratory, Cambridge, Massachusetts
Antoon Uyttendale, Capital Cities-ABC, Inc., New York, New York

United States Delegation to the International Telecommunication Satellite Organization (INTELSAT), Fifteenth Assembly of Parties, Amsterdam, October 2–5, 1989

Representative

The Honorable Sonia Landau, Coordinator for International Communications and Information Policy, Department of State

Alternate Representatives

Randolph C. Earnest, Director, Office of Satellite and Cable Policy, Bureau of International Communications and Information Policy, Department of State
D. Clark Norton, Bureau of International Communications and Information Policy, Department of State

Congressional Staff Advisers

Priscilla Ardoin, Staff Member, Committee on Foreign Affairs, United States House of Representatives
Thomas Bruce, Staff Member, Committee on Foreign Affairs, United States House of Representatives
Michael Finley, Staff Member, Committee on Foreign Affairs, United States House of Representatives

Advisers

James Ball, Assistant Bureau Chief, International Common Carrier Bureau, Federal Communications Commission
Jeanine M. Collins, United States Embassy, The Hague
Gregg Daffner, National Telecommunications and Information Administration, Department of Commerce
James Earl, Office of the Legal Adviser, Department of State
Timothy C. Finton, Executive Assistant to the Coordinator, Bureau of International Communications and Information Policy, Department of State
Joel Pearlman, Attorney, International Operations, Federal Communications Commission

Private Sector Advisers

Betty C. Alewine, Communications Satellite Corporation, Clarksburg, Maryland
William Coulter, Communications Satellite Corporation, Washington, D.C.
Bruce L. Crockett, President, World Systems Division, Communications Satellite Corporation, Clarksburg, Maryland
Maury J. Mechanick, INTELSAT Affairs Director, Communications Satellite Corporation, Clarksburg, Maryland
Paul Stern, Communications Satellite Corporation, Clarksburg, Maryland

United States Delegation to the International Telecommunication Union, International Telegraph and Telephone Consultative Committee (CCITT), Study Group III (General Accounting), Working Parties 1, 2, 3, 5, and 6, Geneva, Switzerland, October 10–20, 1989

Representative

Earl S. Barbely, Director, Office of Telecommunications and Information Standards, Bureau of International Communications and Information Policy, Department of State

Advisers

Jack E. Cole, Program Manager, National Telecommunications and Information Administration, Department of Commerce
William Kirsch, Deputy Assistant Chief/ International Common Carrier Bureau, Federal Communications Commission

Private Sector Advisers

Donald P. Casey, Directory Regulatory, Western Union Corporation, Upper Saddle River, New Jersey
Wanda G. Glanzman, Regulatory Manager, Telenet Communications Corporation, Reston, Virginia
Kenneth Leeson, Telecommunications Adviser, IBM, Purchase, New York
Stephen Lidd, Manager, Business Development, Communications Satellite Corporation, Washington, D.C.
Robert W. Madden, Manager, American Telphone & Telegraph Company, Morristown, New Jersey
William Motherway, Marketing Manager, Western Union International, Rye Brook, New York
Michael Nugent, Attorney, Citicorp, New York, New York
John O'Boyle, Vice President, Facility Management, World Communications Incorporated, New York, New York
Philip Onstad, Consultant, International Communications Association, Washington, D.C.
Carmine Taglialatella, Jr., Advisory Engineer, MCI Telecommunications Corporation, McLean, Virginia
Dana Theus, Office of Government Affairs Representative, Electronic Data Systems Corporation, Washington, D.C.

United States Delegation to the 4th Meeting With International Organizations and the 25th Session of the Administrative and Legal Committee, Union For the Protection of New Plant Varieties (UPOV), Geneva, October 9–13, 1989

Representative

H. Dieter Hoinkes, Office of Legislation and International Affairs, Patent and Trademark Office, Department of Commerce

Adviser

Rose Broome, Plant Variety Protection Office, Department of Agriculture

Private Sector Advisers

Dale L. Porter, General Counsel, Pioneer Hybrid International, Inc., Des Moines, Iowa
Willaim T. Schapaugh, Executive Vice President, American Seed Trade Association, Washington, D.C.
Sidney Williams, Associate Patent Counsel, Upjohn Company, Kalamazoo, Michigan

United States Delegation to the International Council For the Exploration of the Sea (ICES), 77th Statutory Meeting, the Hague, Netherlands, October 5–13, 1989

Representatives

John H. Steele, President, Woods Hole Oceanographic Institute, Woods Hole, Massachusetts
Michael F. Tillman, Senior Scientist for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce

Advisers

Vaughn C. Anthony, Chief, Conservation and Utilization Division, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atomospheric Administration, Department of Commerce, Woods Hole, Massachusetts
Edward B. Cohen, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Woods Hole, Massachusetts
Robert V. Miller, Deputy Director, National Marine Mammal Laboratory, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Seattle, Washington
Steven A. Murawski, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration,

Department of Commerce, Woods Hole, Massachusetts
Robert A. Murchelano, Chief, Environmental Processes Division, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Woods Hole, Massachusetts
William J. Overholtz, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Woods Hole, Massachusetts
John B. Pearce, Deputy Center Director, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Woods Hole, Massachusetts
Paul J. Rago, Chief, Resource Analysis Division, United States Fish and Wildlife Service, Department of the Interior, Kearneysville, West Virginia
Michael Reeve, Ocean Science Division, National Science Foundation
Frederick M. Serchuk, Northesst Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Woods Hole, Massachusetts
Kenneth Sherman, Acting Chief, Fisheries Ecology Division, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Woods Hole, Massachusetts
Carl J. Sindermann, Oxford Laboratory, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Oxford, Maryland
Michael P. Sissenwine, Chief, Research Planning and Coordination Staff, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Woods Hole, Massachusetts
Anne L. Studholme, Sandy Hook Laboratory, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Highlands, New Jersey
James J. Traynor, Alaska Fisheries Science Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Seattle, Washington

Private Sector Advisers

Edward D. Houde, Chesapeake Bilogical Laboratory, University of Maryland, Solomons, Maryland
Judith E. McDowell, Woods Hole Oceanographic Institute, Woods Hole, Massachusetts
Thomas Osborn, The Chesapeake Bay Institution, The Johns Hopkins University, Baltimore, Maryland
Charles H. Peterson, Institute of Marine Sciences, University of North Carolina, Morehead City, North Carolina,
G. Carleton Ray, University of Virginia, Charlottesville, Virginia
Brian J. Rothschild, Chesapeake Biological Laboratory, University of Maryland, Solomons, Maryland

United States Delegation to the International Lead and Zinc Study Group (ILZSG), Vienna, October 5–12, 1989

Representative

Scott Monier, Resources Officer, U.S. Embassy, London

Alternate Representative

Caterina Littleton, International Economist, Department of Commerce

Adviser

Eldwine DeSantis, International Economist, Office of International Commodities, Bureau of Economic and Business Affairs, Department of State
William D. Woodbury, Commodities Specialists for Lead, Bureau of Mines, Department of the Interior

Private Sector Advisers

Richard H. Bauer, Vice President, Eastern Alloys, P.O. Box Q, Maybrook, New York
Jeffrey Beck, Elders Resources, Ltd., 100 First Stamford Place, Stamford, Connecticut
Salvatore Cicolella, Vice President, Commercial, Big River Zinc, Suite 875, 7701 Forsyth Boulevard, Clayton, Missouri
Robert A. Flake, President, Metals Operations, Dresser Industries, Inc., P.O. Box 6504, Houston, Texas
John K. Likarish, Ore Department, ASARCO Incorporated, 180 Maiden Lane, New York, New York
Gregory E. McClain, Sales Manager, Raw Material, Suite 400, 11885 Lackland Road, St. Louis, Missouri

United States Delegation to the Plenary Meeting, 48th Session of the International Cotton Advisory Committee (ICAC), Scottsdale, October 2–6, 1989

Representatives

Richard T. Crowder, Undersecretary for International Affairs and Commodity Programs, Department of Agriculture
William L. Davis, Agricultural Counselor, American Embassy, Mexico City

Alternate Representative

Harry C. Bryan, Director, Tobacco, Cotton and Seeds Division, Foreign Agricultural Service, Department of Agriculture

Advisers

Russel E. Barlowe, Fibers Analyst, World Agricultural Outlook Board, Department of Agriculture
Charles V. Cunningham, Deputy Director, Analysis Division, Agricultural Stabilization and Cooperative Service, Department of Agriculture
Roy S. Evans, Jr., Senior Economist, Economic Research Service, Department of Agriculture
Geron E. Rathell, Marketing Specialist, Tobacco, Cotton and Seeds Division, Foreign Agricultural Service, Department of Agriculture
William R. Steiglemann, Office of Food Policy, Bureau of Economic and Business Affairs, Department of State

Private Sector Advisers

Karle N. Billing, Executive Vice President, American Cotton Shippers Association, P.O. Box 3366, Memphis, Tennessee
Donald B. Conlin, Chairman, New York Cotton Exchange, 4 World Trade Center, New York, New York
J. Nicholas Hahn, President & CEO, Cotton Incorporated, 1370 Avenue of the Americas, New York, New York
Bruce Heiden, H—FOUR Farms, P.O. Box 428, Buckeye, Arizona
Hank Hodges, Chairman, AMCOT, P.O. Box 547, Greenwood, Mississippi
K. Adrian Hunnings, Executive Director, Cotton Council International, 1110 Vermont Ave., Washington, D.C.
Joseph J. O'Neill, President, New York Cotton Exchange, 4 World Trade Center, New York, New York
Karl W. Sears, Consultant to the Executive Vice President, National Cotton Council, 1918 North Parkway, Memphis, Tennessee
Fred W. Traylor, President, American Cotton Shippers Association, P.O. Box 472, Lubbock, Texas

Observers

Priscilla Andrew, Agricultural Economist, Tobacco, Cotton and Seeds Division, Foreign Agricultural Service, Department of Agriculture
Steve Beasley, Agricultural Economist, Tobacco, Cotton and Seeds Division, Foreign Agricultural Service, Department of Agriculture

Jesse F. Moore, Director, Cotton Division, Agricultural Marketing Service, Department of Agriculture

United States Delegation to the Tenth Inter-American Indian Congress Organization of American States (OAS), San Martin De Los Andes, Argentina, October 2–6, 1989

Representative

Sherryle J. Vigil, Superintendent, Bureau of Indian Affairs, Department of the Interior

Advisers

Margarita Riva-Geoghegan, Alternate Representative to the Organization of American States
Alicia M. Cruz Telles, Housing Program Specialist, Bureau of Indian Affairs, Department of the Interior

Private Sector Advisers

Arcadio Gustlem, Chairman, Pascua Yaqui Tribe, Pascua Yaqui
Twila Martin-Kekahbah, Tribal Chairperson,Turtle Mountain Band of Chippewa Indians, Chippewa

United States Delegation to the 12th Regular Meeting of the International Commission For the Conservation of Atlantic Tunas (ICCAT), Madeira, Portugal, November 13–17, 1989

Commissioners

The Honorable Carment J. Blondin (Head of Delegation), Deputy Assistant Secretary for International Trade, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
The Honorable Michael B. Montgomery, San Marino, California
The Honorable Leon J. Weddig, National Fisheries Institute, Washington, DC.

Congressional Staff Advisers

Rodney H. Moore, Staff Member, Merchant Marine and Fisheries Committee, United States House of Representatives
James K. McCallum, Staff Member, Merchant Marine and Fisheries Committee, United States House of Representatives
Jeffrey R. Pike, Staff Member, Merchant Marine and Fisheries Committee, United States House of Representatives

Advisers

Bradford E. Brown, Southeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Brian S. Hallman, Deputy Director, Office of Fisheries Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Walter Nelson, Southeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Katherine Rodriquez, Northeast Region, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Rebecca Rootes, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Richard Stone, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce

Private Sector Adviser

Gordon C. Broadhead, Living Marine Resources, Incorporated, San Diego, California
Frank Carlton, National Coalition for Marine Conservation, Savannah, Georgia

United States Delegation to the 12th Regular Meeting of the International Commission For the Conservation of Atlantic Tunas (ICCAT), Madeira, Portugal, November 13–17, 1989

Commissioners

The Honorable Carmen J. Boldin (Head of Delegation), Deputy Assistant Secretary for International Trade, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
The Honorable Michael B. Montgomery, San Marino, California
The Honorable Leon J. Weddig, National Fisheries Institute, Washington, D.C.

Congressinal Staff Advisers

James K. McCallum, Staff Member, Merchant Marine and Fisheries Committee, United States House of Representatives
Jeffrey R. Pike, Staff Member, Merchant Marine and Fisheries Committee, United States House of Representatives

Advisers

Bradford E. Brown, Southeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Brian S. Hallman, Deputy Director, Office of Fisheries Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Walter Nelson, Southeast Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Katherine Rodriquez, Northeast Region, National Marine Fisheries Serivce, National Oceanic and Atmospheric Administration, Department of Commerce
Rebecca Rootes, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
Richard Stone, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce

Private Sector Adviser

Gordon C. Broadhead, Living Marine Resources, Incorporated, San Diego, California

United States Delegation to the Council and Committee Meetings International Natural Rubber Organization (OECD), Kuala Lumpur, November 6–10, 1989

INRO Council and the Committee on Administration Representative

Jeffrey Cunningham, Deputy Director, Office of International Commodities, Bureau of Economic and Business Affairs, Department of State

Alternate Representative

Fredric W. Siesseger, Director, Primary Commodities Division, Department of Commerce

Adviser

David Miller, Economic Officer, U.S. Embassy, Kuala Lumpur

Committee on Buffer Stock Operations, Statistics, and Other Measures Representative

Fredic W. Siesseger, Director, Primary Commodities Division, Department of Commerce

Alternative Representative

Jeffrey Cunningham, Deputy Director, Office of International Commodities, Bureau of Economic and Business Affairs, Department of State

Adviser

David Miller, Economic Officer, U.S. Embassy, Kuala Lumpur

Private Sector Advisers

Peter W.C. Tan, Managing Director, Goodyear Orient Private Ltd., Singapore
Charles B. Petit, Manager, Firestone Singapore Ltd., Singapore

Harold Ross Miller, Managing Director, Goodrich Co. Pvt., Ltd., Singapore

United States Delegation to the 36th Annual Meeting of the International North Pacific Fisheries Commission (INPFC), Seattle, Washington, November 6–10, 1989

Commissioners

The Honorable (Head of Delegation) Richard B. Lauber, Chairman, U.S. Section, Homer, Alaska
The Honorable Alec W. Brindle, Ward's Cove Packing Company, Seattle, Washington
The Honorable Steven Pennoyer, Regional Director for Alaska, National Oceanic and Atmospheric Administration, Department of Commerce, Juneau, Alaska
The Honorable Clement V. Tillion, Fisherman, Halibut Cove, Alaska

Adviser

Jeffrey A. Miotke, Office of Fisheries Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Private Sector Advisers

David L. Allison, Attorney, Juneau, Alaska
Joan L. Bergy, Consumer Adviser, Mercer Island, Washington
Alvin P. Burch, Fisherman, Kodiak, Alaska
Mark T. Coles, Alaska Fisherman's Union, Seattle, Washington
Sam Cotton, U.S. Advisory Committee, International North Pacific Fisheries Commission, Juneau, Alaska
George P. Easley, Fisherman, Astoria, Oregon
John Gilbert, Vice Chairman, U.S. Adivsory Committee, International North Pacific Fisheries Commission, Seattle, Washington
William E. Gilbert, Fisherman, Bainbridge Islands, Washington
Adelheid Herrmann, U.S. Advisory Committee, International North Pacific Fisheries Commission, Juneau, Alaska
M.E. Islieb, Fisherman, Juneau, Alaska
Richard Jacobson, Fisherman, Sand Point, Alaska
Gordon Jensen, Petersburg Vessel Owners Association, Petersburg, Alaska
Mark T. Lundsten, Fisherman, Seattle, Washington
Charles H. Meacham, Fisheries Consultant, Anchorage, Alaska
Henry Mitchell, Director, Bering Sea Fishermen's Association, Anchorage, Alaska
Dean Paddock, U.S. Advisory Committee, International North Pacific Fisheries Commission, Seattle, Washington
Hugh Reilly, III, President, Westward Trawlers, Inc., Seattle, Washington
Jeffrey R. Stephan, United Fishermen's Marketing Association, Kodiak, Alaska
Arliss Sturgulewski, Senator, Alaska State Legislature, Anchorage, Alaska
Fred Zharoff, Senator, Alaska State Legislature, Kodiak, Alaska

United States Delegation to the World Intellectual Property Organization, Second Session of the Committee of Experts on Model Provisions for Legislation in the Field of Copyright, Geneva, Switzerland, November 6–10, 1989

Representative

Ralph Oman, Register of Copyrights, Library of Congress

Alternate Representative

Lewis Flacks, Policy Planning Adviser, Copyright Office, Library of Congress
Harvey J. Winter, Director, Office of Business Practices, Bureau of Economic and Business Affairs, Department of State

Adviser

Richard Owens, Attorney Adviser, Office of Legislation and International Affairs, Patent and Trademark Office, Department of Commerce

Private Sector Adviser

Morton David Goldberg, Schwab, Goldberg, Price, and Dannay, New York, New York

United States Delegation to the 96th Session of the Council, Food and Agriculture Organization (FAO), Rome, November 6–10, 1989

Representative

Gerald Monore, United States Representative to the United Nations Agencies for Food and Agriculture, Rome

Alternates

E. Wayne Denney, International Relations Advisor, International Organization Affairs, Office of International Cooperation and Development, Department of Agriculture
Joan Dudick-Gayoso, Director, Office of International Development Assistance, Bureau of International Organization Affairs, Department of State

Advisers

Dawson Ahalt, Agricultural Attache, United States Mission to the United Nations Agencies for Food and Agriculture, Rome
Steven Hill, United States Mission to the United Nations Agencies for Food and Agriculture, Rome
Teresa D. Hobgood, Office of United States System Budgets, Bureau of International Organization Affairs, Department of State
David Joslyn, United States Mission to the United Nations Agencies for Food and Agriculture, Rome
David McGaffey, Deputy Director, Office of International Development Assistance, Bureau of International Organization Affairs, Department of State
Richard Seifman, United States Mission to the United Nations Agencies for Food and Agriculture, Rome

Private Sector Adviser

Daniel G. Amstutz (former Under Secretary of Agriculture for International Affairs and Commodity Programs), Arlington, Virginia

United States Delegation to the CSCE Meeting on the Protection of the Environment, Sofia, October 16–November 3, 1989

Representative

Richard J. Smith, Principal Deputy Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State

Alternative Representative

Joshua Gilder, Deputy Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State

Senior Adviser

The Honorable Sol Polansky, United States Ambassador, Sofia

Advisers

Susan Biniaz, Attorney-Advisor, Office of the Assistant Legal Advisor for Oceans, International Environmental and Scientific Affairs, Department of State
Orest Deychakiwsky, Staff Member, Commission on Security and Cooperation in Europe
Jane Sharp Fisher, Deputy Staff Director, Commission on Security and Cooperation in Europe
John Gustafson, Chemical Emergency Preparedness and Prevention, Office of Solid Waste and Emergency Response, Environmental Protection Agency
Robert Hand, Staff Member, Commission on Security and Cooperation in Europe

Ronald A. Kreizenbeck, Deputy Director, Office of Marine and Estuarine Protection Water Office, Environmental Protection Agency
James L. Makris, Director, Chemical Emergency Preparedness and Prevention, Office of Solid Waste and Emergency Response, Environmental Protection Agency
Breck Milroy, Office of Environmental Protection, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State
Maria Pavlova, Expert on Toxicology, Region II, Environmental Protection Agency
Susan Richwagen, Office of European Security and Political Affairs, Bureau of European and Canadian Affairs, Department of State
Jerry Scott, Public Affairs Adviser, U.S. Information Agency
Harlan Strauss, Special Assistant to the Deputy Under Secretary, office of the Secretary of Defense
Gary R. Waxmonsky, Acting Director, Bilateral Branch, Office of International Activities, Environmental Protection Agency
Samuel Wise, Staff Director, Commission on Security and Cooperation in Europe

Public Sector Advisers

Joni Lynn Bosh, Consultant, Phoenix, Arizona
Stephen C. Braverman, Attorney, Baskin, Flaherty, Elliott and Maninno, Philadelphia, Pennsylvania
Penn Kemble, Senior Associate, Freedom House, Washington, D.C.

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DEPARTMENT OF THE TREASURY

Office of Tax Analysis

Intent to Examine Depreciation of Cars and Light Trucks, Crop-Bearing Vines, Assets Used in the Manufacture of Chemical and Allied Products, and Assets Used to Provide Telecommunications Services, and Notice of Public Meetings

The Depreciation Analysis Division of the Office of Tax Analysis, U.S. Department of the Treasury, intends to initiate studies of cars and light trucks, crop-bearing vines, assets used in the manufacture of chemical and allied products, and assets used to provide telecommunications services.

Pursuant to the mandates of the Tax Reform Act of 1986 (Pub. L. 99-514), the Depreciation Analysis Division will solicit information relating to the anticipated useful life and anticipated decline in economic value of the above assets from owners of these assets. This information, together with additional information such as the depreciation methods used in accounting for such assets in financial reports, and the terms under which such assets are financed or leased, will be used to determine appropriate class lives for these assets.

The Depreciation Analysis Division will hold public meetings with all interested parties to discuss the precise definition of the assets to be included in these studies, the specific nature of the information sought, and other related issues. The meetings are scheduled for:

Cars and light trucks: Tuesday, January 23, 1990, from 10:00 a.m. to 12:00 noon.

Crop-bearing vines: Thursday, January 25, 1990, from 10:00 a.m. to 12:00 noon.

Assets used to provide telecommunications services: Tuesday, February 13, 1990, from 10:00 a.m. to 12:00 noon.

Assets used in the manufacture of chemicals and allied products: Tuesday, February 27, 1990, from 10:00 a.m. to 12:00 noon.

Each of these meetings will be held in Room 4125 of the Treasury Department, 15th Street and Pennsylvania Avenue, Washington, DC.

Names of those wishing to attend the meeting, and any inquiries, comments, or requests for materials relating to these studies should be sent to: Depreciation Analysis Division, Office of Tax Analysis, Room 1051, Department of the Treasury, 15th & Pennsylvania Avenue, NW., Washington, DC 20220. The telephone number is (202) 566-8784.

Dated: December 6, 1989.

Kenneth W. Gideon,

Assistant Secretary (Tax Policy).

[FR Doc. 89-29718 Filed 12-20-89; 8:45 am]
BILLING CODE 4810-25-M

Fiscal Service

Surety Companies Acceptable on Federal Bonds; Liquidation; First California Property and Casualty Insurance Co.

First California Property and Casualty Insurance Company, a California Corporation, formerly held a Certificate of Authority as an acceptable surety on Federal bonds and was last listed as such at 50 FR 27114, July 1, 1985. The company's authority was terminated by the Department of the Treasury effective June 30, 1986. Notice of the termination was published in the **Federal Register** of July 11, 1986, on page 25287.

On October 30, 1989, upon a petition by the Insurance Commissioner of the State of California, the Los Angeles Superior Court issued an Order of Liquidation with respect to First California Property and Casualty Insurance Company. Mrs. Roxani Gillespie, the Insurance Commissioner, was appointed as the Liquidator of First California Property and Casualty Insurance Company. All persons having claims against First California Property and Casualty Insurance Company must file their claims, by May 14, 1990, or be barred from sharing in the distribution of assets.

All claims must be filed in writing and shall set forth the amount of the claim, the facts upon which the claim is based, any priorities asserted, and any other pertinent facts to substantiate the claim. It is recommended that Federal Agency claimants asserting priority status under 31 U.S.C. 3713 who have not yet filed their claim should do so, in writing, to: Commercial Litigation Branch, Civil Division, Department of Justice, P.O. Box 875, Ben Franklin Station, Washington, DC 20044-0875, Attn: Ms. Sandra P. Spooner, Deputy Director.

The above office will be consolidating any and all claims against First California Property and Casualty Insurance Company, on behalf of the United States Government. Any questions concerning filing of claims may be directed to Ms. Spooner at (202 or FTS 724-7194).

Questions concerning this notice may be directed to the Department of the Treasury, Financial Management Service, Finance Division, Surety Bond Branch, Washington, DC 20227, Telephone 202-287-3921.

Dated: December 15, 1989.

Mitchell A. Levine,

Assistant Commissioner, Comptroller, Financial Management Service.

[FR Doc. 89-29674 Filed 12-20-89; 8:45 am]
BILLING CODE 4810-35-M

Bureau of the Public Debt; Reorganization to Establish an Office of Public Debt Accounting

AGENCY: Bureau of the Public Debt, Fiscal Service, Treasury.

ACTION: Notice of reorganization.

SUMMARY: This notice announces to the Public that the Bureau of the Public Debt will establish an Office of Public Debt Accounting (OPDA). The establishment was undertaken to provide a more appropriate organizational structure and a more responsive and controlled debt accounting program.

EFFECTIVE DATE: December 31, 1989.

FOR FURTHER INFORMATION CONTACT: Van Zeck, Deputy Commissioner, Bureau of the Public Debt, E Street Building, Washington, DC 20239–0001, 202–376–4302.

SUPPLEMENTARY INFORMATION: The new OPDA will consist of the Office of the Assistant Commissioner and two divisions. One of the divisions will be responsible for accounting operations, and the other will be responsible for accounting policy and development.

Currently, accounting for the public debt is performed by a division within the Office of Securities and Accounting Services (OSAS). OSAS is responsible for the direction of two other major programs—the issuing, servicing, and redemption of direct-access marketable securities and special purpose securities.

The mission of the Bureau of the Public Debt is to borrow money needed to operate the Federal Government when expenditures exceed revenues, and to account for the resulting public debt. The outstanding public debt currently stands at over $2.9 trillion. Public debt cash deposit and withdrawal transactions amount to $1.2 trillion annually—over one-half of the Government's yearly cash flow. The $240 billion in annual interest on the debt constitutes over 20 percent of total Government outlays and the third largest individual component of the Federal Government's budget.

Under the general authority vested in the Secretary of the Treasury in 5 U.S.C. sec. 301 and 31 U.S.C. sec. 321, approval for the reorganization was granted on December 7, 1989, by the Assistant Secretary of the Treasury (Management).

Dated: December 18, 1989.

Richard L. Gregg,

Commissioner.

[FR Doc. 29702 Filed 12–20–89; 8:45 am]

BILLING CODE 4810–40–M

Office of Thrift Supervision

Application for Real Estate for Office and Related Facilities

Date: December 15, 1989.

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice.

SUMMARY: The public is advised that the Office of Thrift Supervision ("OTS") has submitted a request for a new information collection entitled "Application for Real Estate for Office and Related Facilities" to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35).

The information collected enables the OTS to comply with the requirements of § 545.77 of the Federal Savings Association Regulations. The information will be used to determine whether the institution's rate of asset growth and potential for earnings growth support the investment at this time. We estimate that it will take approximately 4 hours per respondent to complete the information collection.

DATE: Comments on the information collection request are welcome and should be received on or before January 2, 1990.

ADDRESS: Comments regarding the paperwork-burden aspects of the request should be directed to: Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503. Attention: Desk Officer for the Office of Thrift Supervision.

The OTS would appreciate commenters sending copies of their comments to the information contact provided below.

Request for copies of the proposed information collection requests and supporting documentation are obtainable at the Office of Thrift Supervision address given below:

Director, Information Services Division, Communications Services, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552. Phone: 202–416–2751.

FOR FURTHER INFORMATION CONTACT: Kathleen O. Willard, (202) 906–6789, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

By the Office of Thrift Supervision.

M. Danny Wall,

Director.

[FR Doc. 89–29670 Filed 12–20–89; 8:45 am]

BILLING CODE 6720–01–M

Application for Response to Notice of Intent to Issue Capital Directives

Date: December 15, 1989.

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice.

SUMMARY: The public is advised that the Office of Thrift Supervision ("OTS") has submitted a request for a new information collection entitled "Application for Response to Notice of Intent to Issue Capital Directives" to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35).

The information collected enables the OTS to comply with the requirements of § 567.4 of the Savings Association Regulations. The information will be used to determine whether the savings association's response to the notice of intent to issue a capital directive is adequate. The savings association must submit its own compliance plan, or may propose an alternative plan. The response should include any information that the savings association wishes the Director of Enforcement to consider and the Senior Deputy Director for Supervision Operations to review in deciding whether to recommend the OTS issue a capital directive. The appropriate state supervisor may also submit a response to the Director of Enforcement. These responses must be in writing and delivered to the Director of Enforcement within 30 days after receipt of the notices. We estimate that it will take approximately 8 hours per respondent to complete the information collection.

DATE: Comments on the information collection request are welcome and should be received on or before January 2, 1990.

ADDRESS: Comments regarding the paperwork-burden aspects of the request should be directed to: Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: Desk Officer for the OTS.

The OTS would appreciate commenters sending copies of their comments to the information contact provided below.

Request for copies of the proposed information collection requests and supporting documentation are obtainable at the OTS address given below:

Director, Information Services Division, Communications Services, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552, Phone: 202–416–2751.

FOR FURTHER INFORMATION CONTACT: Kathleen O. Willard, (202) 906–6789, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

By the Office of Thrift Supervision.

M. Danny Wall,

Director.

[FR Doc. 89–29671 Filed 12–20–89; 8:45 am]

BILLING CODE 6720–01–M

Application for Management Official Interlocks

Date: December 15, 1989.

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice.

SUMMARY: The public is advised that the Office of Thrift Supervision ("OTS") has submitted a request for a new information collection entitled "Application for Management Official Interlocks" to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35).

The information collected enables the OTS to comply with the requirements of section 563f of the Savings Association Regulations. The information will be used to determine whether the management official interlock would be beneficial to the institution in question. We estimate that it will take approximately 4 hours per respondent to complete the information collection.

DATE: Comments on the information collection request are welcome and should be received on or before January 2, 1990.

ADDRESS: Comments regarding the paperwork-burden aspects of the request should be directed to: Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503. Attention: Desk Officer for the Office of Thrift Supervision.

The OTS would appreciate commenters sending copies of their comments to the information contact provided below.

Request for copies of the proposed information collection requests and supporting documentation are obtainable at the Office of Thrift Supervision address given below:

Director, Information Services Division, Communications Services, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552, Phone: 202–416–2751.

FOR FURTHER INFORMATION CONTACT: Kathleen O. Willard, (202) 906–6789, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

By the Office of Thrift Supervision.

M. Danny Wall,

Director.

[FR Doc. 89–29672 Filed 12–20–89; 8:45 am]

BILLING CODE 6720–01–M

Application for Mutual Capital Certificates

Date: December 15, 1989.

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice.

SUMMARY: The public is advised that the Office of Thrift Supervision ("OTS") has submitted a request for a new information collection entitled "Application for Mutual Capital Certificates" to the Office of Management and Budget for approval in accordanoe with the Paperwork Reduction Act (44 U.S.C. chapter 35).

The information collected enables the OTS to comply with the requirements of § 563.74 of the Savings Association Regulations. The information will be used to determine whether the institution has complied with the requirements contained in the aforesaid § 563.74 and that the issuance of the certificates is authorized by applicable law and regulation and is not inconsistent with any provision of the applicant's charter, constitution, or bylaws. In addition, the OTS must ensure that the certificate is in the proper form. We estimate that it will take approximately 6 hours per respondent to complete the information collection.

DATE: Comments on the information collection request are welcome and should be received on or before January 2, 1990.

ADDRESS: Comments regarding the paperwork-burden aspects of the request should be directed to: Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503. Attention: Desk Officer for the Office of Thrift Supervision.

The OTS would appreciate commenters sending copies of their comments to the information contact provided below.

Request for copies of the proposed information collection requests and supporting documentation are obtainable at the Office of Thrift Supervision address given below:

Director, Information Services Division, Communications Services, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552. Phone: 202–416–2751.

FOR FURTHER INFORMATION CONTACT: Kathleen O. Willard, (202) 906–6789, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

By the Office of Thrift Supervision.

M. Danny Wall,

Director.

[FR Doc. 29673 Filed 12–20–89; 8:45 am]

BILLING CODE 6720–01–M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 244
Thursday, December 21, 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).

NATIONAL MEDIATION BOARD

TIME AND DATE: 2:00 P.M., Wednesday, January 10, 1990.

PLACE: Board Hearing Room 8th Floor, 1425 K Street, NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Ratification of the Board actions taken by notation voting during the month of December, 1989.

2. Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

SUPPLEMENTARY INFORMATION: Copies of the monthly report of the Board's notation voting actions will be available from the Executive Director's office following the meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Charles R. Barnes, Executive Director, Tel: (202) 523–5920.

Date of Notice: December 15, 1989.

Charles R. Barnes,

Executive Director, National Mediation Board.

[FR Doc. 89–29792 Filed 12–19–89; 1:09 pm]
BILLING CODE 7550-01-M

Corrections

Federal Register
Vol. 54, No. 244
Thursday, December 21, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Rescheduling Unfair Labor Practice Hearings

Correction

In rule document 89-29172 beginning on page 51196 in the issue of Wednesday, December 13, 1989, make the following correction:

§ 102.16 [Corrected]

On page 51197, in the second column, in § 102.16(b), in the first line, "Where" should be removed.

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 24, 132, 141, 142, and 143

[T.D. 89-104]

RIN 1515-AA72

Customs Regulations Amendments Concerning Statement Processing and Automated Clearinghouse

Correction

In rule document 89-28513 beginning on page 50493 in the issue of Thursday, December 7, 1989, make the following corrections:

1. On page 50493, in the third column, under **SUPPLEMENTARY INFORMATION**, in the first paragraph, in the ninth line from the bottom, "filter" should read "filer".

2. On page 50494, in the first column, in the first *Response*, in the third line from the bottom, after "largest" insert "possible".

3. On the same page, in the same column, in the second *Comment*, in the fifth line, "can" was misspelled.

BILLING CODE 1505-01-D

federal register

Thursday
December 21, 1989

Part II

Small Business Administration

13 CFR Part 121

Small Business Size Standards; Final and Interim Final Rules

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards

AGENCY: Small Business Administration.

ACTION: Final and interim final rules.

SUMMARY: The proposed regulation published August 31, 1987 (52 FR 32870) governing the procedural rules relative to SBA's size determination program is now promulgated in final form, except for §§ 121.403 and 121.1202(a) which define "business concern or concern" for the purpose of Small Business Administration (SBA) programs. Sections 121.403 and 121.1202(a) are promulgated as interim final rules.

The final rule is intended to improve the conceptual framework of small business size standards by reorganizing the current rules to obtain a more logical progression, by clarifying existing ambiguities in the current rules, by conforming these rules to present SBA policies and precedents, and by providing slight substantive modifications where necessary. The reorganized rules are intended to be easier to utilize and should make more sense to the public. The final rule specifically identifies how a business entity can be considered small for each of SBA's programs and separates the size eligibility requirements for each program into separate sections for ease of use. The final rule incorporates several changes made to the Small Business Act by the Continuing Resolution for Fiscal Year 1987, Public Law 99–591, and the National Defense Authorization Act for Fiscal Year 1987, Public Law 99–661, and makes the procedures for small business size protests and size appeals more understandable. This final rule does not, however, change the specific size standards which apply to particular industries and Standard Industrial Classification Codes. SBA published a complete revision to the substantive size standards themselves on February 9, 1984, 49 FR 5024, and a final rule which conformed the size standards to the newly revised SIC system on May 25, 1988, 53 FR 18821 (interim final version was published January 6, 1987, 52 FR 397).

The interim final rule found at § 121.403 restates the existing definition of "business concern or concern" without adding a 51 percent United States ownership requirement, which was included in the proposed rule. This longstanding definition requires a "business concern" to be organized for profit, to have a place of business located in the United States, and to make a significant contribution to the United States economy through payment of taxes and/or use of American products, material and/or labor. The interim final rule found at § 121.1202(a) adopts the definition of "concern" used by SBA for the Small Business Innovation Research Program since August, 1983. This definition includes a 51 percent U.S.-ownership requirement.

DATES: *Effective date:* The provisions of this final and interim final rule shall be effective January 1, 1990. Comments on the interim final rules (§§ 121.403 and 121.1202(a)) should be submitted on or before February 20, 1990.

ADDRESS: Written comments on the interim final rules (§§ 121.403 and 121.1202(a)) may be sent to Gene VanArsdale, Director, Office of Procurement Policy and Liaison, Small Business Administration, Room 624, 1441 L Street NW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Gene F. VanArsdale, Director, Office of Procurement Policy and Liaison, (202) 653–6588.

SUPPLEMENTARY INFORMATION: Pursuant to subsection 3(a) of the Small Business Act, 15 U.S.C. 632(a), the Small Business Administration is charged with the responsibility of setting size standards by which a business entity may be judged to be small. SBA published these rules as one proposed rule on August 31, 1987 (52 FR 32870) and solicited public comment on that proposal for sixty days. During the public comment period SBA received 39 separate comment letters from a wide range of interested parties including individuals, small businesses, trade associations and other representatives of small businesses, other Federal agencies, and representatives of the Canadian government. An overview of the comments, SBA's responses thereto and other changes to the proposed regulations are provided below.

These rules do not change the substantive (numerical) size standards which are applicable to particular industries or Standard Industrial Classification (SIC) Codes. SBA had published a major revision to its substantive size standards in the Federal Register on February 9, 1984, 49 FR 5024. Therefore, SBA did not solicit and did not receive any comments on individual size standards. This regulation reorganizes the current procedural size rules to obtain a more logical progression, clarifies ambiguities in the previous rules, conforms the rules to present SBA policies and precedents, and provides slight substantive modifications where necessary. The previous regulations combined multiple rules and concepts in a single section. These regulations provide separate regulatory sections for each rule, for ease in citation and location.

These rules also provide a new numbering system for SBA's size regulations (13 CFR Part 121). The new numbering system is designed to: (1) Provide greater ease in locating rules; (2) provide a more accurate system for citation and reference to specific provisions; (3) rearrange substantive provisions in a more logical sequence; (4) eliminate single regulatory sections containing a multiplicity of rules; (5) eliminate large paragraph provisions in which significant rules were stated consecutively, making citation and location of such rules difficult; and (6) provide a numbering system that is more adaptable to future expansion and amendments.

Overview of Public Comments, SBA's Responses Thereto and a Description of Changes to the Proposed Rule

Section 121.101, which sets forth the Congressional policy that the Government should ensure that a fair proportion of the Government's procurements are placed with small businesses, elicited comments asking for a more detailed discussion of the definition of "fair proportion" as it relates to the "30 percent rule" mandated by Public Laws 99–591 and 99–661. Section 921 of Public Laws 99–591 and 99–661 was repealed by Public Law 100–656. Therefore, all references to the requirements of that section have been deleted in the final rule.

Section 121.201 states the purpose of the SBA size program. It is derived from §§ 121.1(a) and 121.1(e) of the previous regulations which were clarified for easier use. The concept of "cradle to the grave" in the previous regulation has been removed from this rule to avoid the inference that trying to remain small is something illicit. Some commenters urged SBA to amend this section to strengthen the idea that small business assistance should not be regarded as permanent in nature. SBA believes that the section, with minor editorial changes to the proposal, clearly expresses the purposes of SBA's size program.

Sections 121.301 through 121.305 set forth the functions and responsibilities of SBA offices as they relate to the size program. As a result of comments received, SBA has added a requirement to § 121.301(b) that a request for a new size standard or a size standard change must specify how such change would further the purposes of the Small

Business Act in addition to presenting other specific reasons and justifications for changing or adding a new size standard. SBA has also amended § 121.302 to clarify that the Office of General Counsel represents the agency in size matters before the Comptroller General and other agencies.

Sections 121.401 through 121.407 contain definitions of various terms used throughout the size regulations. Within these definitions are included substantive provisions of size eligibility. Definitions of the following terms, among others, are included in these sections: Affiliation; annual receipts; business concerns or concern; employees; key employees; not dominant in field of operations; and number of employees. Section 121.401 sets forth detailed rules on affiliation. Exclusions from the affiliation rule are described separately in § 121.401(b).

The exclusion relating to Small Business Investment Companies (SBICs) is identical to the former regulation and is based on an earlier SBA regulation, which prohibited SBICs from controlling the small businesses which they help finance. The limitation in the former exclusionary rule to "State" development companies is deleted. Section 121.401(b) includes both State and local development companies within the exclusion because there is no substantive reason to limit the exclusion to State development companies only. In addition, concerns owned by Indian tribes or Alaska Regional or Village Corporations are added to the exclusion. This is consistent with the statutory preferences accorded Indian tribes.

SBA received several comments which suggested that SBA clarify the exclusion with regard to tribally owned concerns. The commenters advocated that, as is required for other SBA programs, concerns that are at least 51 percent owned and controlled by Indian Tribes or Alaskan Regional or Village Corporations should be considered tribally owned concerns and therefore, excluded from the affiliation requirements of this section. SBA has adopted this comment and has revised § 121.401(b) accordingly.

The rule concerning Nature of Control is repeated in this final rule, with clarifying language. The concept has been revised in § 121.401(d) to emphasize "Identity of Interest" as a basis of "control" and "affiliation."

In proposed § 121.401(e), SBA proposed to revise its earlier rule on control through stock ownership to require minority interest holders owning holdings which are large as compared with any other stock holding to have an "identity of interest" in order for SBA to presume that each has the power to control the concern. One commenter expressed the view that this change would permit a business concern owned by three giant companies to be considered small if such companies did not share an identity of interest. SBA considered the comment and has amended § 121.401 to delete the requirement of an identity of interest. The amended section also clarifies that, in such a case, each firm would individually be presumed to control the concern and the employees or receipts of each owner firm would be aggregated with those of the concern to determine the concern's size. Therefore, where three large companies (X, Y and Z) own equal shares of concern G, each would be presumed to control G. In turn, G would be determined to be large because the aggregate of its employees and those of X, Y or Z would exceed the applicable size standard.

Proposed § 121.401(k) (affiliation through contractual relationships) is a new provision which defines affiliation to also include a situation where one concern is dependent upon another for contracts and business to such a degree that its economic viability would be threatened without such contracts or business. SBA received a comment suggesting that SBA consider permitting a concern to be considered small despite such dependence if it is a start-up concern. SBA considered the comment but has decided to retain the provision unchanged. Regardless of the amount of time a concern has been in business, such a degree of dependence on another concern is appropriately treated as an affiliation.

Section 121.401(l)(1) concerns affiliation under joint venture arrangements. The proposed rule defined "joint venture" as an association of "concerns." One commenter pointed out that, because individuals are not "concerns," associations among individuals are excluded from the definition. SBA agrees with this comment and has added the word "individuals" to "concerns" in this section. A sentence has also been added to clarify that joint ventures may be no more than 49 percent owned or controlled by foreign business entities or individuals.

Another commenter was concerned that this section would prohibit Canadian firms from controlling or significantly participating in small business joint ventures. Except as related to the SBIR Program, these rules do not impose such a prohibition because the interim final rule defining "business concern" continues existing rules governing affiliation by joint venture. Joint ventures which are owned and controlled by one or more Canadian individuals or concerns and which meet the definition of "business concern" and the appropriate size standard may receive small business benefits.

Section 121.402 defines "annual receipts" for the purpose of computing size. A number of comments were received on this section. One commenter recommended that receipts of prime contractors collected on behalf of subcontractors should be excluded from the calculation of "receipts." This comment was considered and rejected. The definition of "annual receipts" has always included receipts on behalf of subcontractors. SBA believes the amount of such receipts is a factor in determining the size of a concern and, therefore, should not be excluded. Moreover, such exclusion could encourage concerns to subcontract large percentages of set-aside contracts, frequently to large concerns, in order to remain small, thereby defeating the purpose of the set-aside program.

Another commenter stated that it was unclear whether expenses incurred directly in performance of the contract should be subtracted when calculating gross receipts. Because such costs are not listed under the exclusions, they may not be subtracted. We do not believe the rule is unclear on this issue and therefore, have retained the original language in the final rule.

Another commenter stated that all non-fee/profit bearing revenue should be excluded from the calculation of "receipts" for purposes of determining a firm's size. SBA has rejected this comment because concerns might then manipulate their fee/profit arrangements to circumvent the small business size standard.

Another commenter objected to the exclusion of short years from the calculation of annual receipts as inappropriate in light of a new Internal Revenue Service requirement for subchapter S corporations which will create short years for many of such corporations. SBA considered this comment and has amended this final regulation to require short years to be included. The new calculation for average annual receipts involving short years would require the concern to look to its most recent three fiscal years, to take the sum of the receipts for the short year and the receipts for the two full fiscal years and to divide that sum by the number of weeks in the short year plus 104 (52 weeks times 2) to arrive at an average weekly receipts figure. This figure would then be multiplied by 52 to arrive at an (average) annual receipts

figure. SBA believes this method provides accurate and fair treatment of receipts where short years are involved.

Another commenter objected to the requirement that the accrual basis of accounting be used for purposes of determining size. The decision to impose this requirement was made after considerable research and discussion. SBA believes that requiring all concerns to use the accrual basis of accounting will result in a fairer and more equitable method for determining size. Furthermore, the smaller firms (those with annual receipts less than 75 percent of the size standard) are exempt from the requirement under paragraph (d)(2) of this section.

SBA did amend this section in one respect, however. In order to reduce confusion and avoid charges of vagueness, the language excluding amounts collected as an agent for another has been deleted. In its place new language has been inserted excluding only income received by real estate agents and travel agents in the form of gross bookings to be remitted to third parties. In such cases, only the commissions earned from such gross bookings are to be counted as income.

Section 121.403 defines "business concern or concern" for size purposes. A number of commenters objected to various aspects of this definition. One commenter urged that the definition be amended to include businesses which are U.S. citizens. Another commenter expressed the view that the requirement that 50 percent of the contract cost be performed in the United States was not practical. A number of commenters pointed out that the meaning of the language "including affiliates" in the first sentence of the proposed section was unclear and potentially overbroad. Contrary to the intent of the drafters, this language could be interpreted to prohibit concerns from having any non-profit affiliates. Several commenters, including representatives from the Canadian government, objected to the requirement that a "business concern" be 51 percent owned and controlled by U.S. citizens or lawfully admitted permanent resident aliens.

SBA has decided to retain the status quo with respect to the definition of "concern" in order to permit further review of the issues raised by public comment and by the passage of the Canada-United States Free Trade Agreement (approved and implemented on September 28, 1988, as Pub. L. 100-449, 102 Stat. 1851). Therefore, SBA is publishing this section and § 121.1202(a) as interim final rules. This section restates SBA's definition of "concern" previously found at 13 CFR 121.3(b) and applies to all small business programs, except SBA's Small Business Innovation Research (SBIR) Program. This longstanding definition requires a "business concern" to be organized for profit, to have a place of business located in the United States, and to make a significant contribution to the United States economy through payment of taxes and/or use of American products, material and/or labor.

The interim rule found at § 121.1202(a) adds a 51 percent U.S. ownership requirement to the definition of concern for purposes of the SBIR program that the concern be at least 51 percent owned. This is consistent with paragraph 4(g) of SBA's SBIR Program Policy Directive which has been in effect since 1983. The SBIR Program definition reflects congressional intent, as expressed in the legislative history to the SBIR Program authorizing legislation, that the SBIR Program assist U.S.-owned firms in developing innovations which could be used to bring the United States into technological parity with other countries (S. Rept. No. 194, 97th Cong., 1st Sess. (1981), H. Rept. No. 349, Part I, 97th Cong., 1st Sess. (1981), Cong. Rec. H. 3586, *et seq.*, June 17, 1982). SBA invites public comment on these interim final rules for 60 days from the date of this publication.

Section 121.404 defines the term "employees." One commenter was concerned that this definition was overly restrictive and suggested that temporary employees be counted only after they are employed by the contractor for a specific amount of time. SBA has rejected this comment for a number of reasons. First, if an employee is contributing his or her skill and labor to a concern, his or her status as a temporary or permanent worker is irrelevant in determining the firm's size. Second, if short-term temporary employees are not counted, many contractors could easily evade the size standard by employing a large labor force of temporary workers and firing those employees as they approach the time where they would have to be counted. Finally, the amount of time a temporary worker is employed by a contractor is factored into the calculation of number of employees since the calculation is based on employees during each pay period.

SBA is amending this section in the final rule to incorporate the principles set forth in its "Statement of General Policy," Feb. 20, 1986, 51 FR 6099. The proposed rule did not specifically include the factors listed in the policy statement; however, the policy statement was referred to in the portion of the preamble dealing with this section. The Statement of General Policy listed 11 factors to be considered in determining whether an employee of an employment agency hired by the contractor on a temporary basis should be considered an employee of the contractor. In the interests of clarity and for ease of reference, SBA has decided to list these 11 factors in the final rule.

Section 121.406 defines the term "Not dominant in field of operation." The proposed rule provided that a business concern falling within SBA's size standards is deemed not dominant in its industry or field of operation. Many commenters disagreed with this provision and suggested that SBA return to the former treatment of the term (13 CFR 121.3(c) (1988)). The majority felt that dominance was a separate issue from size and, therefore, should be treated separately. The commenters believed that a firm could be small and, nevertheless, still be dominant in its field of operation. SBA has considered these comments and has returned to the former interpretation of dominance in this final rule.

Section 121.501 provides that any proposed size standard change will be published in the Federal Register and will include a description of the various factors considered in devising the size standard. One commenter suggested that this section list the various factors SBA will consider in revising a size standard. It would be impractical and potentially misleading to list such factors in this section because the particular factors considered vary depending on the size standard being revised.

Section 121.502 of the proposed rule discussed the methodology for changing the size standards in four specific industry categories. This methodology was mandated by section 921 of Public Laws 99-591 and 99-661. Section 921 was repealed by Public Law 100-656. Therefore, the content of this section has been deleted and this section has been designated as reserved in the final rule.

Section 121.503 lists the basic sources of data used in establishing size standards. Two commenters noted that the Census Bureau's "Census of Service Industries" was not listed. This was an inadvertent error. The "Census of Service Industries" has been added to the list in this section in the final rule.

Section 121.601 contains the actual size standards by standard industrial classification (SIC) code. The table of size standards reflect current size standards to date, including the residual size standard of $3.5 million in annual receipts for industries not listed by SIC

code. (This standard is effective December 20, 1989. See 54 FR 47968.) A single table of size standards based on the 1987 SIC system is incorporated into this final rule replacing two tables of size standards in the previous regulation. Table 1 of the previous regulation listed size standards by 1972 SIC codes with corresponding 1987 SIC codes and size standards. Since the 1987 SIC codes have been in effect for three years and are no longer applicable to SBA programs, this table is not included in this regulation. Table 2 from the previous regulation is identical to the size standard table incorporated into this final rule.

The sections following § 121.700 in the proposed rule set forth the procedures for reviewing any size standard adjustments made pursuant to section 921 of Public Laws 99–591 and 99–661. Section 921 was repealed by Public Law 100–656. Therefore the requirements and procedures in these sections are no longer necessary and have been deleted in the final rule. Section 121.701 has been reserved in the final rule.

Sections 121.801 through 121.806 specify the size eligibility requirements for SBA's financial assistance programs. The reference to SBA's section 8(a) program in financial assistance programs in the predecessor size regulations is removed in this final rule. Size eligibility for the section 8(a) program is addressed separately in this revision.

Section 121.802 explains the establishment of the size standard for SBA's financial assistance programs. A dual size standard (must meet the size standard for the primary business of the applicant concern including its affiliates and for the applicant concern alone) is substituted for the predecessor rule (must meet the size standard only for the applicant, including affiliates). SBA was concerned with the inequity which arose under the previous regulation where a concern, without affiliates, would not qualify for assistance under its primary business size standard, whereas another applicant, in the same industry category, would qualify for the assistance because it has affiliates which place it in a different primary business category with a higher size standard.

SBA received only one comment concerning the entire size procedures for financial assistance programs, and this was an internal comment from an SBA official. Section 121.804(e) of this final regulation has been clarified in response to this comment to note that size determinations for disaster loans are the function of the SBA Disaster Assistance Divisions and not SBA Regional Offices. Thus, individuals seeking size determinations in connection with a disaster loan should submit a request for a formal size determination to the appropriate Disaster Area Office.

A new § 121.806, entitled "Size Eligibility for Business Loans Relating to Particular Procurements," has been added to reinstate and expand upon prior SBA policy. This provision allows a concern which received a particular procurement as a small business to be deemed small for purposes of size eligibility for financial assistance relating to that procurement. This policy is intended to eliminate potential conflicts between size standards for procurement purposes, which are based on the industry to which the procurement relates, and size standards for financial assistance, which are based on the primary industry of the applicant for financial assistance. Moreover, this policy is currently in place for the section 8(a) program. To the extent possible, SBA treats size standards issues the same for the small business set-aside and section 8(a) programs.

No other changes have been made to the financial assistance size procedures as they appeared in the proposed rule. The supplementary information to the proposed rule explains these procedures in detail, indicating the changes in the rules from the predecessor size regulations and the reasons for such changes. As such, this information is not repeated in this supplementary information to the final rule.

Sections 121.901 through 121.911 specify the rules concerning size eligibility for Government procurement programs, including the small business set aside program, SBA's Certificate of Competency program, and the Small Business Subcontracting Program authorized under section 8(d) of the Small Business Act, 15 U.S.C. 637(d). These rules are basically the same as those that were contained in § 121.5 of the former regulations, with clarifying language. The specific rules are separated from the multipurpose provisions of the former regulations and made independent sections for ease of location and citation. The rules are also repositioned to reflect a more orderly regulatory sequence.

Sections 121.902(b) and 121.908 clarify the apparent inconsistency between §§ 121.5(b)(1) and 121.5(c) of the former regulations. The apparent conflict stems from the wording in former § 121.5(b)(1) of this part which considered "the relative value of items in the procurement" as a factor in determining the appropriate SIC Code for a procurement, whereas former § 121.5(c) makes the "size standard for the item accounting for the greatest percentage of the contract value" in a multiple item procurement the appropriate size standard. In one instance, value is merely one of several factors to consider, while in the second it is the only factor.

SBA received five comments concerning these sections. Three commenters suggested minor word changes. For example, one commenter recommended that "the primary purpose of the contract" should be a factor in selecting the proper SIC Code under proposed § 121.902(b), while another suggested that the factor should be "the principal purpose" of the contract. SBA has selected the phrase "principal purpose" of the procurement as the key factor in selecting the proper SIC Code. SBA has also made one or two other minor wording changes in response to these comments.

One commenter asked for clarification as to how a procurement requiring more than one service should be treated if each has a different size standard (i.e., whether § 121.902(b) or § 121.907 should apply).

Section 121.902(b) applies to procurements of one end item (which may or may not contain more than one component). Section 121.907 applies to procurements which call for more than one end item. The commenter noted that § 121.907 seemed applicable, but that the supplementary information to the proposed rule stated that § 121.907 would not apply to true service contracts since the Government is really purchasing only one item.

Section 121.907 (derived from current § 121.5(c)) applies where there is more than one end item (e.g., military shirts and military boots) being procured. It was meant to apply also to the situation where more than one type of service is being procured, each having a different size standard, and it is desirable for all services to be performed by one contractor. Accordingly, § 121.907 has been clarified by adding a new paragraph (b). The supplementary information to the proposed rule did not intend to exclude multi-service contracts from the application of § 121.907. It merely intended to indicate that where one service is being procured, § 121.907 would not apply.

Similarly, § 121.907 has no application where the Government requires only one specific end item, which may or may not be comprised of more than one component. In a situation where only one end item is being procured (e.g., the procurement of a specific type of defense weapon made up of many parts,

the construction of a building, or even 1000 military coats), § 121.902(b) (derived from former 13 CFR 121.5(b)(1)) applies. The purpose of § 121.902(b) is to characterize or classify the nature of the procurement as either being one for services, supplies, or construction. The contracting officer must have the flexibility to consider the "principal purpose of the procurement" and what the Government is really purchasing in determining the proper SIC Code for such a procurement. While the value of the components is an important factor in determining the "principal purpose" of a single end item procurement, it is not the controlling factor in all cases. However, the contracting officer must have a good reason to classify a single end item procurement in a way that is inconsistent with the item accounting for the greatest percentage of the contract value.

The same clarifying language of §§ 121.902(b) and 121.907 has also been added to §§ 121.1102(b) and 121.1107, respectively, for application to section 8(a) awards.

Proposed § 121.902(d) would have permitted SBA, in connection with a formal size determination or size appeal, not only to clarify or complete an unclear or incomplete SIC Code designation (as permitted under former § 121.5(d)), but also to supply a missing SIC Code designation and to correct an incorrect designation in such context. In this final regulation, SBA has abandoned this proposal and has reinstated the former scope of authority which permits SBA only to clarify; complete or supply an unclear or incomplete SIC code designation in connection with a formal size determination or size appeal.

Section 121.904 clarifies the time at which size is determined for Government procurement programs. Except for applicants for Certificates of Competency (COC) relating to unrestricted procurements, size would still be determined as of the date of the concern's written self-certification as a small business. The concern would be required to certify that it is small for a particular contract at the time that it submits its initial offer which includes price to the procuring activity for that contract. This final rule states that the size status for COC applicants, where the COC relates to an unrestricted procurement, is determined as of the date of the COC application. Prior to that time, the size of the bidding concern is not relevant. Since SBA only issues COC to small businesses, the date of the application is the concern's first assertion of its size for the purpose of eligibility. Therefore, it is appropriate that the size status of that concern be determined as of the date of its application.

SBA received one comment concerning § 121.904. The commenter believed that paragraphs (a) and (c) could be read to be contradictory because a written request for best and final offers could constitute a modification and, therefore paragraph (c) could be interpreted to mean that size is determined as of the date of the latest best and final offer. SBA did not intend such an interpretation. Size is determined as of the date of the initial offer which includes price. The normal negotiation process and request for best and final offers was not intended to affect the time at which size is determined. Paragraph (c) requires a new size certification only in the situation where the original solicitation has been fundamentally modified so that the initial offer would now be non-responsive.

Proposed § 121.906 which set forth limitations on subcontracting under contracts set aside for small business has been deleted in this final rule. SBA will treat subcontracting requirements separately at a later date.

New § 121.906 (proposed § 121.907) amends the provisions relating to manufactured products under small business set-aside procurements. The rule specifies that in order to qualify as a small business for the procurement of manufactured products, an offeror must first be either a "manufacturer" or a "regular dealer" within the meaning of the Walsh-Healey Act. This clarification concerning the Walsh-Healey Act was added to clear up the confusion that was caused by § 121.5(b)(2) of the former regulations. The former provision provided: "Whether a bidder on a particular procurement is the manufacturer or a nonmanufacturer for the purpose of a size determination need not be consistent with whether such concern is or is not a manufacturer for the purpose of the Walsh-Healey Act." The intent of the provision was that a concern would not automatically qualify as a small business manufacturer simply because it qualified as a manufacturer under the Walsh-Healey Act. The concern would have to meet the requirements of SBA's size regulations in addition to the Walsh-Healey Act. However, the "need not be consistent * * * with the Walsh-Healey Act" language was interpreted by some concerns to override the Walsh-Healey Act. That was never SBA's intention. This rule corrects that misinterpretation.

In order to receive a small business set-aside for manufactured products, a concern must not only qualify under the Walsh-Healey Act for a Government procurement, it also must be the manufacturer of the end item being procured, or must be a nonmanufacturer, a kit assembler, or a supplier under Small Purchase Procedures in compliance with the requirements under paragraphs (b), (c) or (d) of this section.

The rule retains the requirement of the former regulations that a nonmanufacturer must supply the product of a small business manufacturer in order for the nonmanufacturer itself to qualify as a small business concern for a small business set-aside contract, and adds a limited exception. Pursuant to § 121.906(b)(3), a nonmanufacturer need not provide the product of a small business manufacturer where the Administrator determines that there are no small manufacturers of the class of items being procured in the Federal market. SBA received several comments in support of this limited exception as it appeared in the proposed rule.

The wording of this exception has been amended slightly from that appearing in the proposed rule (former § 121.907(a)(2)(iii) as a result of the enactment of Public Law 100-656. Section 303(h) of that law amends section 8(a) of the Small Business Act to authorize the Administrator to waive the requirement that a nonmanufacturer must supply the product of a small business "for any class of products for which there are no small business manufacturers or processors in the Federal market." In the near future, SBA intends to publish a rule relating to such waivers in new subpart B of this part.

Two commenters objected to the requirement that a small business nonmanufacturer be required to supply the product of a small business manufacturer that was manufactured in the United States. The commenters felt that this requirement was unnecessary to protect American businesses in light of the new definition of "concern," which would require both manufacturers and nonmanufacturers to be United States concerns.

This comment was carefully considered but ultimately rejected. If a product is manufactured abroad, foreign labor would be used and foreign equipment would likely be purchased. Therefore, in order to comport with Congress' intent that small business set-asides be used to strengthen the U.S. economy, SBA has retained the requirement that the end product be manufactured in the United States.

This final rule also adopts a 500 employee size standard for nonmanufacturers, kit assemblers and suppliers under Small Purchase Procedures. Such size standard was established in a final rule published in the Federal Register on March 31, 1989 (54 FR 13160).

New § 121.906(c), formerly § 121.907(d), adds clarifying language to the rule concerning the acquisition of kits. Generally, where the Government is Procuring kits with a small business set-aside, more than 50 percent of the total value of the contents of the kit must be manufactured by small businesses. However, where the Government has specified an item for a kit which is not produced by small business concerns, this rule would exclude the value of such item in the calculation of total value (i.e., brand items or other items produced only by large businesses would be excluded from the total value calculation and would not count against the 50% requirement). SBA received several comments supporting this change.

New § 121.907, formerly proposed § 121.908, gives guidance concerning the correct size standard to use for a procurement where the procurement requires that more than one end item be supplied to the Government. (See the discussion above relating to § 121.902(b).) Where an offeror is required to submit an offer on all end items in a multiple item procurement, the offeror will qualify as a small business under § 121.907 (formerly § 121.908) if it meets the size standard of the end items the value of which accounts for the greatest percentage of the total contract value (e.g., two end items each having a size standard of 500 emp1oyees together account for the greatest percentage of the total contract value).

Section 121.908 (proposed § 121.909) sets forth the size procedures relating to SBA's Certificate of Competency (COC) program. This section does not make any substantive changes in the size procedures affecting the COC program, but, for the first time, specifically spells them out in the size regulations. This section has been clarified in the final rule. The proposed rule stated that a formal size determination would be performed whenever a COC application was received by the SBA. SBA does not have the resources to perform "formal size determinations" for every COC application. Every COC applicant is required to submit a completed SBA Application for Small Business Size Determination (currently SBA Form 355) as part of its COC application package. SBA reviews the firm's completed SBA Form 355 to determine the firm's size eligibility for the COC process. SBA will perform a formal size determination where Form 355 indicates that the firm is other than small or where the size of the firm is otherwise called into question.

New § 121.909 (proposed § 121.910) adds clarifying language to the provision concerning manufactured products in an unrestricted procurement for COC purposes (former § 121.5(b)(2)(iv)). One commenter objected to the use of the wholesaler size standard in the case of a COC in an unrestricted procurement for manufactured products. SBA has deleted the reference to the wholesaler size standard and has added the requirement that a small business nonmanufacturer furnish domestically produced or manufactured products. The rationale for the deletion of the reference to the wholesaler size standard is contained in the final rule published by the SBA that makes the applicable size standard for nonmanufacturers 500 employees. See 54 FR 13160 (March 31, 1989). SBA mistakenly omitted the requirement that nonmanufacturers furnish domestically produced products in the proposed rule. Such requirement was in the former size regulations and therefore, does not impose any new restrictions on small business nonmanufacturers.

Sections 121.1001 through 121.1012 set forth the size eligibility requirements for the sale or lease of Government property, including the Timber Sales Program, the Special Salvage Timber Sales Program, and the sale of Government petroleum, coal and uranium. The rule does not make any substantive changes from the former regulations (§ 121.6). In addition, SBA received no comments concerning these sections. As such, no changes are made from the proposed rule aside from minor wording changes in §§ 121.1002 and 121.1003 for clarification.

Sections 121.1101 through 121.1108 describe the size eligibility requirements for SBA's section 8(a) program. The rule keeps the dual size determination of § 121.4(g) of the former regulations (i.e., an initial size determination at the time of admission to the program based upon the primary business of the applicant, and a second size determination for the award of each section 8(a) contract). The rules pertaining to size eligibility for the award of 8(a) contracts are similar to the rules relating to size eligibility for SBA's procurement assistance programs §§ 12.901 through 121.911. The rules covering the proper SIC Code designation for the goods or services being procured and the clarification, completion, supply, or correction of unclear, incomplete, missing, or incorrect SIC Code designations (proposed § 121.1102 (b)(2), (c) and (d)) are identical to those rules in the procurement assistance sections (§ 121.902 (b), (c) and (d)). These rules have been changed in the final rule in the same way as those pertaining to the procurement assistance programs discussed above.

Proposed § 121.1105 sets forth limitations on subcontracting, by requiring a firm to perform a certain percentage of a section 8(a) award with its own employees, in order to qualify as a small business for that 8(a) award. The content of this section has been deleted in the final rule and will appear, instead, in part 124, subpart A, of SBA's regulations. See § 124.314 of the proposed regulation published in the Federal Register on March 23, 1989, 54 FR 12054. Section 121.1105 is designated as reserved in the final rule.

The language contained in §§ 121.1106 and 121.1107 regarding manufactured products (the nonmanufacturer rule) and multiple item procurements is similar to that contained in the procurement assistance sections (§§ 121.906 and 121.907). SBA received several favorable comments, and no objections, concerning these sections. Again, however, in order to make the size rules pertaining to the 8(a) program consistent with those applicable to the small business set-aside program, SBA has made similar changes to the 8(a) nonmanufacturer and multiple end item provisions as were made in §§ 121.906 and 121.907 in response to comments concerning the applicability of those rules to the small business set-aside program.

Section 121.1108, "Eligibility of Section 8(a) Concern For Other SBA Assistance," was a new provision in the proposed rule. This provision confers automatic size eligibility for other SBA assistance (e.g., business loans) to an 8(a) concern which qualifies as a small business for a particular procurement where the assistance directly and primarily relates to the performance of the 8(a) contract. This provision is added to the 8(a) size eligibility rules because it supports one of the primary purposes of the 8(a) program (i.e., business development). SBA also believes that an 8(a) contractor should be given the tools necessary to effect proper contract performance. One commenter objected to the provision because the automatic size eligibility for other SBA assistance for 8(a) firms is limited to instances where it would relate directly to the performance of 8(a)

contracts and urged that such assistance should be available to 8(a) concerns whenever not provided in the marketplace. SBA disagrees. Section 121.1108 does not mean to imply that 8(a) firms are precluded from receiving other SBA (i.e., non-8(a)) assistance unless the assistance directly and primarily relates to the performance of an 8(a) contract. An 8(a) firm is always able to apply for other SBA assistance and may receive such assistance (e.g., a guaranteed SBA loan) when it is deemed eligible under the applicable eligibility criteria pertaining to that program. That basic proposition is unchanged by the rule added in this section.

On the other hand, the provision added in § 121.1108 merely confers *size* eligibility on an 8(a) firm where such firm is seeking other SBA assistance and such assistance would relate to the performance of an 8(a) contract. The mere fact that an 8(a) firm is deemed to be small for such other SBA assistance does not mean that it has met all of the eligibility criteria needed to receive such assistance. What this section will do, for example, is to automatically determine an 8(a) firm to be a small business for an SBA guaranteed loan, whether or not the firm meets the financial assistance size standard, where such loan is needed for the 8(a) firm to successfully perform an 8(a) contract. It will not make the firm eligible to receive the loan. The same credit and other program eligibility criteria must still be met.

Sections 121.1201 through 121.1205 set forth the size eligibility requirements for SBA's Small Business Innovation Research (SBIR) Program. The order and language of the former regulations (former § 121.7) are altered somewhat for clarity. Section 121.1204 codifies the time of size policy of the SBIR Program. The SBIR Policy Directive, published in the Federal Register on January 8, 1985, 50 FR 917, specifies that the size of a concern for the purpose of a funding agreement under Phase I and Phase II of the SBIR Program is determined as of the date of the award. The reason for the departure from the rule applicable to other SBA programs (time of self-certification [with the offer]) is the concern that potential SBIR offerors often are affiliated with large concerns or non-profit institutions (e.g., universities) at the time of their initial proposal and, thus, would be precluded from the SBIR Program by a "time of offer" rule. These offerors typically leave their positions with the affiliated entity upon approval of their proposal and prior to award. This rule makes the date of award the time at which size is determined for both Phase I and Phase II. A concern having more than 500 employees at the date of award will be ineligible for award. Section 121.1205 incorporates the general self-certification and protest procedures into the SBIR Program. No comments were received within the comment period concerning these sections. Thus, the size rules pertaining to the SBIR program in this final rule are the same as those in the proposed rule.

Sections 121.1301 through121.1305 set forth the size eligibility requirements for paying reduced patent fees. SBA received no comments concerning these sections. As such, they are unchanged from the proposed rule.

Sections 121.1401 through 121.1405 set forth the size eligibility requirements for financial institutions for purposes of sections 8(d) and 15(g) of the Small Business Act. Pub. L. 85-536, 72 Stat. 384 (1958). The final rule makes minor changes to the former regulations (former § 121.13) for added clarity. The proposed rule changed the size standard from $100 million "for the preceding fiscal year" to $100 million "at the end of its preceding completed fiscal year." Four commenters believed that the $100 million size standard was too low and recommended a $500 million size standard. The purpose of the change in the proposed rule was not to change the size standard, but to clarify what was to be measured in determining if a financial institution met the size standard.

As SBA has previously stated in this final rule and in the proposed rule, the purpose of this revision to part 121 is to clarify the size rules, making them easier to understand and to use. The proposed rule also noted that this revision would not be used as a vehicle for changing specific size standards, and specifically stated that comments should not be made concerning specific size standards. Thus, the comments recommending a change in the financial institution size standard are not being considered in this revision. Such a change would require a study of the financial institution industry and formal rulemaking concerning the specific change.

One commenter also asserted that basing a size standard on one specific day of the year (i.e., the last day of a financial institution's preceding completed fiscal year) may be misleading as to the financial institution's real asset size if for instance a large amount is deposited at the end of the year and is withdrawn a few days later. SBA agrees that such a standard could give a skewed picture of a financial institution's real asset value. Therefore, this provision has been changed so that the $100 million size standard will be an average of the financial institution's assets during the preceding fiscal year. This average can be determined by comparing the assets of the financial institution as reported on its four quarterly statements.

Sections 121.1501 through 121.1505 set forth the size eligibility requirements for compliance with programs of other agencies. Except for minor language changes for clarification purposes, these rules have not been changed from the proposed rule since no comments were received concerning them.

Section 121.1601 sets forth the entities that may protest the size of a concern or request a formal size determination with respect to designated SBA programs. Paragraph (a)(4) of this section makes clear that SBA shall make size determinations with respect the Department of Defense's Small Disadvantaged Business (SDB) program established in section 1207 of the National Defense Authorization Act of 1987 (Pub. L. 99-661) or any other similar program administered by another agency. The paragraph provides that any offeror for the specific SDB requirement, the contracting officer or SBA official may protest size determinations. This paragraph has not previously been in any SBA size regulation because the SDB program is new. SBA believes that it needs a separate authority paragraph for size protests relating to specific SDB contracts.

Paragraph (a)(5) of this section establishes SBA authority to make size determinations with respect to any other Government procurement in which status as a small business may be beneficial. The Small Business set-aside program is not the only program in which status as a small business has advantages. Advantages accruing to small businesses in the context of unrestricted procurements include the award of a contract to a small business where there is a tie bid and the opportunity to seek a Certificate of Competency by a small business in an unrestricted procurement. SBA believes that other interested parties should be able to protest the size of a concern claiming to be a small business in such instances. This section makes clear that SBA will entertain size protests in these instances.

Paragraph (b)(2) of this section revises the regulations to provide that, with respect to size determinations for SBA's section 8(a) program, the 8(a) concern or SBA officials may request a formal size determination for purposes of initial 8(a)

eligibility and individual contract awards. The former regulations expressly authorized formal size determinations only with respect to particular 8(a) applicant contracting opportunities. SBA also believes that an 8(a) applicant that was denied admission to the 8(a) program on the basis of size should have the right to request a formal size determination at the appropriate SBA Regional Office. Although this right has not been explicitly stated in the regulations previously, it has been SBA's informal policy to permit such determinations.

Section 121.1602 identifies the specific offices which make the formal size determinations. One commenter noted that this section incorrectly omitted reference to size determinations made by SBA's Disaster Offices for purposes of disaster loans. In response to this comment, SBA has amended this section to state that for purposes of determining size in relation to disaster loans, the Disaster Office responsible for the area in which the disaster occurred shall make the formal size determination.

Section 121.1603 sets forth the procedures for protesting size. Two comments were received on this section. One comment proposed that paragraph (c) be amended to clarify that when the contracting officer receives a protest filed by the SBA, he or she does not need to refer the protest back to the SBA, as is required for other protests filed by other parties. In response to this comment, a sentence has been added to paragraph (c)(1) specifying that, in the case of SBA protests, the contracting officer is not required to refer the protest back to the SBA.

The other comment on this section questioned whether the lack of a timeliness requirement for SBA protests would adversely affect the procurement at issue. The lack of such a timeliness requirement will not directly affect the procurement at issue because there is no requirement that the contracting officer stay the procurement pending the size determination. As is the case with all size protests, the decision to stay award of the contract is at the discretion of the contracting officer once the ten-day time limit has expired. (*See* § 121.1606.)

Section 121.1606(a) sets forth the time period in which SBA must make a size determination. One commenter expressed the view that it was unclear whether the 10 working days within which the decision must be made is triggered by receipt of the protest or receipt of the responses. In response to the comment, this section is amended to clarify that the 10-day period is triggered by SBA's receipt of the protest.

Section 121.1606(c) addresses the basis for the size determination and specifies that the SBA may base its decision on facts other than those supplied by the parties. The comment was made that this provision denies small businesses their confrontation rights and their rights to address concerns SBA has which do not appear in the filings. For the following reasons, no change was made to the regulations as a result of this comment. First, the above rights do not exist in the context of administrative adjudications. Moreover, because the rule expressly provides that the decision shall be based primarily on facts and allegations supplied by the protestor and protested concern, as a practical matter, any such denial would rarely affect the result reached. Finally, if a party feels that it did not have adequate opportunity to confront the evidence against it at the initial decision level and that, as a result, the decision reached was incorrect, it may appeal the decision to SBA's Office of Hearings and Appeals (OHA) in accordance with §§ 121.1701 through 121.1722 of this rule.

Section 121.1607 addresses recertifications. SBA received three comments on this section, two of which advocated that OHA make recertification decisions under certain circumstances. After careful consideration, SBA has decided not to adopt these comments. SBA believes that OHA is not an appropriate forum for making recertification decisions. The third commenter expressed the view that the original protester should be notified before a recertification decision is made. This is not necessary because such protester has the opportunity to protest the size of the concern at the time it bids on a set aside contract if it believes that the concern was improperly recertified.

One commenter suggested that a provision on intervention be added to § 121.1600. This suggestion was rejected as impractical because of the short time period within which the decision must be made (10 days). If an interested party is harmed by the decision, such party can file an appeal with the Office of Hearings and Appeals pursuant to §§ 121.1701 through 121.1722 of this rule.

Sections 121.1701 through 121.1722 set forth the procedures for size and SIC Code Appeals. Section 121.1702 contains a new paragraph (c) which defines the term "file" for purposes of initiating proceedings before the Office of Hearings and Appeals.

Section 121.1703 specifies the parties that may appeal. One commenter objected to this section that it does not permit 8(a) contractors to appeal SIC Code designations for 8(a) contracts. That commenter felt the denial of this appeal right to 8(a) contractors was discriminatory and arbitrary. This provision is not new. 8(a) contractors have never had the right to appeal SIC Code determinations under SBA regulations. Moreover, since the SBA represents the interests of the 8(a) participants in dealings with procurement agencies under the 8(a) program, it is appropriate to vest the right to appeal in the SBA.

Section 121.1705 sets forth the time limit for appeals. Paragraph (b)(1) of this section provides that appeals from SIC code designations must be filed no later than ten days before the bid opening day or deadline for submitting proposals as specified in the solicitation, taking into account any modifications to such dates. One commenter stated that the meaning of the phrase "taking into account any modifications to such dates" was unclear. SBA agrees with this comment and has amended this provision to state that if a solicitation is modified to extend the bid opening day or deadline for submitting proposals or quotations, the ten day period for filing shall be calculated based on the date designated in the modification. A similar amendment allowing an extension from the modified date has been made to paragraph (b)(2) for appeals when the bid opening date is less than 30 days after the issuance of the invitation for bids or request for proposals or quotations. Paragraphs (c) and (d) of § 121.1705 have been deleted because their provisions are contained in the definition of "file" at § 121.1702(c).

Section 121.1706 addresses the initiation of an appeal and the notice requirements for appeals. One commenter objected to the requirement in this section that the Appellant send a copy of the Notice of Appeal to SBA's Office of the General Counsel. This requirement has been retained in the final rule. Size determinations are precedent-setting and, therefore, it is important for the SBA to be aware of potentially important policy issues in order to determine whether to intervene to protect the Agency's interests.

Section 121.1707 addresses the scope of appeal and burden of proof. It was suggested that this section be reworded to place an affirmative burden on the SBA to investigate misuse of the Small Business Act each time a protest is filed. The SBA does not have the resources to conduct such investigations. Moreover, the underlying motivation behind the protest is irrelevant if the protest is valid on its face.

Section 121.1709 addresses intervention in appeals to the Office of Hearings and Appeals. One commenter objected to SBA's authority to intervene in appeals. Decisions by the Office of Hearings and Appeals are precedent-setting. Therefore, SBA must have the authority to intervene in order to protect the Agency's interests and to insure that important questions of policy are appropriately addressed. Therefore, this comment was not adopted.

Section 121.1712 sets forth the rules that apply to filing and service of pleadings and other documents. Section 121.1712(e) addresses time limitations on filings and the circumstances under which filing dates may be extended by the Administrative Judge. The proposed rule contained a new provision permitting the time limit for appeal of a size determination to be extended in extraordinary situations. The only comment received by SBA on this provision opposed the grant of discretion to the Administrative Judge to extend this time limit. The commenter argued that this provision could jeopardize pending procurements and was unnecessary with regard to future procurements because of the long period of time in which to appeal (30 days) in those cases. SBA agrees with this comment and has amended this provision to return to the language in the current regulation which prohibits extension of the time limit in which to appeal size determinations.

Section 121.1713(c) addresses access to and disclosure of materials to parties. SBA had proposed to permit an appeal to the Assistant Administrator for the Office of Hearings and Appeals of any denial of a request for disclosure of *in camera* documents. Such appeal is inconsistent with the Presiding Judge's authority to make a final decision. Therefore, SBA has deleted appeal authority from this final rule.

Section 121.1721 addresses reopenings and reconsiderations of decisions by the Office of Hearings and Appeals. One commenter objected to the expansion of the jurisdiction of the Office of Hearings and Appeals to reopen decisions. This change was made after a careful study of other agency administrative appeal processes and responds to specific needs which were not addressed in the former regulations. Such needs include the authority of OHA to correct inadvertent errors in decisions and its need to be able to revise decisions based on new facts absent a request for reopening by one of the parties.

Compliance with the Regulatory Flexibility Act, Executive Orders 12291 and 12612, and the Paperwork Reduction Act

This final rule could be considered a major rule within the meaning of Executive Order 12291 because it contains several substantive provisions which determine whether a concern in any industry may be considered small for purposes of Federal assistance. For instance, changes in the definition of a concern and in the rules on affiliation could affect a concern's eligibility for small business assistance. The economic impact on concerns no longer eligible for such assistance as a result of this final rule combined with the impact on concerns which will become eligible for assistance because of the rule could exceed $100 million. In addition, this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Consequently, SBA offers the following regulatory impact analysis and regulatory flexibility analysis for the purpose of compliance with the pertinent requirements of those two measures:

(1) *Description of potential benefits of the rule:* This revision taken as a whole provides SBA, other Federal agencies, and concerns seeking Federal assistance as small businesses with size procedures which are easier to use and understand. The restructured part 121 clearly identifies all the applicable size rules for each specific small business assistance program. Confusion as to whether a general rule applies to a specific program is eliminated. The revision also provides clearer guidance concerning the procedures by which a concern may protest the size of another concern and appeal the decision in a formal size determination. The rule clarifies how the size procedures, established over time, will be applied. It is our belief that SBA will benefit by the revision since its purpose is to clarify the regulatory framework governing the size program and thus provide for more efficient administration.

(2) *Description of potential costs of the rule:* There should be no costs inherent in the revision which are not presently involved in the administration of the size program. The procedures contained in the rule are basically the same rules currently contained in part 121 of SBA's regulations. The rule is, for the most part, a reorganization of the current rules into a format which is easier to use and understand. The rule does not impose monetary or other types of costs upon SBA, other Federal agencies, or those entities seeking small business status. The rule does not change the specific size standards which apply to particular industries and SIC Codes and, thus, would not directly affect who is and who is not eligible for specific assistance programs. However, as a result of changes in the rules on affiliation and in certain definitions such as the definition of concern, the eligibility of certain concerns could be affected. The loss of eligibility for small business assistance could result in costs to affected concerns.

(3) *Description of the net benefits of the rule:* This revision, taken as a whole, should clarify existing ambiguities in and provide a more logical progression to SBA's size regulations.

(4) *Description of reasons why this action is being considered and objectives of the rule:* The reasons why this rule is being promulgated and its ojectives are contained above in the Supplementary Information to this final rule and in the Supplementary Information to the proposed rule which was published on August 31, 1987 in the Federal Register, 52 F.R. 32870.

(5) *Legal basis for final rule:* The legal basis of this final rule is sections 3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. 632(a) and 634(b)(6), and Pub. L. 100-656, 102 Stat. 3853 (1988).

(6) *Description of entities to which the rule applies:* The rule clarifies the methodology of establishing size standards, clarifies the procedures by which a concern may protest the size of another concern or request that a formal size determination be performed by SBA, and amends certain provisions having substantive effect on whether a concern is considered small. Any entity wishing to be considered small or to protest size or request a formal size determination may be affected by the rule.

(7) *Federal rules:* There are no Federal rules which duplicate, overlap or conflict with this final rule. SBA has statutorily been given exclusive jurisdiction in establishing size standards. These procedures are part of that exclusive jurisdiction.

(8) *Significant alternatives to the final rule:* The changes set forth in these final regulations from the former size regulations clarify existing ambiguities and conform the size regulations to SBA policies and precedents. Thus, there are no significant alternatives which would accomplish the stated objectives of this final rule.

SBA certifies that this final rule does not add any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1980, 44

U.S.C. chap. 355. SBA Form 355, appearing in §§ 121.1605 and 121.1607 of this rule, has been approved by the Office of Management and Budget under number 3245-0101. SBA Form 723, appearing in § 121.1006(d) of this rule, has been approved by the Office of Management and Budget under number 0596-0021.

SBA certifies that this rule will not have federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order 12612.

List of Subject in 13 CFR Part 121

Small businesses, Standard Industrial Classification Codes.

Accordingly, pursuant to the authority set forth in sections 3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. 632(a) and 634(b)(6), and Public Law 100-656, 102 Stat. 3853 (1988), SBA hereby revises part 121 of Title 13 of the Code of Federal Regulations to read as follows:

PART 121 - SMALL BUSINESS SIZE REGULATIONS

Subpart A - Size Eligibility Provisions and Standards

Statutory Provisions

121.101 Congressional policy.
121.102 Authority to set size standards.

General Provisions

121.201 Purpose of the SBA Size Program.
121.202 General outline of SBA's Size Program.
121.203 Notification by concern of adverse size determination.
121.204 Effect of adverse size determination and recertification.
121.205 Effective date.

Functions and Responsibilities of SBA Offices

121.301 Size Standards Staff.
121.302 Office of General Counsel.
121.303 The Size Policy Board.
121.304 The Office of Hearings and Appeals.
121.305 Regional Offices.

Definitions

121.401 Affiliation.
121.402 Annual receipts.
121.403 Business concern or concern.
121.404 Employees.
121.405 Key employee.
121.406 Not dominant in field of operation.
121.407 Number of employees.

Changes in Size Standards

121.501 General.
121.502 [Reserved]
121.503 Sources of data.

Standard Industrial Classification Codes and Size Standards

121.601 Standard Industrial Classification codes and size standards.
121.701 [Reserved]

Size Eligibility for SBA Financial Assistance

121.801 Programs covered.
121.802 Establishment of the size standard.
121.803 Time at which size is determined.
121.804 Procedures prior to a formal size determination.
121.805 Business loan to refinance existing loan.
121.806 Size eligibility for business loans relating to particular procurements.

Size Eligibility for Government Procurement

121.901 Programs covered.
121.902 Establishment of the size standard.
121.903 Binding size determinations.
121.904 Time at which size is determined.
121.905 Self-certification.
121.906 Manufactured products under small business set-aside procurements.
121.907 Multiple item procurements.
121.908 Size procedures under SBA's Certificate of Competency Program.
121.909 Manufactured products in an unrestricted procurement for Certificate of Competency purposes.
121.910 Size standards under SBA's Section 8(d) Subcontracting Program.
121.911 Size procedures under SBA's Section 8(d) Subcontracting Program.

Size Eligibility for Sales or Lease of Government Property

121.1001 Programs covered.
121.1002 Establishment of the size standard.
121.1003 Binding size determinations.
121.1004 Time at which size is determined.
121.1005 Self-certification.
121.1006 Sales of Government owned timber other than Special Salvage Timber Sales (SSTS).
121.1007 Special Salvage Timber Sales (SSTS).
121.1008 Leasing Government land for coal mining.
121.1009 Leasing of Government land for uranium mining.
121.1010 Sales of Government owned petroleum.
121.1011 Stockpile purchases.
121.1012 Sale or lease of Government property other than property subject to §§ 121.1006 through 121.1011.

Size Eligibility for the Minority Small Business and Capital Ownership Development (section 8(a)) Program

121.1101 Programs covered.
121.1102 Establishment of the size standard.
121.1103 Time at which size is determined.
121.1104 Section 8(a) self-certification.
121.1105 [Reserved]
121.1106 Manufactured products under section 8(a) contracts.
121.1107 Multiple item procurements.
121.1108 Eligibility of section 8(a) concern for other SBA assistance.

Size Eligibility for the Small Business Innovation Research Program

121.1201 Program covered.
121.1202 Establishment of the size standard.
121.1203 Binding size determinations.
121.1204 Time at which size is determined.
121.1205 Self-certification.

Size Eligibility for Paying Reduced Patent Fees

121.1301 Program covered.
121.1302 Establishment of the size standard.
121.1303 Binding size determinations.
121.1304 Time at which size is determined.
121.1305 Self-certification.

Size Eligibility for Financial Institutions for Purposes of Sections 8(d) and 15(g) of the Small Business Act

121.1401 Programs covered.
121.1402 Establishment of the size standard.
121.1403 Binding size determinations.
121.1404 Time at which size is determined.
121.1405 Self-certification.

Size Eligibility for Compliance With Programs of Other Agencies

121.1501 Programs covered.
121.1502 Size standards of other agencies.
121.1503 Establishment of the size standard.
121.1504 Time at which size is determined.
121.1505 Procedures for SBA Size determinations.

Procedures for Size Protests and Requests for Formal Size Determinations

121.1601 Who may initiate.
121.1602 Who makes formal size determinations.
121.1603 Protest procedures.
121.1604 Form of protest.
121.1605 Notification of protest and filing of the application for small business size determinations.
121.1606 Making the size determination.
121.1607 Recertifications.
121.1608 SIC appeals.

Procedures for Size and SIC Code Appeals

121.1701 Jurisdiction of Office of Hearings and Appeals.
121.1702 Definitions.
121.1703 Who may appeal.
121.1704 Where to appeal.
121.1705 Time limits for appeals.
121.1706 Initiation of appeal.
121.1707 Scope of appeal and burden of proof.
121.1708 Response to notice of appeal.
121.1709 Intervention.
121.1710 Docket file.
121.1711 Assignment of three judge panel.
121.1712 Filing and service of pleadings.
121.1713 Authority and functions of presiding judge.
121.1714 Oral hearings and telephone conferences.
121.1715 Prohibited ex parte communications.
121.1716 Subpoenas.
121.1717 In camera orders.
121.1718 The record.
121.1719 Post-hearing procedures.
121.1720 Decision.
121.1721 Reconsideration of decision.
121.1722 Delegation of authority when judge not available.

Subpart B—Other Eligibility Provisions [Reserved]

Authority: Sections 3(a) and 5(b)(6) of the Small Business Act, as amended (15 U.S.C. 632(a), 634(b)(6)), and Pub. L. 100-656, 102 Stat. 3853 (1988).

Subpart A—Size Eligibility Provisions and Standards

Statutory Provisions

§ 121.101 Congressional policy.

Section 2(a) of the Small Business Act, 15 U.S.C. 631(a), sets forth the Congressional policy that the Government should ensure that a fair proportion of the Government's procurement needs be placed with small business enterprises.

§ 121.102 Authority to set size standards.

Sections 3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. 632(a) and 634(b)(6), authorize the Small Business Administration (SBA) to determine which business enterprises are to be designated "small business concerns" within any industry.

General Provisions

§ 121.201 Purpose of the SBA Size Program.

(a) To implement statutory policy, Congress established the Small Business Administration (SBA) in 1953 and gave it the responsibility to administer a range of programs designed to achieve specified economic goals. Generally, eligibility for assistance under SBA programs requires that a firm be "small." In addition, other Federal agencies may implement programs for which a "small" size is an eligibility criterion. Both the actual setting of size standards (i.e., the size specification of "small") and the determination of which concerns fall within these standards and accordingly qualify as "small" are powers authorized to the Administrator of the SBA.

(b) Federal assistance should not be regarded as permanent nor as the primary source of a firm's receipts. It should be used to assist a firm to compete in the regular business world, without becoming dependent on continuing Government aid. Small businesses should plan for the day when they can compete without assistance.

§ 121.202 General outline of SBA's Size Program.

The basic operation of SBA's Size Program is as follows:

(a) SBA establishes the appropriate size standards applicable to particular Standard Industrial Classification (SIC) codes (see § 121.601).

(b) SBA determines which concerns qualify as "small" under the appropriate size standard. This process often includes a self-certification procedure by which a concern certifies its size eligibility and may involve a protest or request for a formal size determination (see §§ 121.1601 through 121.1608 for the procedures concerning size protests and requests for formal size determinations). This process is separately explained for each assistance program (see §§ 121.801 through 121.1505).

(c) An adversely affected concern or other interested party may obtain a review of the size determination by SBA's Office of Hearings and Appeals (see §§ 121.1701 through 121.1722).

§ 121.203 Notification by concern of adverse size determination.

If a concern has been determined by SBA to be ineligible as a small business under a particular size standard, and it has already certified itself to be a small business on a pending Government procurement or on another assistance application, subject to the same or a lower size standard, it shall immediately notify the contracting officer or the appropriate Government official of such adverse size determination. (See § 121.1607 for the Recertification Procedure.)

§ 121.204 Effect of adverse size determination and recertification.

If SBA has made a formal size determination that a particular concern is not small, the concern will be deemed ineligible within such applicable size standard for any assistance under the Small Business Act, the Small Business Investment Act of 1958 or other applicable law, unless it is thereafter recertified by SBA as a small business. A change in circumstances may provide a basis for an application for recertification. (See §§ 121.1606(h) and 121.1607 for specific provisions as to the effect of and procedures for recertification.)

§ 121.205 Effective date.

The provisions set forth in this regulation shall be effective January 1, 1990. Except as related to non-competitive 8(a) contracts, these provisions will apply to any solicitation issued on or after the effective date of the regulation. The provisions of this regulation will also apply to any non-competitive requirement offered for the 8(a) program which has been accepted by SBA subsequent to the effective date of these regulations. This regulation will apply to any application for financial assistance, including an application for participation in the 8(a) program, received by SBA on or after the effective date.

Functions and Responsibilities of SBA Offices

§ 121.301 Size Standards Staff.

(a) SBA's Size Standards Staff shall:

(1) Develop and recommend small business size standards;

(2) Consider and take appropriate action on written requests to change existing size standards or establish new size standards;

(3) Conduct industry hearings pertaining to size standards, when necessary;

(4) Perform other related functions (e.g., industry studies) as may be appropriate to administer the SBA size standards program.

(b) Requests to change the existing or establish new size standards should be addressed to the Director, Size Standards Staff, 1441 L Street NW., Washington DC 20416. These requests should include information relative to the economic conditions and structure of the entire national industry, as well as specific reasons and justifications for the change or new size standard. Any request to change an existing size standard should provide information concerning the effect such a change would have on the Federal procurement process and information demonstrating how the proposed change would promote the purposes of the Small Business Act (15 U.S.C. 631 *et seq.*).

(c) If no size standard for an industry has been established in this Part, then SBA, upon request, may issue a temporary size standard for the industry in question by publishing an interim emergency rule in the **Federal Register** with an opportunity for public comment in accordance with the Administrative Procedure Act. 5 U.S.C. 553 (1976).

§ 121.302 Office of General Counsel.

The Office of General Counsel shall:

(a) Develop, coordinate, and recommend regulations and procedures to assist in implementing the size standards;

(b) Upon motion or other appropriate pleadings, represent the Agency in proceedings before the Office of Hearings and Appeals in order to present the position of the SBA;

(c) Represent the Agency in connection with any matter arising out of this part 121 before the Comptroller General, and other agencies.

§ 121.303 The Size Policy Board.

(a) The SBA Size Policy Board considers and makes recommendations relating to improvements in SBA regulations, procedures and directives concerning size matters, including size standards.

(b) The members of the SBA Size Policy Board are:

(1) The Associate Administrator for Procurement (Chairperson);

(2) The Associate Administrator for Finance and Investment;
(3) The Associate Administrator for Minority Small Business/Capital Ownership Development;
(4) The Assistant Administrator for Innovation, Research & Technology;
(5) The Director of the Size Standards Staff;
(6) The Chief Counsel for Advocacy;
(7) One Regional Administrator, designated by the Administrator;
(8) The General Counsel (non-voting, advisory member);
(9) The Assistant Administrator for Hearings and Appeals (non-voting, advisory member);

§ 121.304 The Office of Hearings and Appeals.

Pursuant to the provisions of §§ 121.1701 through 121.1722, SBA's Office of Hearings and Appeals will review appeals and make final decisions affirming, reversing or modifying:
(a) Determinations by the SBA Regional Offices, made pursuant to §§ 121.1601 through 121.1608, as to a concern's small business size status (size status determinations);
(b) Designations by contracting officers, appealed to SBA pursuant to §§ 121.1701 through 121.1722 or supplied by SBA pursuant to § 121.902(d) or § 121.1102(d), as to the Standard Industrial Classification (SIC) code into which the product or service is classified and/or as to the Small Business Administration size standard applicable thereto, (product or service classifications).

§ 121.305 Regional Offices.

(a) The Regional Offices of SBA shall make:
(1) Formal size determinations pursuant to a protest (§§ 121.1601 through 121.1608) against the self-certification of a concern in connection with eligibility for government set-asides (§§ 121.901 through 121.911), eligibility for sales or leases of government property (§§ 121.1001 through 121.1012), or eligibility for SBA's Small Business Innovation Research Program (§§ 121.1201 through 121.1205).
(2) Product or service classifications and/or size standard designations where an unclear, incomplete or missing classification/designation has been made by the contracting officer where necessary in connection with a size determination or size appeal.
(3) Formal size determinations (§§ 121.1601 through 121.1608) pursuant to a request by a section 8(a) participant whose status as a small business is not verified by SBA in connection with a particular section 8(a) procurement (§§ 121.1101 through 121.1108). Formal determinations shall also be made by the Regional Offices in connection with such applications for section 8(a) assistance upon request by the Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD) or his or her designee (See § 124.102(b)).
(4) Formal size determinations (§§ 121.1601 through 121.1608 of this part) pursuant to a request therefore by an applicant for any assistance program of SBA not otherwise provided for, adversely affected by a size status finding made by an official of SBA, or by a size status finding made by a participating financial institution or a small business investment company in connection with an application for financial assistance §§ 121.801 through 121.806. Formal size determinations shall also be made by the Regional Office in connection with applications for program assistance upon request by the appropriate program official of SBA, a participating financial institution or a small business investment company.
(b) Except for SBA's small business set-aside program and SBA's Small Business Innovation Research program, formal size determinations shall be made by the SBA Regional Office serving the geographical area in which the principal office of the protested concern or applicant concern, excluding its affiliates, is located. Formal size determinations in the small business set-aside program and SBA's Small Business Innovation Research program shall be made by the SBA Regional Office serving the geographical area of the headquarters of the offeror, regardless of the location of parent companies or affiliates.
(c) The Regional Administrator may request a formal size determination whenever he/she deems it appropriate.

Definitions

§ 121.401 Affiliation.

(a) *General rule.* (1) Except as otherwise noted, size determinations shall include the applicant concern and all its domestic and foreign affiliates. Moreover, all affiliates, regardless of whether organized for profit, must be included.
(2) Except as otherwise provided in this section, concerns are affiliates of each other when either directly or indirectly
(i) One concern controls or has the power to control the other, or
(ii) A third party or parties controls or has the power to control both, or
(iii) An "identity of interest" between or among parties exists such that affiliation may be found.
(3) In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships.
(b) *Exclusion from affiliation coverage.* Portfolio or client concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying under the Small Business Investment Act of 1958, as amended, or by Investment Companies registered under the Investment Company Act of 1940, as amended, concerns owned and controlled by Indian Tribes, or concerns owned and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*) are not considered affiliates of such investment companies, development companies, tribes or Alaska Regional or Village Corporations.
(c) *Nature of control in determining affiliation.* (1) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. A party owning 50 percent of the voting stock of a concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders. Affiliation exists when one or more parties have the power to control a concern while at the same time another party, or other parties, may be in control of the concern at the will of the party with the power to control.

(2) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors.

(3) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of a concern's voting stock, but no officer or director has a block sufficient to give him control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control.

(d) *Identity of interest between and amono persons as an affiliation determinant.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control a concern, persons with an identity of interest may be treated as though they were one person.

(e) *Affiliation through stock ownership.* (1) A person is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(2) A person is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(3) If two or more persons each owns, controls or has the power to control less than 50% of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each such person individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

Example: Assume that Firms A and B each own 40 percent of Firm C. Assume further that Firm A has 200 employees, Firm B has 400 employees, Firm C alone has 50 employees and that the applicable size standard is 500 employees. This subsection requires that both Firm A and Firm B be considered to individually control Firm C and that their employees be aggregated with those of Firm C to determine Firm C's size. Therefore, Firm C would be considered small because Firm A's employees plus its employees (200 + 50) would fall short of the 500 employee size standard as would the total of Firm B's employees plus its employees (400 + 50).

(f) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company "A" holds an option to purchase a controlling interest in company "B," the situation is treated as though company "A" had exercised its rights and had become owner of a controlling interest in company "B." The employees or annual receipts, as the case may be, of both concerns must be taken into account in determining size.

Example 2. If large company "A" holds 70% (70 of 100 outstanding shares) of the voting stock of company "B" and gives a third party an option to purchase 25 shares of concern "B", company "B" will be deemed to be an affiliate of company "A" until the third party actually exercises its option to purchase such shares. In order to prevent large company "A" from circumventing the intent of the regulation which gives present effect to stock options, the option is not considered to have present effect in this case.

Example 3. If company "A" has entered into an agreement to merge with company "B" in the future, the situation is treated as though the merger has taken place.

(g) *Affiliation under voting trusts.* (1) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may qualify as a small business within the size regulations, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction. However, if a voting trust is primarily entered into for a legitimate purpose other than that described above, and it is recognized within the appropriate jurisdiction, it may be considered valid for the purpose of a size determination.

(2) Agreements to divest (including agreements in principle) are not considered to have a present effect on the power to control the concern.

(h) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another concern.

(i) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated.

(j) *Affiliation with a newly organized concern.* Affiliation generally arises where former officers, directors, principal stockholders, and/or key employees of one concern organize a new concern in the same or a related industry or field of operation, and serve as its officers, directors, principal stockholders, and/or key employees, and the one concern is furnishing or will furnish the other concern with subcontracts, financial or technical assistance, bid or performance bond indemnification, and/or other facilities, whether for a fee or otherwise.

(k) *Affiliation through contractual relationships.* Affiliation generally arises where once concern is dependent upon another concern for contracts and business to such a degree that its economic viability would be in jeopardy without such contracts/business.

(l) *Affiliation under joint venture arrangements.* (1) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(2) For the purpose of financial assistance to a joint venture, the parties thereto are considered to be affiliated with each other. Where the financial assistance, however, is to a concern for its own use, outside the joint venture, an affiliation determination shall not automatically arise from the existence of the joint venture arrangement. In this latter situation, the existence of affiliation shall be determined under these regulations.

(3) Concerns bidding on a particular procurement or property sale as joint venturers are affiliated with each other with regard to performance of the contract. This determination of affiliation does not extend to other contracts or business outside the joint venture arrangement.

(4) An ostensible subcontractor which performs or is to perform primary or

vital requirements of a contract may have such a controlling role that it must be considered a joint venturer affiliated on the contract with the prime contractor. In determining whether subcontracting rises to the level of affiliation as a joint venture, SBA considers whether the prime contractor has unusual reliance on the subcontractor.

(5) Even though a concern might not be an affiliate of its joint venturers for the purpose of operations apart from the joint venture, it nevertheless must include its proportionate share of the joint venture receipts or employees in determining its eligibility under the size standards.

(m) *Affiliation under franchise and license agreements.* In determining whether the franchisor controls or has the power to control and, therefore, is affiliated with the franchisee, the restraints, relating to standardized quality, advertising, accounting format and other provisions, imposed on a franchisee by its franchise agreement shall generally not be considered, provided that the franchisee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee may not be controlled by the franchisor by virtue of such provisions in the franchise agreement, control and, thus, affiliation could arise through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

§ 121.402 Annual receipts.

(a) In size determinations where the standard is "annual receipts," size eligibility requires that the concern may not exceed the "annual receipts" in that standard.

(b) *Definitions.* For the purpose of determining annual receipts of a concern:

(1) *Accrual basis* means a method of accounting in which accounts and notes receivable are recorded in the regular books of account for the period in which the firm first has a claim of right to them. "Claim of right" has the meaning attributed to it by the U.S. Internal Revenue Service (IRS).

(2) *Receipts* is defined to include all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. However, the term "receipts" excludes proceeds from sales of capital assets and investments, proceeds from transactions between a concern and its domestic and foreign affiliates, proceeds from payments of notes receivable and accounts receivable, amounts collected for another by a travel agent or real estate agent, and taxes collected for remittance to a taxing authority.

(3) *Regular books of account* means the general ledger or other book of final entry and, if used, the journals or other books of original entry.

(4) *Completed fiscal year* means a taxable year including any short period. "Taxable year" and "short period" have the meaning attributed to them by the IRS.

(5) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

(c) *Period of measurement.* "Annual Receipts" of a concern which has been in business for 3 or more completed fiscal years means the arithmetic annual average revenue of the concern over its last 3 completed fiscal years (total revenue compiled over the entire 3-year period would be divided by three). "Annual Receipts" of a concern which has been in business for less than 3 fiscal years means the arithmetic annual average revenue over the time period the concern has been in business. (Total revenues compiled over the period the concern has been in business, divided by the number of weeks, including fractions of a week, the concern has been in business, multiplied by 52). "Annual receipts" of a concern which has been in business three or more years but has a short year in the last three years will be the arithmetic annual average revenue over the two full years and the short year. See paragraph (d)(3) of this section. The short period may appear at the beginning, middle or end of the three year calculation period.

(d)(1) *Method of determining annual receipts.* Revenue may be taken from the regular books of account of the concern. If the concern so elects, or has not kept regular books of account, or the IRS has found such records to be inadequate and has reconstructed income of the concern, then revenue as shown on the Federal Income Tax return of the concern may be used in determining annual receipts, *Provided* That subject to the exception in paragraph (d)(2) of this section, revenue shown on the regular books of account or the Federal Income Tax return on a basis other than accrual is restated to show revenue on an accrual basis. Further, where the completed contract method of determining income has been used, revenue must be restated to a percentage of completion method prior to determining annual receipts.

(2) Where the Federal Income tax return of a concern, restated if necessary pursuant to paragraph (d)(1) of this section to reflect the percentage of completion method, shows its annual receipts to be less than 75 percent of the applicable size standard, the concern need not restate its revenue to an accrual basis prior to determining annual receipts.

(3) Where a short period is included in the concern's most recent three years, "annual receipts" are calculated by dividing the sum of the receipts of the short year and the receipts of the two full fiscal years by the sum of the number of weeks in the short fiscal year and the number of weeks in the two full fiscal years, and multiplying that figure (the weekly average receipts) by 52.

Example: If the short year were 12 weeks and X represents the receipts from the short year, the calculation would be:

$[(X + \text{receipts for the two full fiscal years}) \div (12 + 52 + 52)] \times 52 = \text{Average annual receipts for the three year period including the short year.}$

(e) *Annual receipts of affiliates.* (1) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period, the "annual receipts" in determining size status include the receipts of both the applicant and the affiliate. Furthermore, this aggregation of the receipts of both the applicant and its affiliate applies during the entire period used in computing size (usually the preceding three complete fiscal years) rather than only for the period after the affiliation arose.

(2) The "annual receipts" of a concern which had been an affiliate of the applicant during part of the period used in determining size (usually the preceding three completed fiscal years), but was not an affiliate at the time of self-certification for the assistance in question, are not included within the computation of "annual receipts" in making size determinations. This exclusion of "annual receipts" of a former affiliate applies during the entire period used in computing size, rather than only for the period after which the affiliation ceased.

§ 121.403 Business concern or concern.

(a) A business concern eligible for assistance as a small business is a business entity organized for profit, with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, materials and/or labor.

(b) Such business entity may be in the legal form of an individual proprietorship, partnership, corporation,

joint venture, association, trust or a cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

§ 121.404 Employees.

The term "employees" means all individuals employed on a full-time, part-time, temporary, or other basis. Such other basis may exist, for example, where individuals are provided by an independent employment contractor in an apparent effort to circumvent these regulations. The totality of the circumstances should be considered in determining whether employees of an independent contractor are employed on an "other basis" including, but not limited to, the following factors:

(a) Did the company engage and select the employees?

(b) Does the company pay the employees wages and/or withhold employment taxes and/or provide employment benefits?

(c) Does the company have the power to dismiss the employees?

(d) Does the company have the power to control and supervise the employees' performance of their duties?

(e) Did the company procure the services of the employees from any employment contractor involved in close proximity to the date of self-certification as a small business?

(f) Did the company dismiss employees from its own payroll and replace them with the employees from any employment contractor involved. Were they replaced soon after their dismissal?

(g) Are the individual employees supplied by any employment contractor, the same individuals that were dismissed by the company?

(h) Do the employees possess a type of expertise or skill that other companies in the same or similar lines of business normally employ in-house (as opposed to procuring by sub-contract or through an employment contractor)?

(i) Do the employees perform tasks normally performed by the regular employees of the business or which were previously performed by the company's own employees?

(j) Were the employees procured through an employment contractor to do more than fill in for regular employees of the company who are temporarily absent?

(k) Does the contract with the independent contractor have a term based on the term of an existing Government contract?

§ 121.405 Key employee.

A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

§ 121.406 Not dominant in field of operation.

A concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

§ 121.407 Number of employees.

In size determinations where the standard is "number of employees," size eligibility requires that the concern may not exceed the number of employees in that standard.

(a) "Number of employees" means the average employment of the concern, including the employees of its domestic and foreign affiliates, based upon employment during each of the pay periods for the preceding completed 12 calendar months.

(b) In computing average employment, part-time and temporary employees are counted as full-time employees for each applicable pay period.

(c) If a concern has not been in business for 12 months, "number of employees" means the average employment of the concern, including its affiliates, during each of the pay periods during which it has been in business.

(d) If a concern has acquired an affiliate or has been acquired as an affiliate during the applicable averaging period, the "number of employees" in determining size status includes both the employees of the applicant and the affiliate. Furthermore, this aggregation of the employees of both the applicant and its affiliate applies during the entire period used in computing size (usually, the preceding 12 months) rather than only for the period after the affiliation arose.

(e) The employees of a concern which had been an affiliate of the applicant during part of the period used in determining size (usually the preceding 12 months), but was no longer an affiliate at the time of self-certification for the assistance in question, are not included within the computation of "number of employees" in making size determinations. This exclusion of employees of a former affiliate applies during the entire period used in computing size.

Changes in Size Standards

§ 121.501 General.

Any proposed size standard change will be published in the Federal Register and will include a description of the various factors considered in devising the size standard. Such proposal will also identify the number of small businesses which would be affected by the change in the size standard.

§ 121.502 [Reserved]

§ 121.503 Sources of data.

The basic sources of data used in establishing size standards include: "The Standard Industrial Classification Manual", which is used as a guide in defining industries; U.S. Bureau of the Census, Economic Censuses including "Concentration Ratios in Manufacturing" and "Enterprise Statistics"; special tabulations of the "Enterprise Statistics" (prepared for SBA by the U.S. Bureau of the Census); "Census of Service Industries" (prepared by the Bureau of the Census); Annual Survey of Manufacturers"; U.S. Department of Commerce, U.S. Industrial Outlook", "Survey of Current Business", and County Business Patterns"; Internal Revenue Service, "Statistics of Income"; Dun and Bradstreet, "DMI Market Profile"; and SBA's small business data base (USEEM tabulations); "Federal Procurement Data System" statistics; SBA's own extensive files of articles and correspondence; information provided by trade associations; and other appropriate sources.

Standard Industrial Classification Codes and Size Standards

§ 121.601 Standard Industrial Classification codes and size standards.

The following industry size standards apply to all SBA programs except the sale of Government property (§§ 121.1001 through 121.1012); physical disaster loans (no size standards); and non-physical disaster loans, Small Business Investment Companies, Development Companies, and Pollution Control Bonds (*see* §§ 121.801 through 121.806). The Standard Industrial Classification (SIC) codes and corresponding industry size standards are set forth in the table following this section. Their relationship to the various SBA programs is set forth in §§ 121.801 through 121.806; 121.901 through 121.911;

121.1101 through 121.1108; 121.1201 through 121.1205 and 121.1401 through 121.1405. The table column labeled "SIC" refers to the Standard Industrial Classification (SIC) codes as published by the U.S. Government respectively in the current version of the "Standard Industrial Classification Manual", Office of Management and Budget, Executive Office of the President. The "Standard Industrial Classification Manual" is intended to cover the entire field of economic activities. It classifies and defines activities by industry categories and is the source used by SBA as a guide in defining industries for size standards. (It is available for sale from the U.S. Government Printing Office [1] and is in the reference room of most libraries.) The number of employees or annual receipts indicates the maximum allowed for a concern (including its affiliates) to be considered small.

SIZE STANDARDS BY SIC INDUSTRY

SIC (* = New SIC Code in 1987, Not Used in 1972)	Description (N.E.C. = Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
	For all industries not specifically listed in this table, except for those in Divisions I and J of the SIC System, the size standard is $3.5 million in annual receipts.	
	DIVISION A—AGRICULTURE	
	Major Group 01—Agricultural Production—Crops	
0111-0191		[1] $0.5
	Major Group 02—Agricultural Production—Livestock and Animal Specialties	
0211	Beef Cattle Feedlots (Custom).	$1.0
0212-0291	Livestock and Animal Specialties, Except 0211 and 0252.	$0.5
0252	Chicken Eggs	$1.0
	Major Group 07—Agricultural Services	
All SICs		$3.5
	Major Group 08—Forestry	
All SICs		$3.5
	Major Group 09—Fishing, Hunting, and Trapping	
All SICs		$2.0
	DIVISION B—MINING	
	Major Group 10—Metal Mining	
1011	Iron Ores	500
1021	Copper Ores	500
1031	Lead and Zinc Ores	500
1041	Gold Ores	500
1044	Silver Ores	500
1061	Ferroalloy Ores, Except Vanadium.	500
1081	Metal Mining Services	$3.5
1094	Uranium-Radium-Vanadium Ores.	500
1099	Miscellaneous Metal Ores, N.E.C.	500
	Major Group 12—Coal Mining	
1221*	Bituminous Coal and Lignite Surface Mining.	500
1222*	Bituminous Coal Underground Mining.	500
1231*	Anthracite Mining	500
1241*	Coal Mining Services	$3.5
	Major Group 13—Oil and Gas Extraction	
1311	Crude Petroleum and Natural Gas.	500
1321	Natural Gas Liquids	500
1381	Drilling Oil and Gas Wells	500
1382	Oil and Gas Field Exploration Services.	$3.5
1389	Oil and Gas Field Services, N.E.C.	$3.5
	Major Group 14—Mining and Quarrying of Nonmetallic Minerals, Except Fuels	
1411	Dimension Stone	500
1422	Crushed and Broken Limestone.	500
1423	Crushed and Broken Granite.	500
1429	Crushed and Broken Stone, N.E.C.	500
1442	Construction Sand and Gravel.	500
1446	Industrial Sand	500
1455	Kaolin and Ball Clay	500
1459	Clay, Ceramic, and Refractory Minerals, N.E.C.	500
1474	Potash, Soda, and Borate Minerals.	500
1475	Phosphate Rock	500
1479	Chemical and Fertilizer Mineral Mining, N.E.C.	500
1481	Nonmetallic Minerals Services, Except Fuels.	$3.5
1499	Miscellaneous Nonmetallic Minerals, Except Fuels.	500
	DIVISION C—CONSTRUCTION	
	Major Group 15—Building Construction—General Contractors and Operative Builders	
1521	General Contractors—Single-Family Houses.	$17.0
1522	General Contractors—Residential Buildings, Other Than Single-Family.	$17.0
1531	Operative Builders	$17.0
1541	General Contractors—Industrial Buildings and Warehouses.	$17.0
1542	General Contractors—Nonresidential Buildings, Other Than Industrial Buildings and Warehouses.	$17.0
	Major Group 16—Heavy Construction Other Than Building Construction—Contractors	
1611	Highway and Street Construction, Except Elevated Highways.	$17.0
1622	Bridge, Tunnel, and Elevated Highway Construction.	$17.0
1623	Water, Sewer, Pipeline, and Communications and Power Line Construction.	$17.0
1629	Heavy Construction, Except Dredging, N.E.C..	$17.0
1629	Dredging and Surface Cleanup Activities.	$13.5 [2]
	Major Group 17—Construction—Special Trade Contractors	
1711	Plumbing, Heating, and Air-Conditioning.	$7.0
1721	Painting and Paper Hanging.	$7.0
1731	Electrical Work	$7.0
1741	Masonry, Stone Setting, and Other Stone Work.	$7.0
1742	Plastering, Drywall, Acoustical and Insulation Work.	$7.0
1743	Terrazzo, Tile, Marble, and Mosaic Work.	$7.0
1751	Carpentry Work	$7.0
1752	Floor Laying and Other Floor Work, N.E.C.	$7.0
1761	Roofing, Siding, and Sheet Metal Work.	$7.0
1771	Concrete Work	$7.0
1781	Water Well Drilling	$7.0
1791	Structural Steel Erection	$7.0
1793	Glass and Glazing Work	$7.0
1794	Excavation Work	$7.0
1795	Wrecking and Demolition Work.	$7.0
1796	Installation or Erection of Building Equipment, N.E.C.	$7.0
1799	Special Trade Contractors, N.E.C.	$7.0
	Base Housing Maintenance [20].	$7.0
	DIVISION D—MANUFACTURING [3]	
	Major Group 20—Food and Kindred Products	
2011	Meat Packing Plants	500
2013	Sausages and Other Prepared Meat Products.	500

[1] Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
2015*	Poultry Slaughtering and Processing.	500
2021	Creamery Butter	500
2022	Natural, Processed, and Imitation Cheese.	500
2023	Dry, Condensed, and Evaporated Dairy Products.	500
2024	Ice Cream and Frozen Desserts.	500
2026	Fluid Milk	500
2032	Canned Specialties	1,000
2033	Canned Fruits, Vegetables, Preserves, Jams, and Jellies *.	500
2034	Dried and Dehydrated Fruits, Vegetables, and Soup Mixes.	500
2035	Pickled Fruits and Vegetables, Vegetable Sauces and Seasonings, and Salad Dressings.	500
2037	Frozen Fruits, Fruit Juices, and Vegetables.	500
2038	Frozen Specialities, N.E.C..	500
2041	Flour and Other Grain Mill Products.	500
2043	Cereal Breakfast Foods	1,000
2044	Rice Milling	500
2045	Prepared Flour Mixes and Doughs.	500
2046	Wet Corn Milling	750
2047	Dog and Cat Food	500
2048	Prepared Feeds and Feed Ingredients for Animals and Fowls, Except Dogs and Cats.	500
2051	Bread and Other Bakery Products, Except Cookies and Crackers.	500
2052	Cookies and Crackers	750
2053*	Frozen Bakery Products, Except Bread.	500
2061	Cane Sugar, Except Refining.	500
2062	Cane Sugar Refining	750
2063	Beet Sugar	750
2064*	Candy and Other Confectionery Products.	500
2066	Chocolate and Cocoa Products.	500
2067	Chewing Gum	500
2068*	Salted and Roasted Nuts and Seeds.	500
2074	Cottonseed Oil Mills	500
2075	Soybean Oil Mills	500
2076	Vegetable Oil Mills, Except Corn, Cottonseed, and Soybean.	1,000
2077	Animals and Marine Fats and Oils.	500
2079	Shortening, Table Oils, Margarine, and Other Edible Fats and Oils, N.E.C..	750
2082	Malt Beverages	500
2083	Malt	500
2084	Wines, Brandy, and Brandy Spirits.	500
2085	Distilled and Blended Liquors.	750
2086	Bottled and Canned Soft Drinks and Carbonated Waters.	500
2087	Flavoring Extracts and Flavoring Syrups, N.E.C.	500
2091	Canned and Cured Fish and Seafoods.	500
2092	Prepared Fresh or Frozen Fish and Seafoods.	500
2095	Roasted Coffee	500
2096*	Potato Chips, Corn Chips, and Similar Snacks.	500
2097	Manufactured Ice	500
2098	Macaroni, Spaghetti, Vermicelli, and Noodles.	500
2099	Food Preparations, N.E.C.	500
	Major Group 21—Tobacco Products	
2111	Cigarettes	1,000
2121	Cigars	500
2131	Chewing and Smoking Tobacco and Snuff.	500
2141	Tobacco Stemming and Redrying.	500
	Major Group 22—Textile Mill Products	
2211	Broadwoven Fabric Mills, Cotton.	1,000
2221	Broadwoven Fabric Mills, Manmade Fiber and Silk.	500
2231	Broadwoven Fabric Mills, Wool (Including Dyeing and Finishing).	500
2241	Narrow Fabric and Other Smallwares Mills: Cotton, Wool, Silk and Manmade Fiber.	500
2251	Women's Full-Length and Knee-Length Hosiery, Except Socks.	500
2252	Hosiery, N.E.C.	500
2253	Knit Outerwear Mills	500
2254	Knit Underwear and Nightwear Mills.	500
2257	Weft Knit Fabric Mills	500
2258	Lace and Warp Knit Fabric Mills.	500
2259	Knitting Mills, N.E.C.	500
2261	Finishers of Broadwoven Fabrics of Cotton.	1,000
2262	Finishers of Broadwoven Fabrics of Manmade Fiber and Silk.	500
2269	Finishers of Textiles, N.E.C.	500
2273*	Carpets and Rugs	500
2281	Yarn Spinning Mills	500
2282	Yarn Texturizing, Throwing, Twisting, and Winding Mills.	500
2284	Thread Mills	500
2295	Coated Fabrics, Not Rubberized.	1,000
2296	Tire Cord and Fabrics	1,000
2297	Nonwoven Fabrics	500
2298	Cordage and Twine	500
2299	Textile Goods, N.E.C.	500
	Major Group 23—Apparel and Other Finished Products Made From Fabrics and Similar Materials	
2311	Men's and Boys' Suits, Coats and Overcoats.	500
2321	Men's and Boys' Shirts, Except Work Shirts.	500
2322	Men's and Boys' Underwear and Nightwear.	500
2323	Men's and Boys' Neckwear.	500
2325*	Men's and Boys' Separate Trousers and Slacks.	500
2326*	Men's and Boys' Work Clothing.	500
2329	Men's and Boys' Clothing, N.E.C.	500
2321	Women's, Misses', and Juniors' Blouses and Shirts.	500
2335	Women's, Misses', and Juniors' Dresses.	500
2337	Women's, Misses', and Juniors' Suits, Skirts, and Coats.	500
2339	Women's, Misses', and Juniors' Outerwear, N.E.C.	500
2341	Women's, Misses', Children's, and Infants' Underwear and Nightwear.	500
2342	Brassieres, Girdles, and Allied Garments.	500
2353*	Hats, Caps, and Millinery	500
2361	Girls', Children's, and Infants' Dresses, Blouses, and Shirts.	500
2369	Girls', Children's, and Infants' Outerwear, N.E.C.	500
2371	Fur Goods	500
2381	Dress and Work Gloves, Except Knit and All-Leather.	500
2384	Robes and Dressing Gowns.	500
2385	Waterproof Outerwear	500
2386	Leather and Sheep-Lined Clothing.	500
2387	Apparel Belts	500
2389	Apparel and Accessories, N.E.C.	500
2391	Curtains And Draperies	500
2392	Housefurnishings, Except Curtains and Draperies.	500
2393	Textile Bags	500
2394	Canvas and Related Products.	500
2395	Pleating, Decorative and Novelty Stitching, and Tucking for the Trade.	500
2396	Automotive Trimmings, Apparel Findings, and Related Products.	500

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
2397	Schiffli Machine Embroideries.	500
2399	Fabricated Textile Products, N.E.C.	500
	Major Group 24—Lumber and Wood Products, Except Furniture	
2411	Logging	500
2421	Sawmills and Planning Mills, General.	500
2426	Hardwood Dimension and Flooring Mills.	500
2429	Special Product Sawmills, N.E.C.	500
2431	Millwork	500
2434	Wood Kitchen Cabinets	500
2435	Hardwood Veneer and Plywood.	500
2436	Softwood Veneer and Plywood.	500
2439	Structural Wood Members, N.E.C.	500
2441	Nailed and Lock Corner Wood Boxes and Shook.	500
2448	Wood Pallets and Skids	500
2449	Wood Containers, N.E.C.	500
2451	Mobile Homes	500
2452	Prefabricated Wood Buildings and Components.	500
2491	Wood Preserving	500
2493*	Reconstituted Wood Products.	500
2499	Wood Products, N.E.C.	500
	Major Group 25—Furniture and Fixtures	
2511	Wood Household Furniture, Except Upholstered.	500
2512	Wood Household Furniture, Upholstered.	500
2514	Metal Household Furniture.	500
2515	Mattresses, Foundations, and Convertible Beds.	500
2517	Wood Television, Radio, Phonograph, and Sewing Machine Cabinets.	500
2519	Household Furniture, N.E.C.	500
2521	Wood Office Furniture	500
2522	Office Furniture, Except Wood.	500
2531	Public Building and Related Furniture.	500
2541	Wood Office and Store Fixtures, Partition, Shelving, and Lockers.	500
2542	Office and Store Fixtures, Partitions, Shelving, and Lockers, Except Wood.	500
2591	Drapery Hardware and Window Blinds and Shades.	500
2599	Furniture and Fixtures, N.E.C.	500

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
	Major Group 26—Paper and Allied Products	
2611	Pulp Mills	750
2621	Paper Mills	750
2631	Paperboard Mills	750
2652	Setup Paperboard Boxes	500
2653	Corrugated and Solid Fiber Boxes.	500
2655	Fiber Cans, Tubes, Drums, and Similar Products.	500
2656*	Sanitary Food Containers, Except Folding.	750
2657*	Folding Paperboard Boxes, Including Sanitary.	750
2671*	Packaging Paper and Plastics Film, Coated and Laminated.	500
2672*	Coated and Laminated Paper, N.E.C.	500
2673*	Plastics, Foil, and Coated Paper Bags.	500
2674*	Uncoated Paper and Multiwall Bags.	500
2675*	Die-Cut Paper and Paperboard and Cardboard.	500
2676*	Sanitary Paper Products	500
2677*	Envelopes	500
2678*	Stationery, Tablets, and Related Products.	500
2679*	Converted Paper and Paperboard Products, N.E.C.	500
	Major Group 27—Printing, Publishing, and Allied Industries	
2711	Newspapers: Publishing, or Publishing and Printing.	500
2721	Periodicals: Publishing, or Publishing and Printing.	500
2731	Books: Publishing, or Publishing and Printing.	500
2732	Book Printing	500
2741	Miscellaneous Publishing	500
2752	Commercial Printing, Lithographic.	500
2754	Commercial Printing, Gravure.	500
2759*	Commercial Printing, N.E.C.	500
2761	Manifold Business Forms	500
2771	Greeting Cards	500
2782	Blankbooks, Looseleaf / Binders and Devices.	500
2789	Bookbinding and Related Work.	500
2791	Typesetting	500
2796*	Platemaking and Related Services.	500
	Major Group 28—Chemicals and Allied Products	
2812	Alkalies and Chlorine	1,000
2813	Industrial Gases	1,000
2816	Inorganic Pigments	1,000
2819	Industrial Inorganic Chemicals, N.E.C.	1,000

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
2821	Plastics Materials, Synthetic Resins, and Nonvulcanizable Elastomers.	750
2822	Synthetic Rubber (Vulcanizable Elastomers).	1,000
2823	Cellulosic Manmade Fibers.	1,000
2824	Manmade Organic Fibers, Except Cellulosic.	1,000
2833	Medicinal Chemicals and Botanical Products.	750
2834	Pharmaceutical Preparations.	750
2835*	In Vitro and In Vivo Diagnostic Substances.	500
2836*	Biological Products, Except Diagnostic Substances.	500
2841	Soap and Other Detergents, Except Specialty Cleaners.	750
2842	Specialty Cleaning, Polishing, and Sanitation Preparations.	500
2843	Surface Active Agents, Finishing Agents, Sulfonated Oils, and Assistants.	500
2844	Perfumes, Cosmetics, and Other Toilet Preparations.	500
2851	Paints, Varnishes, Lacquers, Enamels, and Allied Products.	500
2861	Gum and Wood Chemicals.	500
2865	Cyclic Organic Crudes and Intermediates, and Organic Dyes and Pigments.	750
2869	Industrial Organic Chemicals, N.E.C.	1000
2873	Nitrogenous Fertilizers	1,000
2874	Phosphatic Fertilizers	500
2875	Fertilizers, Mixing Only	500
2879	Pesticides and Agricultural Chemicals, N.E.C.	500
2891	Adhesives and Sealants	500
2892	Explosives	750
2893	Printing Ink	500
2895	Carbon Black	500
2899	Chemicals and Chemical Preparations, N.E.C.	500
	Major Group 29—Petroleum Refining and Related Industries	
2911	Petroleum Refining [5]	1,500
2951	Asphalt Paving Mixtures and Blocks.	500
2952	Asphalt Felts and Coatings.	750
2992	Lubricating Oils and Greases.	500
2999	Products of Petroleum and Coal, N.E.C.	500

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
Major Group 30—Rubber and Miscellaneous Plastics Products		
3011	Tires and Inner Tubes 6	1,000
3021	Rubber and Plastics Footwear.	1,000
3052*	Rubber and Plastics Hose and Belting.	500
3053*	Gaskets, Packing, and Sealing Devices.	500
3061*	Molded, Extruded, and Lathe-Cut Mechanical Rubber Goods.	500
3069	Fabricated Rubber Products, N.E.C.	500
3081*	Unsupported Plastics Film and Sheet.	500
3082*	Unsupported Plastics Profile Shapes.	500
3083*	Laminated Plastics Plate, Sheet, and Profile Shapes.	500
3084*	Plastics Pipe	500
3085*	Plastics Bottles	500
3086*	Plastics Foam Products	500
3087*	Custom Compounding of Purchased Plastics Resins.	500
3088*	Plastics Plumbing Fixtures	500
3089*	Plastics Products, N.E.C.	500
Major Group 31—Leather and Leather Products		
3111	Leather Tanning and Finishing.	500
3131	Boot and Shoe Cut Stock and Findings.	500
3142	House Slippers	500
3143	Men's Footwear, Except Athletic.	500
3144	Women's Footwear, Except Athletic.	500
3149	Footwear, Except Rubber, N.E.C.	500
3151	Leather Gloves and Mittens.	500
3161	Luggage	500
3171	Women's Handbags and Purses.	500
3172	Personal Leather Goods, Except Women's Handbags and Purses.	500
3199	Leather Goods, N.E.C.	500
Major Group 32—Stone, Clay, Glass, and Concrete Products		
3211	Flat Glass	1,000
3221	Glass Containers	750
3229	Pressed and Blown Glass and Glassware, N.E.C.	750
3231	Glass Products, Made of Purchased Glass.	500
3241	Cement, Hydraulic	750
3251	Brick and Structural Clay Tile.	500
3253	Ceramic Wall and Floor Tile.	500
3255	Clay Refractories	500
3259	Structural Clay Products, N.E.C.	500
3261	Vitreous China Plumbing Fixtures and China and Earthenware Fittings and Bathroom Accessories.	750
3262	Vitreous China Table and Kitchen Articles.	500
3263	Fine Earthware (Whiteware) Table and Kitchen Articles.	500
3264	Porcelain Electrical Supplies.	500
3269	Pottery Products, N.E.C.	500
3271	Concrete Block and Brick	500
3272	Concrete Products, Except Block and Brick.	500
3273	Ready Mixed Concrete	500
3274	Lime	500
3275	Gypsum Products	1,000
3281	Cut Stone and Stone Products.	500
3291	Abrasive Products	500
3292	Asbestos Products	750
3295	Minerals and Earths, Ground or Otherwise Treated.	500
3296	Mineral Wool	750
3297	Nonclay Refractories	750
3299	Nonmetallic Mineral Products, N.E.C.	500
Major Group 33—Primary Metal Industries		
3312	Steel Works, Blast Furnaces (Including Coke Ovens), and Rolling Mills.	1,000
3313	Electrometallurgical Products, Except Steel.	750
3315	Steel Wiredrawing and Steel Nails and Spikes.	1,000
3316	Cold-Rolled Steel Sheet, Strip, and Bars.	1,000
3317	Steel Pipe and Tubes	1,000
3321	Gray and Ductile Iron Foundries.	500
3322	Malleable Iron Foundries	500
3324	Steel Investment Foundries.	500
3325	Steel Foundries, N.E.C.	500
3331	Primary Smelting and Refining of Copper.	1,000
3334	Primary Production of Aluminum.	1,000
3339	Primary Smelting and Refining of Nonferrous Metals, Except Copper and Aluminum.	750
3341	Secondary Smelting and Refining of Nonferrous Metals.	500
3351	Rolling, Drawing, and Extruding of Copper.	750
3353	Aluminum Sheet, Plate, and Foil.	750
3354	Aluminum Extruded Products.	750
3355	Aluminum Rolling and Drawing, N.E.C.	750
3356	Rolling, Drawing, and Extruding of Nonferrous Metals, Except Copper and Aluminum.	750
3357	Drawing and Insulating of Nonferrous Wire.	1,000
3363*	Aluminum Die-Castings	500
3364*	Nonferrous Die-Castings, Except Aluminum.	500
3365*	Aluminum Foundries	500
3366*	Copper Foundries	500
3369	Nonferrous Foundries, Except Aluminum and Copper.	500
3398	Metal Heat Treating	750
3399	Primary Metal Products, N.E.C.	750
Major Group 34—Fabricated Metal Products, Except Machinery and Transportation Equipment		
3411	Metal Cans	1,000
3412	Metal Shipping Barrels, Drums, Kegs, and Pails.	500
3421	Cutlery	500
3423	Hand and Edge Tools, Except Machine Tools and Handsaws.	500
3425	Saw Blades and Handsaws.	500
3429	Hardware, N.E.C.	500
3431	Enameled Iron and Metal Sanitary Ware.	750
3432	Plumbing Fixture Fittings and Trim.	500
3433	Heating Equipment, Except Electric and Warm Air Furnaces.	500
3441	Fabricated Structural Metal.	500
3442	Metal Doors, Sash, Frames, Molding, and Trim.	500
3443	Fabricated Plate Work (Boiler Shops).	500
3444	Sheet Metal Work	500
3446	Architectural and Ornamental Metal Work.	500
3448	Prefabricated Metal Buildings and Components.	500
3449	Miscellaneous Structural Metal Work.	500
3451	Screw Machine Products	500
3452	Bolts, Nuts, Screws, Rivets, and Washers.	500
3462	Iron and Steel Forgings	500
3463	Nonferrous Forgings	500
3465	Automotive Stampings	500
3466	Crowns and Closures	500
3469	Metal Stampings, N.E.C.	500
3471	Electroplating, Plating, Polishing, Anodizing, and Coloring.	500
3479	Coating, Engraving, and Allied Services, N.E.C.	500
3482	Small Arms Ammunition	1,000
3483	Ammunition, Except for Small Arms.	1,500
3484	Small Arms	1,000

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
3489	Ordnance and Accessories, N.E.C.	500
3491*	Industrial Valves	500
3492*	Fluid Power Valves and Hose Fittings.	500
3493	Steel Springs, Except Wire.	500
3494	Valves and Pipe Fittings, N.E.C.	500
3495	Wire Springs	500
3496	Miscellaneous Fabricated Wire Products.	500
3497	Metal Foil and Leaf	500
3498	Fabricated Pipe and Pipe Fittings.	500
3499	Fabricated Metal Products, N.E.C.	500
	Major Group 35—Industrial and Commercial Machinery and Computer Equipment	
3511	Steam, Gas, and Hydraulic Turbines, and Turbine Generator Set Units.	1,000
3519	Internal Combustion Engines, N.E.C.	1,000
3523	Farm Machinery and Equipment.	500
3524	Lawn and Garden Tractors and Home Lawn and Garden Equipment.	500
3531	Construction Machinery and Equipment.	750
3532	Mining Machinery and Equipment, Except Oil and Gas Field Machinery and Equipment.	500
3533	Oil and Gas Field Machinery and Equipment.	500
3534	Elevators and Moving Stairways.	500
3535	Conveyors and Conveying Equipment.	500
3536	Overhead Traveling Cranes, Hoists, and Monorail Systems.	500
3537	Industrial Trucks, Tractors, Trailers, and Stackers.	750
3541	Machine Tools, Metal Cutting Types.	500
3542	Machine Tools, Metal Forming Types.	500
3543*	Industrial Patterns	500
3544	Special Dies and Tools, Die Sets, Jigs and Fixtures, and Industrial Molds.	500
3545	Cutting Tools, Machine Tool Accessories, and Machinists' Precision Measuring Devices.	500
3546	Power-Driven Handtools	500
3547	Rolling Mill Machinery and Equipment.	500
3548*	Electric and Gas Welding and Soldering Equipment.	500
3549	Metalworking Machinery, N.E.C.	500
3552	Textile Machinery	500
3553	Woodworking Machinery	500
3554	Paper Industries Machinery.	500
3555	Printing Trades Machinery and Equipment.	500
3556*	Food Products Machinery	500
3559	Special Industry Machinery, N.E.C.	500
3561	Pumps and Pumping Equipment.	500
3562	Ball and Roller Bearings	750
3563	Air and Gas Compressors	500
3564	Industrial and Commercial Fans and Blowers and Air Purification Equipment.	500
3565*	Packaging Machinery	500
3566	Speed Changers, Industrial High-Speed Drives, and Gears.	500
3567	Industrial Process Furnaces and Ovens.	500
3568	Machanical Power Transmission Equipment, N.E.C.	500
3569	General Industrial Machinery and Equipment, N.E.C.	500
3571*	Electronic Computers	1,000
3572*	Computer Storage Devices.	1,000
3575*	Computer Terminals	1,000
3577*	Computer Peripheral Equipment, N.E.C.	1,000
3578*	Calculating and Accounting Machines, Except Electronic Computers.	1,000
3579	Office Machines, N.E.C.	500
3581	Automatic Vending Machines.	500
3582	Commercial Laundry, Drycleaning, and Pressing Machines.	500
3585	Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment.	750
3586	Measuring and Dispensing Pumps.	500
3589	Service Industry Machinery, N.E.C.	500
3592	Carburetors, Pistons, Piston Rings, and Valves.	500
3593*	Fluid Power Cylinders and Actuators.	500
3594*	Fluid Power Pumps and Motors.	500
3596*	Scales and Balances, Except Laboratory.	500
3599	Industrial and Commercial Machinery and Equipment, N.E.C.	500
	Major Group 36—Electronic and Other Electrical Equipment and Components, Except Computer Equipment	
3612	Power, Distribution, and Specialty Transformers.	750
3613	Switchgear and Switchboard Apparatus.	750
3621	Motors and Generators	1,000
3624	Carbon and Graphite Products.	750
3625*	Relays and Industrial Controls.	750
3629	Electrical Industrial Apparatus, N.E.C.	500
3631	Household Cooking Equipment.	750
3632	Household Refrigerators and Home and Farm Freezers.	1,000
3633	Household Laundry Equipment.	1,000
3634	Electric Housewares and Fans.	750
3635	Household Vacuum Cleaners.	750
3639	Household Appliances, N.E.C.	500
3641	Electric Lamp Bulbs and Tubes.	1,000
3643	Current-Carrying Wiring Devices.	500
3644	Noncurrent-Carrying Wiring Devices.	500
3645	Residential Electric Lighting Fixtures.	500
3646	Commercial, Industrial, and Institutional Electric Lighting Fixtures.	500
3647	Vehicular Lighting Equipment.	500
3648	Lighting Equipment, N.E.C.	500
3651	Household Audio and Video Equipment.	750
3652	Phonograph Records and Prerecorded Audio Tapes and Disks.	750
3661	Telephone and Telegraph Apparatus.	1,000
3663*	Radio and Television Broadcasting and Communications Equipment.	750
3669*	Communications Equipment, N.E.C.	750
3671	Electron Tubes	750
3672*	Printed Circuit Boards	500
3674	Semiconductors and Related Devices.	500
3675	Electronic Capacitors	500
3676	Electronic Resistors	500
3677	Electronic Coils, Transformers, and Other Inductors.	500
3678	Electronic Connectors	500
3679	Electronic Components, N.E.C.	500

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
3691	Storage Batteries	500
3692	Primary Batteries, Dry and Wet.	1,000
3694	Electrical Equipment for Internal Combustion Engines.	750
3695*	Magnetic and Optical Recording Media.	1,000
3699	Electrical Machinery, Equipment, and Supplies, N.E.C.	750
	Major Group 37—Transportation Equipment	
3711	Motor Vehicles and Passenger Car Bodies.	1,000
3713	Truck and Bus Bodies	500
3714	Motor Vehicles Parts and Accessories.	500
3715	Truck Trailers	500
3716	Motor Homes	1,000
3721	Aircraft	1,500
3724	Aircraft Engines and Engine Parts.	1,000
3728	Aircraft Parts and Auxiliary Equipment, N.E.C [17].	1,000
3731	Shipbuilding and Repair of Nuclear Propelled Ships.	1,000
	Shipbuilding of Nonnuclear Propelled Ships and Nonpropelled Ships.	1,000
	Ship Repair (Including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships East of the 108 Meridian.	1,000
	Ship Repair (Including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships West of the 108 Meridian.	1,000
3732	Boat Building and Repairing.	500
3743	Railroad Equipment	1,000
3751	Motorcycles, Bicycles, and Parts.	500
3761	Guided Missiles and Space Vehicles.	1,000
3764	Guided Missiles and Space Vehicle Propulsion Units and Propulsion Unit Parts.	1,000
3769	Guided Missile and Space Vehicle Parts and Auxiliary Equipment, N.E.C.	1,000
3792	Travel Trailers and Campers.	500
3795	Tanks and Tank Components.	1,000
3799	Transportation Equipment, N.E.C.	500
	Major Group 38—Measuring, Analyzing, and Controlling Instruments; Photographic, Medical, and Optical Goods; Watches and Clocks	
3812*	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical Systems and Instruments.	750
3821*	Laboratory Apparatus and Furniture.	500
3822	Automatic Controls for Regulating Residential and Commercial Environments and Appliances.	500
3823	Industrial Instruments for Measurement, Display, and Control of Process Variables, and Related Products.	500
3824	Totalizing Fluid Meters and Counting Devices.	500
3825	Instruments for Measuring and Testing of Electricity and Electrical Signals.	500
3826*	Laboratory Analytical Instruments.	500
3827*	Optical Instruments and Lenses.	500
3829	Measuring and Controlling Devices, N.E.C.	500
3841	Surgical and Medical Instruments and Apparatus.	500
3842	Orthopedic, Prosthetic, and Surgical Appliances and Supplies.	500
3843	Dental Equipment and Supplies.	500
3844*	X-Ray Apparatus and Tubes and Related Irradiation Apparatus.	500
3845*	Electromedical and Electrotherapeutic Apparatus.	500
3851	Ophthalmic Goods	500
3861	Photographic Equipment and Supplies.	500
3873	Watches, Clocks, Clockwork Operated Devices, and Parts.	500
	Major Group 39—Miscellaneous Manufacturing Industries	
3911	Jewelry, Precious Metal	500
3914	Silverware, Plated Ware, and Stainless Steel Ware.	500
3915	Jewelers' Findings and Materials, and Lapidary Work.	500
3931	Musical Instruments	500
3942	Dolls and Stuffed Toys	500
3944	Games, Toys, and Children's Vehicles, Except Dolls and Bicycles.	500
3949	Sporting and Athletic Goods, N.E.C.	500
3951	Pens, Mechanical Pencils, and Parts.	500
3952	Lead Pencils, Crayons, and Artists' Materials.	500
3953	Marking Devices	500
3955	Carbon Paper and Inked Ribbons.	500
3961	Costume Jewelry and Costume Novelties, Except Precious Metal.	500
3965*	Fasteners, Buttons, Needles, and Pins.	500
3991	Brooms and Brushes	500
3993	Signs and Advertising Specialties.	500
3996	Linoleum, Asphalted-Felt-Base, and Other Hard Surface Floor Coverings, N.E.C.	750
3999	Manufacturing Industries, N.E.C.	500
	DIVISION E—TRANSPORTATION, COMMUNICATIONS, ELECTRIC, GAS, AND SANITARY SERVICES	
	Major Group 40—Railroad Transportation	
4011	Railroads, Line-Haul Operating.	1,500
4013	Railroad Switching and Terminal Establishments.	500
	Major Group 41—Local and Suburban Transit and Interurban Highway Passenger Transportation	
4111	Local and Suburban Transit.	$3.5
4119	Local Passenger Transportation, N.E.C.	$3.5
4121	Taxicabs	$3.5
4131	Intercity and Rural Bus Transportation.	$3.5
4141	Local Bus Charter Service	$3.5
4142	Bus Charter Service, Except Local.	$3.5
4151	School Buses	$3.5
4173*	Terminal and Service Facilities for Motor Vehicle Passenger Transportation.	$3.5
	Major Group 42—Motor Freight Transportation and Warehousing	
4212	Local Trucking Without Storage [8].	$12.5
4213	Trucking, Except Local	$12.5
4214	Local Trucking With Storage.	$12.5
4215*	Courier Services, Except by Air.	$12.5
4221	Farm Product Warehousing and Storage.	$12.5

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
4222	Refrigerated Warehousing and Storage.	$12.5
4225	General Warehousing and Storage.	$12.5
4226	Special Warehousing and Storage, N.E.C.	$12.5
4231	Terminal and Joint Terminal Maintenance Facilities for Motor Freight Transportation.	$3.5
	Major Group 44—Water Transportation [8]	
4412	Deep Sea Foreign Transportation of Freight.	500
4424*	Deep Sea Domestic Transportation of Freight.	500
4432*	Freight Transportation on the Great Lakes—St. Lawrence Seaway.	500
4449*	Water Transportation of Freight, N.E.C.	500
4481*	Deep Sea Transportation of Passengers, Except by Ferry.	500
4482*	Ferries	500
4489*	Water Transportation of Passengers, N.E.C.	500
4491*	Marine Cargo Handling	$12.5
4492*	Towing and Tugboat Services.	$3.5
4493*	Marinas	$3.5
4499*	Water Transportation Services, N.E.C.	$3.5
	Major Group 45—Transportation by Air [8]	
4512	Air Transportation, Scheduled.	[9] 1,500
4513*	Air Courier Services	[9] 1,500
4522*	Air Transportation, Nonscheduled.	[9] 1,500
4581*	Airports, Flying Fields, and Airport Terminal Services.	$3.5
	Major Group 46—Pipelines, Except Natural Gas	
4612	Crude Petroleum Pipelines.	1,500
4613	Refined Petroleum Pipelines.	1,500
4619	Pipelines, N.E.C	$17.0
	Major Group 47—Transportation Services	
4724*	Travel Agencies	[10] $0.5
4725*	Tour Operators	$3.5
4729*	Arrangement of Passenger Transportation, N.E.C.	$3.5
4731*	Arrangement of Transportation of Freight and Cargo.	$12.5
4741*	Rental of Railroad Cars	$3.5
4783	Packing and Crating	$12.5
4785*	Fixed Facilities and Inspection and Weighing Services for Motor Vehicle Transportation.	$3.5
4789	Transportation Services, N.E.C.	$3.5
	Major Group 48—Communications	
4812*	Radiotelephone Communications.	1,500
4813*	Telephone Communications, Except Radiotelephone.	1,500
4832	Radio Broadcasting Stations.	$3.5
4833	Television Broadcasting Stations.	$7.0
4841*	Cable and Other Pay Television Services.	$7.5
4899	Communications Services, N.E.C.	$7.5
	Major Group 49—Electric, Gas, and Sanitary Services	
4911	Electric Services	4 million megawatt hrs.
4924	Natural Gas Distribution	500
4941	Water Supply	$3.5
4952	Sewerage Systems	$3.5
4953	Refuse Systems	$6.0
4959	Sanitary Services, N.E.C	$3.5
4961	Steam and Air-Conditioning Supply.	$6.0
4971	Irrigation Systems	$3.5
	DIVISION F—WHOLESALE TRADE (Not Applicable to Government procurement of supplies. The non-manufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies)	
	Major Group 50—Wholesale Trade—Durable Goods	
5012	Automobiles and Other Motor Vehicles.	100
5013	Motor Vehicle Supplies / and New Parts.	100
5014	Tires and Tubes	100
5015*	Motor Vehicle Parts, Used	100
5021	Furniture	100
5023	Homefurnishings	100
5031	Lumber, Plywood, Millwork, and Wood Panels.	100
5032*	Brick, Stone, and Related Construction Materials.	100
5033*	Roofing, Siding, and Insulation Materials.	100
5039	Construction Materials, N.E.C.	100
5043	Photographic Equipment and Supplies.	100
5044*	Office Equipment	100
5045*	Computers and Computer Peripheral Equipment and Software.	100
5046*	Commercial Equipment, N.E.C.	100
5047*	Medical, Dental, and Hospital Equipment and Supplies.	100
5048*	Ophthalmic Goods	100
5049*	Professional Equipment and Supplies, N.E.C.	100
5051	Metals Service Centers and Offices.	100
5052	Coal and Other Minerals and Ores.	100
5063	Electrical Apparatus and Equipment, Wiring Supplies, and Construction Materials.	100
5064	Electrical Appliances, Television and Radio Sets.	100
5065	Electronic Parts and Equipment, N.E.C.	100
5072	Hardware	100
5074	Plumbing and Heating Equipment and Supplies (Hydronics).	100
5075	Warm Air Heating and Air-Conditioning Equipment and Supplies.	100
5078	Refrigeration Equipment and Supplies.	100
5082	Construction and Mining (Except Petroleum) Machinery and Equipment.	100
5083	Farm and Garden Machinery and Equipment.	100
5084	Industrial Machinery and Equipment.	100
5085	Industrial Supplies	100
5087	Service Establishment Equipment and Supplies.	100
5088	Transportation Equipment and Supplies, Except Motor Vehicles.	100
5091*	Sporting and Recreational Goods and Supplies.	100
5092*	Toys and Hobby Goods and Supplies.	100
5093	Scrap and Waste Materials.	100
5094	Jewelry, Watches, Precious Stones, and Precious Metals.	100
5099	Durable Goods, N.E.C	100
	Major Group 51—Wholesale Trade—Nondurable Goods	
5111	Printing and Writing Paper	100
5112	Stationery and Office Supplies.	100
5113	Industrial and Personal Service Paper.	100
5122	Drugs, Drug Proprietaries, and Druggists' Sundries.	100
5131*	Piece Goods, Notions, and Other Dry Goods.	100

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (* = New SIC Code in 1987, Not Used in 1972)	Description (N.E.C. = Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
5136	Men's and Boys' Clothing and Furnishings.	100
5137	Women's, Children's, and Infants' Clothing and Accessories.	100
5139	Footwear	100
5141	Groceries, General Line	100
5142	Packaged Frozen Foods	100
5143	Dairy Products, Except Dried or Canned.	100
5144	Poultry and Poultry Products.	100
5145	Confectionery	100
5146	Fish and Seafoods	100
5147	Meats and Meat Products	100
5148	Fresh Fruits and Vegetables.	100
5149	Groceries and Related Products, N.E.C.	100
5153	Grain and Field Beans	100
5154	Livestock	100
5159	Farm-Product Raw Materials, N.E.C.	100
5162*	Plastics Materials and Basic Forms and Shapes.	100
5169*	Chemical and Allied Products, N.E.C.	100
5171	Petroleum Bulk Stations and Terminals.	100
5172	Petroleum and Petroleum Products Wholesalers, Except Bulk Stations and Terminals.	100
5181	Beer and Ale	100
5182	Wine and Distilled Alcoholic Beverages.	100
5191	Farm Supplies	100
5192*	Books, Periodicals, and Newspapers.	100
5193*	Flowers, Nursery Stock, and Florists' Supplies.	100
5194	Tobacco and Tobacco Products.	100
5198	Paints, Varnishes, and Supplies.	100
5199	Nondurable Goods, N.E.C.	100

DIVISION G—RETAIL TRADE (Not Applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies)

Major Group 52—Building Materials, Hardware, Garden Supply, and Mobile Home Dealers

5211	Lumber and Other Building Materials Dealers.	$3.5
5231	Paint, Glass, and Wallpaper Stores.	$3.5
5251	Hardware Stores	$3.5
5261	Retail Nurseries, Lawn and Garden Supply Stores.	$3.5
5271	Mobile Home Dealers	$6.5

Major Group 53—General Merchandise Stores

5311	Department Stores	$13.5
5331	Variety Stores	$5.5
5399	Miscellaneous General Merchandise Stores.	$3.5

Major Group 54—Food Stores

5411	Grocery Stores	$13.5
5421*	Meat and Fish (Seafood) Markets, Including Freezer Provisioners.	$3.5
5431	Fruit and Vegetable Markets.	$3.5
5441	Candy, Nut, and Confectionery Stores.	$3.5
5451	Dairy Products Stores	$3.5
5461*	Retail Bakeries	$3.5
5499	Miscellaneous Food Stores.	$3.5

Major Group 55—Automotive Dealers and Gasoline Service Stations

5511	Motor Vehicle Dealers (New and Used).	$11.5
5521	Motor Vehicle Dealers (Used Only).	$11.5
5531	Auto and Home Supply Stores.	$3.5
5541	Gasoline Service Stations	$4.5
5551	Boat Dealers	$3.5
5561	Recreational Vehicle Dealers.	$3.5
5571	Motorcycle Dealers	$3.5
5599	Automotive Dealers, N.E.C [12].	$3.5

Major Group 56—Apparel and Accessory Stores

5611	Men's and Boys' Clothing and Accessory Stores.	$4.5
5621	Women's Clothing Stores	$4.5
5632*	Women's Accessory and Specialty Stores.	$3.5
5641	Children's and Infants' Wear Stores.	$3.5
5651	Family Clothing Stores	$4.5
5661	Shoe Stores	$4.5
5699	Miscellaneous Apparel and Accessory Stores.	$3.5

Major Group 57—Home Furniture, Furnishings, and Equipment Stores

5712	Furniture Stores	$3.5
5713	Floor Covering Stores	$3.5
5714	Drapery, Curtain, and Upholstery Stores.	$3.5
5719	Miscellaneous Homefurnishings Stores.	$3.5
5722	Household Appliance Stores.	$4.5
5731*	Radio, Television, and Consumer Electronics Stores.	$4.5
5734*	Computer and Computer Software Stores.	$4.5
5735*	Record and Prerecorded Tape Stores.	$3.5
5736*	Musical Instrument Stores	$3.5

Major Group 58—Eating and Drinking Places

5812	Eating Places, Except Food Service, Institutional.	$3.5
5812	Food Service, Institutional	$10.0
5813	Drinking Places (Alcoholic Beverages).	$3.5

Major Group 59—Miscellaneous Retail

5912	Drug Stores and Proprietary Stores.	$3.5
5921	Liquor Stores	$3.5
5932*	Used Merchandise Stores	$3.5
5941	Sporting Goods Stores and Bicycle Shops.	$3.5
5942	Book Stores	$3.5
5943	Stationery Stores	$3.5
5944	Jewelry Stores	$3.5
5945	Hobby, Toy, and Game Shops.	$3.5
5946	Camera and Photographic Supply Stores.	$3.5
5947	Gift, Novelty, and Souvenir Shops.	$3.5
5948	Luggage and Leather Goods Stores.	$3.5
5949	Sewing, Needlework, and Piece Goods Stores.	$3.5
5961	Catalog and Mail-Order Houses.	$12.5
5962	Automatic Merchandising Machine Operators.	$3.5
5963	Direct Selling Establishments.	$3.5
5983	Fuel Oil Dealers	$6.0
5984	Liquefied Petroleum Gas (Bottled Gas) Dealers.	$3.5
5989*	Fuel Dealers, N.E.C.	$3.5
5992	Florists	$3.5
5993	Tobacco Stores and Stands.	$3.5
5994	News Dealers and Newsstands.	$3.5
5995*	Optical Goods Stores	$3.5
5999	Miscellaneous Retail Stores, N.E.C.	$3.5

DIVISION H—FINANCE, INSURANCE, AND REAL ESTATE [13]

Major Group 60—Depository Institutions

6021*	National Commercial Banks.	$100 [14]
6022	State Commercial Banks	$100 [14]
6029*	Commercial Banks, N.E.C.	$100 [14]
6035*	Savings Institutions, Federally Chartered.	$100 [14]
6036*	Savings Institutions, Not Federally Chartered.	$100 [14]

Major Group 62—Security and Commodity Brokers, Dealers, Exchanges, and Services

6221	Commodity Contracts Brokers and Dealers.	$3.5

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (*=New SIC Code in 1987, Not Used in 1972)	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
Major Group 63—Insurance Carriers		
6331	Fire, Marine, and Casualty Insurance.	$1,500
Major Group 64—Insurance Agents, Brokers, and Service		
6411	Insurance Agents, Brokers, and Service.	$3.5
Major Group 65—Real Estate		
6515	Operators of Residential Mobile Home Sites.	$3.5
	Leasing of Building Space to Federal Government by Owners.	$10.0
6531	Real Estate Agents and Managers.	$1.0 [10]
DIVISION I—SERVICES		
Major Group 70—Hotels, Rooming Houses, Camps, and Other Lodging Places		
7011	Hotels and Motels	$3.5
7021	Rooming and Boarding Houses.	$3.5
7032	Sporting and Recreational Camps.	$3.5
7033	Recreational Vehicle Parks and Campsites.	$3.5
7041	Organization Hotels and Lodging Houses, on Membership Basis.	$3.5
Major Group 72—Personal Services		
7211	Power Laundries, Family and Commercial.	$7.0
7212	Garment Pressing, and Agents for Laundries and Drycleaners.	$3.5
7213	Linen Supply	$7.0
7215	Coin-Operated Laundries and Dry cleaning.	$3.5
7216	Drycleaning Plants, Except Rug Cleaning.	$2.5
7217	Carpet and Upholstery Cleaning.	$2.5
7218	Industrial Launderers	$7.0
7219	Laundry and Garment Services, N.E.C..	$3.5
7221	Photographic Studios, Portrait.	$3.5
7231	Beauty Shops	$3.5
7241	Barber Shops	$3.5
7251	Shoe Repair Shops and Shoeshine Parlors.	$3.5
7261	Funeral Service and Crematories.	$3.5
7291*	Tax Return Preparation Services.	$3.5
7299	Miscellaneous Personal Services, N.E.C.	$3.5
Major Group 73—Business Services		
7311	Advertising Agencies	$3.5
7312	Outdoor Advertising Services.	$3.5
7313	Radio, Television, and Publishers' Advertising Representatives.	$3.5
7319	Advertising, N.E.C.	$3.5
7322*	Adjustment and Collection Services.	$3.5
7323*	Credit Reporting Services	$3.5
7331	Direct Mail Advertising Services.	$3.5
7334*	Photocopying and Duplicating Services.	$3.5
7335*	Commercial Photography	$3.5
7336*	Commercial Art and Graphic Design.	$3.5
7338*	Secretarial and Court Reporting Services.	$3.5
7342	Disinfecting and Pest Control Services.	$3.5
7349	Building Cleaning and Maintenance Services, N.E.C.	$8.0
7352*	Medical Equipment Rental and Leasing.	$3.5
7353*	Heavy Construction Equipment Rental and Leasing.	$3.5
7359*	Equipment Rental and Leasing, N.E.C.	$3.5
7361	Employment Agencies	$3.5
7363*	Help Supply Services	$3.5
7371*	Computer Programming Services.	$7.0
7372	Prepackaged Software	$7.0
7373*	Computer Integrated Systems Design.	$7.0
7374	Computer Processing and Data Preparation and Processing Services.	$7.0
7375*	Information Retrieval Services.	$7.0
7376*	Computer Facilities Management Services.	$7.0
7377*	Computer Rental and Leasing.	$12.5
7378*	Computer Maintenance and Repair.	$12.5
7379	Computer Related Services, N.E.C.	$12.5
7381*	Detective, Guard, and Armored Car Services.	$6.0
7382*	Security Systems Services.	$6.0
7383*	News Syndicates	$3.5
7384*	Photofinishing Laboratories.	$3.5
7389*	Business Services, N.E.C.	$3.5
Major Group 75—Automotive Repair, Services, and Parking		
7513	Truck Rental and Leasing, Without Drivers.	$12.5
7514*	Passenger Car Rental	$12.5
7515*	Passenger Car Leasing	$12.5
7519	Utility Trailer and Recreational Vehicle Rental.	$3.5
7521*	Automobile Parking	$3.5
7532*	Top, Body, and Upholstery Repair Shops and Paint Shops.	$3.5
7533*	Automotive Exhaust System Repair Shops.	$3.5
7534	Tire Retreading and Repair Shops.	$7.0
7536*	Automotive Glass Replacement Shops.	$3.5
7537*	Automotive Transmission Repair Shops.	$3.5
7538	General Automotive Repair Shops.	$3.5
7539	Automotive Repair Shops, N.E.C.	$3.5
7542	Carwashes	$3.5
7549	Automotive Services, Except Repair and Carwashes.	$3.5
Major Group 76—Miscellaneous Repair Services		
7622	Radio and Television Repair Shops.	$3.5
7623	Refrigeration and Air-Conditioning Service and Repair Shops.	$3.5
7629	Electrical and Electronic Repair Shops, N.E.C.	$3.5
7631	Watch, Clock, and Jewelry Repair.	$3.5
7641	Reupholstery and Furniture Repair.	$3.5
7692	Welding Repair	$3.5
7694	Armature Rewinding Shops.	$3.5
7699	Repair Shops and Related Services, N.E.C. [17]	$3.5
Major Group 78—Motion Pictures		
7812*	Motion Picture and Video Tape Production.	$14.5
7819	Services Allied to Motion Picture Production.	$14.5
7822*	Motion Picture and Video Tape Distribution.	$14.5
7829	Services Allied to Motion Picture Distribution.	$3.5
7832	Motion Picture Theaters, Except Drive-In.	$3.5
7833	Drive-In Motion Picture Theaters.	$3.5
7841*	Video Tape Rental	$3.5
Major Group 79—Amusement and Recreation Services		
7911	Dance Studios, Schools, and Halls.	$3.5
7922	Theatrical Producers (Except Motion Picture) and Miscellaneous Theatrical Services.	$3.5
7929	Bands, Orchestras, Actors, and Other Entertainers and Entertainment Groups.	$3.5
7933	Bowling Centers	$3.5
7941	Professional Sports Clubs and Promoters.	$3.5

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (* = New SIC Code in 1987, Not Used in 1972)	Description (N.E.C. = Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
7991*	Physical Fitness Facilities	$3.5
7993	Coin-Operated Amusement Devices.	$3.5
7996	Amusement Parks	$3.5
7997	Membership Sports and Recreation Clubs.	$3.5
7999	Amusement and Recreation Services, N.E.C.	$3.5
	Major Group 80—Health Services	
8011	Offices and Clinics of Doctors of Medicine.	$3.5
8021	Offices and Clinics of Dentists.	$3.5
8031	Offices and Clinics of Doctors of Osteopathy.	$3.5
8041	Offices and Clinics of Chiropractors.	$3.5
8042	Offices and Clinics of Optometrists.	$3.5
8043*	Offices and Clinics of Podiatrists.	$3.5
8049	Offices and Clinics of Health Practitioners, N.E.C.	$3.5
8051	Skilled Nursing Care Facilities.	$3.5
8052*	Intermediate Care Facilities.	$3.5
8059	Nursing and Personal Care Facilities, N.E.C.	$3.5
8062	General Medical and Surgical Hospitals.	$3.5
8063	Psychiatric Hospitals	$3.5
8069	Specialty Hospitals, Except Psychiatric.	$3.5
8071	Medical Laboratories	$3.5
8072	Dental Laboratories	$3.5
8082*	Home Health Care Services.	$3.5
8092*	Kidney Dialysis Centers	$3.5
8093*	Specialty Outpatient Facilities, N.E.C.	$3.5
8099*	Health and Allied Services, N.E.C.	$3.5
	Major Group 81—Legal Services	
8111	Legal Services	$3.5
	Major Group 82—Educational Services	
8211	Elementary and Secondary Schools.	$3.5
8221	Colleges, Universities, and Professional Schools.	$3.5
8222	Junior Colleges and Technical Institutes.	$3.5
8231	Libraries	$3.5
8243	Data Processing Schools	$3.5
8244	Business and Secretarial Schools.	$3.5
8249	Vocational Schools, N.E.C.	$3.5
8299	Schools and Educational Services, N.E.C.	$3.5
8299	Flight Training Services	$12.5

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (* = New SIC Code in 1987, Not Used in 1972)	Description (N.E.C. = Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
	Major Group 83—Social Services	
8322*	Individual and Family Social Services.	$3.5
8331	Job Training and Vocational Rehabilitation Services.	$3.5
8351	Child Day Care Services	$3.5
8361	Residential Care	$3.5
8399	Social Services, N.E.C.	$3.5
	Major Group 84—Museums, Art Galleries, and Botanical and Zoological Gardens	
8412*	Museums and Art Galleries.	$3.5
8422*	Arboreta and Botanical or Zoological Gardens.	$3.5
	Major Group 86—Membership Organizations	
8611	Business Associations	$3.5
8621	Professional Membership Organizations.	$3.5
8631	Labor Unions and Similar Labor Organizations.	$3.5
8641	Civic, Social, and Fraternal Associations.	$3.5
8651	Political Organizations	$3.5
8661	Religious Organizations	$3.5
8699	Membership Organizations, N.E.C.	$3.5
	Major Group 87—Engineering, Accounting, Research, Management, and Related Services	
8711*	Engineering Services:	
	Military and Aerospace Equipment and Military Weapons.	$13.5
	Marine Engineering and Naval Architecture.	$9.0
	Other Engineering Services.	$2.5
8712*	Architectural Services (Other Than Naval).	$2.5
8713*	Surveying Services	$2.5
8721*	Accounting, Auditing, and Bookkeeping Services.	$4.0
8731*	Commercial Physical and Biological Research:[18].	
	Aircraft	1,500
	Aircraft Parts, and Auxiliary Equipment, and Aircraft Engines and Engine Parts.	1,000
	Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts.	1,000
	Other Commercial Physical and Biological Research.	500
8732*	Commercial Economic, Sociological, and Educational Research.	$3.5
8733*	Noncommercial Research Organizations.	$3.5
8734*	Testing Laboratories	$3.5
8741*	Management Services	$3.5

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC (* = New SIC Code in 1987, Not Used in 1972)	Description (N.E.C. = Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
8742*	Management Consulting Services.	$3.5
8743*	Public Relations Services	$3.5
8744*	Facilities Support Management Services.[19].	$3.5
	Base Maintenance [20]	$13.5
8748*	Business Consulting Services, N.E.C.	$3.5
	Major Group 89—Services, Not Elsewhere Classified	
8999	Services, N.E.C.	$3.5

[1] Size standards preceded by a dollar sign ($) are in millions of dollars of annual receipts. All others are in number of employees unless specified otherwise.

[2] *SIC code 1629—Dredging:* To be considered small, a firm must perform the dredging of at least 40 percent of the yardage with its own dredging equipment or equipment owned by another small dredging concern.

[3] *SIC Division D—Manufacturing:* "Rebuilding on a factory basis or equivalent." For rebuilding machinery or equipment on a factory basis, use SIC code applicable for new manufactured product. The appropriate size standard is not limited to manufacturers. Ordinary repair services or preservation operations, however, are not considered rebuilding activities.

[4] *SIC code 2033:* For purposes of Government procurement for food canning and preserving under SIC code 2033, the standard of 500 employees shall be exclusive of agricultural labor as defined in Section (k) of the Federal Unemployment Tax Act, 68A, Stat. 454, 26 U.S.C. (I.R.C. 1954) 3306.

[5] *SIC code 2911:* For purposes of Government procurement, the firm may not have more than 1,500 employees, nor may it have more than 50,000 barrels per day capacity. This capacity may be measured in terms of either crude oil or bona fide feedstocks or both, but the sum total of the various petroleum-based inputs into the process may not exceed 50,000 barrels. In addition to the direct owned capacity of the concern in question, counted capacity will include any leased facilities or any facilities made available to the concern under an arrangement such as (but not limited to) an exchange agreement or a throughput, or other form, or processing agreement (whereby another party processes the concern's own crude or feedstocks). Such an arrangement would have the same effect as though such facilities had been leased, and this would have to be included in the concern's own capacity. The total product to be delivered in the performance of the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

[6] *SIC code 3011:* For purposes of Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census Classification codes 30111 and 30112, provided that: (1) the value of tires within Census Classification codes 30111 and 30112 which it manufactured in the United States during the previous calendar year is more than 50 percent of the value of its total worldwide manufacture, (2) the value of pneumatic tires within Census Classification codes 30111 and 30112 which it manufactured worldwide during the preceding calendar year was less than 5 percent of the value of all such tires manufactured in the United States during said period, and (3) the value of the principal product which it manufactured or otherwise produced, or sold worldwide during the preceding calendar year is less than 10 percent of the total value of such products manufactured or otherwise produced or sold in the United States during said period.

[7] *SIC code 4212:* The component "Garbage and Refuse, Collecting and Transporting, Without Disposal" shall have a size standard of $6.0 million. This is the same size standard as SIC code 4953, Refuse Systems.

[8] *Offshore Marine Services:* The applicable size standard shall be $14 million for firms furnishing specific transportation services to concerns engaged in offshore oil and/or natural gas exploration, drilling production, or marine research; such services, encompass passenger and freight transportation, anchor handling, and related logistical services to and from the work site or at sea.

[9] *SIC codes 4512, 4513, and 4522:* Includes passenger or cargo transportation requiring the use of one or more helicopters or fixed-wing aircraft. This does not include offshore marine transportation services as defined in footnote 8.

[10] *SIC codes 4724 and 6531:* As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The Commissions received would be included as revenue.

[11] *SIC code 4953:* "Garbage and Refuse, Collecting and Transporting, Without Disposal," a component of SIC code 4212, has the same size standard as SIC code 4953.

[12] *SIC code 5599:* For retail firms whose principal line of business is the retail sale of aircraft, a $5 million size standard shall apply.

[13] Most industries in Division H:—Finance, Insurance, and Real Estate—are excluded from SBA assistance.

[14] *Major Group 60:* As measured by total assets.

[15] *Major Group 65—Leasing of building space to the Federal Government by owners:* For the purpose of Government procurement, a size standard of $10 million in gross receipts is established for owners of building space that is leased to the Federal Government. The standard for these procurements shall apply to the owner of the property and not to those acting as an agent for the owner. There is no size standard concerning the agent in a leasing arrangement.

[16] *Division J—Services:* For all industries not specifically listed in this division, the size standard is $3.5 million.

[17] *SIC codes 7699 and 3728:* Contracts for the rebuilding or overhaul of aircraft ground support equipment on a contract basis will be classified under SIC code 3728.

[18] *SIC code 8731:* For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard to use is that of the manufacturing industry in which the specific products is classified.

Research and Development, as defined in the SIC Manual, means laboratory or other physical research and development on a contractor fee basis. Research and development for purposes of size determinations does not include the following: economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

For purposes of the Small Business Innovation Research (SBIR) program only, a different definition has been established by law. See § 121.7 of these regulations.

Research and development for guided missiles and space vehicles includes evaluation and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

[19] *Facilities Management, a component of SIC code 8744,* has the following definition: Establishments, not elsewhere classified, which provide overall management and the personnel to perform a variety of related support services in operating a complete facility in or around the specific building, or within another business or Government establishment. Facilities management means furnishing three or more personnel supply services which may include, but are not limited to, secretarial services, typists, telephone answering, reproduction or Mimeograph service, mailing services, financial or business management, public relations, conference planning, travel arrangements, word processing, maintaining files and/or libraries, switchboard operation, writers, bookkeeping, minor office equipment maintenance and repair, use of information systems (not programming), etc.

[20] *SIC code 8744:* If one of the activities of *base maintenance,* as defined below, can be identified with a separate industry, and that activity (or industry) accounts for 50 percent or more of the value of an entire contract, then the proper size standard shall be that for the particular industry, and not the base maintenance size standard.

"Base Maintenance" constitutes three or more separate activities. The activities may be either service or special trade costruction related activities. As services, these activities must each be in a separate industry. These activities may include, but are not limited to, such separate maintenance activities as Janitorial and Custodial Service, Protective Guard Service, Commissary Service, Fire Prevention Service, Safety Engineering Service, Messenger Service, and Grounds Maintenance and Landscaping Service. If the contract involves the use of special trade contractors (plumbing, painting, plastering, carpentering, etc.), all such specialized special trade construction activities will be considered a single activity, which is Base Housing Maintenance. This is only one activity of base maintenance and two additional activities must be present for the contract to be considered base maintenance. The size standard for Base Housing Maintenance is $7 million, the same size standard as for Special Trade Contractors.

§ 121.701 [Reserved]

Size Eligibility for SBA Financial Assistance

§ 121.801 Programs covered.

These sections apply to small size determinations for the purpose of SBA financial assistance, including assistance under the Business Loan Programs, the Disaster Loan Programs (except physical disaster assistance), the Small Business Investment Company Program, the Development Company Programs, the Surety Bond Guaranty Program and the Pollution Guaranty Program.

§ 121.802 Establishment of the size standard.

(a)(1) An applicant concern for an SBA Business Loan, Disaster Loan (other than physical disaster loans), and Pollution Control Guaranty assistance must meet a two-fold size standard. It must meet the size standard designated for the industry in which the applicant, including its affiliates, is primarily engaged *and* the size standard designated for the industry in which the applicant concern, not including its affiliates, is primarily engaged. These size standards are set forth in § 121.601 of this regulation.

(2) For financial and/or management/technical assistance under the Small Business Investment Company Program and the Development Company Programs, an applicant concern must meet one of the following standards:

(i) Together with its affiliates, it does not have net worth in excess of $6 million, and does not have average net income after Federal income taxes (excluding any carry-over losses) for the preceding 2 completed fiscal years in excess of $2 million; or

(ii) Together with its affiliates, it meets the size standard for the industry in which it is primarily engaged and, excluding its affiliates, meets the size standard for the industry in which it is primarily engaged. These size standards are set forth in § 121.601.

(3) An applicant, including its affiliates, for Surety Bond Guaranty assistance must not have average annual receipts for its preceding three completed fiscal years in excess of $3.5 million.

(b) In determining what is the primary industry in which a concern applying for financial assistance is engaged, primary consideration shall be given to the distribution of receipts, employees and costs of doing business among differing industries in which a concern is operating for the most recently completed fiscal year of the concern. Other factors (e.g., patents, contract awards, assets) may be considered.

(c) Where the size standard relates to the applicant and its affiliates, the determination of the appropriate primary business and, accordingly, the appropriate size standard of the applicant, must include the aggregates for the concern and its affiliates. Furthermore, the application of size criteria (i.e., number of employees or annual receipts) to the size standard is not confined to the operations of the primary business of the concern, but must measure all operations of the concern.

(d) Labor Surplus Area & Redevelopment Area Differentials: The applicable size standards for the purpose of all SBA financial programs, excluding the Surety Bond Guarantee Program, are increased by 25 percent whenever the concern agrees to use the assistance within a "labor surplus area," or "redevelopment area."

"Redevelopment area" is defined in the Public Works Economic Development Act of 1965 (Pub. L. 89–136, 79 Stat. 570, 42 U.S.C. 3211), "Labor surplus areas" are listed monthly in the Department of Labor publication "Area Trends."

§ 121.803 Time at which size is determined.

(a) Except in the case of Disaster Loan assistance, the size of an applicant for SBA financial assistance is determined as of the date of its application for such financial assistance. Subsequent changes in size between the date of application and the extension of SBA financial assistance will not affect a firm's size status.

(b) Agreements to merge, including agreements in principle, stock options, or convertible securities and other business arrangements affecting possible future affiliation of the concern with another concern or change of control of the concern are considered as executed on the date of the application.

(c) In the case of applicable disaster loan assistance (i.e., disaster assistance other than physical disaster loans), the size status of concerns and the relevant size standards are determined as of the time the disaster commenced, as set forth in the Disaster Declaration.

§ 121.804 Procedures prior to a formal size determination.

(a) An applicant for SBA financial assistance shall be deemed to certify as part of its application that it is small under the applicable SBA size standard.

(b) In processing such application, SBA shall consider the size of the applicant in determining eligibility. Where applications with accompanying materials contain credible information indicating that the applicant may not be small, the processing official shall cause a determination to be made as to program size eligibility based on information supplied in the application and any other information requested.

(c) In the absence of credible information indicating otherwise, a participating financial institution, a small business investment company, a development company, a surety bond company, or a pollution control guaranty issuing authority may accept at face value the information provided by the applicant for the particular financial assistance involved.

(d) The SBA program official with authority to take final action on the assistance requested has the authority to make a program size eligibility determination, except that such a determination is not a formal size determination as described in §§ 121.1601 through 121.1608. Where he or she deems it appropriate, such a formal size determination may be requested prior to a determination to deny eligibility for such assistance on the grounds of size.

(e) When an applicant has been denied assistance for size ineligibility because the SBA program official has found it to be other than small, the applicant may request a formal size determination (pursuant to §§ 121.1601 through 121.1608 of these regulations). Except for disaster loan eligibility, such a request shall be made with the SBA Regional Office serving the geographical area in which the SBA office denying the assistance is located. In the case of an application for disaster loan assistance, the request for a size determination shall be made to the appropriate Disaster Area Office.

(f) When requested pursuant to paragraphs (d) or (e) of this section, the SBA Regional Office shall make a formal size determination in accordance with the procedures set forth in §§ 121.1601 through 121.1608, except that the time limitations shall not apply and notification of the request and the formal size determination shall be provided to requesting officials and/or SBA program officials interested in the matter.

§ 121.805 Business loan to refinance existing loan.

A concern which applies for an SBA loan or guarantee to refinance an existing SBA loan or guarantee but which, since the date of the original financing, has by natural growth (as distinguished from e.g., merger or acquisition) grown to a size which exceeds the applicable size standard, is considered as small for the purpose of refinancing. However, SBA must determine administratively that refinancing is necessary to protect the Government's financial interest.

§ 121.806 Size eligibility for business loans relating to particular procurements.

A concern which has qualified as small for a particular procurement, will be deemed small for purposes of size eligibility for financial assistance relating to that procurement.

Size Eligibility For Government Procurement

§ 121.901 Programs covered.

These sections apply to size for the purpose of government procurement programs, including government procurement reserved for small business (i.e., the small business set-aside program), SBA's Certificate of Competency Program and the Small Business Subcontracting Program authorized under section 8(d) of the Small Business Act. The contracting aspects of SBA's Minority Small Business and Capital Ownership Development Program (the section 8(a) program) are separately covered under §§ 121.1101 through 121.1108 of this Part.

§ 121.902 Establishment of the size standard.

(a) Except as provided in § 121.911(a), a concern which submits an offer on a Government procurement as a small business must meet the size standard determined by reference to the SIC code as specified in the solicitation or as clarified, completed, or supplied by SBA pursuant to paragraph (d) of this section. These standards are set forth in § 121.601.

(b) The proper SIC code designation for the goods or services being procured is that which best describes the principal purpose of the procurement, giving primary consideration to the industry descriptions in the SIC Manual, the product or service description in the solicitation and attachments thereto, the relative value and importance of each of the components in the procurement (if in fact there is more than one component which makes up the end item being procured) and the function of the goods or services being purchased. Consideration may also be given to previous Government procurement classifications of the same or similar products or services, additional information on the industries and on the product or service procured, and to evaluations on which industry classification would best serve the purposes of the Small Business Act. Generally, a procurement will be classified according to the component which accounts for the greatest percentage of the contract value. A contracting officer must have a good reason to classify a procurement in a way that is inconsistent with this general rule.

(c) The determination of the appropriate SIC code designation shall be made by the contracting officer of the procuring agency or his authorized representative. Both the SIC code designation and the applicable size standard (i.e., number of employees or annual receipts) shall be set forth in the solicitation and such determination of the contracting officer shall be final unless appealed to SBA's Office of Hearings and Appeals in the manner provided in §§ 121.1701 through 121.1722 or assigned by SBA pursuant to paragraph (d) of this section.

(d) An unclear, incomplete or missing SIC code designation and/or size standard by the contracting officer or his representative in the solicitation may be clarified, completed or supplied by SBA, if necessary, in connection with a formal size determination or size appeal.

(e) Any offeror or other interested party adversely affected by a SIC code designation and/or size standard designation by the contracting officer or the appropriate SBA official may appeal such designation to SBA's Office of Hearings and Appeals under the procedures set forth in §§ 121.1701 through 121.1722.

§ 121.903 Binding size determinations.

Size and SIC code determinations are formal actions by the appropriate SBA officials, pursuant to §§ 121.1601 through 121.1722, based upon a specific Government procurement and are binding upon the parties. Opinions provided by SBA to contracting officers or others, not relating to a specific government procurement and not given pursuant to § 121.1601 through 121.1608

or 121.1701 through 121.1722, are advisory in nature and not binding size determinations under these sections, and are not appealable.

§ 121.904 Time at which size is determined.

(a) Except for applicants for Certificates of Competency (COC) relating to unrestricted procurements, the size status of a concern (including its affiliates) is determined as of the date of its written self-certification as a small business. The concern shall certify that it is a small business for the purpose of performing a particular contract at the time it submits its initial offer which includes price to the procuring agency for that contract. For applicants for COC's relating to unrestricted procurements, size status is determined as of the date of its application to SBA for a COC.

(b) Agreements to merge, including agreements in principle, stock options, convertible securities and other business arrangements affecting possible future affiliation of the concern with another concern or change of control of the concern are considered executed as of the date of the certification. (*See* § 121.401(f).)

(c) Where a solicitation is modified so that initial offers are no longer responsive to the solicitation, the concern must recertify that it is a small business at the time it submits a responsive offer which includes price to the modified solicitation.

§ 121.905 Self-certification.

(a) A concern must self-certify itself to be small under the appropriate size standard as specified in the solicitation or as clarified, completed or supplied by SBA pursuant to § 121.902(d) (i.e., number of employees or average annual receipts) in the submission of its initial offer including price relating to a Government procurement.

(b) In the absence of a written protest by other offerors or other credible information which would cause a contracting officer or SBA to question the veracity of the self-certification, a contracting officer may accept the self-certification at face value for the particular procurement involved.

(c) Protests against the self-certification of an offeror by another offeror, the contracting officer, SBA, or other interested parties shall be made under the procedures set forth in §§ 121.1601 through 121.1608.

§ 121.906 Manufactured products under small business set-aside procurements.

(a) *General.* In order to qualify as a small concern in Government contracts reserved for small business (i.e., small business set-asides) for the procurement of manufactured products, an offeror must be either a "manufacturer" or a "regular dealer" under the Walsh-Healey Act (unless specifically exempted under § 124.304 of this title) and, in addition, must manufacture the end item being produced, or must comply with the requirements of paragraphs (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Small Purchase Procedures.

(b) *Nonmanufacturers.* (1) A concern need not be the manufacturer of the item(s) being acquired under a manufacturing contract, if the concern:

(i) Is a small business concern under this Part under a 500 employee size standard;

(ii) Is primarily engaged in the wholesale or retail trade;

(iii) Represents that it will supply the product of a small business concern that is the manufacturer of the end product, as defined in paragraph (b)(2) of this section, or obtains a waiver of such requirement under paragraph (b)(3) of this section; and

(iv) Represents that it will furnish an end product that was manufactured or produced in the United States.

(2) For size determination purposes, there can be only one manufacturer of the end item being acquired. The manufacturer for the purposes of this provision is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item of a manufacturer possesses characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item of a manufacturer may be finished in the sense that it is ready for utilization or consumption, or it may be semifinished to become a raw material for a concern engaged in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers. The following factors are evaluated in determining whether a concern is the manufacturer for the procurement:

(i) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit; and

(ii) The importance of the elements added by the concern to the function of the end item, regardless of their relative value.

(3) The Administrator may waive the requirement set forth in paragraph (b)(1)(iii) of this section that the end item must be manufactured by a small business manufacturer, for any class of products for which there are no small business manufacturers or processors in the Federal market.

(c) *Kit assemblers.* (1) Where the manufactured item being acquired is a kit of supplies or other goods provided by the offeror for a special purpose, the offeror must meet the applicable size standard of 500 employees and 50 percent of the total value of the contents of the kit must be manufactured by small business concerns under the size standard for the SIC code of the item being acquired. Under this provision, the offeror need not itself be the manufacturer of any of the items acquired.

(2) Where the Government has specified an item (or items) for the kit which is (are) not produced by small business concerns, then such item(s) shall be excluded from the determination of total value for the purposes of this subsection.

(d) *Small Purchase Procedures.* Where the procurement of a manufactured item is processed under Small Purchase Procedures, as defined in the Federal Acquisition Regulation (FAR) (48 CFR 13.101), the offeror need not supply the end product of a small business concern so long as the product acquired is manufactured or produced in the United States and so long as the offeror is a small business concern under the applicable size standard of 500 employees. Under this provision, the offeror need not itself be the manufacturer of any of the items acquired.

§ 121.907 Multiple item procurements.

(a) If a procurement calls for two or more specific end items with different size standards and the offeror may submit an offer on any or all end items, the offeror must meet the size standard for each end item for which it submits an offer. If the procurement calls for more than one specific end item and an offeror is required to submit an offer on all end items, the offeror may qualify as a small business for such procurement if it meets the size standard of the end item(s) which account(s) for the greatest percentage of the total contract value.

Example. A solicitation requires an item costing $2 million with a SIC code of 3613 (750 employee size standard), an item costing $4 million with a SIC Code of 3621 (1,000 employee size standard), and an item costing $3 million with a SIC Code of 3622 (750 employee size standard.). In order to qualify

as a small business for the procurement, an offeror must meet the 750 employee size standard because the greatest percentage of the total contract value has a 750 employee size standard ($5 million out of the $9 million contract), despite the fact that the largest single item has a 1,000 employee size standard.

(b) If a procurement calls for two or more specific types of services to be performed with different size standards and the offeror may submit an offer on any or all of the service items, the offeror must meet the size standard for each service item for which it submits an offer. If the procurement calls for more than one specific type of service to be performed and an offeror is required to submit an offer on all service items, the offeror may qualify as a small business for such procurement if it meets the size standard of the service(s) having the same numerical standard which account(s) for the greatest percentage of the total contract value.

§ 121.908 Size procedures under SBA's Certificate of Competency Program.

(a) Upon receipt of a referral for a Certificate of Competency (COC) from a procuring agency contracting officer, SBA shall review the size of the concern to determine whether the concern is eligible to receive COC. SBA will review the concern's completed SBA "Application for Small Business Size Determination" (Size Determination Application) to make such a program size eligibility determination. If the Size Determination Application indicates that the firm is small under the applicable size standard and does not raise questions concerning the firm's size status, the firm is deemed a small business for purposes of a COC and the COC application is processed. If the Size Determination Application indicates that the firm is other than small or raises issues concerning the firm's size status, SBA will initiate a formal size determination.

(b) Where a firm's size is called into question in connection with a COC, a formal size determination shall be made in accordance with the procedures set forth in §§ 121.1601 through 121.1608 of these regulations. Such formal size determination must be made prior to the issuance of a COC.

(c)(1) Pursuant to § 121.904(a), the size of such concern, except for those concerns bidding on unrestricted procurements, is determined as of the date of its written certification that it is a small business for the purpose of performing a particular contract.

(2) When the size determination relates to a concern which has bid on an unrestricted procurement size is determined as of the date of such concern's application for a COC.

(d) A firm will be deemed ineligible for a COC if the SBA determines it to be other than small.

§ 121.909 Manufactured products in an unrestricted procurement for Certificate of Competency purposes.

For the purpose of receiving a Certificate of Competency in an unrestricted procurement for a manufactured product, a concern is a qualified small business nonmanufacturer if it meets the size standard for nonmanufacturers (500 employees) and furnishes any domestically produced or manufactured product, regardless of the size status of the manufacturer thereof. Under this provision the offeror need not be the manufacturer of any of the items acquired.

§ 121.910 Size standards under SBA's Section 8(d) Subcontracting Program.

For subcontracting purposes pursuant to section 8(d) of the Small Business Act, a concern is small:

(a) In connection with subcontracts of $10,000 or less which relate to Government procurements, if its number of employees (including its affiliates) does not exceed 500 persons; and

(b) In connection with subcontracts exceeding $10,000 which relate to Government procurements, if its number of employees or average annual receipts, (including its affiliates), does not exceed the size standard for the product or service it is providing on the subcontract as set forth in § 121.601. (Subcontracting for financial services under section 8(d) of the Small Business Act is addressed by §§ 121.1401 through 121.1405.)

§ 121.911 Size procedures under SBA's Section 8(d) Subcontracting Program.

(a) A concern must self-certify its small size as a section 8(d) subcontractor. The basis for such self-certification is set forth in § 121.905(a).

(b) The self-certification of a concern subcontracting or proposing to subcontract under section 8(d) of the Small Business Act may be protested pursuant to §§ 121.1601 through 121.1608 by the contracting officer, the prime contractor, the appropriate SBA official or any other interested party.

Size Eligibility for Sales or Lease of Government Property.

§ 121.1001 Programs covered.

These provisions apply to size status for the purpose of the sale or lease of Government property. This includes the Timber Sales Program, the Special Salvage Timber Sales Program and the sale of Government petroleum, coal and uranium.

§ 121.1002 Establishment of the size standard.

(a) Size status for the purposes of Government sales and leases under these sections is determined by reference to the primary industry of the applicant business concern, except for the lease of Government land for the purpose of coal mining or uranium prospecting and mining where the nature of the sales contract is controlling. (*See* §§ 121.1008 and 121.1009.) In the case of sales of Government timber, in addition to the business characteristics of the applicant business concern, there are further conditions relating to the implementation of the executed contract that must be met (*See* §§ 121.1006 and 121.1007).

(b) In determining what is the primary industry in which a concern is engaged, primary consideration shall be given to the distribution of receipts, employees and costs of doing business among differing industries in which a concern is operating for the most recently completed fiscal year of the concern. All other relevant factors (e.g., patents, contract awards, assets) will be considered.

§ 121.1003 Binding size determinations.

Size determinations for the purpose of Government sales and leases are formal actions by the appropriate SBA officials pursuant to §§ 121.1601 through 121.1722, based upon a specific Government sale or lease and are binding upon the parties thereto, as provided by law. A size determination may also be performed when no contract is at issue if another Government agency requests such a determination pursuant to §§ 121.1501 through 121.1505 of these regulations. Opinions provided by SBA to contracting officers or others not relating to a specific sale or lease and not given pursuant to §§ 121.1601 through 121.1608 or 121.1701 through 121.1722 are advisory in nature and not binding size determinations under these sections, and are not appealable.

§ 121.1004 Time at which size is determined.

(a) The size status of a concern, including its affiliates, is determined as of the date of its written self-certification as a small business as part of the concern's submission of an offer.

(b) Agreements to merge, including agreements in principle, stock options, convertible securities and other

business arrangements affecting possible future affiliation of the concern with another concern or change of control of the concern are considered executed as of the date of the self-certification.

§ 121.1005 Self-certification.

(a) A concern shall, as and when required by the sale solicitation, self-certify itself to be small in the submission of an offer to purchase or lease Government property, based upon its reasonable, good faith application of the size criteria set forth in these sections and the absence of a previous, still outstanding determination by SBA that the concern is ineligible under the same or a lower size standard. This self-certification includes both the measurement criteria (i.e., number of employees or average annual receipts) and acceptance of the restrictions upon the resale or exchange of the property purchased, as contained in these regulations.

(b) In the absence of a written protest by other offerors or other credible information which would cause a contracting officer to question the veracity of a concern's self-certification as a small business, a contracting officer may accept the self-certification at face value.

(c) Protests against the self-certification of an offeror as a small business by another offeror, by the contracting officer or by SBA shall be made under the procedures set forth in §§ 121.1601 through 121.1608. In addition, requests for formal size determinations may be made (pursuant to §§ 121.1601 through 121.1608) by SBA or another Federal agency, in accordance with §§ 121.1501 through 121.1505, for the purpose of the administration of a Federal property sales program.

§ 121.1006 Sales of Government owned timber other than Special Salvage Timber sales (SSTS).

(a) A concern which submits an offer as a small business for the purchase of Government owned timber, other than SSTS timber, qualifies as small when:

(1) It is primarily engaged in the logging or forest products industry ("Forest Products Industry" means logging, wood preserving, and the manufacture of lumber and wood related products such as veneer, plywood, hardboard, particle board, or wood pulp, and of products of which lumber or wood related products are the principal raw materials); and

(2) Together with its affiliates, does not have over 500 employees. (The rules for determining number of employees are set forth in § 121.407.)

(b) In addition to the requirements of paragraph (a) of this section, where the sale of the Government timber is pursuant to a small business set-aside and the offeror does not intend at the time of the offer to resell the timber, a concern qualifies as small when:

(1) It agrees that, in manufacturing sawlogs cut from the Government timber, it will do so only with its own facilities or those of concerns that qualify under paragraph (a) of this section as small businesses. "Manufacture of logs" means, at a minimum, a breakdown of the log into a rough cut of the finished product; and

(2) It agrees, if standing timber or sawlogs acquired in good faith from the small business set-aside sale is to be resold, not to sell more than 30% of the advertised sawtimber volume, whether in the form of standing timber or sawlogs, therefrom, to other concerns which do not qualify as small business under paragraph (a) of this section (the term "sell" includes but is not limited to the exchange of sawlogs for sawlogs on a product-for-product basis, with or without monetary adjustment, and an indirect transfer, such as the sale of the assets of a concern after it has been awarded one or more set-aside sales of timber); and,

(3) It agrees that if, after award of a set-aside sale(s), the small business concern sells out to, becomes controlled by, or merges with a large business, the resulting entity shall sell an amount of sawtimber volume from each of the set-aside sales to one or more small businesses to comply with the (30%) volume distribution rule. Any agreement for return, directly or indirectly, of logs from small to large concerns which exceeds the distribution rule shall constitute noncompliance. The sawtimber volume distribution restriction shall not apply to the manufacture of preferential timber by a small business concern that purchases the set-aside sale, and at a later date exceeds the applicable small business size standard due to internal growth. Internal growth includes an increase in number of employees without change of control. Also, the distribution restriction shall not apply to a concern which certified itself to be a small business at the time of sale award, but was later determined to be other than small. This applies, provided that a large business did not purchase, assume control of, or merge with the small business after sale award date.

(c) In addition to the requirements of paragraph (a) of this section, where the sale of the Government timber is pursuant to a small business set-aside and the offeror intends to resell the timber, a concern qualifies as small when:

(1) It agrees that it will not sell to a concern which is not a small business within the meaning of paragraph (a) of this section more than 30 percent (50 percent in Alaska) of such timber. The term "sell" includes but is not limited to the exchange of sawlogs for sawlogs on a product-for-product basis with or without monetary adjustment, and an indirect transfer, such as the sale of the assets of a concern after it has been awarded one or more set-aside sales of timber; and

(2) It agrees that if, after award of a set-aside sale(s), the small business concern sells out to, becomes controlled by, or merges with a large business, the resulting entity shall sell an amount of sawtimber volume from each of the set-aside sales to one or more small businesses to comply with the (30%) volume distribution rule. Any agreement for return, directly or indirectly, of logs from small to large concerns which exceeds the distribution rule shall constitute noncompliance.

(d) In order to monitor compliance with the resale restrictions of this section, the offeror must maintain, for a period of 3 years, the name, address, and size status of each concern to which the timber or sawlogs were sold and the log species, grades and volumes involved. Such concern, and any subsequent small business concern that acquires the sawlogs, also shall require its small business purchasers to maintain similar records for a period of 3 years. Further, if the timber purchased is not to be resold in the form of sawlogs, but is to be manufactured into lumber or timber by a concern other than the offeror, the offeror must maintain records to show the name, address, and the size of the concern manufacturing the sawlogs into lumber or timber.

§ 121.1007 Special Salvage Timber Sales (SSTS).

(a) A concern which submits an offer as a small concern for the purchase of Government owned special salvage timber from the United States Forest Service or the Bureau of Land Management qualifies as small when it:

(1) Is primarily engaged in the logging or forest product industry (See § 121.1006(a) for definition of "Forest Product Industry"); and

(2) Together with its affiliates, has not had over 25 employees during any pay period for the last 12 months.

(b) In addition to the requirements of paragraph (a) of this section, where the sale of the special salvage timber is pursuant to a small business set-aside and the offeror does not intend at the time of the offer to resell the timber, a concern qualifies as small when:

(1) It agrees that it will manufacture a significant portion of the logs with its own employees. Manufacture of logs means, at the minimum, a breakdown of the log into the rough cut of the finished product; and

(2) It further agrees that it will accomplish the logging of SSTS timber, exclusive of hauling, with its own employees, or will subcontract such logging only to concerns eligible for preferential award of an SSTS. Logging means felling and bucking, yarding, and loading.

(c) In addition to the requirements of paragraph (a) of this section, where the sale of the special salvage timber is pursuant to a small business set-aside and the offeror intends to resell the timber, a concern qualifies as small when it agrees that it will accomplish a significant portion of the logging operation, exclusive of hauling, with its own employees. Significant logging of timber means using its own employees to accomplish two or more of the following elements: felling and bucking, yarding, and loading. It further agrees that such SSTS logging elements not accomplished with its own employees will be subcontracted only to concerns eligible for preferential award of an SSTS.

§ 121.1008 Leasing Government land for coal mining.

A concern which submits an offer as a small business for the lease of Government land for the purpose of mining coal qualifies as small when it:

(a) Together with its affiliates, does not have over 250 employees (number of employees is defined in § 121.407;

(b) Maintains management and control of the actual mining operations at the tract; and

(c) Agrees that any transfer of the lease from the holder of the original set aside must be to another small business within the meaning of this subpart.

§ 121.1009 Leasing of Government land for uranium mining.

A concern which submits an offer as a small concern for the lease of Government land for the purpose of prospecting for or mining uranium qualifies as small when it, together with its affiliates, does not have over 100 employees (number of employees is defined in § 121.407).

§ 121.1010 Sales of Government owned petroleum.

A concern which submits an offer as a small business for the purchase of Government owned petroleum qualifies as small when it:

(a) Together with its affiliates, does not have over 1,500 employees (number of employees is defined in § 121.407);

(b) Is primarily engaged in petroleum refining (SIC Industry 2911); and

(c) Does not have more than 50,000 barrels per day crude oil or bona fide feed stock capacity from owned and/or leased facilities, or from facilities made available to such concern under an agreement such as, but not limited to, an exchange agreement (except one on a refined-product-for-refined-product basis) or a throughput or other form of processing agreement, with the same effect as though such facilities had been leased.

§ 121.1011 Stockpile purchases.

Any concern primarily engaged in the purchase of materials which are not domestic products is small if its average annual receipts for its preceding three fiscal years do not exceed $42 million.

§ 121.1012 Sale or lease of Government property other than property subject to §§ 121.1006 through 121.1011

A concern which submits an offer as a small business for the purchase or lease of Government property other than property subject to §§ 121.1006 through 121.1010 qualifies as small when it:

(a) Together with its affiliates, does not have over 500 employees (rules for determining "number of employees" are set forth in § 121.407), if it is primarily engaged in manufacturing; or

(b) Together with its affiliates, has average annual receipts for its preceding three completed fiscal years not exceeding $2 million (rules for determining "annual receipts" are set forth in § 121.402), if it is primarily engaged in an industry other than manufacturing.

Size Eligibility for the Minority Small Business and Capital Ownership Development (Section 8(a)) Program

§ 121.1101 Programs covered.

These sections apply to small size status for the purpose of contract assistance pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)) and management/technical assistance available to section 8(a) concerns pursuant to section 7(j) of the Small Business Act (15 U.S.C. 636(j)).

§ 121.1102 Establishment of the size standard.

(a) For purposes of the Minority Small Business and Capital Ownership Development Assistance (section 8(a)) program:

(1) In order to be eligible to participate in the section 8(a) program, an applicant concern must qualify as a small business concern as defined for purposes of Government procurement in § 121.601. The particular size standard to be applied will be based on the primary industry classification of the applicant concern. (See also § 124.102).

(2) In order to obtain section 8(a) contracts once a concern is admitted to the section 8(a) program, the concern must certify to SBA that it is a small business for the purpose of performing each individual contract. SBA, in turn, must verify each such certification.

(b)(1) In determining what is the primary industry in which an applicant, including its affiliates, is engaged, primary consideration shall be given to the distribution of receipts and employees and the costs of doing business among differing industry areas in which a concern is operating for the most recently completed fiscal year of the concern. Other factors (e.g., patents, contract awards, assets) may be considered.

(2) The proper SIC Code designation for the goods or services being procured is that which best describes the principal purpose of the procurement, giving primary consideration to the industry descriptions in the SIC Manual, the product or service description in the solicitation and attachments thereto, the relative value and importance of each of the components in the procurement (if in fact there is more than one component which makes up the end item being procured), and the function of the goods or services being purchased. Consideration may also be given to previous government procurement classifications of the same or similar products or services, to additional information on the industries and on the product or service procured, and to evaluations on which industry classification would best serve the purposes of the Small Business Act. Generally, a procurement will be classified according to the component which accounts for the greatest percentage of the contract value. A contracting officer must have a good reason to classify a procurement in a way that is inconsistent with this general rule.

(c) The determination of the appropriate SIC code designation for the product or service being procured under

a section 8(a) contract shall initially be made by the procuring agency contracting officer. Such designation shall be accepted by SBA unless the AA/MSB&COD elects to appeal to SBA's Office of Hearings and Appeals in the manner provided in §§ 121.1701 through 121.1722 (See § 124.308(b)). A designation may also be made by SBA pursuant to paragraph (d) of this section.

(d) An unclear, incomplete or missing SIC code designation and/or size standard by the contracting officer or his representative may be clarified, completed or supplied by SBA, if necessary, in connection with a formal size determination or size appeal.

§ 121.1103 Time at which size is determined.

The size of a concern, including its affiliates, for sections 8(a) and 7(j) assistance is determined:

(a) As of the date of the application for program eligibility for the purposes of general program eligibility (this determination will not confer subsequent size eligibility for the award of section 8(a) contracts or of section 7(j) assistance);

(b) As of the date of the concern's written self-certification as a small business as part of its initial offer including price to the procuring agency for a particular section 8(a) contract; and

(c) As of the date of application for section 7(j) management or technical assistance (such a 7(j) application may be in the form of a letter to the appropriate SBA officer or as otherwise directed by the proper SBA official).

§ 121.1104 Section 8(a) self-certification.

(a) After SBA has notified a procuring agency in writing that it has accepted a procurement for the 8(a) program in support of the approved business plan of a particular 8(a) concern, the 8(a) concern shall certify that it is a small business for the purpose of performing that particular contract (by certifying that it is small for a particular SIC code or codes) at the time it submits its initial offer including price to the procuring agency for that contract. A copy of the 8(a) concern's offer, including its self-certification as to size, shall be provided to the appropriate SBA district office upon submission to the procuring agency.

(b) The SBA district office involved with the procurement shall verify, within 30 days of its receipt of the selected 8(a) concern's self-certification of size, if possible, that the selected concern is small.

(1) In verifying the selected 8(a) concern's size, SBA will review the annual financial statements and other relevant material regarding the number of employees submitted by the concern to SBA pursuant to part 124 of these regulations. Such financial statements and materials should be present in the 8(a) concern's business plan file. Verification cannot occur unless these financial statements and materials are available to and reviewed by SBA.

(2) Where SBA verifies that the selected 8(a) concern is small for a particular procurement, subsequent changes in size up to the date of award, except those due to merger with or acquisition by another business concern, will not affect the firm's size status as it relates to that procurement.

(i) Where the selected 8(a) concern has merged with or been acquired by another business concern between the date of its certification and the date of award, the concern must recertify its size status, and SBA must verify that new certification, before award can occur.

(ii) An award of an 8(a) contract will be voidable where the selected 8(a) concern does not so recertify its size status.

(c) SBA may, in its discretion, request a formal size determination (pursuant to §§ 121.1601 through 121.1608) with the SBA regional office serving the geographical area in which the principal office of the selected 8(a) concern is located.

(d) Where SBA cannot verify that the selected 8(a) concern is small for a particular procurement, the concern will be ineligible for that procurement, unless a formal size determination is made in favor of the 8(a) concern.

(e) The selected 8(a) concern may request a formal size determination (pursuant to §§ 121.1601 through 121.1608) with the SBA regional office serving the geographical area in which the principal office of the 8(a) concern is located within 5 working days of its receipt of SBA's denial of verification.

(f) Where the selected 8(a) concern does not timely request a formal size determination, SBA may accept the procurement in support of another 8(a) concern, or may return the procurement from the 8(a) program, as appropriate.

§ 121.1105 [Reserved]

§ 121.1106 Manufactured products under section 8(a) contracts.

(a) *General.* In section 8(a) contracts for the procurement of manufactured products, in order to qualify as a small concern, the section 8(a) concern must be either a "manufacturer" or a "regular dealer" under the Walsh-Healey Act (unless specifically exempted under 124.304 of this title) and, in addition, must manufacture the end item being produced, or must comply with the requirements of paragraph (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Small Purchase Procedures.

(b) *Nonmanufacturers.* (1) A concern need not be the manufacturer of the item(s) being acquired under a manufacturing contract, if the concern:

(i) Is a small business concern under this part under a 500-employee size standard;

(ii) Is primarily engaged in the wholesale or retail trade;

(iii) Represents that it will supply the product of a small business concern that is the manufacturer of the end product, as defined in paragraph (b)(2) of this section, or obtains a waiver of such requirement under paragraph (b)(3) of this section; and

(iv) Represents that it will furnish an end product that was manufactured or produced in the United States.

(2) For size determination purposes, there can be only one manufacturer of the end item being acquired. The manufacturer for the purposes of this provision is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item of a manufacturer possesses characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item of a manufacturer may be finished in the sense that it is ready for utilization or consumption, or it may be semifinished to become a raw material for a concern engaged in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers. The following factors are evaluated in determining whether a concern is the manufacturer for the procurement:

(i) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit; and

(ii) The importance of the elements added by the concern to the function of the end item, regardless of their relative value.

(3) The Administrator may waive the requirement set forth in paragraph (b)(1)(iii) of this section that the end item must be manufactured by a small business manufacturer, for any class of products for which there are no small

business manufacturers or processors in the Federal market.

(c) *Kit assemblers.* Where the manufactured item being acquired is a kit of supplies or other goods provided by the offeror for a special purpose, the offeror must meet the applicable size standard of 500 employees and 50 percent of the total value of the contents of the kit must be manufactured by small business concerns under the size standard for the SIC code of the item being acquired. Under this provision, the offeror need not itself be the manufacturer of any of the items acquired.

§ 121.1107 Multiple item procurements.

(a) If a procurement calls for two or more specific end items with different size standards and the section 8(a) concern may submit an offer on any or all end items, the section 8(a) concern must meet the size standard for each end item for which it contracts with SBA. If a procurement calling for two or more specific end items with different size standards requires performance by a single contractor, the section 8(a) concern qualifies as a small business if it meets the size standard of the end item(s) which account(s) for the greatest percentage of total contract value. *See* example under §121.907(a).

(b) If a procurement calls for two or more specific types of services to be performed with different size standards and the section 8(a) concern may submit an offer on any or all of the service items, the section 8(a) concern must meet the size standard for each service item for which it contracts with SBA. If a procurement calls for more than one specific type of service to be performed with different size standards, and an offeror is required to submit an offer on all service items, the offeror may qualify as a small business for such procurement if it meets the size standard of the service(s) having the same numerical standard which account(s) for the greatest percentage of the total contract value.

§ 121.1108 Eligibility of section 8(a) concern for other SBA assistance.

A concern which is eligible under these size regulations for the award of a section 8(a) contract, shall be deemed eligible under the size regulations for assistance, as described in § 121.801 through 121.806; 121.1001 through 121.1012 and 121.1301 through 121.1305 where the latter assistance directly and primarily relates to the performance of the section 8(a) contract in question.

Size Eligibility for the Small Business Innovation Research Program

§ 121.1201 Program covered.

(a) These sections apply to size status for the purpose of award of a "funding agreement" pursuant to the Small Business Innovation Development Act of 1982 (Pub. L. 97-219, 15 U.S.C. 638(e) thru (k)).

(b) The term "funding agreement officer" for purposes of §§ 121.1201 through 121.1205 is defined to include a contracting officer, a grants officer, or a cooperative agreement officer.

§ 121.1202 Establishment of the size standard.

(a) To be eligible to compete for award of funding agreements in SBA's Small Business Innovation Research (SBIR) program, a business concern must be at least 51 percent owned and controlled by an individual(s) who is (are) citizens of or lawfully admitted permanent resident aliens in the United States, and, including affiliates, may not have more than 500 employees. The rules for determining "number of employees" are set forth in 121.407.

(b) A "funding agreement" is any contract, grant or cooperative agreement entered into between any Federal agency and any small business for the Performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such work is defined in the SBIR legislation as any "* * * activity which is (1) a systematic, intensive study directed toward greater knowledge or understanding of the subject studied; (2) a systematic study directed specifically toward applying new knowledge to meet a recognized need; or (3) a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements"—15 U.S.C. 638, as amended by section 4(e)(5) of Pub. L. 97-219, 96 Stat. 217.

§ 121.1203 Binding size determinations.

Size determinations are formal actions by SBA officials, pursuant to §§ 121.1601 through 121.1722 of these regulations, based upon a specific "funding agreement", as described herein, and are binding upon the parties thereto. Opinions provided by SBA to funding agreement officers or others not relating to a specific "funding agreement" and not given pursuant to §§ 121.1601 through 121.1608 or 121.1701 through 121.1722 are advisory in nature and not binding size determinations under these sections, and are not appealable.

§ 121.1204 Time at which size is determined.

The size status of a concern for the purpose of a "funding agreement" under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards. A concern having more than 500 employees at the date of award (as determined pursuant to § 121.407) is ineligible for award.

§ 121.1205 Self-certification.

(a) A firm submitting a proposal for award of an SBIR funding agreement must certify itself to be a small business as part of its proposal.

(b) In the absence of a written protest by other offerors or other credible information which would cause the funding agreement officer or SBA to question the veracity of the self-certification, the funding agreement officer may accept the self-certification at face value for the "funding agreement" in question.

(c) Protests against the self-certification of an offeror by another offeror or prospective offeror, by the funding agreement officer or by SBA shall be made under the procedures set forth in §§ 121.1601 through 121.1608.

Size Eligibility for Paying Reduced Patent Fees

§ 121.1301 Program covered.

These sections apply to size status for the purpose of paying reduced patent fees pursuant to Public Law 97-247. This statute provides for the payment of reduced patent fees "by independent inventors and nonprofit organizations as defined in regulations established by the Commissioner of Patents and Trademarks, and by small business concerns as defined in section 3 of the Small Business Act and by regulations established by the Small Business Administration." These regulations deal with eligibility for the latter category, that is, small business concerns. Eligibility for the former categories, that is, independent inventors and nonprofit organizations, is set forth in the regulations of the Patent and Trademark Office, Department of Commerce, 37 CFR 1.9, 1.27, 1.28.

§ 121.1302 Establishment of the size standard.

A concern eligible for reduced patent fees is one

(a) Whose number of employees, including those of its affiliates, does not exceed 500 persons (the rules for

determining "number of employees" are set forth in § 121.407); and

(b) Which has not assigned, granted, conveyed, or licensed, and is under no obligation under contract or law to assign, grant, convey or license, any rights in the invention to any person who could not be classified as an independent inventor, if that person had made the invention, or to any concern which would not qualify as a non-profit organization or as a small business concern under this section.

§ 121.1303 Binding size determinations.

Size determinations are formal actions by SBA officials pursuant to §§ 121.1601 through 121.1722 of these regulations, based upon a specific patent application pursuant to the rules of the Patent and Trademark Office, Department of Commerce, and are binding upon the parties thereto. Opinions provided by SBA to patent applicants or others not relating to a specific patent application and not given pursuant to §§ 121.1601 through 121.1608 or 121.1701 through 121.1722 are advisory in nature and not binding size determinations under this section, and are not appealable.

§ 121.1304 Time at which size is determined.

The size status of a concern, including its affiliates, for the purpose of reduced patent fees is determined as of the date of the written verification as a small business as part of the patent application pursuant to 37 CFR 1.27 of the regulations of the Patent and Trademark Office of the Department of Commerce.

§ 121.1305 Self-certification.

(a) A concern may verify its small size in the submission of a patent application to the Patent and Trademark Office pursuant to 37 CFR 1.27 of the regulations of that office.

(b) Any attempt to improperly establish small size status—fraudulently, through gross negligence or otherwise—could result in remedial action by the Patent and Trademark and Office (*see* 37 CFR 1.28, 1.56(d) and 1.555).

(c) In the absence of credible information indicating otherwise, the Patent and Trademark Office may accept the verification by the concern as a small business at face value for the patent application in question.

(d) Questions concerning the verification by a concern as a small business in connection with a patent application shall be resolved, in the first instance, by the Patent and Trademark Office. In the event that the Patent and Trademark Office does not verify that the applicant is small, the applicant for the patent may request a formal SBA size determination pursuant to §§ 121.1601 through 121.1608 of this part.

Size Eligibility of Financial Institutions for Purposes of Sections 8(d) and 15(g) of the Small Business Act

§ 121.1401 Programs covered.

The statutory directives of section 8(d) and 15(g) of the Small Business Act, 15 U.S.C. 637(d) and 644(g), include subcontracting opportunities in connection with Government procurements for "small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals." These sections of this regulation apply to size status for the purpose of subcontracting requirements for financial services to commercial banks and savings and loan associations.

§ 121.1402 Establishment of the size standard.

(a) For the purposes of financial services subcontracting under sections 8(d) and 15(g) of the Small Business Act, a small business, including its affiliates, is a commercial bank or savings and loan association, the assets of which do not exceed $100 million. A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding fiscal year.

(b) "Assets" for the purposes of this regulation means the assets defined according to the Federal Financial Institutions Examination Council 034 call report form.

§ 121.1403 Binding size determinations.

Size determinations are formal actions by SBA officials, pursuant to §§ 121.1601 through 121.1722 based upon specific subcontracts and are binding upon the parties thereto. Opinions provided by SBA to prime contractors, contracting officers or others, not relating to a specific subcontract and not given pursuant to §§ 121.1601 through 121.1608 or 121.1701 through 121.1722, are advisory in nature and not binding size determinations under these sections, and are not appealable.

§ 121.1404 Time at which size is determined.

The size status of a concern for the purpose of financial services subcontracting is determined as of the date of the written self-certification as a small business as part of the subcontractor's initial offer including price.

§ 121.1405 Self-certification.

(a) The financial services subcontractor will self-certify its small size status in the submission of its offer to the prime contractor.

(b) In the absence of a written protest by offerors for the prime contract or for the subcontract or other credible information which would cause the prime contractor, the Government contracting officer or SBA to question the veracity of the self-certification, the prime contractor and the government contracting officer may accept the self-certification at face value for the subcontract in question.

(c) Protests against the self-certification of a subcontractor or an offeror or other interested party for a subcontract by other offerors for the prime contract or the subcontract, by the prime contractor, by the government contracting officer or by SBA shall be made under the procedures set forth in §§ 121.1601 through 121.1608.

Size Eligibility for Compliance With Programs of Other Agencies

§ 121.1501 Programs covered.

SBA will provide size determinations, under its rules, standards and procedures, for the purpose of compliance with small business requirements of statutes, regulations or programs of other government agencies. These size determinations are provided upon request by the other agencies and have binding effect to the extent determined by the relevant statute, regulation or program of such other agencies. SBA size determinations under these regulations are solely findings regarding the size status of a concern and do not affect other regulatory, compliance, contractual or administrative matters.

§ 121.1502 Size standards of other agencies.

Federal agencies considering and promulgating regulations relating to small businesses generally utilize small business size criteria developed pursuant to the Small Business Act. However, SBA size standards sometimes may not be appropriate for the particular regulation involved. In such cases where a Federal agency decides the SBA size standard is not appropriate, the agency may, after consultation with the SBA Office of Advocacy, establish a small business definition which is more appropriate to the activities of the agency.

§ 121.1503 Establishment of the size standard.

For purposes of size determinations made pursuant to this section, the size standards for compliance with programs of other agencies are those set forth in these regulations for SBA programs which are most comparable to the programs of such other agencies, unless otherwise agreed by the agency and SBA.

§ 121.1504 Time at which size is determined.

For the purpose of compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of a definite time, as set forth in the request of such other agency.

§ 121.1505 Procedures for SBA size determinations.

SBA size determinations for other Government agencies will be made under the procedures set forth in §§ 121.1601 through 121.1608. Appeals from these SBA determinations, pursuant to §§ 121.1701 through 121.1722, are available to the concern whose size is in issue; the Government agency requesting the size determination; or to other interested parties as identified by the other Government agency.

Procedures for Size Protests and Requests for Formal Size Determinations

§ 121.1601 Who may initiate.

(a) *Protests of small business status.* Entities may protest the size of a concern with respect to designated SBA programs as identified below.

(1) With respect to SBA's Small Business Set-Aside Program, including the Property Sales Program, the following entities, in connection with a particular procurement or sale, may protest:

(i) Any offeror;

(ii) The contracting officer;

(iii) The SBA Regional Administrator in the region serving the geographical area of the headquarters of the protested offeror, regardless of the location of parent companies or affiliates, or the Associate Administrator for Procurement Assistance;

(iv) Other interested parties. Other interesed parties may include large businesses where only one concern submitted an offer for the specific procurement in question. A protest challenging the size of a concern which does not pertain to a particular procurement or sale shall not be acted upon by the SBA.

(2) With respect to SBA's Subcontracting Program (including the Minority Bank Subcontracting Program), the following entities may protest:

(i) The prime contractor;

(ii) The contracting officer;

(iii) Other potential subcontractors;

(iv) The SBA Regional Administrator of the region serving the geographical area of the headquarters of the protested offeror, regardless of the location of parent companies or affiliates, or the Associate Administrator for Procurement Assistance;

(v) Other interested parties.

(3) With respect to SBA's Small Business Innovation Research Program, the following entities may protest:

(i) A prospective offeror;

(ii) The funding agreement officer;

(iii) The SBA Regional Administrator in the region serving the geographical area of the headquarters of the protested offeror, regardless of the location of parent companies or affiliates, or the Assistant Administrator for Innovation, Research and Technology;

(iv) Other interested parties.

(4) With respect to the Department of Defense's Small Disadvantaged Business (SDB) Program, and any other similar program by another agency, the following entities, in connection with a particular SDB procurement may protest:

(i) Any offeror for the specific SDB requirement;

(ii) The contracting officer;

(iii) The SBA Regional Administrator in the region serving the geographical area of the headquarters of the protested offeror, regardless of the location of parent companies or affiliates, the Associate Administrator for Procurement Assistance, or the Associate Administrator for Minority Small Business and Capital Ownership Development.

(5) With respect to any other Government procurement in which status as a small business may be beneficial, including the award of a contract to a small business where there are tie bids, the opportunity to seek a Certificate of Competency by a small business in an unrestricted procurement, and Small Disadvantaged Business (SDB) price evaluation preferences in unrestricted procurements, the following entities, in connection with a particular procurement may protest:

(i) Any offeror;

(ii) The contracting officer;

(iii) The SBA Regional Administrator in the region serving the geographical area of the headquarters of the protested offeror, regardless of the location of parent companies or affiliates, the Associate Administrator for Procurement Assistance, or the Associate Administrator for Minority Small Business and Capital Ownership Development.

(b) *Requests for size determinations.* Entities may request a formal size determination for a concern with respect to designated SBA programs as identified below. In making a formal size determination, the procedures of §§ 121.1602, 121.1605, and 121.1606 shall apply.

(1) With respect to SBA's Financial Assistance Programs, the following entities may request a formal size determination:

(i) The applicant for assistance;

(ii) The SBA program official in the relevant SBA District Office with authority to take final action on the assistance requested;

(iii) The SBA Regional Administrator of the region serving the geographical area in which the principal office of the applicant concern, excluding parent companies and affiliates, is located, or the Associate Administrator for Finance and Investment.

(2) With respect to SBA's section 8(a) program,

(i) For purposes of initial 8(a) eligibility, the following entities may request a formal size determination:

(A) The 8(a) applicant concern; or

(B) The SBA Regional Administrator of the region serving the geographical area in which the principal office of the applicant concern, excluding parent companies and affiliates, is located, the Director of the Division of Program Certification and Eligibility, or the Associate Administrator for Minority Small Business and Capital Ownership Development.

(ii) For purposes of individual 8(a) contract awards, whether sole source or competitive, the following entities may request a formal size determination:

(A) The section 8(a) concern nominated by SBA for the particular procurement;

(B) The SBA program official in the relevant SBA office with authority to execute the section 8(a) contract;

(C) The SBA Regional Administrator of the region serving the geographical area in which the principal office of the 8(a) concern, excluding parent companies and affiliates, is located, or the Associate Administrator for Minority Small Business and Capital Ownership Development.

(3) With respect to SBA's Certificate of Competency Program, the following entities may request a formal size determination:

(i) The offeror who has applied for a Certificate of Competency;

(ii) The SBA Regional Administrator in the region serving the geographical area in which the principal office of the offeror, excluding parent companies and affiliates, is located, or the Associate Administrator for Procurement Assistance.

(4) With respect to SBA's sale or lease of government property, the following entities may request a formal size determination:

(i) The SBA Regional Administator in the region serving the geographical area in which the principal office of the offeror, excluding parent companies and affiliates, is located, or the Associate Administrator for Procurement Assistance;

(ii) Other Federal agencies for the purpose of administration of a property sales program.

(5) With respect to eligibility for paying reduced patent fees, the following entities may request a formal size determination:

(i) The applicant for the reduced patent fees;

(ii) The Patent and Trademark Office.

(6) Additionally, SBA will make a formal size determination when requested by another Government agency for purposes of eligibility for a non-SBA program.

§ 121.1602 Who makes formal size determinations.

(a) In response to either a protest or a request for a formal size determination, the Regional Administrator or his or her delegate shall make all formal size determinations under this Part with the exception of size determininations for purposes of the Disaster Loan Program. Size determinations for purposes of receiving disaster loans shall be made by the Disaster Area Office responsible for the area in which the disaster occurred.

(b) For protest purposes, the appropriate Regional Administrator shall be the one in the SBA region serving the geographical area of the headquarters of the protested offeror, regardless of the location of parent companies or affiliates.

(c) In cases of a request for a formal size determination, the Regional Administrator determining size shall be the one in the SBA region serving the geographical area in which the principal office of the applicant fo assistance or potential recipient of the Government program benefits involved, excluding parent companies and affiliates, is located.

§ 121.1603 Protest procedures.

(a) *Filing.* (1) A protest in connection with a government procurement or sale shall be directed to the contracting officer responsible for the particular procurement or sale involved. Except as provided below with respect to contracting officers or SBA, in order to apply to the procurement or sale in question, such protest must be received prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) With respect to negotiated procurements, a protest must be received within 5 days, exclusive of Saturdays, Sundays, and legal holidays, after receipt from the contracting officer of notification of the identity of the prospective awardee being protested, except as provided below with respect to protests made by contracting officers or SBA. A protest filed within such five day period shall apply to the procurement in question even though a contracting officer may have awarded the contract prior to receipt of the protest.

(3) Such protest must be delivered to the contracting officer by hand, telegram, or mail within the 5-day period allotted; however, a protest shall be considered timely if made by telephone to the contracting officer within the 5-day period allotted and the contracting officer thereafter receives a confirming letter either within such 5-day period or postmarked no later than one day after the date of such telephone protest.

(4) At any time after bid opening, a contracting officer may question the size of any offeror for the purpose of a particular procurement or sale by filing a protest with the SBA Regional Office serving the area in which the headquarters of the offeror is located, regardless of the location of parent companies or affiliates.

(b) *Timeliness of protest.* (1) A protest received after the time limits set forth above shall not apply to the procurement or sale in question. A concern determined other than small as a result of such late protest, however, shall be precluded from self-certifying in any other procurement or sale in which the size standard is the same or lower than the standard in the procurement or sale in question.

(2) A protest by a contracting officer shall be timely for the purpose of the procurement or sale in question whether filed before or after award.

(3) A protest by SBA shall be timely for the purpose of the procurement or sale in question whether filed before or after award. SBA protests, like other protests, must initially be filed with the contracting officer.

(4) On a multiple award schedule procurement set aside for small business, protests will be deemed timely if received by SBA at any time prior to the expiration of the contract period (including renewals).

(5) Protests filed by any person before bid opening or notification of intended award shall be considered premature and shall be dismissed.

(c) *Referral to Regional Office.* (1) Any contracting officer who receives a protest shall promptly forward such protest to the Regional Office serving the geographical area in which the headquarters of the offeror is located, regardless of the location of parent companies or affiliates. Contracting officers need not refer a Protest to SBA, however, when SBA is the protesting party.

(2) When a contracting officer receives a protest and refers it to the SBA, such referral shall contain the following:

(i) The protest and any accompanying materials;

(ii) A copy of the self-certification as to size;

(iii) Identification of the applicable size standard;

(iv) A copy of the solicitation;

(v) Identification of the date of bid opening; and

(vi) The date on which the protest was received.

§ 121.1604 Form of protest.

(a) *Required specificity.* No specific form is required for a protest. However, a protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns will not be deemed to specify adequate grounds for the protest. Some basis for the belief stated in the protest must be given. For the purpose of illustrating required specificity, set forth below are 3 examples which provide sufficient specificity and 3 examples which lack sufficient specificity.

Example 1: An allegation that firm X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is unspecific.

Example 2: An allegation that firm X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 3: An allegation that firm X is affiliated with firm Y without setting forth any basis for the allegation is unspecific.

Example 4: An allegation that firm X is affiliated with firm Y because officer A is an officer of both companies is sufficiently specific.

Example 5: An allegation that firm X has revenues in excess of $2 million (where the applicable size standard is $2 million) without setting forth a basis for the allegation is unspecific.

Example 6: An allegation that firm X exceeds the size standard (where the applicable size standard is $2 million) because it received Government contracts in excess of $2 million last year is sufficiently specific.

The examples given above in this subsection are stated in the briefest possible fashion, but protestors should provide as much detail as is available to them in order to facilitate making expeditious and accurate size determinations. Materials supporting the protest should be submitted where possible.

(b) *Non-specific protests.* Protests which do not contain sufficient specificity shall be dismissed by SBA.

(c) *Appeal of dismissals.* A dismissal by the applicable SBA Regional Office of a protest for lack of specificity may be appealed to SBA's Office of Hearings and Appeals pursuant to §§ 121.1701 through 121.1722.

§ 121.1605 Notification of protest and filing of the application for small business size determinations.

(a) Upon receipt of the protest, the SBA Regional Administrator or his or her delegate shall immediately notify the contracting officer and the protestor of the date such protest was received and whether it will be processed or dismissed for lack of specificity. Where a protest is filed pertaining to SBA's Small Business Innovation Research Program, notification shall also be made to SBA's Assistant Administrator for Innovation, Research and Technology. In cases where the protest is sufficiently specific, the Regional Administrator or his or her delegate shall also advise the protested offeror of the receipt of the protest and shall forward to the protested offeror a copy of the protest and a blank SBA Application for Small Business Size Determination (Size Determination Application assigned OMB Control No. 3245–0101), and where appropriate, SBA's Size Determination Application Supplement, by certified mail, return receipt requested.

(b) Such offeror must file the completed Form 355 within 3 working days as directed by SBA, and must attach thereto its answers to the allegations contained in the protest, together with any supporting material.

(c) If such offeror does not submit the completed SBA Form 355 and its answers to the allegations within 3 working days, or within any additional period of time provided by SBA for good cause, SBA may assume that disclosure of the form or any missing part thereof or any missing answer to the allegations would be contrary to the interests of the protested concern, and SBA may determine that the protested concern is other than a small business.

§ 121.1606 Making the size determination.

(a) *General.* After receipt of a protest or a request for a formal size determination, SBA shall make a formal size determination. The size determination shall be made within 10 working days after receipt of the protest, if possible.

(b) *Withdrawal of request for formal size determination or protest.* Once properly instituted by the filing of a request for a formal size determination or a protest, the size determination may be completed by SBA even if the particular application, proposal, or offer is withdrawn or the Government procurement or sale is cancelled or awarded. This continuation of the size determination process is discretionary with SBA and will be used to prevent the misuse of small business assistance programs and this part 121.

(c) *Basis for determination.* Once the protest or request for a formal size determination is found to be sufficiently specific, such size determination may be based on other grounds not raised in the protest/request. The size determination shall be based primarily on facts and allegations supplied by the protestor and protested concern (or by the entity requesting the size determination). If deemed necessary or appropriate, SBA may utilize other information in its files and may make inquiries including requests to the protestor, the protested concern and any alleged affiliates, or other persons for additional specific information.

(d) *Burden of persuasion.* The burden of establishing its small business size by submitting full information to SBA shall be upon the concern whose size is under consideration.

(e) *Weight of evidence.* Specific signed factual evidence will be weighed more heavily by SBA than general unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(f) *Formal size determination.* The SBA shall base its formal size determination upon the record, including reasonable inferences therefrom, and shall state in writing the basis for its findings and conclusions.

(g) *Notification of determination.* After making its determination, SBA shall immediately notify the contracting officer, the protestor and the protested offeror and each affiliate or alleged affiliate of its determination. Such notification shall be by certified mail, return receipt requested.

(h) *Results of an SBA size determination.* (1) A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed upon appeal to SBA's Office of Hearings and Appeals pursuant to §§ 121.1701 through 121.1722, or unless the concern is recertified as a small business pursuant to § 121.1607.

(2) After SBA has determined that a protested concern is other than small for purposes of a particular procurement, such concern cannot thereafter become eligible for such procurement by affirmatively reducing its size.

(3) If SBA has made a formal size determination that a particular concern is not small, the concern will be deemed ineligible within such applicable size standard for any assistance under the Small Business Act or the Small Business Investment Act of 1958, unless it is thereafter recertified by SBA as a small business as provided in § 121.1607. After such an adverse size determination, the concern shall not self-certify as small within the same or a lower employee or annual receipts size standard (whichever is applicable) unless it is recertified.

§ 121.1607 Recertifications.

(a) An application for recertification may be made at any time to the SBA Regional Office which made the original size determination. Such application must be accompanied by a current completed Form 355 (assigned OMB Control No. 3245–0101) and any other information sufficient to show a significant change in its ownership, management, contractual relations, or in other factors bearing on its status as a small concern.

(b) Recertification shall not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture (e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible manufacturer where the eligible small business bidder or offeror is a

nonmanufacturer on a particular Government procurement.

(c) If SBA denies an application for recertification, such denial shall be deemed a formal size determination. Except as to timber sales size determinations, denials are appealable only by the concern in question to the SBA Office of Hearings and Appeals pursuant to §§ 121.1701 through 121.1722. With respect to timber sales size determinations, SBA may also appeal a denial to the Office of Hearings and Appeals.

(d) The granting of an application for recertification shall have future effect only and shall be deemed a formal size determination, except that the notice requirements of § 121.1606(g) to entities other than the applicant shall not apply.

§ 121.1608 SIC Appeals.

The Office of Hearings and Appeals exclusively shall determine all SIC Code Appeals. Procedures for filing appeals from SIC Code designations are set forth in §§ 121.1701 through 121.1722.

Procedures for Size and SIC Code Appeals

§ 121.1701 Jurisdiction of Office of Hearings and Appeals.

The jurisdiction of the Office of Hearings and Appeals under this part shall be limited, as specified in paragraphs (a) and (b) of this section, to appeals from formal size determinations and appeals from SIC Code designations. No appeal will be permitted from an informal or advisory size opinion. The Office of Hearings and Appeals will review appeals and make final decisions pursuant to the provisions of this subpart, affirming, reversing or modifying:

(a) Formal size determinations made by SBA Regional Offices, pursuant to §§ 121.1601 through 121.1608, and size determinations made by Disaster Area Offices in connection with an application for a disaster loan, as to a concern's small business size status; and

(b) Designations by contracting officers, as made by the contracting officer, or as assigned by SBA pursuant to § 121.902(d) or § 121.1102(d) of this part, regarding classifications of the Standard Industrial Classification (SIC) code and/or the Small Business Administration size standard applicable to a product or service for the purpose of Government procurements and sales.

§ 121.1702 Definitions.

The following definitions shall apply to §§ 121.1701 through 121.1722:

(a) *Person* means an individual, partnership, corporation, association, or other business entity.

(b) Party means the appellant, the concern whose size is at issue and all alleged affiliates of such concern that participate or are specifically afforded the opportunity to participate in the proceeding by the Presiding Judge, the contracting officer in a SIC code designation appeal, the SBA in section 8(a) size appeals and other size appeals in which there is initially no other adverse party to the concern whose size is at issue in the case or where admitted by motion, and any other person so designated by the Presiding Judge. Parties have full rights of participation in the proceeding and are bound by the decision of the panel.

(c) *File* means to deliver personally or to send by U.S. certified mail, return receipt requested or by any other mail service that provides proof of mailing and receipt. The filing date will be determined by reference to the postmark date.

§ 121.1703 Who may appeal.

Appeals from size determinations and SIC Code designations may be filed with the Office of Hearings and Appeals by any of the following:

(a) Any interested person who was a party to or has been adversely affected by a formal size determination made pursuant to §§ 121.1601 through 121.1608;

(b) Any interested person who has been adversely affected by a SIC code designation; however, with respect to a particular 8(a) contract, only the AA/MSB&COD or the procuring agency contracting officer may appeal a SIC code designation;

(c) The SBA Associate or Assistant Administrator for the SBA program involved or the SBA Regional Administrator in the region which made the formal size determination.

(d) SBA appeals shall be made through SBA's Office of General Counsel to the Office of Hearings and Appeals.

§ 121.1704 Where to appeal.

Written Notices of Appeal conforming to § 121.1706 may be mailed to the Office of Hearings and Appeals, Small Business Administration, Washington, DC 20416, or may be personally delivered to the Office of Hearings and Appeals at 2100 K Street NW., Washington, DC.

§ 121.1705 Time limits for appeals.

(a)(1) Except as provided in paragraph (a)(2) of this section, a written appeal from a size determination must be filed with the Office of Hearings and Appeals no later than thirty (30) calendar days after the date of receipt of such determination.

(2) A written appeal from a size determination in a pending procurement or a pending Government property sale must be filed with the Office of Hearings and Appeals no later than five (5) days (exclusive of Saturdays, Sundays, and legal holidays) after the date of receipt of such determination. Unless written notice of such an appeal is filed within the prescribed time limit, the appellant will be deemed to have waived all rights of appeal regarding size insofar as the pending procurement or sale is concerned; however, an appeal which is untimely under this paragraph (a)(2) may, if timely under paragraph (a)(1) of this section, proceed to final determination and shall apply to future procurements and sales.

(b)(1) Except as provided in paragraph (b)(2) of this section, an appeal from a SIC code designation must be filed with the Office of Hearings and Appeals no later than 10 days (exclusive of Saturdays, Sundays, and legal holidays) before the bid opening day or deadline for submitting proposals or quotations as specified in the solicitation. If a solicitation is modified to extend the bid opening day or deadline for submitting proposals or quotations, the 10 day period for filing shall be from the date designated in the modification.

(2) Where the bid opening day or deadline for submitting proposals or quotations is less than 30 days after the issuance of the invitation for bids or request for proposals or quotations, the appeal must be filed with the Office of Hearings and Appeals no later than 5 days (exclusive of Saturdays, Sundays, and legal holidays) before the bid opening day or deadline for submitting proposals or quotations. If a solicitation is modified to extend the bid opening day or deadline for submitting proposals or quotations, the 5-day period for filing shall be from the date designated in the modification.

(3) An untimely appeal of a SIC code designation will be dismissed.

§ 121.1706 Initiation of appeal.

(a) The appeal is initiated by filing the Notice of Appeal. No particular form is prescribed for the Notice of Appeal. The appellant shall file the Notice of Appeal with the Office of Hearings and Appeals, in writing. A telegraphic or texefaxed notice shall be confirmed by next day mailing of a written Notice. In accordance with § 121.1712, the Notice of Appeal shall be certified and a copy shall be concurrently served by the appellant upon those parties and persons specified in paragraph (a)(6) of

this section. The Notice of Appeal shall include the following information:

(1) Name, address and telephone number of the party filing the appeal, and identification of the person to be contacted for service of correspondence, notices, orders, pleadings and requests for information pertaining to the appeal;

(2) The substance and date of the size determination or SIC code designation from which the appeal is taken, including identification of the concern whose size is being determined, or the SIC or SBA size standard being appealed;

(3) If applicable, the solicitation or contract number and date, and the name, address and telephone number of the contracting officer;

(4) A full and specific statement of the reasons why the size determination or SIC code designation appealed is alleged to be erroneous;

(5) Presentation of arguments in support of such allegations; and

(6) A statement certifying that copies of the Notice of Appeal have been served upon the following, as applicable:

(i) The contracting officer where a procurement or sale is involved;

(ii) The SBA official whose formal size determination is appealed;

(iii) The concern whose size status is at issue;

(iv) All persons, other than the appellant, who filed protests at the SBA Regional Office level; and

(v) Each concern alleged to be affiliated with the concern whose size is at issue, to the extent that the address of such concern is reasonably identifiable;

(vi) SBA's Office of General Counsel, attention: Associate General Counsel for General Law.

(b) Upon receipt of a copy of the Notice of Appeal, the SBA Regional Office shall immediately, by express mail or other appropriate next day delivery, send the entire case file to the Office of Hearings and Appeals.

(c) The Office of Hearings and Appeals will notify the parties and persons specified in paragraph (a)(6) of this section, and any other interested persons as determined by the Presiding Judge, of the date it received the Notice of Appeal and the docket number assigned.

§ 121.1707 Scope of appeal and burden of proof.

The Office of Hearings and Appeals will not consider issues not previously presented to the Small Business Administration official whose size determination is being appealed unless such consideration is determined to be necessary to prevent manifest injustice to a party and such omission was not due to the fault of such party. The appellant shall have the burden of proof, by a preponderance of the evidence, in both size and SIC code appeals.

§ 121.1708 Response to notice of appeal.

After a Notice of Appeal has been filed, any interested person may file a signed statement supporting or opposing the appeal and presenting argument and evidence with the Office of Hearings and Appeals. Such statement must be filed with the Office of Hearings and Appeals no later than five (5) calendar days after receipt of such Office's notification of the filing of an Appeal (pursuant to § 121.1706(c)), unless otherwise specified by the Presiding Judge. Such statement shall also, in accordance with § 121.1712, be certified and concurrently served upon all parties and persons specified in § 121.1706(a)(6), and upon other persons determined to be interested by the Presiding Judge. In the discretion of the Presiding Judge, the appellant may be permitted to reply to any such response submitted.

§ 121.1709 Intervention.

(a) *Intervention by SBA.* The SBA may, upon motion and for good cause, intervene in any proceeding covered under this Part. Such motion shall be filed on behalf of the SBA by SBA's Office of the General Counsel. Such motion shall be concurrently served on all parties and persons specified in § 121.1706(a)(6), and upon other persons determined to be interested by the Presiding Judge.

(b) *Intervention by interested persons.* Other persons may move to intervene in an appeal before the Office of Hearings and Appeals by filing a motion containing a brief statement of the movant's interest in the proceeding. Such motion shall be concurrently served on all parties and persons specified in § 121.1706(a)(6), and upon other persons determined to be interested by the Presiding Judge. The Presiding Judge may permit a person to intervene to such extent and upon such terms as appropriate, if:

(1) The movant's interest will not be adequately represented by the existing parties;

(2) The movant's participation in the appeal may reasonably be expected to assist in the development of a proper record; and

(3) The movant's participation will not broaden the issues, resulting in prejudicial delay of the proceeding.

§ 121.1710 Docket file.

(a) *Contents.* Upon the receipt of a Notice of Appeal, the case is assigned a docket number. The docket file will consist, as applicable, of the Notice of Appeal, any responses thereto, the case file submitted by the Small Business Administration Regional Office, any materials submitted by the contracting officer, including the related written determination of the official or officer, any additional pleadings, motions and other documents submitted pursuant to these sections, unless expressly excluded from the docket file or not received into evidence by the Presiding Judge, the transcript or recording of any oral hearing or telephone conference, and any orders and decisions issued in the proceeding.

(b) *Public access to docket file.* The following rules apply regarding public access to the docket file for a proceeding:

(1) Except as provided in paragraph (b) (2) and (3) of this section, the docket file is available for public inspection in the Office of Hearings and Appeals during normal business hours and copies of such material may be obtained upon payment of the applicable charges.

(2) The following information in the docket file shall not be subject to public inspection or copying:

(i) Information which cannot be disclosed according to law;

(ii) Information subject to an *in camera* order issued pursuant to § 121.1717 of these regulations; and

(iii) Any proprietary information the withholding of which is provided pursuant to § 121.1712 or which is identified and contained in the case file submitted by the Small Business Administration official or the contracting officer.

(3) The case file submitted by the Small Business Administration Regional Office shall be returned to such office upon termination of the proceeding. The remainder of the docket file shall be retained and disposed of in accordance with general principles of Government records management.

§ 121.1711 Assignment of three judge panel.

Upon receipt of a Notice of Appeal, the Assistant Administrator for the Office of Hearings and Appeals will assign the appeal to a panel of three Judges, one of whom (the Presiding Judge) will be designated to preside over the panel. The panel will have jurisdiction to conduct proceedings relative to and to decide the controversy and to take such further appropriate action as may be necessary to issue a decision in the matter in accordance with applicable agency policy, precedent and law. A decision agreed

upon by a majority of the panel will be the final decision of the Small Business Administration.

§ 121.1712 Filing and service of pleadings.

The following rules apply to all pleadings (including the Notice of Appeal), motions, responses, and other documents filed pursuant to these sections.

(a) Except as provided in paragraph (c) of this section, all pleadings, motions, and other documents filed with the Office of Hearings and Appeals pursuant to these sections shall be served upon all parties to the proceeding or their respective counsel or other representative in the proceeding, personally or by registered or certified mail, and shall be accompanied by certification of such service.

(b) Any pleading, motion, response, and other document filed with the Office of Hearings and Appeals shall include a signed certificate which states how and when service was made.

(c) Tax returns, confidential data on SBA Form 355 and any other document that constitutes proprietary information need not initially be served, so long as such deletions are identified and described in the copies served upon all parties to the proceeding pursuant to paragraph (a) of this section. In addition, if such proprietary information is received in evidence by the Presiding Judge, the offering party must petition for an *in camera* order, pursuant to § 121.1717, in order to withhold such information from the public and from other parties.

(d) Any pleading, motion, response, or other document filed pursuant to these sections shall be signed by an authorized person, who shall certify as follows:

I have read this document and, under penalty of perjury and the sanctions imposed under 18 U.S.C. 1001, of which I am aware, I certify that, to the best of my knowledge, the statements made herein are true and correct, and that this document is not being filed for the purpose of delay or harassment.

(e) Time limitations on all filings are strictly enforced. Late filings, and filings not specifically provided for in this subpart, may be disregarded to avoid delay in disposing of the appeal. Untimely appeals will be dismissed. Motion for an extension of any other time limit must be filed within the time period to which it applies.

§ 121.1713 Authority and functions of Presiding Judge.

The Presiding Judge of the panel to which the appeal is assigned is authorized to act upon and to dispose of all relevant motions, petitions, responses, and other pleadings; to obtain such competent and relevant facts as the Presiding Judge may deem necessary to a proper and just determination of the matters at issue, including, for example, by oral hearing or telephone conferences, through judge's interrogatories, or by other appropriate means; and to fix the time and place of any oral hearing or telephone conference. The Presiding Judge is also authorized to:

(a) Administer oaths and affirmations;

(b) Request the attendance of Small Business Administration employees;

(c) Examine witnesses;

(d) Permit discovery upon motion;

(e) Issue protective orders in the context of discovery and, as specified in § 121.1716, in the context of subpoenas;

(f) Issue subpoenas as provided in § 121.1716;

(g) Issue *in camera* orders pursuant to § 121.1717;

(h) Rule upon questions of procedure, evidence, policy and law, including the designation of party status in a proceeding and the nature and extent of participation for all other participants;

(i) Regulate the course of any oral hearing, maintain decorum, and exclude from such hearing any person engaging in disruptive conduct;

(j) Require the filing of memoranda and the presentation of oral argument with respect to any question upon which the Presiding Judge is required to rule during the course of the proceeding;

(k) Hold conferences for the settlement, explanation or simplification of the issues or for other appropriate purposes;

(l) Dispose of procedural requests and similar matters;

(m) Take action and make decisions in conformity with applicable law, policy, and procedures of the Small Business Administration;

(n) Act on motions to enlarge, modify, or delete issues in the proceedings;

(o) Extend the time limits for filing pleadings for good cause, except the time limits for initiating appeals set forth in § 121.1705 (a) and (b); and

(p) Impose appropriate sanctions if any party fails to comply with an order of the Presiding Judge to produce certain information, including but not limited to:

(1) Drawing an inference against the party who has failed to comply with the order as to facts in dispute;

(2) Prohibiting the party who has failed to comply with the order from introducing, or otherwise relying upon, evidence relating to the information sought;

(3) Permitting any opposing party to introduce secondary evidence concerning the information sought;

(4) Striking any part of the pleadings of the party failing to comply with such order; or

(5) Taking such other appropriate action in accordance with applicable law, policy, and procedures of the SBA.

§ 121.1714 Oral hearings and telephone conferences.

The following rules apply to oral hearings and telephone conferences:

(a) The Presiding Judge generally decides the appeal upon the written record, without an oral hearing or oral argument. An oral hearing shall be held only when the Presiding Judge determines, upon examination of the docket file and consideration of such additional facts as may be acquired on notice to the parties, that there is a genuine dispute as to any material fact of decisional significance which cannot be resolved except by confrontation of witnesses.

(b) If the Presiding Judge determines that there is a matter that cannot be resolved other than by a telephone conference or an oral hearing, he or she will fix a time and place for such conference or hearing to resolve such matter.

(c) Any oral hearing will be set at a site reasonably convenient to the parties and notice thereof will set forth:

(1) A statement as to the purpose of the oral hearing; and

(2) A statement as to the matters of fact and law involved and the issues that will be heard.

(d) The Office of Hearings and Appeals will provide a means for recording oral hearings and telephone conferences at which evidence is taken. A transcript or record, as applicable, may be obtained upon payment of the applicable charges.

§ 121.1715 Prohibited ex parte communications.

Except to the extent required for the disposition of *ex parte* matters as authorized by law or regulation, no person may consult a Judge on a question of fact or law at issue in an appeal except on notice and opportunity for all parties to participate.

§ 121.1716 Subpoenas.

The following rules apply to subpoenas:

(a) Subpoenas are authorized at the discretion of the Presiding Judge. Only parties to the proceeding may request subpoenas. No subpoenas may be issued against Small Business Administration personnel or for documents in the custody or control of the Small Business Administration.

(b) Subpoenas requiring the attendance and testimony of witnesses, and subpoenas requiring the production of any books, papers, records, contracts, agreements, and other documents relating to an appeal under this section shall be signed and issued by the Presiding Judge.

(c) Unless submitted on the record while an oral hearing is in progress, requests for a subpoena *ad testificandum* shall be submitted in writing, under oath, identifying the person to be subpoenaed and showing the relevance, materiality, and the basis for requiring the testimony of such person.

(d) Requests for a subpoena *duces tecum* shall be submitted in writing, under oath, and shall specify with particularity the books, papers and documents desired and the facts expected to be proved thereby. A showing shall also be made as to the relevance and materiality of the evidence sought.

(e) Requests for subpoenas shall be submitted by a party in triplicate and may be made *ex parte*.

(f) Any person or entity against whom a subpoena is directed may, prior to the return date, file with the Presiding Judge a motion to quash or limit the subpoena, setting forth the reasons the subpoena should not be complied with or should be limited in scope. Notwithstanding the requirements of § 121.1712(a), such motion need only be served upon the party requesting the subpoena.

(g) Notice, including a brief statement of the reasons therefor, will be given for the denial, in whole or in part, of a request for subpoena or of a motion to quash.

(h) A subpoena may be served by any person who is not a party to or participant in the proceeding and who is not less than 18 years of age.

(i) Service of a subpoena upon the person named therein shall be made by exhibiting the original subpoena to such person, by reading the original subpoena if such person is unable to read, by delivering a duplicate of the subpoena to such person, and by tendering the fees for one day's attendance at the proceeding to which such person is summoned and the mileage allowed by law. If the subpoena is issued on behalf of the United States or an officer or agency thereof, attendance fees and mileage need not be tendered, but will be paid upon filing of an appropriate claim therefor.

(j) The person effecting service of a subpoena shall sign an affidavit thereof, stating the date, time, and manner of service.

(k) In case of failure to make service, the reasons for the failure shall be stated on the original subpoena by the person who attempted to make service.

(l) The original subpoena, bearing or accompanied by the required affidavit or statement, shall be returned immediately to the Office of Hearings and Appeals.

(m) The attendance of witnesses and the production of documentary evidence may be required from any place in the United States to any designated place of hearing. In case of disobedience of a subpoena, the SBA may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

(n) Witnesses who are subpoenaed and respond thereto are entitled to the same fees, including mileage, as are paid for like service in the courts of the United States. Fees shall be paid by the party at whose instance the subpoena is issued.

(o) In the exercise of discretion, the Presiding Judge authorizing and issuing any subpoena may, upon request or upon his or her own motion, devise and provide such protective order(s) as may be necessary and appropriate to protect against harassment, undue expense or breach of confidentiality of information and data reasonably concluded to require protection from general disclosure.

§ 121.1717 In camera orders.

(a) *Definition. In camera* materials are documents, testimony, or other data which by order of the Presiding Judge are kept confidential and excluded from disclosure to any person except as provided in this section.

(b) *In camera treatment of documents and testimony.* Upon motion and a showing of good cause, the Presiding Judge shall have the authority to order documents or oral testimony to be received *in camera*. The order will specify the date on which *in camera* treatment is expected to expire and will include:

(1) A description of the documents and/or testimony, or portion(s) thereof, being received *in camera;*

(2) A full statement of the reasons for granting *in camera* treatment; and

(3) The terms and conditions imposed by the Presiding Judge limiting access to or use of the *in camera* material.

(c) *Access and disclosure to parties.* (1) Administrative Judges, their designated staffs and other Office of Hearings and Appeals personnel, as appropriate, shall have complete access to *in camera* materials. Any party to the proceedings may seek access only in accordance with paragraph (c)(2) of this section.

(2) Any person seeking disclosure of *in camera* documents or access to testimony shall make a written request to the Presiding Judge who issued the *in camera* order. The Presiding Judge may grant or deny the request in whole or in part. The Presiding Judge will examine the *in camera* materials and may excise any portions prior to disclosure of the materials to the requester consistent with his or her ruling on the request.

(d) *In camera* materials shall be segregated from the docket file and protected from public disclosure until the termination of *in camera* treatment, either by expiration of the order or a successful appeal. After the termination of such *in camera* treatment, the materials shall be open to the public to the extent permitted by law.

(e) Proposed findings, conclusions, briefs, or other documents may not include specific details of *in camera* materials. However, general references to such materials may be made. To the extent that parties consider necessary the inclusion of specific details of *in camera* materials, those references shall be segregated and marked and shall become part of the *in camera* record. Those documents shall be served only on parties accorded access to the *in camera* material by the Presiding Judge.

§ 121.1718 The record.

The following rules apply to the record compiled in the proceeding:

(a) A transcript or recording of any testimony and exhibits, and any other documents included in the docket file pursuant to this provision shall constitute the exclusive record for decision. Where the decision is based on official notice of a material fact not appearing in the record, any party may file a petition for reconsideration no later than 20 calendar days following the issuance of the decision served pursuant to § 121.1721(b) advocating a contrary factual proposition and setting forth the factual or legal basis for the challenge.

(b) The record in a proceeding in which an oral hearing has been held will be closed on the date designated by the Presiding Judge when the taking of testimony has been concluded. When no oral hearing has been held, the record in a proceeding will be closed upon receipt of the last-filed timely response to the Notice of Appeal made pursuant to § 121.1708, unless the Presiding Judge, in his or her discretion, amends the date that the record is closed. In any case where an evidentiary transcript has been prepared following an oral hearing,

the transcript, together with all exhibits, will be certified by the Presiding Judge and filed in the docket file in the Office of Hearings and Appeals. A copy of such certification will be served on all parties to the proceeding.

(c) At any time during the course of the proceeding, or as directed by the Presiding Judge, but no later than ten (10) calendar days after the issuance of notice of certification of the record made pursuant to paragrah (b) of this section, any party to the proceeding may file with the Presiding Judge a motion requesting the correction of a transcript, if any, which shall be accompanied by proof of service thereof upon all other parties to the proceeding. No later than five (5) calendar days after the receipt of such a motion, other parties may file a response in support of, or in opposition to, such motion. Thereafter, the Presiding Judge will issue an order specifying the corrections, if any, to be made in the transcript. A copy of the order shall be served upon all parties and will be made a part of the record. The Presiding Judge may, on his or her own motion, specify on notice to the parties corrections to be made in the transcript. Objection to any such proposed correction(s) shall be filed within three (3) days after receipt of such notice and such objection(s) will be the subject of appropriate rulings by the Presiding Judge.

§ 121.1719 Post-hearing procedures.

The following rules will apply to proposed findings and conclusions:

(a) After the conclusion of any oral hearing, any party may, with the concurrence of the Presiding Judge, file proposed findings of fact and conclusions, briefs and memoranda of law; provided, that the Presiding Judge may, in any proceeding, direct any party to file proposed findings of fact and conclusions, briefs and memoranda of law. Any proposed findings of fact, conclusions, briefs, and memoranda of law shall be filed within fifteen (15) calendar days after the issuance of notice of certification of the record pursuant to paragraph (b) of this section unless the Presiding Judge specifies otherwise.

(b) Proposed findings of fact shall be set forth in serially numbered paragraphs and shall set out with particularity all decisionally significant evidentiary facts developed on the record that are deemed to support the findings proposed, with citations to the transcript, where appropriate, and to other portions of the record relied on for each evidentiary fact. Proposed conclusions shall also be separately stated in serially numbered paragraphs. Proposed findings and conclusions may be limited to those issues that affect the interests of their proponent and may be accompanied by supporting briefs.

(c) In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs and memoranda of law, when directed to do so by the Presiding Judge, will be deemed to constitute a waiver of the right to object to the findings and conclusions of the panel.

§ 121.1720 Decision.

(a) Following receipt of proposed findings and conclusions authorized or directed pursuant to § 121.1719 or default in the making of such filings, or upon closing the record when such filings have not been authorized or directed, the Presiding Judge will prepare a proposed decision containing findings of fact and conclusions, as well as the reasons therefor, with respect to all the decisionally significant material issues of fact and law presented on the record. The proposed decision will be circulated among the panel members for consideration and concurrence. Upon approval of that decision or a different decision by a majority of the panel, the decision will be issued.

(b) The decision is the final decision of the Small Business Administration, becomes effective immediately, and binds all parties to the proceeding. However, a party may petition for reconsideration pursuant to § 121.1721.

(c) The Office of Hearings and Appeals shall serve the decision upon all parties to the proceeding by certified mail. Where time is of the essence, notice of the ultimate determination may be communicated in a telegram or by telephone to the parties, to be followed by service of the full text.

§ 121.1721 Reconsideration of decision.

(a) At any time after a written decision has been issued and upon notice to all parties and persons specified in § 121.1706(a)(6), and upon other persons determined to be interested by the Presiding Judge, the panel may, on its own initiative, reopen the proceeding and enter a new decision confirming, modifying, or setting aside the decision in whole or in part.

(b) Within 20 calendar days after issuance of a written decision and upon notice to all parties and persons specified in § 121.1706(a)(6), and upon other persons determined to be interested by the Presiding Judge, any party may file a petition for reconsideration of such decision, setting forth the relief sought and the grounds in support of the petition. Such grounds must be confined to new questions raised by the decision concerning which the petitioner had no previous opportunity to present evidence or argument.

(c) In cases where SBA has not previously appeared in the case as a party, and was not so asked to appear by the Presiding Judge, SBA's Office of the General Counsel may, within 20 calendar days after issuance of a written decision and upon notice to all parties and persons specified in § 121.1706(a)(6), and upon other persons determined to be interested by the Presiding Judge, file a petition for reconsideration where the decision presents significant issues of precedential importance.

(d) Any party may oppose a petition filed pursuant to paragraph (b) or (c) of this section by filing an answer thereto within 10 days after receipt of service of the petition upon such party.

(e) The filing of a petition for reconsideration shall not stay the effect of the decision unless explicitly ordered by the panel.

§ 121.1722 Delegation of authority when Judge not available.

In the event of the absence or unavailability of the Presiding Judge or other member of the panel to which the appeal is assigned, where such action is necessary, any Judge in the Office of Hearings and Appeals may be authorized by the Assistant Administrator of the Office of Hearings and Appeals to participate in rendering a final decision and to dispose of any motions or other interlocutory matters, as appropriate, pertaining to such appeal.

Subpart B—Other Eligibility Provisions [Reserved]

Dated: September 12, 1989.

Susan Engeleiter,

Administrator.

[FR Doc. 89-29491 Filed 12-20-89; 8:45 am]

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Thursday
December 21, 1989

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Part 71

Alteration of the Seattle, WA, Terminal Control Area; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 89-AWA-10]

Alteration of the Seattle, WA, Terminal Control Area

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the Seattle, WA, Terminal Control Area (TCA). This action will raise the upper limits of the TCA to 10,000 feet mean sea level (MSL) to enable air traffic control (ATC) to provide terminal ATC service to arriving and departing turbojet aircraft in a TCA environment throughout transition to and from the en route structure. Additionally, this action will extend the lateral limits of the TCA north and south to 30 nautical miles, east and west to 18 nautical miles from the airport, to provide an area wherein ATC can provide TCA control and services throughout critical maneuvering phases of flight operations in the terminal area. This action redefines several existing subareas which will enhance air traffic procedures and simplify visual flight rules (VFR) transient operations outside TCA airspace.

EFFECTIVE DATE: 0901 u.t.c., January 11, 1990.

FOR FURTHER INFORMATION CONTACT: Alton D. Scott, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9252.

SUPPLEMENTARY INFORMATION:

Background

The TCA program was developed to reduce the midair collision potential in the congested airspace surrounding airports with high density air traffic by providing an area in which all aircraft will be subject to certain operating rules and equipment requirements.

The density of traffic and the type of operations being conducted in the airspace surrounding major terminals increase the probability of midair collisions. In 1970, an extensive study found that the majority of midair collisions occurred between a general aviation (GA) aircraft and an air carrier, military or another GA aircraft. The basic causal factor common to these conflicts was the mix of uncontrolled aircraft operating under visual flight rules (VFR) and controlled aircraft operating under instrument flight rules (IFR). TCA's provide a method to accommodate the increasing number of IFR and VFR operations. The regulatory requirements of TCA airspace afford the greatest protection for the greatest number of people by providing ATC with an increased capability to provide aircraft separation service, thereby minimizing the mix of controlled aircraft.

To date, the FAA has established a total of 26 TCA's. The FAA is proposing to take action to modify or implement the application of these proven control techniques to more airports to provide greater protection of air traffic in the airspace regions most commonly used by passenger-carrying aircraft.

User Group Participation

The TCA modified by this amendment is the product of discussions with a broad representation of the aviation community. In conjunction with this action, the FAA will continue to work cooperatively with local user groups to ensure that the TCA is effective for all users by identifying any adjustments or modifications that appear necessary. Through joint FAA and user cooperation, any problems that arise can then be identified and corrective action taken with necessary.

The TCA configuration adopted in this final rule has been developed through substantial public participation. Informal airspace meetings were held on November 29, 30, and December 2, 1988, to allow local aviation interests and airspace users an opportunity to present input on the alteration of this TCA. An additional opportunity for public participation was provided by a Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on August 28, 1989 (54 FR 35564). Fifty-seven comments were received in response to the Notice. Due consideration has been given to these comments as well as the comments received at the various meetings.

Discussion of Comments

The FAA received fifty-seven comments pertaining to the TCA proposal. All comments were considered fully before developing the final design contained in this rule. The FAA believes that the final TCA design contained herein promotes the safe and efficient use of airspace while satisfying ATC and user requirements.

Some comments received were not relevant to this rulemaking action and, therefore, will not be discussed. Those subject areas included controller staffing, pilot education, waivers and rules enforcement.

The Air Transport Association of America and the Air Line Pilots Association wrote to concur with the alteration as proposed.

Several other commenters also wrote to concur with the TCA alteration and commended the FAA for incorporating user recommendations; they stated that the alteration will enhance safety by providing an environment which will better serve the increased amount of traffic in the Seattle terminal area.

Some commenters wrote stating that the present TCA configuration is sufficient to handle all operations at the Seattle-Tacoma International Airport.

Since the Seattle TCA's implementation in 1974, the increased volume of traffic and revised operational procedures dictate a need to modify the TCA. The Seattle TCA alteration takes these factors into consideration and provides necessary TCA airspace for increased IFR operations, while allowing nonparticipating VFR aircraft sufficient airspace to circumnavigate the TCA.

The majority of commenters opposing the TCA alteration complained about the design around the Renton Airport, Boeing Field, and the areas east of the Seattle-Tacoma International Airport. These commenters believe that this portion of the TCA design has the potential for compressing nonparticipating aircraft too close to each other and the mountainous terrain.

The FAA finds that this airspace is necessary to contain the flight paths of aircraft operating to and from the Seattle-Tacoma International Airport. The additional airspace contained in this alteration is limited to include only that airspace necessary to contain such operations. The FAA believes that sufficient airspace exists to accommodate nonparticipating aircraft.

Some commenters wrote stating that the TCA design is too complex for aircraft desiring to circumnavigate the area. The TCA is designed to allow ample airspace for nonparticipating VFR aircraft. Charts depicting VFR flyways will be distributed throughout the Northwest Mountain Region prior to the TCA modification effective date and will appear on the Seattle VFR terminal area chart in future publications.

The Aircraft Owners and Pilots Association wrote to concur with altering the Seattle TCA, but submitted the following suggestions: lower the ceiling to 7,000 feet MSL; reduce all 30-mile extensions to 25; reduce the east and west boundaries to 15 miles, and adopt a more standardized TCA design.

In designing the Seattle TCA alteration, the FAA utilized that airspace needed to encompass updated procedures which will enhance the flow of traffic in the terminal area. The design adopted incorporates users' suggestions to the extent possible without compromising the FAA's safety requirements. The design includes areas that extend to 30 nautical miles over arrival gates or on final approach segments. These areas are needed to protect aircraft in critical stages of flight. Since the design is based on users' needs, updated procedures, FAA safety requirements, and area terrain, a more standardized TCA was not feasible.

Two cities wrote expressing concern that the TCA alteration may increase the present noise level in their areas.

Along with the alteration of the Seattle TCA, new procedures have been developed to enhance the flow of traffic and enable aircraft the opportunity to climb more rapidly on departure, thereby reducing the potential for adverse noise effects.

A parachute club wrote requesting the FAA to raise the TCA floor from 6,000 feet MSL to 8,000 feet MSL in the vicinity of the Kapowsin Airport. This will allow sufficient airspace to conduct jumps without TCA involvement.

The FAA finds that during periods of adverse weather or traffic saturation, it becomes necessary to extend the final approach segment of Runway 34. When this extension is required, the airspace in the vicinity of the parachuting club's operating area is affected from 6,000 feet MSL and above, thus precluding parachuting activity. Jump operations will, however, be available during favorable weather and lighter traffic periods.

The Puget Sound Soaring Association wrote suggesting to extend Area K to the southwest; reduce Area N from 18 miles to 15 miles, and reduce Area S from 30 miles to 25 miles. These changes would allow the soaring aircraft more airspace to conduct operations without fear of penetrating the TCA.

The airspace in Areas K, N, and S is needed for aircraft transitioning to the final approach course from downwind and base legs. The FAA has designed the TCA in this area to contain IFR operations, leaving sufficient airspace for nonparticipating aircraft to maneuver.

Some commenters wrote expressing concern that the TCA alteration is not designed to protect approach procedures used at various airports inside the TCA airspace. The modified TCA airspace design considered new procedures and provides protection for all IFR aircraft operating to and from airports contained within TCA airspace.

The Washington Air National Guard wrote stating that the FAA proposal was too complex and large. They recommended a smaller, corridor-type design.

The FAA finds that the Washington Air National Guard's proposal does not take into consideration new procedures. Therefore, their proposal does not insure containment of all aircraft operating to and from the primary airport.

The Rule

This amendment to part 71 of the Federal Aviation Regulations modifies the Terminal Control Area (TCA) at Seattle, WA. This action will raise the upper limits of the TCA to 10,000 feet mean sea level (MSL) to enable air traffic control (ATC) to provide terminal ATC service to arriving and departing turbojet aircraft in a TCA environment throughout transition to and from the en route structure. Additionally, this action will extend the lateral limits of the TCA north and south to 30 nautical miles, east and west to 18 nautical miles from the airport, to provide an area wherein ATC can provide TCA control and services throughout critical maneuvering phases of flight operations in the terminal area. This action redefines several existing subareas which will enhance air traffic procedures and simplify visual flight rules (VFR) transient operations outside TCA airspace.

The total number of enplaned passengers at the Seattle-Tacoma International Airport has increased to 7,178,491 which dictates a need to alter the present TCA configuration. This alteration will better serve the users, as well as the FAA, by providing airspace configured to handle new procedures and the increased amount of operations. The FAA has determined that modifying the TCA at the Seattle-Tacoma International Airport is in the interest of flight safety and will result in a greater degree of protection for the greatest number of people during flight in the terminal area.

Regulatory Evaluation Summary

The FAA is required to examine the potential benefits and costs of each proposed rulemaking action to ensure that the public is not burdened with rules where costs outweigh benefits. This section of the preamble evaluates both quantitatively and qualitatively, to the maximum possible extent, the potential costs and benefits expected to accrue from modification of the Seattle TCA.

Costs-Benefits Analysis

a. Costs

The FAA believes that there will be no costs associated with the implementation of this final rule either to the agency or to aircraft operators for the reasons discussed below.

In terms of the FAA, the rule will not impose any additional administrative cost in terms of either personnel or equipment. The additional operations workload generated by the rule will be absorbed by current personnel and equipment resources which are already in place at the Seattle TCA

In terms of aircraft operators, the rule will not impose any additional cost either in the form of avionics equipment or circumnavigation. The rule will not adversely impact aircraft operators operating under instrument flight rules (IFR). Aircraft operators operating routinely under IFR conditions primarily consist of large air carrier, business jet, commuter, and air taxi operators. Thus, the rule will potentially impact aircraft operators operating routinely under visual flight rules (VFR). Those aircraft operators operating routinely under VFR conditions primarily consist of small, general aviation (GA) (single-engine, piston) operators and other GA aircraft operators such as glider and balloon operators. Other airspace user groups operating within the proximity of the Seattle TCA will also be potentially impacted by the rule. Such user groups consist of sport parachutists and some student pilots.

Under the final rule, the TCA ceiling will be raised from 7,000 feet MSL to 10,000 feet MSL. Since GA airplane operators such as glider pilots, balloonists, and sport parachutists do not operate directly above the TCA ceiling of 7,000 feet MSL, they are not expected to incur adverse impacts from expansion of the TCA ceiling. However, some of the small GA airplane operators (such as single-engine, piston types) do operate under VFR directly above the TCA ceiling of 7,000 feet MSL. Under these conditions, such operators are not expected to incur adverse impacts because they will be allowed to enter the TCA, provided they request clearance from air traffic control (ATC). This situation should not present a problem for either ATC or small GA airplane operators. These operators are already equipped with transponders with automatic altitude reporting capability (Mode C) and they communicate regularly with ATC when operating under VFR directly above the subject airspace of 7,000 feet MSL. Therefore, in view of the discussion

above, the focus of potential cost impact falls on the expanded segments of the TCA floor. As the result of the rule, expanded segments of the TCA floor will range from 5,000 feet to 8,000 feet MSL. While enhancing aviation safety, the expanded segments of the TCA floor will be adopted with all due consideration to small GA airplane operators, glider pilots, and balloonists.

The rule will allow such aircraft operators to circumnavigate the Seattle TCA in a manner that will not require much deviation from current flying practices. Thus, this rule will permit such operators to operate their respective aircraft beneath the expanded segments of the TCA floor. This assessment also holds true for sport parachutists. The expanded segments of the TCA floor will be adopted at 8,000 feet MSL to provide sufficient airspace for jumps on the part of sport parachutists without TCA involvement. The rule will not have an adverse impact on student pilots because Boeing Field, where most flight instruction is conducted, will remain outside of the TCA.

b. Benefits

The final rule is expected to generate potential benefits primarily in the form of enhanced safety to the aviation community and the flying public. Such safety will take the form of reduced casualty losses (namely, aviation fatalities and property damage) as a result of the lowered likelihood of midair collisions due to the increase in positive control airspace for the Seattle TCA.

The expansion of the Seattle TCA will restrict more of the airspace to controlled aircraft operations from 7,000 feet to 10,000 feet MSL, and along the northern, southern, western, and eastern lateral boundaries. Due to the proactive nature of the rule, the potential safety benefits are extremely difficult, if not impossible, to quantify in monetary terms. The rule is proactive in the sense that the FAA is taking action to prevent a safety problem from occurring. In this case the symptom is increased complexity (or density) of aircraft operations in the vicinity of the present ceilings and lateral boundaries of the Seattle TCA. As the result of the increased complexity of aircraft operations, the controlled airspace will be expanded in the aforementioned areas of the TCA.

Up to now, safety has been maintained in the vicinity of the existing Seattle TCA in the face of steady growth in activity by such measures as traffic management and procedural changes. While the FAA believes that these measures will not be adequate in the future, they have been successful in the past as evidenced by a record of no midair collisions in the TCA. Without documented evidence of a midair collision in the Seattle TCA, estimating the probability of a potential occurrence in the absence of this rule cannot be determined with a reliable degree of certainty. Despite this difficulty, the FAA believes that certain measures must be taken to maximize aviation safety. In the absence of this rule, aviation safety in the vicinity of the TCA will be expected to become critical and lead to potentially catastrophic consequences.

Ordinarily, the potential safety benefits of the rule will be an incremental reduction in the likelihood of all midair collisions caused by the TCA modification as opposed to the existing TCA configuration. However, with the adoption of FAA regulations requiring the use of a transponder with automatic altitude reporting capability (Mode C, FAR § 91.24) and, for certain aircraft operators, installation of a traffic alert and collision avoidance system (TCAS, FAR §§ 91.26, 121.356, 125.224, 129.18, and 135.180), the number of potential midair collisions avoided by this rule is expected to be significantly lower. Nevertheless, this rule is still expected to accrue benefits in terms of enhanced aviation safety, though on a much smaller scale. Thus, the potential safety benefits of this rule and the Mode C and TCAS rules are considered to be inextricably linked.

In view of the estimated zero cost of compliance and enhanced aviation safety, the FAA firmly believes the final rule is cost-beneficial.

The regulatory evaluation that has been placed in the docket contains additional detailed information related to the costs and benefits that are expected to accrue from implementation of this rule.

Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The RFA requires agencies to review rules which may have a "significant economic impact on a substantial number of small entities."

The small entities which could be potentially affected by the implementation of this rule are unscheduled operators of aircraft for hire owning nine or fewer aircraft.

Only those unscheduled aircraft operators without the capability to operate under IFR conditions will be potentially impacted by the rule. The FAA believes that all of the potentially impacted unscheduled aircraft operators are already equipped to operate under IFR conditions. This is because such operators fly regularly around airports where radar approach control services have been established. Therefore, the FAA believes this rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The final rule will neither have an effect on the sale of foreign aviation products or services in the United States, nor will it have an effect on the sale of U.S. products or services in foreign countries. This is because the rule will neither impose costs on aircraft operators nor aircraft manufacturers (U.S. or foreign).

Federalism Implications

This regulation will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, preparation of a Federalism assessment is not warranted.

Conclusion

For the reasons discussed under "Regulatory Evaluation," the FAA has determined that this regulation (1) is not a "major rule" under Executive Order 12291; and (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). It is certified that this regulation will not have a significant economic impact on a substantial number of small entities.

The FAA has determined that the users of the Seattle-Tacoma International Airport and surrounding area will benefit from the implementation of the TCA. In order to maximize the benefit at the earliest time, the FAA will have the TCA charted on the next available charting date, which is January 11, 1990, and is making the implementation of the TCA effective on that charting date. Therefore, due to the need to implement the TCA at the earliest possible time, the FAA finds good cause for making this amendment effective in less than 30 days from the date of the publication of this amendment.

List of Subjects in 14 CFR Part 71

Aviation safety, Terminal control areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 71 of the Federal Aviation Regulations (14 CFR part 71) is amended as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

§ 71.403 [Amended]

2. Section 71.403 is amended as follows:

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 71 of the Federal Aviation Regulations (14 CFR part 71) is amended as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE AND REPORTING POINTS

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§ 71.403 [Amended]

2. Section 71.403 is amended as follows:

Seattle, WA [Revised]

Primary Airport
Seattle-Tacoma International Airport (lat. 47°26'57" N., long. 122° 18'29" W.).

Boundaries. Based on Seattle VORTAC (SEA) (lat. 47°26'08" N., long. 122°18'30" W.) arcs, DME distances, radials, lines of longitude, and the Puget Sound shoreline.

Area A. That airspace extending upward from the surface to and including 10,000 feet MSL within an area bounded by a line beginning at the 2-mile DME on the SEA 012° radial to a point on the 4-mile arc of the SEA 007° radial, then counterclockwise along the 4-mile arc of the SEA 007° radial to the Puget Sound shoreline then south along the Puget Sound shoreline to the 2-mile arc of the SEA VORTAC then counterclockwise along the 2-mile arc of the SEA VORTAC to the SEA 192° radial extending to the 6-mile arc of the SEA 192° radial then counterclockwise along the 6-mile arc of the SEA VORTAC to the SEA 163° radial extending to the 2-mile arc of the SEA 192° radial then counterclockwise along the 2-mile arc of the Seattle VORTAC to the point of beginning.

Area B. That airspace extending upward from 1,100 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 4-mile DME point on the SEA 007° radial extending to the 6-mile arc of the SEA 007° radial then counterclockwise along the 6-mile arc of the SEA VORTAC to the SEA 342° radial to the 4-mile arc of the SEA 342° radial then clockwise along the 4-mile arc of the SEA VORTAC to the point of beginning.

Area C. That airspace extending upward from 1,600 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 6-mile DME on the SEA 192° radial to the 12-mile arc of the SEA 192° radial then counterclockwise along the 12-mile arc of the SEA VORTAC to the SEA 163° radial to the 6-mile arc of the SEA 163° radial then clockwise along the 6-mile arc of the SEA VORTAC to the point of beginning.

Area D. That airspace extending upward from 1,800 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 6-mile arc of the SEA 007° radial then counterclockwise along the 6-mile arc of the SEA VORTAC to the SEA 342° radial to the 12-mile arc of the SEA 342° radial then clockwise along the 12-mile arc of the SEA VORTAC to the SEA 007° radial to the point of beginning.

Area E. That airspace extending upward from 2,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 4-mile arc of the SEA 192° radial then clockwise along the 4-mile arc of the SEA VORTAC to the Puget Sound shoreline then south along the Puget Sound shoreline to the 2-mile arc of the SEA VORTAC counterclockwise along the 2-mile arc of the SEA VORTAC to the SEA 192° radial to the point of beginning.

Area F. That airspace extending upward from 2,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 4-mile DME on the SEA 342° radial and extending north on the 342° radial to the Puget Sound shoreline then south along the Puget Sound shoreline to the 4-mile arc of the SEA VORTAC then clockwise along the 4-mile arc of the SEA VORTAC to the point of beginning.

Area G. That airspace extending upward from 2,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 2-mile arc of the SEA 012° radial then clockwise along the 2-mile arc of the Seattle VORTAC to the SEA 163° radial to the 4-mile arc of the SEA 163° radial then counterclockwise along the 4-mile arc of the Seattle VORTAC to the SEA 022° radial to the 12-mile arc of the SEA 022° radial then counterclockwise along the 12-mile arc of the Seattle VORTAC to the SEA 007° radial to the 4-mile DME of the SEA 007° radial to the point of beginning.

Area H. That airspace extending upward from 3,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 322° radial then clockwise along the 18-mile arc of the Seattle VORTAC to the SEA 032° radial then southwest along the SEA 032° radial to a point at lat. 47°39'17" N., long. 122°06'20" W.; to lat. 47°17'14" N., long. 122°06'20" W.; then southeast on the SEA 137° radial to the 18-mile arc of the SEA 137° radial then clockwise along the 18-mile arc of the Seattle VORTAC to the SEA 232° radial then northeast on the SEA 232° radial to a point at lat. 47°18'52" N., long. 122°32'10" W.; to lat. 47°37'56" N., long. 122°32'10" W.; to the point of beginning, excluding that airspace in the Areas A through G.

Area I. That airspace extending upward from 5,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 322° radial then clockwise along the 18-mile arc of the Seattle VORTAC to the SEA 032° radial extending to the 22-mile arc of the SEA 032° radial then counterclockwise along the 22-mile arc of the Seattle VORTAC to the SEA 322° radial to the point of beginning.

Area J. That airspace extending upward from 5,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 032° radial then clockwise along the 18-mile Arc of the Seattle VORTAC to the SEA 052° radial to a point at lat. 47°32'34" N., long. 122°06'20" W.; to lat. 47°39'17" N., long. 122°06'20" W.; to the point of beginning.

Area K. That airspace extending upward from 5,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 117° radial then clockwise to the SEA 137° radial then northwest on the SEA 137° radial to a point at lat. 47°17'14" N., long. 122°06'20" W.; to lat. 47°21'55" N., long. 122°06'20" W.; then southwest on the SEA 117° radial to the point of beginning.

Area L. That airspace extending upward from 5,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 192° radial then counterclockwise along the 18-mile arc of the Seattle VORTAC to the SEA 163° radial extending to the 25-mile arc of the SEA 163° radial then clockwise along the 25-mile arc of the Seattle VORTAC to the SEA 192° radial to the point of beginning.

Area M. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 322° radial then counterclockwise along the 18-mile arc of the Seattle VORTAC to the SEA 232° radial then northeast on the SEA 232° radial to a point at lat. 47°18'52" N., long. 122°32'10" W.; to lat. 47°37'56" N., long. 122°32'10" W.; to the point of beginning.

Area N. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 052° radial then clockwise along the 18-mile arc of the Seattle VORTAC to the SEA 117° radial then northwest on the SEA 117° radial to a point at lat. 47°21'55" N., long. 122°06'20" W.; to lat. 47°32'34" N., long. 122°06'20" W.; then northeast on the SEA 052° radial to the point of beginning.

Area O. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 22-mile arc of the SEA 342°

radial then clockwise along the 22-mile arc of the Seattle VORTAC to the SEA 032° radial to the 30-mile arc of the SEA 032° radial then counterclockwise along the 30-mile arc of the Seattle VORTAC to the SEA 342° radial to the point of beginning.

Area P. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 232° radial then counterclockwise along the 18-mile arc of the Seattle VORTAC to the SEA 192° radial to the 25-mile arc of the SEA 192° radial then clockwise along the 25-mile arc of the Seattle VORTAC to the SEA 232° radial to the point of beginning.

Area Q. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 25-mile arc of the SEA 192° radial then counterclockwise along the 25-mile arc of the Seattle VORTAC to the SEA 163° radial to the 30-mile arc of the SEA 163° radial then clockwise along the 30-mile arc of the Seattle VORTAC to the SEA 192° radial to the point of beginning.

Area R. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 163° radial then counterclockwise along the 18-mile arc of the Seattle VORTAC to the SEA 137° radial to the 25-mile arc of the SEA 137° radial then clockwise along the 25-mile arc of the Seattle VORTAC to the SEA 163° radial to the point of beginning.

Area S. That airspace extending upward from 8,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 137° radial then counterclockwise along the 18-mile arc of the Seattle VORTAC to the SEA 117° radial to the 30-mile arc of the SEA 117° radial then clockwise along the 30-mile arc of the Seattle VORTAC to the SEA 137° radial to the point of beginning.

Area T. That airspace extending upward from 8,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 18-mile arc of the SEA 032° radial then clockwise along the 18-mile arc of the Seattle VORTAC to the SEA 052° radial to the 30-mile arc of the SEA 052° radial then counterclockwise along the 30-mile arc of the Seattle VORTAC to the SEA 032° radial to the point of beginning.

Area U. That airspace extending upward from 8,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 22-mile arc of the SEA 342° radial then counterclockwise along the 22-mile arc of the Seattle VORTAC to the SEA 322° radial to the 30-mile arc of the SEA 322° radial then clockwise along the 30-mile arc of the Seattle VORTAC to the SEA 342° radial to the point of beginning.

Area V. That airspace extending upward from 8,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the 25-mile arc of the SEA 232° radial then counterclockwise along the 25-mile arc of the Seattle VORTAC to the SEA 219° radial extending to the 30-mile arc of the SEA 219° radial then clockwise along the 30-mile arc of the Seattle VORTAC to the SEA 232° radial to the point of beginning.

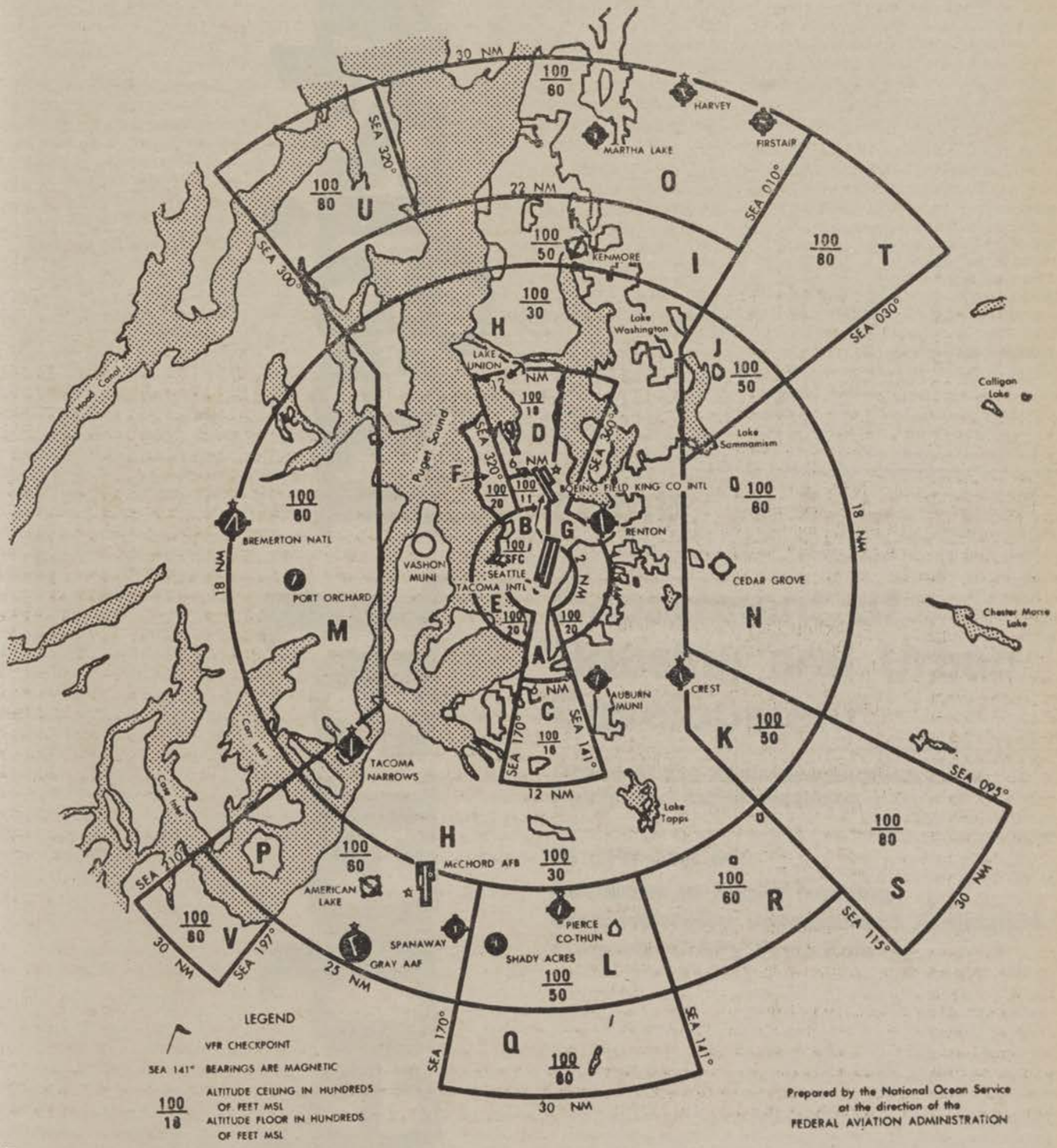
Issued in Washington, DC, on December 15, 1989.

James B. Busey,

Administrator.

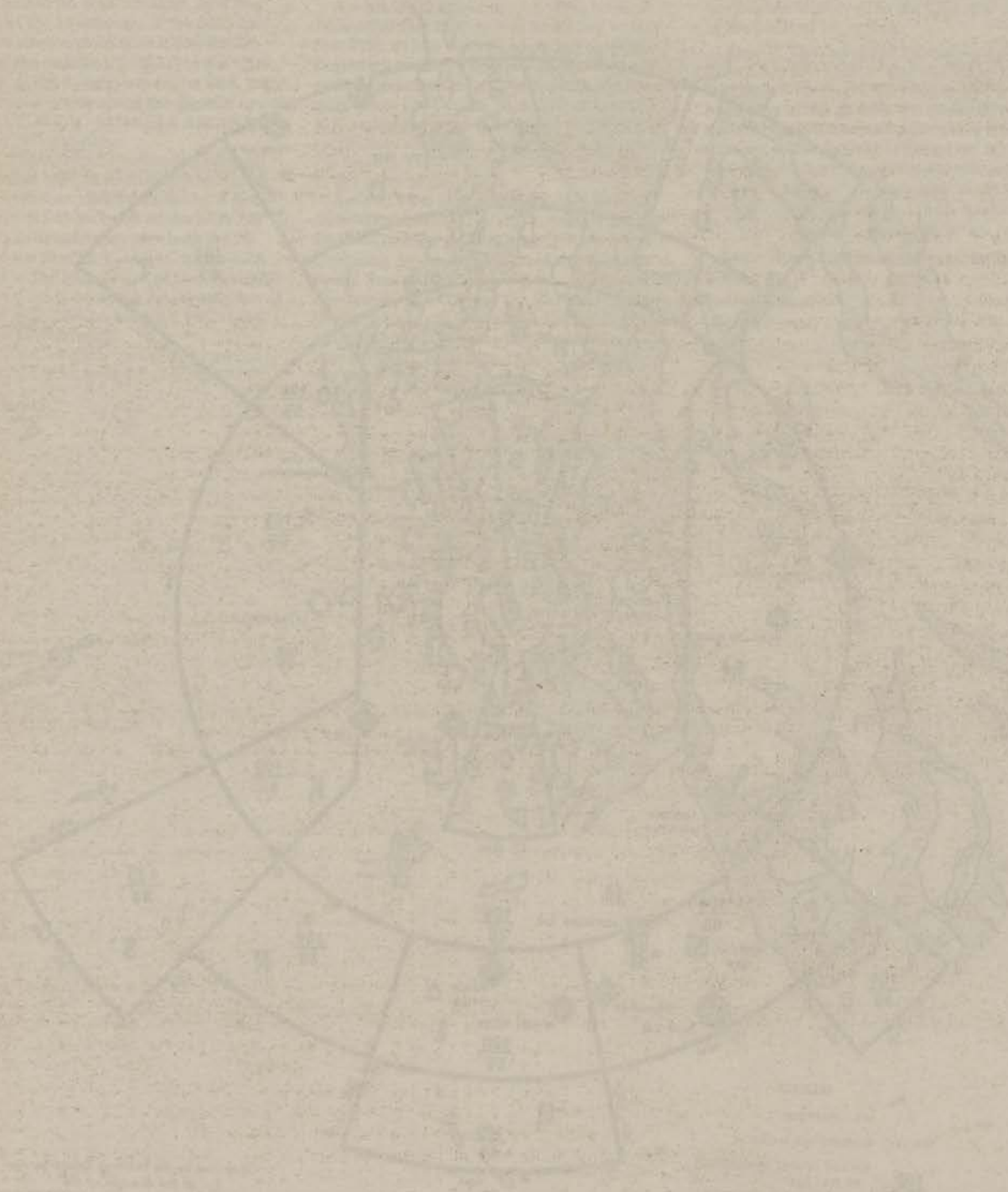
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SEATTLE TACOMA TERMINAL CONTROL AREA



[FR Doc. 89-29601 Filed 12-18-89; 8:45 am]

BILLING CODE 4910-13-C



federal register

Thursday
December 21, 1989

Part IV

Department of Housing and Urban Development

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 968

Revisions to Public Housing Comprehensive Improvement Assistance Program (CIAP); Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 968

[Docket No. R-89-1423; FR-2488-F-02]

RIN 2577-AA66

Revisions to Public Housing Comprehensive Improvement Assistance Program (CIAP)

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This rule streamlines the current CIAP program by authorizing (1) a one-stage application process and (2) PHA certifications with respect to budget revisions and management improvement contracts. The rule also provides for the execution of a Declaration of Trust by the PHA to protect certain rights and interests of HUD. Provisions establishing a new Comprehensive Grant program, contained in the earlier proposed rule, are not contained in this final rule.

EFFECTIVE DATE: January 22, 1990.

FOR FURTHER INFORMATION CONTACT: Pris P. Buckler, Public and Indian Housing, Department of Housing and Urban Development, Room 4130, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 755-6640. Hearing or speech impaired individuals may call HUD's TDD number (202) 245-0850. (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

I. Background

24 CFR part 968 sets out regulations for the Public Housing Comprehensive Improvement Assistance Program (CIAP program). This program applies to all public housing, including housing owned and operated by Indian housing authorities (IHAs). This rule revises part 968 to (1) rename the part as "Public Housing Modernization," and (2) reorganize the part by establishing a subpart A, containing generally applicable provisions; and a subpart B, setting forth the current CIAP program contained in part 968, as revised by this final rule. The revised part continues to apply to all PHAs without regard to the number of units they own and operate. Subpart C, a proposal contained in the proposed rule published on October 27, 1988 (53 FR 43648) which set forth a new Comprehensive Grant program for the larger PHAs, is not contained in this final rule. A subpart C will not be promulgated until the Congress approves the method of allocating assistance under the new Comprehensive Grant program. Until that time, subparts A and B, which cover the existing CIAP program, will apply to all PHAs. The public comments on specific provisions in the proposed subpart C are therefore not covered in this Preamble.

Subparts A and B are retained from the proposed rule. Any revisions made from the proposed rule and HUD's response to public comments made with respect to specific provisions in those subparts will be found in the following part II of this Preamble headed "Description of Final Rule."

The new section designations, contained in the proposed rule, are adopted in this final rule. The following chart shows both the current and new section numbers for the various provisions.

New	New section heading	Current
	Subpart A—General	
968.101	Purpose and applicability.	968.1 and .2
968.105	Definitions	968.3
968.110	Other program requirements.	968.9
968.115	Modernization and energy conservation standards.	968.18
968.120	Preemption of State prevailing wage requirements.	968.9(h)
	Subpart B—Comprehensive Improvement Assistance Program	
968.201	Purpose	968.1 and .2
968.203	Definitions	968.3
968.205	Eligible costs	968.4
968.210	Procedures for obtaining approval of a modernization program.	968.5
968.215	Modernization project	968.6
968.220	Tenant participation	968.7
968.225	Homebuyer participation.	968.8
968.230	Special requirements for homeownership projects.	968.11
968.235	Special requirements for section 23 leased housing bond-financed projects.	968.12
968.236	Additional requirements for special purpose modernization.	968.10
968.240	Contracting requirements.	968.13
968.245	Fund requisitions	968.14
968.246	Progress reporting	968.15
968.250	Budget revisions	968.16
968.251	On-site inspections	968.17
968.255	Fiscal closeout of a modernization program.	968.18

II. Description of Final Rule

A. Subpart A—General Provisions Applicable to Part 968

1. Purpose and Applicability

Section 968.101 sets forth general statements of purpose and applicability for the revised part 968. The purpose of the Public Housing Modernization program is to provide financial assistance to PHAs to improve the physical condition and upgrade the management and operation of public housing projects, to assure that they continue to serve lower income families. Subpart A applies to all modernization under part 968.

Part 968 applies to PHA-owned public housing (including Lanham Act and Public Works Administration projects) and to section 23 Leased Housing Bond-Financed projects. It does not apply to projects under the section 23 Leased Housing Non-Bond Financed or section 10(c) Leased Housing programs, or the section 23 or section 8 Housing Assistance Payments programs.

The Department is planning to consolidate all public housing regulations for Indian Housing in part 905 (see proposed rule, 53 FR 24554, published on June 29, 1988). When the planned consolidation takes effect, Indian Housing will no longer be subject to this part. Until that time, Indian Housing continues to be covered under this part.

This section is the same as the proposed rule, except that (1) references to the proposed subpart C—Comprehensive Grant program are deleted and (2) references to Indian Housing Authorities (IHAs) are added. Unless otherwise noted, the term PHA includes IHA.

2. Definitions

Section 968.105 contains certain key definitions necessary for an understanding of subparts A and B, including definitions of the U.S. Housing Act of 1937, ACC, CIAP program, Federal Fiscal Year, HUD, IHA, and PHA. This section is unchanged from the proposed rule, except that the term PHA includes IHA. (Subpart B also contains its own definitions section.)

3. Other Program Requirements

Section 968.110 sets forth general Federal statutory and regulatory

requirements that apply to the part, including civil rights, environmental, wage rate, and lead-based paint requirements. There are three changes from the proposed rule. First, paragraph (g) provides that, beginning on April 2, 1989, modernization under part 968 is subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, and implementing regulations published on March 2, 1989 (54 FR 8912). Second, in paragraphs (a) and (e) (3) and (4), there is a technical incorporation of references to IHAs and in paragraphs (a), (b), and (h), there is a correction of statutory and executive order references. Finally, in the proposed rule, lead-based paint requirements would have been extensively revised to be consistent with the final rule on lead-based paint published on June 6, 1988 (53 FR 20790). However, Congressional actions have made it clear that HUD is not to implement the June 6, 1988 rule until (1) technical guidelines are developed and (2) revisions are made to reflect changes mandated by the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. 100–628, approved Nov. 7, 1988). Until such time, existing statutory, regulatory and HUD notice provisions apply. In this final rule, a paragraph (k) is being reserved for the future inclusion of the revised lead-based paint requirements. The Department anticipates early action on publication of both the guidelines and the revised regulations.

4. Modernization and Energy Conservation Standards

Section 968.115 requires all modernization under part 968 to meet HUD's modernization standards and HUD's energy conservation standards for cost-effective conservation measures. This section is unchanged from the proposed rule.

5. Preemption of State Prevailing Wage Requirements

Section 968.120 contains the provisions preempting State prevailing wage requirements as published on August 10, 1988 (53 FR 30206). This section is unchanged from the proposed rule, except that references to tribal law are added.

B. Subpart B—CIAP Simplifications

Subpart B sets forth the regulations specifically applicable to the CIAP. This subpart is largely based on the existing part 968. However, it makes two changes designed to simplify program administration, which are: (1) Streamlining the application process by requiring only one, complete application up-front, followed by Joint Review, budget submission, HUD funding decisions and fund reservation; and (2) allowing HUD-established thresholds under which PHA certifications on budget revisions and management improvement contracts are allowed without prior HUD approval. In addition, the Subpart provides for the execution of a Declaration of Trust by the PHA to protect certain rights and interests of HUD and makes minor technical changes, as discussed below.

1. Streamlining of Application Process

The new § 968.210 simplifies the application process by eliminating the current two-part (preliminary and final) application process and requiring only one CIAP application. With the exception of the budget, information which is now submitted with the final application will be submitted at the front-end with the single CIAP application.

This section is substantially the same as that found in the proposed rule. While PHAs are required to submit a more complete application up-front, the selected applications will be able to reach the implementation stage faster.

The application (§ 968.210(c)) will contain:

a. A 5-year funding request plan, which is the PHA's estimate of the funds to be requested over a 5-year period to meet the needs of its projects;

b. A preliminary assessment of the total physical and management needs of each project for which the PHA is requesting comprehensive modernization and of the specialized physical improvement needs of each project for which the PHA is requesting special purpose, emergency or homeownership modernization in the current fiscal year.

c. For each project proposed for comprehensive modernization, an identification of and an estimate of the total costs of replacement of equipment, systems, or structural elements that would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the application, whichever period is longer;

d. A resolution by the PHA Board of Commissioners approving the application and containing various certifications; and

e. Other data related to the operation of the program, as required by HUD. The rule sets forth the required contents of the application with less specificity than is found in the current regulation in order to make it easier to make changes to these requirements by handbook. The Department intends to continue to require PHAs to submit an organization and staffing plan and a statement on the locality's compliance with the cooperation agreement.

Following HUD review of the CIAP applications, HUD will select PHAs for Joint Review. To prepare for Joint Review, PHAs will conduct the detailed comprehensive needs assessments. After Joint Review, PHAs will prepare and submit the modernization budget. HUD then will make funding decisions. Selected PHAs are required to submit an implementation schedule (§ 968.210(j)) for each project in the approved modernization program.

Public Comment on One-Stage Application Process. Of the 20 public comments received, nine commented on Subpart B. Eight commented on streamlining the application process and all favored such an approach. The eight commenters were composed of two interest groups, two extra-large PHAs (more than 6600 units), two large PHAs (1250–6600 units), one medium-sized PHA (250–1249 units), and one small PHA (less than 250 units). One housing authority stated, "Any effort by HUD to streamline procedures in modernization programs could only have a positive impact on PHAs." Another authority pointed out, however, that "the current application process takes eight months from the time we submit the preliminary application until the field office approves the ACC amendments. However, before we can review the advantages, we would have to review in detail how much work is involved in the new one-stage application process. There appears to be new forms and new requirements that could effectively not change the overall time frame from submission to approval."

HUD Response. The statutory requirement for a five-year plan, currently met through the preliminary application, would be met in a new, simplified form, resulting in less duplication with the program budget. The one-step application process will require more PHA preparation up-front, because it requires the submission of documents that would, under the current process, be submitted at final application. Somewhat more time will be required by the HUD Field Offices to review the expanded applications and by the HUD Regional Offices to make Joint Review selections. However, this additional review time early in the processing cycle will be more than offset by the reduction of time required after

Joint Review. Under the one-step application process, a reduced amount of time will be required after Joint Review for PHA submission of the program budget before HUD funding decisions and HUD fund reservation.

Additional Comment on One-Step Application Proposal. Of the eight commenters who addressed the one-step application process, four stated that HUD should get funds obligated much earlier in the year, rather than waiting to the middle to end of September.

HUD Response. It is anticipated that the total processing cycle, from PHA application submission to HUD fund reservation and obligation, will be shorter under the new one-step application process.

2. PHA Certifications

To continue the Department's efforts to reduce burdensome program requirements, §§ 968.240(i), (Management Improvement Contracts) and 968.250, (Budget Revisions) of this final rule amend the current regulations to permit the use of certifications of compliance for PHAs with proven modernization capability. This section is unchanged from the proposed rule.

Management Improvement Contracts Certification. Section 968.240(i), Management Improvement Contracts, is modified to become consistent with §§ 968.240 (b), (e), and (g), which permit either prior HUD approval or PHA certification of compliance, depending on the modernization capability and past modernization performance of the PHA. Section 968.240(i) requires the PHA to comply with HUD requirements either to (a) submit for prior HUD approval contracts for management improvements, as well as contract changes, or (b) certify that the contracts accurately reflect HUD-approved work, do not exceed the HUD-approved budget amount, and have received HUD clearance under previous participation procedures.

Public Comments on Management Improvement Contracts Certification. Only one commenter, a PHA, addressed the management improvement certification. It stated that, "simplification of language concerning management improvement contracts * * * will improve the efficiency of the program."

Budget Revisions Certification. Section 968.250, Budget Revisions, is modified to become consistent with §§ 968.240 (b), (e), (g), and (i), which permit either prior HUD approval or PHA certification of compliance, depending on the modernization capability and past modernization performance of the PHA. Section 968.250 permits a PHA to comply with HUD requirements either to (a) submit the proposed budget revision for prior HUD approval if the PHA plans to delete or substantially revise approved work items, add new work items, or incur modernization costs in excess of the approved budget amount for a work item, or (b) certify that the revisions are necessary to carry out the approved work and do not result in the approved budget amount for any project being exceeded.

Public Comments on Budget Revisions Certification. There were two public comments concerning budget revisions certification. One was a general, favorable comment by a PHA. However, another commenter objected to such a certification, stating that "HUD approval is necessary to assure fiscal accountability, program integrity, and oversight by the area office. To eliminate HUD approval could greatly change a previously approved plan, result in unacceptable materials, methods and procurement while overriding the established program controls of the threshold and change order procedures."

HUD Response. Depending on the modernization capacity and past modernization performance of a PHA, the regulation would permit either prior HUD approval or PHA certification of compliance for budget revisions. In essence, the regulation permits a threshold approach.

3. Miscellaneous Provisions

Section 968.14, Progress Reporting, and § 968.16, On-Site Inspections, of the existing regulations were not included in the proposed rule. Section 968.9(i), Insurance, was also omitted. Section 968.245, Fund Requisitions, was made more general. The proposed rule stated HUD's intention to cover these matters in program handbooks.

There were no public comments about eliminating provisions in the current regulation on progress reporting, on-site inspections, and insurance, or on generalizing the fund requisition section. Upon reconsideration, however, HUD has decided to retain the provisions of §§ 968.14 (Progress Reporting) and 968.16 (On-Site Inspections) in the regulations. They are reflected as new §§ 968.246 and 968.251 in the final rule. HUD believes those provisions to be of sufficient importance to PHA implementation and HUD monitoring of approved modernization that they should be included in the permanent regulations.

4. Declaration of Trust

Section 968.215(c) requires a PHA to execute and file for record a Declaration of Trust to protect the rights and interests of HUD. This is currently a handbook requirement that merits inclusion in the regulations as an important legal requirement. This section is unchanged from the proposed rule.

Public Comment on Trust Requirement. Three commenters stated that requiring a PHA to execute and file for record a Declaration of Trust appears as additional and unnecessary paperwork.

HUD response. The Declaration of Trust is necessary to implement the statutory requirement that the ACC remain in effect for 20 years for any project receiving the benefit of a grant. Therefore, the requirement is retained in the final rule. However, the Department is revising the Declaration of Trust to cover all future modernization so that additional filings will not be necessary.

5. Special Purpose Modernization

The amendments made by section 120 of the Housing and Community Development Act of 1987, amending provisions governing special purpose modernization, were implemented by a final rule published on March 3, 1989, at 54 FR 9039. These amendments are incorporated in this final rule in §§ 968.203, 968.210 and 968.236.

6. Homeownership Modernization

A technical correction has been made to § 968.230(b)(2)(ii) to reflect that for Mutual Help projects funded through grants (FY 1987 and subsequent years), no interest rate is used when computing the new purchase price schedule.

III. Findings and Certifications

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours (7:30 a.m. to 5:00 p.m. weekdays) in the Office of the Rules Docket Clerk, Room 10272, 451 Seventh Street SE., Washington, DC 20410.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order 12291 on Federal Regulations issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a

major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, or innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The rule was listed as sequence number 1120 under the Office of Public and Indian Housing in the Department's Semiannual Regulatory Agenda published October 30, 1989 (54 FR 44702, 44735), under Executive Order 12291 and the Regulatory Flexibility Act.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule simplifies the current CIAP for the modernization of public housing. HUD does not anticipate a significant economic impact on small entities, since PHAs will continue to carry out their modernization activities by entering into contracts for the work as they now do. There may be some beneficial effects, to the extent the rule simplifies and streamlines the process.

Information collections for the CIAP program in subpart B of this rule, except for CIAP application, are identical to or less burdensome than ones contained in the current CIAP program requirements. The approved paperwork control numbers assigned by the Office of Management and Budget appear in the text of subpart B. The collection of revised information requirements for the CIAP application have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980. Information on these revised requirements is provided as follows:

TABULATION OF ANNUAL REPORTING BURDEN PUBLIC HOUSING COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM (CIAP), 24 CFR PART 968 SUBPART B APPLICATION REQUIREMENTS UNDER OMB NO. 2577-0044

Description of information collection	Section of 24 CFR affected	Number of respondents	Number of responses per respondents	Total annual responses	Hours per response	Total hours
Management needs assessment	968.210(c)(2)	1,100	1.5	1,650	4.00	6,600
HUD-52824, Five-year funding request plan	968.210(c)(1)	1,600	1.0	1,600	3.00	4,800
HUD-52825, Comprehensive assessment/program budget.	968.210(c)(2)	1,600	1.0	1,600	10.00	16,000
Narrative statement addressing technical review factors.	968.210(c)(6)	1,600	1.0	1,600	2.00	3,200
Replacement reserves estimate	968.210(c)(3)	1,100	1.5	1,650	1.00	1,650
HUD-52823, project financial forecast	968.210(c)(4)	1,100	1.5	1,650	2.00	3,300
List of participating homeownership units/costs	968.210(c)(6)	60	4.0	240	1.00	240
Modernization organization and staffing plan	968.210(c)(6)	1,400	1.0	1,400	2.00	2,800
PHA report on local compliance with cooperation agreement.	968.210(c)(6)	1,600	1.0	1,600	.50	800
HUD-50070, certification for a drug-free workplace	968.210(c)(6)	1,600	1.0	1,600	.25	400
HUD-52820, PHA/IHA board resolution approving CIAP application.	968.210(c)(5)	1,600	1.0	1,600	.25	400
Total annual burden						40,190

The length of time for each requirement will vary according to the size and complexity of the modernization. The hours per requirement are estimated to be a reasonable average, based on program experience.

This has been developed in accordance with Executive Order 12612, Federalism, and determined not to have substantial, direct effects on PHAs. The rule relates to the CIAP program. It streamlines the application process, making it easier for PHAs to obtain modernization assistance. The changes are consistent with Federalism principles since they reduce unnecessary burdens on PHAs. The nature and purpose of the program does not change.

This rule has been developed in accordance with Executive Order 12606, The Family. It does not have potential significant impact on family formation, maintenance, or general well-being. The rule changes the application process for the CIAP program. Families are not affected, since PHAs will continue to carry out modernization activities at public housing projects.

(The Catalog of Domestic Assistance numbers for the programs affected by this rule are 14.850, 14.851, and 14.852.)

List of Subjects in 24 CFR Part 968

Loan programs—housing and community development, public housing, reporting and recordkeeping requirements.

Grant programs—housing and community development, Indians.

For the reasons set forth in the preamble, part 968 of title 24 of the Code of Federal Regulations is revised to read as follows:

PART 968—PUBLIC HOUSING MODERNIZATION

Subpart A—General

Sec.

968.101 Purpose and applicability.
968.105 Definitions.
968.110 Other program requirements.
968.115 Modernization and energy conservation standards.
968.120 Preemption of State prevailing wage requirements.

Subpart B—Comprehensive Improvement Assistance Program

968.201 Purpose.
968.203 Definitions.
968.205 Eligible costs.
968.210 Procedures for obtaining approval of a modernization program.
968.215 Modernization project.
968.220 Tenant participation.
968.225 Homebuyer participation.
968.230 Special requirements for homeownership projects.
968.235 Special requirements for section 23 leased housing bond-financed projects.
968.236 Additional limitations for special purpose modernization.
968.240 Contracting requirements.
968.245 Fund requisitions.
968.246 Progress reporting.
968.250 Budget revisions.
968.251 On-site inspections.
968.255 Fiscal closeout of a modernization program.

Authority: Secs. 6 and 14, United States Housing Act of 1937 (42 U.S.C. 1434d, 1437*l*); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General

§ 968.101 Purpose and applicability.

(a) *Purpose.* Section 14 of the Act established the Public Housing Modernization program, authorizing HUD to provide financial assistance to public housing agencies (PHAs), including Indian Housing Authorities (IHAs), to improve the physical condition and upgrade the management and operation of existing public housing projects, to assure that such projects continue to be available to serve lower income families. These physical and management improvements are funded under section 5(c) of the Act. This part prescribes the requirements and procedures for the Public Housing Modernization program.

(b) *Applicability.* (1) Subpart A applies to all modernization under this part. Subpart B sets forth the requirements and procedures for the Comprehensive Improvement Assistance Program (CIAP).

(2) This part applies to PHA-owned lower income public housing projects, including conveyed Lanham Act and Public Works Administration (PWA) projects, and to section 23 Leased Housing Bond-Financed projects, for which PHAs, including IHAs, request assistance under the CIAP. This part also applies to the implementation of modernization programs which were approved before FY 1989. This part does not apply to projects under section 23 Leased Housing Non-Bond Financed program, the section 10(c) Leased Housing program, or the section 23 of section 8 Housing Assistance Payments programs.

§ 968.105 Definitions.

As used in this part:

Act. The United States Housing Act of 1937, as amended, (42 U.S.C. 1437 et seq.).

Annual contributions contract (ACC). A contract under the Act between HUD and the PHA containing the terms and conditions under which the Department assists the PHA in providing decent, safe, and sanitary housing for lower income families. The ACC must be in a form prescribed by HUD under which HUD agrees to provide assistance in the development, modernization, and/or operation of a lower income housing project under the Act, and the PHA agrees to develop, modernize, and operate the project in compliance with all provisions of the ACC and the Act, and all HUD regulations and implementing requirements and procedures.

CIAP program. The Comprehensive Improvement Assistance Program.

FFY. Federal fiscal year.

HUD. The Department of Housing and Urban Development, including the regional and field offices that have been delegated authority to perform functions pertaining to this part for the area in which the PHA is located.

IHA. Indian housing authority.

PHA. Public housing agency, including IHA.

§ 968.110 Other program requirements.

The PHA shall comply with the following program requirements:

(a) *Civil rights compliance.* The PHA shall comply with the title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4), 24 CFR part 1; Fair Housing Act (42 U.S.C. 3601–3620), 24 CFR part 100; Executive Orders 11063 (Equal Opportunity in Housing), 11246 (Equal Employment Opportunity), and 12138 (Women's Business Enterprise); section 3 of the HUD Act of 1968 (12 U.S.C. 1701u); the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), 24 CFR part 146; and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), 24 CFR part 8. (For IHAs, see 24 CFR 905.106, applicability of civil rights statutes, and 24 CFR 905.204, Preferences, opportunities, and nondiscrimination in employment and contracting.)

(b) *Minority and women's business enterprise opportunity.* In conformance with Executive Orders 11625, 12432, and 12438, the PHA shall take every action to meet Departmental goals for awarding modernization contracts to minority business enterprises. The PHA shall take appropriate affirmative action to assist women's business enterprises.

(c) *Environmental clearance.* Before approving a proposed project, HUD will comply with the requirements of 24 CFR part 50, implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4332 et seq.) and related requirements of 24 CFR 50.4.

(d) *Flood insurance.* HUD will not approve for acquisition, construction, or improvement, a building located in an area that has been identified by the Federal Emergency Management Agency as having special flood hazards, unless the following conditions are met:

(1) Flood insurance on the building is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 et seq.); and

(2) The community in which the area is situated is participating in the National Flood Insurance Program in accord with 44 CFR parts 59–79, or less than one year has passed since FEMA notification regarding flood hazards.

(e) *Wage rates*—(1) *Davis Bacon.* With respect to modernization work or contracts over $2,000 (except for nonroutine maintenance work), all laborers and mechanics employed by the PHA or its contractors shall be paid not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a through 276c).

(2) *HUD-determined.* With respect to all nonroutine maintenance work or contracts, all laborers and mechanics employed by the PHA or its contractors shall be paid not less than the wages prevailing in the locality, as determined or adopted by HUD pursuant to section 12 of the United States Housing Act of 1937.

(3) *State.* Prevailing wage rates determined under State or tribal law are inapplicable under the circumstances set forth in § 968.120.

(f) *Technical wage rates.* All architects, technical engineers, draftsmen, and technicians employed in the development of a project, shall be paid not less than the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable State or local law) by HUD.

(g) *Relocation and acquisition*—(1) *Temporary relocation.* The following policies cover residential tenants who are moved temporarily due to rehabilitation or demolition of a project assisted under this part, but are offered the opportunity to return to the same project at the same site, although not necessarily the same unit or building in the project. The PHA shall provide such tenants:

(i) All actual reasonable moving and related costs incurred in connection with the temporary relocation, by either undertaking the move itself or reimbursing for such costs; and

(ii) Appropriate advisory services, including reasonable advance written notice of: the date and approximate duration of the temporary relocation; the suitable, decent, safe and sanitary temporary housing which will be made available; and the provisions of paragraph (1)(i) of this section.

(2) *Relocation assistance for displaced persons.* A displaced person, defined in paragraph (6)(i) of this section, shall be provided relocation assistance at the levels described in, and in accordance with the requirements of, 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) (42 U.S.C. 4601).

(3) *Real property acquisition requirements.* The acquisition of real property for a project is subject to the

URA and the requirements described in 49 CFR part 24, subpart B.

(4) *Responsibility of PHA.* The PHA shall certify compliance with the URA, the regulations at 49 CFR part 24 and the requirements of this section. Such certification shall be included in the agreement between HUD and the PHA. The cost of assistance required by this section may be paid from local public funds, funds provided in accordance with this part, or funds available from other sources.

(5) *Appeals.* A person who disagrees with the PHA's determination concerning a payment or other assistance required by this section may file a written appeal of that determination with the PHA. The appeal procedures to be followed are described in 49 CFR 24.10.

(6) *Definition of displaced person.* (i) The term "displaced person" means a person (family, individual, business, nonprofit organization, or farm) that moves from real property, or moves personal property from real property, permanently and involuntarily, as a direct result of acquisition, rehabilitation, or demolition for a project assisted under this part. Permanent, involuntary moves for an assisted project include:

(A) A permanent move from the real property (project/site) following notice by the PHA to move permanently from the property, if the move takes place on or after the date that HUD approves the PHA's application for assistance;

(B) A permanent move from the real property that occurs before HUD's approval of the PHA's application, if the PHA or HUD determines that the displacement resulted directly from acquisition, rehabilitation or demolition for a project;

(C) A permanent move from the real property by a tenant-occupant of a dwelling unit that occurs after the execution of the ACC between the PHA and HUD if

(*1*) The tenant has not been provided a reasonable opportunity to lease and occupy a suitable, decent, safe and sanitary dwelling in the same project/site following the completion of the project at a rent, including estimated average utility costs, that does not exceed the greater of the tenant's rent and estimated average utility costs before the initiation of negotiations (as defined in 49 CFR 24.2(k), or 30 percent of gross household income; or

(*2*) The tenant has been required to relocate temporarily as described in paragraph (g)(1) of this section, but the tenant is not offered payment for all actual reasonable moving and related expenses incurred in connection with the temporary relocation or other conditions of the temporary relocation are not reasonable; or

(*3*) The tenant is required to move to another unit in the same project/site, but is not offered reimbursement for all moving and related expenses incurred in connection with the move.

(ii) A person shall not qualify as a displaced person, if:

(A) The person has been evicted for cause based upon a serious or repeated violation of material terms of the lease or occupancy agreement and the PHA determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance;

(B) The person moved into the property after PHA approval of the application and, before commencing occupany, received written notice of the expected displacement;

(C) The person is ineligible under 49 CFR 24.2(g)(2); or

(D) The PHA determines and HUD concurs that the person was not displaced as a direct result of acquisition, rehabiliation, or demolition for the project.

(iii) The PHA may, at any time, request a HUD determination as to whether a displacement is or would be covered by 49 CFR part 24.

(h) *Physical accessibility.* The PHA shall comply with the Architectural Barriers Act of 1968 (42 U.S.C. 4151–4157), 24 CFR part 40; section 504 of the Rehabilitation Act of 1973, 24 CFR part 8; and the Fair Housing Act, 24 CFR part 100.

(i) *Audits.* Under the Single Audit Act of 1984 (31 U.S.C. 7501–7507), all PHAs that receive assistance under this part must comply with the audit requirements of 24 CFR part 44. The Secretary of Housing and Urban Development, the Inspector General of the Department of Housing and Urban Development, and the Comptroller General of the United States shall have access to all books, documents, papers, or other records that are pertinent to the activities carried out under this section in order to make audit examinations, excerpts, and transcripts.

(j) *Uniform administrative requirements.* The Uniform Administrative Requirements for Grants and Cooperative Agreements to States, Local, and Federally Recognized Indian Tribal Governments, as set forth in 24 CFR part 85, are applicable to grants under this part, except as specified in this part and in 24 CFR 990.103(c) and 24 CFR 990.201.

(k) *Lead-based paint poisoning prevention.* [Reserved]

[Note: Although this paragraph is reserved, PHAs are required to comply with existing statutory, regulatory and HUD notice requirements.]

(l) *Energy conservation.* The PHA shall comply with 24 CFR part 965, subpart C, regarding the conduct or update of an energy audit and the undertaking of cost-effective energy conservation measures. The cost of performing or updating an energy audit is an eligible modernization cost.

§ 968.115 Modernization and energy conservation standards.

(a) All improvements funded under this part, which may include alterations, betterments, additions, replacements, or non-routine maintenance, shall meet the HUD modernization standards, described in paragraph (b) of this section and established to provide decent, safe, and sanitary living conditions in PHA-owned and PHA-operated public housing, and the HUD energy conservation standards for cost-effective energy conservation measures in such projects, described in paragraphs (c) and (d) of this section.

(b) The modernization standards are standards which will provide decent, safe, and sanitary living conditions in public housing, including corrections of violations of basic health and safety codes, and address all deficiencies, including those related to deferred maintenance, in order to meet the intent of HUD's minimum property standards as they could reasonably be applied to existing housing. In addition, these standards cover improvements relating to site and building security. The modernization standards are contained in HUD Handbook 7485.2, as revised, Public and Indian Housing Modernization Standards, and in other documents cited in the Handbook. (This handbook is available from any HUD office).

(c) The energy conservation standards are standards for the installation of cost-effective energy conservation measures, including solar energy systems. The energy conservation standards provide for the conducting or updating of energy audits, including cost-benefit analyses of energy saving opportunities, in order to determine which measures will be cost-effective in conserving energy. The energy conservation standards are contained in the HUD Workbook, Energy Conservation for Housing, and in other documents cited in the Workbook.

(d) Life-cycle cost-effective energy performance standards established by HUD to reduce the operating costs of public housing projects over the

estimated life of the building shall apply to projects modernized under this part. These standards are contained in HUD Handbook 7418.1, as revised, Life-Cycle Cost Analysis for Utility Combinations. (This handbook is available from any HUD office).

§ 968.120 Preemption of State prevailing wage requirements.

(a) A prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or tribal law shall be inapplicable to the modernization of a project whenever:

(1) The modernization of the project is otherwise subject to State or tribal law requiring the payment of wage rates determined by a State or local government or agency to be prevailing; and

(2) The wage rate determined under State or tribal law to be prevailing with respect to an employee in any trade or position employed in the modernization of a project exceeds whichever of the following Federal wage rates is applicable:

(i) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a et seq.) to be prevailing in the locality with respect to such trade;

(ii) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(iii) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(iv) In the case of non-routine maintenance, the wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(v) For the purpose of ascertaining whether a wage rate determined under State or tribal law for a trade or position exceeds the Federal wage rate:

(A) Where a rate determined by the Secretary of Labor or an apprentice or trainee wage rate based thereon is applicable, the total wage rate determined under State or tribal law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the Secretary of Labor or apprentice or trainee wage rate; and

(B) Where at a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State or tribal law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(b) Whenever paragraph (a)(1) is applicable:

(1) Any solicitation of bids or proposals issued by the PHA and any contract executed by the PHA for modernization of the project shall include a statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or tribal law to be prevailing with respect to an employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract whenever either of the following occurs:

(i) Such nonfederal prevailing wage rate exceeds:

(A) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a et seq.) to be prevailing in the locality with respect to such trade;

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency; or

(C) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(ii) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

Failure to include this statement may constitute grounds for requiring resolicitation of the bid or proposal;

(2) The PHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State or tribal law and described in paragraph (a)(2) of this section to any of its own employees who may be engaged in the modernization of the project; and

(3) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State or tribal law and described in paragraph (a)(2) of this section shall be enforced against the PHA or any of its contractors or subcontractors with respect to employees engaged in the modernization of the project.

(c) Nothing in this section shall affect the applicability of any wage rate established in a collective bargaining agreement with a PHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (a)(2) of this section, nor does this section impose a ceiling on wage rates a PHA or its contractors or subcontractors may choose to pay independent of State or tribal law.

(d) The provisions of this section shall be applicable to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any worked performed by employees of a PHA on or after October 6, 1988.

Subpart B—Comprehensive Improvement Assistance Programs

§ 968.201 Purpose.

The purpose of this subpart is to set forth the policies and procedures for the CIAP program under which PHAs receive financial assistance for the modernization of public housing projects, including comprehensive, emergency, homeownership, and special purpose modernization.

§ 968.203 Definitions.

In addition to the definitions in § 968.105, the following definitions apply to this subpart:

Comprehensive modernization. A modernization program for a project which provides for all needed physical and management improvements. Under CIAP, all modernization programs are comprehensive modernization, except those defined as emergency, homeownership or special purpose.

Emergency modernization. A modernization program for a project that is limited to physical work items of an emergency nature, posing an immediate threat (*i.e.*, must be corrected within one year of funding approval) to tenant life, health, or safety or related to fire safety. Under emergency modernization, management improvements are not eligible modernization costs.

Financial feasibility. The cost (excluding the cost of management improvements, administration, architectural and engineering fees, and other fees) of the modernization program does not exceed 62.5 percent (for a nonelevator structure) or 69 precent (for an elevator structure) of the total cost guidelines for a new project with the same structure type and number and size of units in the market area.

Financially distressed PHA. A PHA that has an operating reserve level of 20 percent or less of its authorized maximum or other level as determined by HUD, as shown on the latest year-end financial statement.

Homebuyer Agreement. A Mutual Help and Occpancy Agreement or Turnkey III Homebuyer's Ownership Opportunity Agreement.

Homeownership modernization. A modernization program for a project that is under the Turnkey III Homeownership Opportunities Program or the Mutual Help Homeownership Opportunities Program. Unde homeownership modernization, limited physical improvements are eligible modernization costs, but management improvements are not eligible modernization costs.

Lack of management capability. The PHA

(a) Has inadequate management practices, as determined by HUD on the basis of regular monitoring and performance of on-site reviews, audits, and surveys, and

(b) Has not taken appropriate corrective action.

Management practices which are to be considered include, but are not limited to: management, financial, and accounting controls; tenant programs and services; tenant and project security; tenant selection and eviction; occupancy; rent collection; maintenance; and administration of equal opportunity requirements.

Lack of modernization capability. The PHA

(a) Has previously approved, but unobligated, modernization funds that are over one year old for emergency modernization and over three years old (or older, where HUD has approved a longer period) for comprehensive, special purpose, or homowonership modernization, and that HUD has determined that the failure to obligate the funds is due to reasons within the PHA's control; or

(b) Has spent modernization funds so that the quality of the work does not assure the long-term social and physical viability of the modernized units.

Modernization funds. Funds derived from an allocation of budget authority for the purpose of funding physical and management improvements under an approved modernization program.

Modernization program. A PHA's program for carrying out modernization, as set forth in the approved application for modernization funds.

Modernization project. The improvement of one or more existing public housing projects under a new project number designated for modernization purposes. The term "project" or "public housing project" means a development project with a unique project number.

Non-routine maintenance. Work items that ordinarily would be performed on a regular basis in the course of upkeep of a property, but have become substantial in scope because they have been put off, and that involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does qualify, but reconstruction, substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify.

Special purpose modernization. A modernization program for a project that is limited to any one or more of the following types of physical improvements otherwise eligible for CIAP funding under this part, subject to a HUD determination that the physical improvements are necessary and sufficient to extend substantially the useful life of the project, beyond that which it would have if such improvements were not made (examples cited in each category are for illustration only):

(1) Physical improvements to replace or repair major equipment systems (such as elevators and heating, cooling, electrical, and water and sewer systems) or structural elements (such as roofs, walls, and foundations);

(2) Physical improvements to upgrade security, such as installation of additional lighting, security screens on windows, better locks, or design changes to enhance security (excluding non-physical improvements, such as security staffing and services);

(3) Physical improvements to increase accessibility for elderly and handicapped families, according to the applicable standards of 24 CFR part 8;

(4) Physical improvements to reduce the number of units which are vacant and substandard, including any improvements necessary to meet local code requirements and return the units to occupancy; and

(5) Cost-effective physical improvements to increase the energy efficiency of the project.

Work item. Any separately identifiable unit of work constituting a part of a modernization program.

§ 968.205 Eligible costs.

(a) *Physical improvements.* Physical improvements eligible for modernization funding include alterations, betterments, additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 968.115. These standards may be exceeded only when necessary or highly desirable for the long-term physical and social viability of the individual project. If demolition is proposed, the PHA shall comply with 24 CFR part 970.

(b) *Management improvement costs*—(1) *Eligibility.* Management improvements that are project-specific or PHA-wide in nature are eligible modernization costs only under comprehensive modernization, subject to all of the following conditions:

(i) The management improvements are necessary to correct identified management problems and to sustain the physical improvements at the project to be comprehensively modernized;

(ii) The management improvements require additional funds for implementation and the funds are not available from other sources;

(iii) The combined costs for management improvements and planning under paragraph (d) of this section do not exceed 10 percent of the total estimated physical improvement costs for a project (from all fiscal years), unless specifically approved by HUD. Under paragraph (d) of this section, planning costs shall not exceed 5 percent of the funds available to a HUD regional office in a particular FFY;

(iv) Management improvement costs are funded only for the implementation period of the physical improvements. In rare cases, HUD may approve a longer period, up to a maximum of five years where it is clearly shown to be necessary to complete the initial installation and demonstrate that the management work item will bring about needed management improvements; and

(v) Where an approved modernization program includes management improvements which involve ongoing costs, HUD is not obligated to provide continued funding or additional operating subsidy after the end of the implementation period of the management improvements. The PHA is responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities.

(2) *Eligible management areas.* Subject to the conditions set forth in paragraph (b)(1) of this section, management improvements may involve or upgrade the following areas:

(i) Management, financial, and accounting control systems of the PHA that are related to the project to be modernized;

(ii) Adequacy and qualifications of personnel employed by the PHA in the management and operation of the project to be modernized, for each significant category of employment;

(iii) Adequacy and efficacy of the following for the project to be modernized:

(A) Tenant programs and services;
(B) Tenant and project security;
(C) Tenant selection and eviction;
(D) Occupancy;
(E) Rent collection;
(F) Maintenance; and
(G) Equal opportunity; and
(iv) Resident management corporations under paragraph (i) of this section.

(c) *Tenant moving costs.* See § 968.110(g).

(d) *Planning costs.* Planning costs necessary for developing the application (*i.e.*, costs incurred before modernization program approval) are eligible modernization costs. These costs may be reimbursed after application approval. Financially distressed PHAs may request approval from HUD for upfront funding of planning costs where HUD determines that developing the application would otherwise present an undue financial hardship. Not more than 5 percent of the funds available to the HUD regional office in a particular FFY shall be used for planning costs.

(e) *Administrative costs.* Administrative costs necessary for the additional design and implementation of the physical and management improvements (*i.e.*, costs to be incurred after modernization program approval) are eligible modernization costs, as follows:

(1) *Nontechnical and technical salaries.* The salaries of nontechnical and technical PHA personnel assigned full-time or part-time to the modernization program are eligible modernization costs. Any proration of salaries shall be justified by the PHA, authorized by HUD, and reflected by an appropriate revision to the PHA's operating budget.

(2) *Employee benefit contributions.* PHA contributions to employee benefit plans on behalf of nontechnical and technical PHA personnel are eligible modernization costs in proportion to the amount of salary charged to the modernization program.

(f) *Homeownership projects.* For homeownership projects only, eligible physical improvements are limited to work items that are not the responsibility of the homebuyer families and that are related to health and safety, correction of development deficiencies, physical accessibility, and cost-effective energy conservation measures. Nonroutine maintenance or replacements, additions, items that are the responsibility of the homebuyer families, and management improvements are not eligible modernization costs for homeownership projects.

(g) *Resident management corporations.* Eligible modernization costs include use of management improvement funds to assist a resident management corporation, as defined in § 964.7 of this chapter, to develop its management capabilities and carry out management improvements identified as PHA-wide or project-specific in nature, under the terms of a management contract between the PHA and the resident management corporation. (See part 964 of this chapter for information on the establishment and functions of resident management corporations.) Such funding is subject to the limitations indicated in paragraph (b) of this section.

§ 968.210 Procedures for obtaining approval of a modernization program.

(a) *HUD notification.* As soon as possible after modernization funds for a particular FFY become available, HUD shall give written notification of the availability of such funds and the time frame for submission of the application.

(b) *PHA consultation with local officials and tenants/homebuyers.* The PHA shall develop the application in consultation with local officials and tenants/homebuyers at the project to be modernized, as set forth in § 968.220 and § 968.225. Before developing the application, the PHA shall consult with local government officials as to whether the proposed comprehensive, special purpose, or homeownership modernization is financially feasible and will result in long-term physical and social viability of the project.

(c) *Application.* The PHA shall submit to HUD an application, in a form prescribed by HUD, which shall include, but not be limited to:

(1) A five-year funding request plan, which includes the PHA's estimate of the comprehensive modernization funds to be requested over a five-year period to meet the total physical and management improvement needs of its projects sufficient to meet the modernization and energy conservation standards in § 968.115, including any special purpose and homeownership needs, as well as any emergency needs in the current FFY.

(2) A preliminary assessment of the total physical and management needs of each project for which the PHA is requesting comprehensive modernization and of the specialized needs of each project for which the PHA is requesting special purpose, emergency or homeownership modernization in the current FFY.

(3) For each project proposed for comprehensive modernization in the current FFY, an identification of and an estimate of the total costs of replacement of the equipment, systems, or structural elements that would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the application, whichever period is longer.

(4) A resolution by the PHA Board of Commissioners, approving the application and containing certifications as required by HUD.

(5) Other data related to the operation of the program, as may be required to comply with other Federal laws and regulations.

(d) *HUD screening and review.* HUD shall screen and review the applications, and select application for further processing, on the basis of such factors as the extent and urgency of the need and the PHA's management and modernization capability.

(e) *PHA preparation for joint review.* The PHA shall prepare for the joint review by:

(1) Reaching agreement with HUD on the specific project(s) to be covered during the joint review;

(2) Completing an assessment of the needs of each project for which the PHA is requesting funds in the current FFY. The PHA will complete a detailed, comprehensive assessment, in a form prescribed by HUD, of the total physical and management needs of each project for which the PHA is requesting comprehensive or special purpose modernization; except that if the request for a particular project is limited to physical improvements to increase accessibility for elderly and handicapped families and to increase energy efficiency, a specialized assessment will be completed unless HUD determines that there is evidence indicating that the project has major problems that justify a comprehensive assessment. An assessment of specialized physical improvement needs will be completed for each project for which the PHA is requesting emergency or homeownership modernization;

(3) For each project proposed comprehensive modernization, completing:

(i) A project operating budget for each 12-month period covered by the plan, excluding modernization costs;

(ii) An estimate of the financial resources to be available from all sources and the amount of modernization funds to be requested for each 12-month period covered by the plan; and

(4) Reviewing the other factors to be covered during the joint review as prescribed by HUD.

(f) *Joint review.* The PHA and HUD shall conduct an on-site review to discuss the proposed modernization program, as set forth in the application, and reach tentative agreement on the PHA needs. The joint review shall include an on-site inspection of the property and resolution of the relevant issues as prescribed by HUD.

(g) *Comprehensive modernization approach.* HUD will fund proposed comprehensive modernization in one stage, or, on an exception basis, in more than one stage—not to exceed a total of five stages, subject to future fund availability. Grounds for exception include a PHA's lack of modernization or management capability (which necessitates multi-stage funding).

(1) *One-stage funding.* Under one-stage funding, the total amount of modernization funds for all required physical and management improvements at the project shall be approved at one time, from funds for a single FFY, under one application.

(2) *Multi-stage funding.* Under multi-stage funding, the total amount of modernization funds for all required physical and management improvements at the project shall be approved in the fewest number of stages that are feasible, over several different FFYs, with the total number of stages not to exceed five. The first stage will include funds for architectural/engineering work and/or a portion of the physical improvements. Management improvements may be included in the first stage to the extent they are eligible costs under § 968.205(b).

(i) *First stage.* At the first stage of funding, the application shall include a comprehensive assessment of the project's physical and management improvement needs and a plan under paragraph (c)(2) of this section addressing only the work items to be completed during this stage. When approving the first stage, HUD will indicate the approximate balance of the funds required to complete the comprehensive modernization, but also will indicate that future funding will be subject to all of the following conditions: the availability of funds, satisfactory progress by the PHA in obligating first stage and subsequent stage funds, PHA submission of additional documents, and PHA compliance with HUD regulatory and statutory requirements.

(ii) *Subsequent stages.* Where the PHA is requesting funds for a subsequent stage of a multi-stage comprehensive modernization, HUD will determine whether the PHA has made satisfactory progress in obligating prior stage funds, whether it has submitted necessary additional documents, and whether it has complied with HUD regulatory and statutory requirements. If the PHA has not satisfied these conditions, HUD will not approve that subsequent stage of funding at this time. The PHA submission for any subsequent stage should not duplicate items previously submitted.

(3) *Implementation.* After the application for each stage is approved, the PHA and HUD shall agree on an implementation period that is appropriate for that funding stage, not to exceed five years for any stage from the date on which that stage is first funded.

(h) *HUD funding decisions.* After all of the joint reviews, HUD will determine whether the PHA will be approved for funding and whether any further modifications are required to the application, including PHA submission of the budget. HUD will give preferences to PHAs which request assistance for:

(1) Group 1, projects having emergency conditions that pose an immediate threat (*i.e.*, must be corrected within one year of funding approval) to tenant life, health, or safety or related to fire safety. Funding is limited to correction of emergency conditions and may not be used for substantial rehabilitation.

(2) Group 2, projects:

(i) Having conditions which threaten tenant life, health, or safety or having a significant number (10 percent or more) of vacant or substandard units; and

(ii) Located in PHAs having demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose, and homeownership modernization); or

Within this group, the Secretary may also give priority to additional factors, such as the correction of physical disparities under the nondiscrimination preference, the project is at the second or subsequent stage of comprehensive modernization, cost benefit, and the need for lead-based paint testing and hazard abatement.

(3) Group 3, other projects located in PHAs having demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose, and homeownership modernization). The Secretary may give priority to factors which demonstrate that the modernization will result in the greatest cost benefit.

(4) HUD may set aside for special purpose modernization a portion of the total modernization funds available for any FFY, as determined by HUD to be necessary to assure that special purpose needs are appropriately addressed.

(i) *ACC amendment.* After HUD approval of the application and budget, HUD and the PHA shall enter into an ACC amendment to obtain modernization funds.

(j) *Implementation schedule.* After HUD executes the ACC, the PHA shall submit for HUD approval an implementation schedule for each project in the approved modernization program.

(The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under OBM control number 2577–0048. The information collection requirements contained in paragraph (c) were approved under OMB control numbers 2577–0044 and 2577–0047. The information collection requirements contained in paragraph (j) of this section were approved under OMB control number 2577–0065).

§ 968.215 Modernization project.

(a) *Modernization projects.* For purposes of funding modernization, each modernization program approved for a PHA shall be treated as a separate modernization project. The modernization project may include improvements to one or more public housing projects. Improvements to a single public housing project may be included in more than one modernization project.

(b) *ACC.* HUD and the PHA shall enter into an ACC amendment for each modernization project. The ACC amendment shall require lower income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

(c) *Declaration of trust.* The PHA shall execute and file for record a Declaration of Trust as provided under the ACC to protect the rights and interest of HUD throughout the 20-year period during which the PHA is obligated to operate the individual projects receiving modernization grant funds in accordance with the ACC, the Act, and HUD regulations and requirements.

§ 968.220 Tenant participation.

For a rental project only, before submission of the application, the PHA shall consult with the tenants (including, for purposes of this section, tenant organizations and resident management corporations (see § 964, Subpart C of this Chapter), if any) regarding its intent to submit an application for modernization funds. Before the joint review, the PHA shall notify the tenants

of the project to be modernized of the proposed modernization program, give tenants a reasonable opportunity to present their views on the proposed program and alternatives to it, and give full and serious consideration to tenant recommendations. At the joint review, the PHA shall provide the tenants and HUD with a copy of, and an evaluation of, tenant recommendations, indicating the reasons for PHA acceptance or rejection, consistent with HUD requirements and the PHA's own determination of efficiency, economy, and need. After HUD approval of the modernization program, the PHA shall inform the tenants of the approved work items. The provisions of this section do not apply to proposed work items of an emergency nature affecting the life, health, and safety of tenants, which are processed in a "fast track" mode outside the normal processing schedule. However, the PHA shall inform tenants of approved emergency work items.

(Approved by the Office of Management and Budget under OMB control number 2577–0048.)

§ 968.225 Homebuyer participation.

(a) For a homeownership project only, before the joint review, the PHA shall discuss the modernization program with the homebuyer families of the project to be modernized and advise them of the effect of the modernization on the terms of the homebuyer agreements. The PHA shall give the homebuyer families a reasonable opportunity to present their views on the proposed program and give full and serious consideration to their recommendations consistent with HUD requirements and the PHA's own determination of efficiency, economy, and need.

(b) The PHA shall inform each homebuyer family that:

(1) To participate, it must be in substantial compliance with the terms of its homebuyer agreement;

(2) It will have an opportunity to express its views and preferences with respect to the modernization of its home;

(3) The purchase price and the amortization period will be increased as provided in § 968.230;

(4) It will have an opportunity to participate in the final inspection of the work to determine completion in accordance with the requirements; and

(5) Participation in the program is optional.

(c) The PHA shall provide each homebuyer family with a copy of the PHA's evaluation of its recommendations, the tentative decisions reached on the modernization program to be submitted to HUD, the estimated cost of the proposed modernization program, and the amount of the cost to be attributed to its home.

(d) If the homebuyer family decides to participate in the modernization program with respect to any of the proposed work items, it must agree in writing that its homebuyer agreement will be amended upon approval of the application to provide that, as a result of the amount of modernization cost attributed to its home, the purchase price and the amortization period will be increased as provided in § 968.230.

(e) Any homebuyer family may decline to participate without risk to its homebuyer status.

(f) Before HUD approval of the application, the PHA shall obtain a signed agreement from each participating homebuyer family that it will amend its homebuyer upon approval of the application. The PHA shall retain copies of the signed agreements in its files for inspection by HUD.

(g) The provisions of paragraphs (b) through (f) of this section do not apply where modernization work is limited to correction of development deficiencies, conduct of energy audits, or undertaking of cost-effective energy conservation measures.

(Approved by the Office of Management and Budget under OMB control number 2577–0048.)

§ 968.230 Special requirements for homeownership projects.

(a) Promptly after HUD approval of the application, each homebuyer family shall execute an amendment to its Homebuyer Agreement, reflecting an increase in the purchase price of its home and an extension of the amortization period in accordance with paragraphs (b) and (c) of this section, except where the modernization work is limited to the correction of development deficiencies, conduct of energy audits, or undertaking of cost-effective energy conservation measures.

(b) For Turnkey III projects that have purchase price schedules and for Mutual Help projects placed under ACC from March 9, 1976 or converted in accordance with 24 CFR 905.428:

(1) The amount of estimated modernization cost attributable to the home, as shown in the HUD-approved application, shall be added to the homebuyer's purchase price as initially determined under 24 CFR 904.113(a) or 904.113(b) for Turnkey III projects or under 24 CFR 905.422 (b) or (c) for Mutual Help projects.

(2) The period of the homebuyer's current purchase price schedule shall be extended by the same percentage as the percentage of increase in the homebuyer's purchase price. The new purchase price schedule shall:

(i) Show monthly amortization of the new purchase price over a period commencing on the same day as the original purchase price schedule and terminating at the end of the extended period; and

(ii) Be computed on the basis of the same interest rate as used for the current purchase price schedule. (For Mutual Help projects where the original development cost was funded through grants, no interest rate is used when computing the new purchase price schedule.)

(3) If a modernization program is approved for a project after one or more earlier modernization programs for the same project, the total amount of modernization cost attributable to the home under the prior modernization program(s) shall be included as part of the homebuyer's initial purchase price in applying the provisions of paragraphs (b)(1) and (2) of this section.

(c) For Turnkey III projects that do not have purchase price schedules and for Mutual Help projects placed under ACC before March 9, 1976, and not converted in accordance with 24 CFR 905.428:

(1) These projects do not involve purchase price schedules for amortization of the homebuyer's purchase price over a fixed period of time because the homebuyer's purchase price in these projects is based on the unamortized balance of the portion of the project's development debt attributable to the home. Consequently, it is necessary to establish a separate schedule for the amortization of the estimated modernization cost attributable to the home, as shown by the HUD-approved application.

(2) The PHA shall furnish to the homebuyers a schedule showing monthly amortization of the estimated modernization cost attributable to the home, at the minimum loan interest rate specified in the ACC for the modernization project, over a period commencing on the first day of the month after the date of original occupancy of the home by the homebuyer and terminating at the end of the period determined as follows:

(i) Divide the amount of the estimated modernization cost attributable to the home (including the total amount of modernization cost attributable to the home under prior modernization programs, if any) by the amount of the current HUD-approved estimated replacement cost of the home.

(ii) Multiply this amount by 25, round the result to the next higher number, and add that number to 25. This is the

number of years to be used as the period for the modernization amortization schedule.

(iii) The purchase price for the unit shall be the sum of (A) the balance of the debt attributable to the home and (B) the amount remaining on the modernization schedule at the time of settlement.

§ 968.235. Special requirements for section 23 leased housing bond-financed projects.

(a) A section 23 Leased Housing Bond-Financed project is eligible for modernization only if HUD determines that the project has met the following conditions:

(1) The project was financed by the issuance of bonds;

(2) Clear title to the project will be conveyed to or vested in the PHA at the end of the section 23 lease term;

(3) There are no legal obstacles affecting the PHA's use of the property as public housing during the 20-year period of the modernization;

(4) After completion of the modernization, the project will have a remaining useful life of at least 20 years and it is in the financial interest of the Federal Government to improve the project; and

(5) The project is covered by a cooperation agreement between the PHA and local governing body during the 20-day period of the modernization.

(b) A section 23 Leased Housing Bond-Financed project which has been conveyed to the PHA after the bonds have been retired is similarly eligible for modernization if the conditions specified under paragraph (a) of this section have been satisfied.

§ 968.236 Additional limitations for special purpose modernization.

(a) For each of the three types of special purpose modernization relating to major equipment systems or structural elements, security, and reduction of vacant, substandard units, a PHA may obtain special purpose modernization funding only once for a project that has not been comprehensively modernized. Subsequent funding for the same project for any additional physical improvements of these types may be provided only as a part of a program which addresses all of the physical and management improvement needs of the project under a comprehensive modernization program. This limitation does not apply to a project which has been comprehensively modernized.

(b) Special purpose modernization to reduce the number of vacant, substandard units will be limited to physical improvements which are necessary to meet local code requirements and return such units to a condition that is comparable to the condition of occupied units in the same project.

§ 968.240 Contracting requirements.

(a) *Compliance with State and local law and Federal requirements.* The PHA shall comply with State and local laws and Federal requirements applicable to bidding and contract awards. (See § 968.110(e) and (f) and § 968.120 for wage rate requirements.)

(b) *PHA agreement with architect/engineer.* The PHA shall obtain architectural/engineering services through the competitive negotiation process. Notwithstanding 24 CFR 85.36(g), the PHA shall comply with HUD requirements either to

(1) Submit the contract for prior HUD approval before execution, or

(2) Certify that the scope of work is consistent with any agreements reached with HUD, and that the fee is appropriate and does not exceed the HUD-approved budget amount.

(c) *Sealed bid (formal advertising) requirements.* For each construction or equipment contract over $25,000, and lead-based paint testing services over $25,000, the PHA shall conduct formal advertising as required in § 85.36(d)(2) of this chapter, except for procurement under the HUD Consolidated Supply Program, 24 CFR part 965, supart G.

(d) *Assurance of completion.* For each construction or equipment contract over $25,000, the contractors shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding 24 CFR 85.36(h) and as may be required by law, separate performance and payments bonds, each for 50 percent or more of the contract price, or a 20 percent cash escrow, or a 25 percent letter of credit.

(e) *Construction and bid documents.* Notwithstanding 24 CFR 85.36(g), the PHA shall comply with HUD requirements either to

(1) Submit complete construction and bid documents for prior HUD approval before inviting bids, or

(2) Certify to receipt of the required architect's/engineer's certification that the construction documents accurately reflect HUD-approved work and that the bid documents are complete and include all mandatory items.

(f) *Contract award.* The PHA shall obtain HUD approval of the proposed award of modernization construction and equipment contracts if the bid amount exceeds the HUD-approved budget amount or if the procurement meets the criteria set forth in 24 CFR 85.36(g)(2)(i) through (iv). In all other instances, the PHA shall make the award without HUD approval after the PHA has certified that:

(1) The bidding procedures and award were conducted in compliance with State or local laws and Federal requirements;

(2) The award does not exceed the approved budget amount and does not meet the criteria in § 85.36(g)(2)(i) through (iv) for prior HUD approval; and

(3) HUD clearance has been obtained for the award under previous participation procedures, including absence of the contractor from the Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

(g) *Contract modifications.* Notwithstanding 24 CFR 85.36, except in an emergency endangering life or property, the PHA shall comply with HUD requirements either to

(1) Submit the proposed contract modifications for prior HUD approval, or

(2) Certify that such modifications are within the scope of the contract and that any additional costs are within the latest HUD-approved budget or otherwise approved by HUD.

(h) *Construction requirements.* The PHA shall submit to HUD periodic progress reports and shall submit all contract settlement documents for prior HUD approval.

(i) *Management improvement contracts.* The PHA shall obtain consultant services through the competitive proposal process. The PHA shall comply with HUD requirements either to

(1) Submit contracts for management improvements, as well as contract changes, for prior HUD approval, or

(2) Certify that the contracts accurately reflect HUD-approved work, do not exceed the HUD-approved budget amount, and have received HUD clearance under previous participation procedures.

In the case of contract changes, the PHA also shall certify that the changes are within the scope of the contract and that any additional costs are within the latest HUD-approved budget or otherwise are approved by HUD.

(The information collection requirement contained in paragraph (b) was approved by OMB under control number 2577–0015. The information collection requirements contained in paragraphs (e), (f), (g), and (h) were approved by OMB under control number 2577–0039. The information requirements in paragraph (i) were approved under OMB control number 2577–0049.)

§ 968.245 Fund requisitions.

To request modernization funds against the total approved modernization budget, the PHA shall submit a request to HUD in accordance with HUD requirements.

(Approved by the Office of Management and Budget under OMB control number 2577–0104.)

§ 968.246 Progress reporting.

For each quarter until completion of the modernization program, the PHA shall submit, in a form prescribed by HUD, to the HUD Field office:

(a) A report on modernization fund expenditures; and

(b) A narrative report on management improvement progress, where applicable.

(Approved by the Office of Management and Budget under OMB control number 2577–0049.)

§ 968.250 Budget revisions.

The PHA shall not incur any modernization cost in excess of the total approved budget. The PHA shall submit a budget revision, in a form prescribed by HUD, if the PHA plans (within the total approved modernization budget) to incur modernization costs in excess of the approved budget amount for any project. The PHA also shall comply with HUD requirements either to

(a) Submit the proposed budget revision for prior HUD approval if the PHA plans to delete or substantially revise approved work items, add new work items, or incur modernization costs in excess of the approved budget amount for a work item, or

(b) Certify that the revisions are necessary to carry out the approved work and do not result in the approved budget amount for any project being exceeded.

(Approved by the Office of Management and Budget under OMB control number 2577–0044.)

§ 968.251 On-site inspections.

The PHA shall provide, by contract or otherwise, adequate and competent supervisory and inspection personnel during modernization, whether work is performed by contract or force account labor and with or without the services of an architect/engineer, to assure work quality and progress.

§ 968.255 Fiscal closeout of a modernization program.

Upon completion of a modernization program, the PHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. The PHA shall immediately remit any excess funds provided by HUD. The audit shall follow the guidelines prescribed in 24 CFR part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate indicates that there are still excess funds, the PHA shall remit the excess funds as directed by HUD. If the audited modernization cost certificate discloses unauthorized expenditures, the PHA shall take such corrective actions as HUD may direct.

(Approved by the Office of Management and Budget under OMB control number 2577–0049.)

Dated: December 7, 1989.

Thomas Sherman,

Acting General Deputy, Assistant Secretary for Public and Indian Housing.

[FR Doc. 89–29577 Filed 12–20–89; 8:45 am]

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Part V

Office of Management and Budget

Revision to Circular No. A-125, "Prompt Payment"

OFFICE OF MANAGEMENT AND BUDGET

Revision to Circular No. A-125, "Prompt Payment"

AGENCY: Office of Management and Budget.

ACTION: Final circular.

SUMMARY: This notice revises OMB Circular No. A-125, "Prompt Payment," originally published on August 19, 1982, to implement provisions of the Prompt Payment Act, Pub. L. 97-177. A notice of proposed revision was published April 14, 1989. This revision is being made to:

- Implement changes made by Pub. L. 100-496, the Prompt Payment Act Amendments of 1988; and
- Clarify and reorganize existing provisions of the circular.

The revisions will strengthen OMB Circular No. A-125 and provide for equitable treatment of vendors who provide necessary goods and services to the Federal Government. This final circular incorporates suggestions received through public comment.

EFFECTIVE DATE: Unless otherwise noted, the Act is effective for payments under contracts awarded, contracts renewed, and contract options exercised on or after April 1, 1989. Two provisions are effective with respect to all obligations incurred on or after January 1, 1989, including:

- Application of the Prompt Payment Act to the United States Postal Service; and
- Requirements for payments to farm producers.

Effective for payments under contracts awarded on or after October 1, 1989, agencies must notify vendors of the amount of interest penalty, rate of interest, and period for which the penalty was computed.

The Amendments did not prescribe an effective date for the new requirement to pay an additional penalty when interest should have been paid by law. Since this provision requires OMB to issue regulations, the provision is effective 30 days after publication of the final circular.

FOR FURTHER INFORMATION CONTACT: Suzanne Duval and Marvin Saunders, (202) 395-6107, Credit and Cash Management Branch, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503.

SUPPLEMENTARY INFORMATION: Since implementation of the Prompt Payment Act in 1982, Federal agencies have made significant improvements in their bill-paying performance. Nevertheless, concern in Congress was such that on October 14, 1988, major new provisions were enacted to clarify the Prompt Payment Act and provide new guidance for improving timeliness of payments to vendors. The revised circular implements the legislation and reorganizes the circular to clarify its provisions. Additional changes were made to respond to questions raised by agencies and contractors. This final circular incorporates changes made in response to comments from the public received in response to publication of the proposed revision on April 14, 1989. The circular has been reoganized to place sections 4, 5, 7 through 17, and 19 from the proposed circular in an attachment. The discussion of comments follows the structure used in the proposed circular.

Analysis of comments: Comments were received from 53 private firms, industry associations, Federal agencies, and Members of Congress. The issues raised in these comments are discussed in the order they appear in the circular.

In the supplementary material published April 14, 1989, OMB noted that agencies were free to apply the new provisions to payments under contracts awarded, renewed, or for which options were exercised before April 1, 1989. The context of this statement was that most of the provisions were beneficial to contractors. Further, a number of agencies had complained that the cost of creating and maintaining dual payment systems—pre-April 1 and post-April 1—outweighed by far the increased cost of paying interest penalties on payments made during the grace period. We recognize that the amendments did nothing to affect the obligations of existing contracts. Nevertheless, if an agency determines that it is in the best interest of the Federal government to eliminate the grace period for all payments regardless of the date of award of the contract, recognizing that interest penalty costs may temporarily increase, that agency may operate such a system. Similarly, agencies may also retroactively apply other new provisions through an appropriate contract modification.

Section 3. Policy

One agency commented that the proposed language on temporary unavailability of funds could lead to coverage of all types of payments. We have revised the sentence to specify only payments for property or services.

The proposed circular was in error in stating that "For contracts awarded after October 1, 1989, agencies shall pay an additional penalty under specified circumstances." Three comments noted this error. The effective date for this provision is 30 days after publication of this circular.

Section 4. Definitions

d. Applicable interest rate

One comment noted that the reference to the Renegotiation Board Interest Rate is confusing and recommended dropping the term because the Renegotiation Board is no longer in existence. We have not dropped this term because some Federal agencies are accustomed to request the interest rate under this title. We have added the other terms used by Treasury to characterize this rate—Prompt Payment Interest Rate and Contracts Disputes Act Interest Rate—and agencies may use any of three terms.

e. Contract

The Department of Agriculture recommended that the definition of contract be expanded to bring contracts between the Commodity Credit Corporation (CCC) and agricultural producers under the definition. OMB concurs and this change has been made.

Two industry associations requested clarification of the application of new requirements to orders placed on or after April 1, 1989, against GSA Federal Supply Schedule (FSS) contracts awarded before April 1, 1989. The circular includes delivery orders in the definition of a contract. Delivery orders are the mechanism by which an agency obligates funds under indefinite-delivery contracts, including GSA FSS contracts. The circular has been clarified.

1. Payment date

The new legislation defines the date a payment is made as the date a check is dated or an electronic fund transfer is made. In the proposed circular, we further defined the date an Electronic Fund Transfer (EFT) is made as the date of receipt of the funds in the contractor's financial institution. We proposed this definition on the recommendation of Treasury's Financial Management Service (FMS). This definition is intended to establish an unambiguous date for payment in an electronic environment. The definition is also intended to create an incentive for contractors to agree to accept payment through EFT rather than by check because in most cases they should have use of the funds somewhat sooner.

Six agencies, one bank, and a network opposed this provision, recommending that the payment date be the date an EFT payment is originated. One industry association supported the definition, noting that using the date of origination

of the payment message would in effect create a new grace period not authorized by law.

Some agencies are concerned that they must currently deliver EFT vendor payments to the Treasury Regional Finance Center two days earlier than they deliver check payment requests. FMS has assured OMB that this schedule will be compressed. In FY 1990, FMS will arrange for a "next-day" settlement schedule with the Federal Reserve System. This schedule will permit agencies to deliver EFT vendor payment requests one day prior to the due date; settlement will occur the following day (payment date).

The industry standard on which the entire EFT payment system is built assumes that settlement date is the date on which a payment is made—debit, credit, return, dispute, and reclamation. To define origination date as the date payment is made contradicts 31 CFR 210 and the Federal Reserve Operating Circular. In fact, the date of settlement is used as payment date in other categories of Federal payments. For example, Social Security benefits and Federal employee salaries are in fact originated several days prior to the payment date so as to be received by the recipient on the payment date.

Some comments view the check date as equal to the "origination date" for EFT. In fact the two dates are not equal. Once a check is printed and dated, it is a negotiable instrument and carries immediate value to the payee. For example, many defense contractors routinely pick up checks at disbursing sites on the check date and immediately deposit them. Origination of an EFT payment merely begins the EFT payment process; the EFT payment file carries no value to the payee until settlement occurs.

One agency was concerned that it might be liable for events in the EFT process beyond its control while they are not liable for any inability of the Postal Service to deliver mail. The circular has been clarified to protect agencies from such liability.

Taking all these factors into consideration, we have retained the definition provided by Treasury.

Two agencies asked for clarification of settlement date—the date the receiving financial institution's Federal Reserve account is credited or the date the contractor has use of funds. Treasury regulations at 31 CFR 210 require these two actions to occur on the same day.

n. Receipt of invoice

One agency recommended that invoices received after normal business hours be deemed as officially received on the following business day. OMB disagrees with this suggestion because the payment date must be the actual date of receipt.

Section 5. Application

Two agencies asked for clarification of the applicability of the Prompt Payment Act to utility payments or to other payments regulated by State governments. Subsection 4.d. of the proposed circular specified that where the interest rate is specified by other governmental authority (e.g., tariffs), that rate prevails. We have broadened the scope of this provision. Utility services are ordinarily subject to Federal, state, or other governmental regulations which set not only the late payment interest penalty rate but also the payment period. Agencies may acquire utility services either through contracts or by purchase order or other written request for services. Section 5, Application, has been amended to clarify that where there is a contract, the terms of that contract prevail. Where no contract exists or the contract is silent about payment terms, the applicable tariff prevails.

The proposed circular prohibited payment of late payment interest penalties on periodic or interim payments under cost reimbursement contracts unless the contracts defined these payments as partial payments for property or services furnished. Three industry associations recommended that interest be paid on such late payments. The intent of the proposed restriction was to prohibit payment of interest on contract financing payments. The FAR (32.907–2) prohibits payment of interest penalties on "contract financing payments" and defines contract financing payments (32.902) as authorized disbursement of monies prior to acceptance of supplies or services. Contract financing payments do not include invoice payments or payments for partial deliveries. Contract financing payments include:

—Advance payments
—Progress payments based on cost
—Progress payments (other than under construction contracts or architect-engineer contracts) based on a percentage or stage of completion
—Interim payments on cost-type contracts

The 1988 amendments require that interest penalties be paid on late payments when a contractor makes a partial delivery of supplies or periodic performance of service, performance has been accepted, and a proper invoice submitted under a contract where periodic payments are not prohibited.

OMB finds that the proposed circular was unclear. We have eliminated the definition of partial payments in section 4 and substituted a definition of contract financing payments based on the definition in the FAR. Subsection 5.a. has been clarified by referencing the definition of contract financing payments.

We received comments from three agencies, one industry association, and a foreign government agency, asking for clarification or complaining about precluding applicability to foreign vendors outside the United States for work performed outside the United States. We have conferred with the FAR Council, the Office of the U.S. Trade Representative, and a number of affected agencies and concluded that the proposed exclusion should be removed to avoid possible discrimination on the basis of nationality.

Section 6. Responsibilities

The proposed circular added a new responsibility that agency heads publish lists of designated agency contacts within their payment centers or finance offices to provide contractors assistance in determining the status of invoices. One industry association expressed support for this requirement and asked for information on where and how the lists may be obtained. One agency recommended that agencies report agency contacts to OMB and that OMB publish lists. The circular will continue to require that agency heads are responsible for publishing these lists, which is necessary to ensure that contractors have access to current information. Agencies will be required to report annually to OMB on where the lists will be available and the publication schedule. OMB will include this information in its annual report on prompt payment.

In May 1988, the President's Council on Integrity and Efficiency (PCIE) recommended that OMB require agencies to perform quality control reviews over their payment systems to ensure that bills are being paid promptly. OMB asked agencies to submit, along with their prompt payment data for FY 1988, descriptions of any quality control systems which assessed prompt payment. The proposed circular added a new agency responsibility—to establish a quality control program to assess performance of payment systems and provide a reliable way to estimate payment performance. No comments were received on this provision. After

review of agency descriptions of their quality control programs, OMB has concluded that more guidance is needed. General requirements for quality control systems have been included in the circular.

Section 7. Standards for Prompt Payment

a. Documentation

A number of comments noted that the circular needs to address more completely advances in technology permitting transactions through electronic media. OMB agrees that the circular must permit the use of electronic media where it is consonant with protecting the integrity of the procurement and payment processes. One agency commented that maintaining copies of awarded contracts in the payment office is not practical. OMB notes that the circular does not require that contracts be maintained in payment offices but that they be forwarded to payment offices. The purpose of this requirement is to ensure that payment offices have access to critical payment information that may be maintained in any form that meets the payment office needs. Agencies have discretion in the location at which they maintain copies of contracts for purposes of complying with the Prompt Payment Act. The FAR requires payment offices to maintain copies of contracts and modifications, invoices and supporting documentation, and records of payment.

b. Review of invoices

One industry assocation and two agencies recommended that the payment period should begin on the date of delivery of an invoice to the designated billing office, fixing responsibility for date stamping invoices upon receipt. OMB agrees and has amended the circular to say that invoices shall be stamped or otherwise annotated by the designated billing office with the date on the day they are delivered to that office.

One agency asked for latitude to contact the contractor by telephone and correct invoices informally. OMB encourages agencies and contractors to use the most efficient means available to resolve discrepancies. The Act requires an agency to promptly return a defective invoice to a contractor to permit corrective action. The Act neither requires nor prohibits agency action to take the necessary corrective action (with or without assistance from the contractor) to render the invoice a proper invoice suitable for payment. OMB does not believe that a change in the circular is required.

c. Receipt and acceptance

One industry association recommended that the circular incorporate language from the supplementary material that commercial items and services should not be subject to extended acceptance periods. OMB concurs.

d. Starting the payment period

One agency recommended that the circular be clarified to reference requirements for progress payment requests under construction contracts. OMB concurs.

e. Determining the payment due date

The Prompt Payment Act has set different payment schedules for different categories of products based on industry practice. The proposed circular gave no guidance on paying promptly when items with different statutory due dates are invoiced together.

We received comments from one agency, two private firms, and two industry associations. The agency recommended paying mixed invoices on the latest date. The two private firms asked for flexibility in policy so that they would not be required to split invoices. One of these firms also complained that an agency's practice of making timely but separate payment for mixed invoices was causing confusion in the firm's accounts receivable department. The firm asked that the Prompt Payment Act be amended to eliminate payment for cooking oils from the 10-day policy because such products do not have a short shelf life. One industry association recommended that mixed invoices be accepted and agencies agree to pay on the earliest date. The other association said that firms should not be denied prompt payment for certain items because an agency chooses to write a mixed order. The circular addresses this issue as follows: Agencies should specify their proposed payment practices for contracts (or individual orders under requirements-type contracts, blanket ordering agreements, or similar contractual arrangements) in the solicitations for the contracts. Contractually-specified payment terms for items covered by statutorily specified maximum payment periods may not exceed those payment periods. If payments are not made on time (in accordance with statutorily or contractually specified payment terms applicable to various items included in a single order), agencies *must* pay interest. Agencies may split payments, paying separately for each category to meet the statutory requirements. Finally, the circular notes that contractors may be encouraged to submit separate invoices for the product categories, but that they cannot be required to do so. It is clear that separate invoices for products with different payment periods would simplify recordkeeping for both contractors and agencies. If agencies wish to avoid invoices containing items with different payment terms, they are free to place orders so as to assure that only one payment period applies to each order. A new subsection g. is inserted. The succeeding subsections are re-designated.

Two agencies asked that the starting date be defined when an agency ratifies unauthorized commitments. The Federal Acquisition Regulation (48 CFR 1.602–3) provides policy and procedures for such ratification and strongly discourages agencies from making unauthorized commitments. In the process of ratifying an unauthorized commitment, the agency should establish the payment due date.

f. Determining the payment due date for certain commodities

One private firm, one industry association, and three Members of Congress expressed concern that a government agency has begun limiting the application of the amendment requiring 10-day payment on dairy products to those which require refrigeration. Nothing in the Act or legislative history supports this limitation. The circular has been amended to make this clear.

One industry association recommended that agencies determine industry practice before deciding to exclude any product from coverage of special payment periods for certain commodities. Based on the legislative history, OMB concurs and has added this to section 7.f.(3).

h. Determining the payment due date when discounts are taken

Five agencies opposed using the date on the invoice, rather than the date of receipt of the invoice, to determine the payment date when discounts are taken. OMB disagrees that any change can be made because of the clear language of the statute.

Two agencies asked whether discount terms based on something other than the date of the invoice can be used. This is permissible. One agency recommended that if no date is placed on the invoice by the contractor, the date of receipt of

invoice should be used for computing the discount period. OMB concurs.

k. Timely payment

Comments were mixed on the new provision permitting payments more than 7 days before the due date if the agency head or designee has determined, on a case-by-case basis for specific payments, that earlier payment is necessary. One agency expressed strong concern that such discretion could lead to impropriety and would undermine the incentive for contractors to offer time discounts. Three agencies asked for more explicit flexibility; one agency stated its intention to set a dollar limit and pay all invoices under that level immediately. This comment suggests a misunderstanding of the legislative history of this provision. The House Committee on Government Operations Report clearly indicates congressional concern that agencies were making some payments late in order to avoid making them three or more days before due. The seven-day payment window is intended to permit agencies to assure payment not later than the due date but as close as possible to it, balancing the need to pay promptly with the need to manage cash wisely. Nothing in the legislative history indicates an intention to pay classes of invoices early. OMB believes that payments should be made early only when it is in the clear interest of the Federal Government to do so. Further, OMB has serious concerns about agencies' ability to ensure the integrity of the payment process when agencies pay without receiving reports or other required documentation. No change will be made to the circular.

m. Making the payment

One agency and two industry associations objected to permitting mailing checks "on or about the same day for which the check is dated" and recommended more precise language to require same-day mailing. OMB concurs.

One industry association objected to agencies making payments which fall due on Saturday or Sunday on the next business day without paying interest. The proposed circular adopted this policy because it is standard business practice and was recommended by the General Accounting Office.

n. Partial payments

One agency recommended that partial payment be contingent upon submission of an invoice if an invoice is required by the contract. OMB concurs.

Section 8. Required documentation

The documentation required by this circular will, upon implementation in the Federal Acquisition Regulation (FAR), result in a collection of information from the public. In accordance with the Paperwork Reduction Act of 1980, OMB approved the information collection contained in the December 23, 1988, proposed FAR rule, "Prompt Payment," and assigned OMB approval number 9000–0102 to that collection.

One agency recommended that agencies be allowed to maintain physical records certifying receipt at a site other than the payment center. The circular does not limit agencies' authority to store and maintain records so long as appropriate internal controls are in place to ensure the security and reliability of data. Payments must be supported by basic payment documents, either in hard-copy form or machine-readable records, showing sufficient information to adequately account for the payments. The documentation should link supporting records and enable audit of the payments.

a. In contracts

Comments indicated some confusion over the information to be included in contracts. OMB has decided that the FAR should prescribe the content of contracts; the circular will prescribe information to be derived from the contract as documentation for payments.

One agency complained that paragraph 8.a(2) is unclear. OMB concurs and has amended the circular to state that the requirement is that a notation is required when partial payments are prohibited under the contract.

One agency commented that the exclusion of contracts to procure brand-name commercial items for authorized resale appears to conflict with the seven-day acceptance period. OMB concurs and has clarified this provision.

Two agencies commented that the requirement that contracts should provide for payment of multiple invoices with one payment is unclear. OMB agrees. The intent of this paragraph was to encourage agencies and contractors to operate efficiently by minimizing frequent small invoices resulting in agencies paying a contractor daily. Invoicing and payment frequency should be established by the contract. This material has been dropped from the circular.

b. In invoices

One agency recommended adding that information must be correct to constitute a proper invoice. OMB concurs.

One agency recommended that for EFT payments, contractors be required to provide the receiving correspondent and financial institution(s) routing/transit number(s) and account information or other data sufficient to permit proper transmission through the Federal Reserve System and correct posting to the contractor's account. OMB finds this to be unnecessary and cites in the FAR (48 CFR 52.232.28) rules governing the method for providing this information and the required data.

That agency also recommended that the circular require that the description, price, and quantity of property or services be exactly as on the contract or purchase order. OMB disagrees with this suggestion because there may be good reasons for a difference.

One agency complained that contractors routinely date invoices well in advance of postmark dates because of the time needed to sort by zip code to get reduced postage rates. The agency recommended that the definition of "proper invoice" require an appropriate and reasonable date in relation to the postmark. OMB concurs and the circular has been amended to encourage contractors to date invoices as close to the date of mailing as possible.

One agency suggested requiring or recommending that contractors include the invoice number to allow agencies to cite the invoice number on the payment. OMB concurs that the invoice number will facilitate agency processing. The invoice number will be a suggested data element for contractors to provide to assist the agencies in paying promptly.

c. In receiving reports

Two agencies recommended that the requirement for a signature on receiving reports be modified to permit an electronic alternative when supported by appropriate internal controls, *e.g.*, a unique alpha/numeric signature code. A third agency recommended that the definition of acceptance specify that acceptance be in writing and usually in the form of a receiving report. OMB agrees that electronic alternatives should be permitted. The requirement in section 8.c(5) has been modified accordingly. One agency requested that the circular address electronic invoicing. OMB agrees that the benefits of electronic processing will save taxpayer funds and reduce costs to business. Electronic invoicing is one component of a much larger Electronic Data

Interchange initiative, and policy governing electronic invoicing must be coordinated with the Federal Acquistion Regulation. While the circular will not explicitly address electronic invoicing, agencies are encouraged to use this technology so long as they maintain internal controls. If the contractor, contract officer, and paying office agree, electronic invoicing may be used.

d. In requests for progress payments under construction contracts

The draft circular required an itemization of amounts requested related to the elements of work required by the contract but did not require copies of payment requests to be submitted to the agency as substantiation. Four industry associations commented on the proposed policy to require limited subcontractor substantiation in construction contracts. Three of the associations recommended that the copies of payment requests from subcontractors and suppliers be required by the circular; one association opposed inclusion of this material. One agency recommended that the contracting officer have authority to specify necessary details.

The circular's provision relating to the substantiation of progress payment requests under construction contracts has been expanded to conform to explicit statements of Congressional intent, while fully addressing concerns relating to paperwork burdens, which were expressed by the Department of Defense. The report accompanying the House amendments to S. 328 specified that the implementation of the statutory provision requires that the prime contractor's payment request include copies of "the various payment requests submitted by the subcontractors that have been incorporated into the contractor's payment request." The Committee report made clear that substantiation requirements were needed to protect the government from fraudulent payment requests for funds in excess of those actually due. Further, without minimum standards regarding substantiation, the Act's certification requirements would be essentially unenforceable, thus frustrating the explicit Congressional objective of deterring inflated or fraudulent contractor payment requests, which was statutorily expressed in both the Senate and House bills, as well as the final enactment.

To address paperwork burdens inherent in the submission of complete copies of all payment requests from each subcontractor along with the prime contractor's request, the circular now requires the prime contractor merely to annotate its itemized request for payment (often referred to as a "schedule of values") with certain specified information. The prime contractor's progress payment request must list: (a) the amounts included for each subcontractor; (b) the total amount reflected in the agreement between the contractor and its subcontractor; and (c) the total payments already made to each subcontractor under the contract. The requested information is readily available to any prime contractor responsibly discharging its contract management obligations on behalf of the government. In addition, the method of getting this essential information into the contracting officer's hands will be accomplished through minor additions to paperwork currently submitted to the government. To ensure that agencies have flexibility to process billings effectively, the circular requires submission of additional supporting data in a form and detail required by the contracting officer.

Section 9. Required notices to contractors

One agency noted the omission of deadlines for return of invoice for meat, meat food products, perishable agricultural commodities, dairy products, and edible fats or oils. OMB concurs.

Section 10. Late payment interest penalties

a. Calculation

Three agencies recommended using the interest rate in effect at the time the invoice is paid because of the impact on payment systems of maintaining multiple interest rates. OMB disagrees because the legislation is clear in requiring the rate in effect at the time the interest became due. One industry association recommended that interest paid should be the Treasury rate plus points to cover contractor expenses. OMB disagrees because the legislation clearly specifies the interest rate to be paid.

One agency noted a discrepancy between section 10.a(4), which says that interest penalties will accrue until paid, and section 10.a(5), which says that interest will not accrue after a claim is filed under the Contract Disputes Act or for more than one year. OMB concurs and has corrected section 10.a(4).

One agency asked whether the phrase "penalties will not continue to accrue for more than one year" means that penalties do not have to be paid. Clearly, interest penalties must be paid.

One agency noted a discrepancy between paragraph 10.a(8), which did not include the provision that interest is due only if the agency fails to repay the improperly taken discount before the payment due date, and subsection 7.1, which did include this provision. OMB concurs and has used the language of subsection 7.1. in both places.

One agency recommended that the minimum amount of interest should be higher than $1.00 because processing costs are much larger. OMB disagrees because this is a statutory requirement.

One agency recommended that "or incomplete" be inserted after "incorrect" in paragraph 10.a(9). OMB concurs.

Five agencies suggested various ways to clarify procedures when EFT transactions are returned. The primary concern was the start date for the seven-day notice period. OMB concurs and has added that the seven-day period begins when the agency is notified of defective information. Two of these agencies requested a seven-day grace period to originate payment after correct information is received. Since payment should be made as quickly as possible upon receipt of correct information, OMB finds no basis for this grace period.

One agency recommended that the circular explain that interest computations are based on a 360-day year. OMB concurs.

b. Payment

One industry association recommended that section 10.b(4) be made consistent with section 9.a. in recommending that contract and invoice numbers be included in the notice. OMB concurs.

c. Penalties not due

The Department of Agriculture recommended minor changes to section 10.c. to clarify the status of payments made under CCC programs. OMB concurs.

Section 11. Additional penalties

The 1988 amendments required OMB to set the percent level for the new additional penalty imposed when an agency fails to pay the interest due on late payment as required by law. The amendments also permit OMB to set a dollar cap on each additional penalty payment. The proposed circular set the additional penalty at 100 percent of the interest penalty due but unpaid, set no cap, and requested suggestions and supporting data.

Seven agencies commented on the 100 percent additional penalty; all opposed

the level as excessive. Twelve private sector comments strongly supported the 100 percent additional penalty.

Five agencies commented on the cap, recommending upper limits of $100, $250, $500, and $1,000. Only one agency provided data on the impact of a cap. Agencies also recommended lower limits—one at $25 and one adequate to reimburse the contractor for the cost of having to request the interest. We investigated private sector costs of collecting overdue bills and found that $25–35 is a typical cost for collecting a bill 30 days in arrears. An industry association recommended that OMB should not set a maximum on the additional penalty because: (1) the legislation permits but does not require OMB to set a maximum; (2) the contract disputes act sets no maximum; (3) a maximum is set by the one-year limit; (4) once the limit is reached the agency will have no incentive to pay; and (5) reporting and monitoring will increase. OMB finds these arguments cogent but believes that to fail to set a maximum would neglect OMB's responsibility to exercise due care over taxpayer funds.

OMB has set the additional penalty at 100 percent of the interest owed (as proposed). We have established a cap of $2,500 on the additional penalty for the first two years after the effective date of the circular, increasing to $5,000 after two years. We have added a minimum $25 additional penalty payment to the circular. The additional penalty will continue to accrue indefinitely. If the contractor submits multiple invoices under a contract which are then paid together in a single payment, the maximum and minimum additional penalty amounts apply to that payment. We believe this approach should balance three important factors: The need to levy an appropriate penalty against agencies which fail to comply with the law, the need to assure contractors some compenation for time spent in collecting bills in arrears, and the need to conserve scarce taxpayer dollars. OMB intends to review this action carefully based on data collected by the agencies during FY 1990 and has modified the reporting requirements accordingly. If the review indicates that the effectiveness of the additional penalty in deterring the egregious practice of denying contractors their rightful late payment interest has been blunted, we will modify this provision to ensure the additional penalty serves the legislative intent.

Three comments noted a discrepancy in effective dates. The proposed circular erroneously stated that the additional penalty is effective October 1, 1989. In fact, the 1988 amendments were silent as to the effective date; as a result, the provision is effective 30 days after publication of the final circular in the **Federal Register.**

One agency asked whether the 40th day for the contractor to request the additional penalty is the date placed on the contractor's request or the date the agency receives the request. The 40th day shall be the date the request is postmarked. If there is no postmark, the 40th day shall be the date the request is received by the agency and annotated. If the agency fails to annotate the contractor's request for the additional penalty with the date of receipt at the time of receipt, the 40th day shall be the date placed on the request by the contractor.

An industry association recommended that documentation needed for contractors to qualify for the additional penalty be specified. OMB concurs. The contractor must send a written request asking for payment of late payment interest and of the additional penalty. The request must be accompanied by a copy of the original invoice with the date of the invoice and certification that payment for the principal had been received and the date of receipt. No other information is required.

Section 12. Interest penalties due farm producers

The Department of Agriculture recommended that the circular be clarified to show that interest payments owed by CCC to producers on a farm due to late payments under agreements entered into under the Agricultural Act of 1949 are exempted from the Contract Disputes Act. OMB concurs.

Section 13. Interest penalties under construction contracts

One agency recommended that the term "solicitation" be replaced by "contract" because payments will be made in accord with the contract. OMB has decided to make no change in the circular because the legislation is explicit and the legislative history discusses the need for the longer period to be announced in the solicitation in order to give competing contractors the opportunity to make bidding decisions based on this information. Any longer period specified in the solicitation will also be contained in the resulting contract.

One industry association recommended that any progress payment period longer than 14 days be approved by the agency head and that the justification be contained in the contract file and explained in the solicitation and contract. This material is appropriate for the FAR. The association recommended that the circular adopt language from the FAR requiring that justification for extending the acceptance period be included in the solicitation, contract and contract file. While OMB agrees with this policy, the circular does not need to restate purely procurement requirements.

One industry association recommended that section 13.a(3) be revised to read "The 30th day from the date on which the designated billing office receives a proper invoice" because the proposed wording extends the payment period by one day. OMB concurs. The association also recommended that this section repeat the requirement that the billing office is the point designated in the contract to first receive the invoice because problems remain with agencies interpreting receipt as occurring after first receipt. OMB believes that the definition in subsection 4.i. should suffice. Agencies must take particular care to implement fully the plain language of the statute regarding receipt of invoice.

The association expressed concern that the term "billing office" might cause confusion when the first office designated to receive the invoice is a procurement office. OMB recognizes the potential for confusion but believes that any possible confusion should be minimized by emphasizing that the payment period starts on receipt in the office designated in the contract.

Section 14. Grant recipients

One industry association recommended that the circular acknowledge that the Prompt Payment Act does not extend to payment practices of Federal grantees. While OMB agrees, it sees no need to add this material.

Section 16. Relationship to other laws

An industry association recommended that the circular specify that the additional penalty for nonpayment of interest may be recovered under the Contract Disputes Act. OMB concurs.

Section 17. Reporting requirements

Eight agencies objected to the November 15 due date for reports to OMB for the annual report to Congress due January 28th. OMB concurs and has changed the due date to November 30 in order to assure accurate reporting by agencies.

Agencies have asked how the reporting form will treat pre- and post-April 1 reports. In order to minimize reporting burden on agencies during this

transition year, only one report will be required.

One agency opposed the requirement that the agency report to OMB be certified by the agency official with authority over both procurement and payment. Many problems with prompt payment arise because of internal control problems. OMB believes that a good way to ensure that serious payment problems are addressed effectively is to require that those problems be brought to the attention of senior officials in both procurement and finance. The certification requirement is intended to ensure that communication between the key offices occurs.

One agency recommended combining the description of agency payment practices and an updated description of quality control. After review of agency descriptions of their quality control systems, OMB has determined that most agencies need to place more emphasis on this tool; the quality control requirements will be kept separate. This agency also recommended that data on the grace period be clarified to indicate that the requirement is only for existing contracts which continue to have grace periods; OMB concurs.

An agency recommended that a new item be added under data reported on discounts to show discounts not taken because not economically justified. OMB concurs.

Three agencies recommended eliminating the requirement for a list of agency contracts. Section 6.f. requires agencies to publish lists of designated agency contacts within their payment centers or finance offices to provide contractors assistance in determining the status of their invoices. As a result, OMB has changed the reporting requirement: the major agencies will provide OMB annually with the address of a single contact point where the agency list may be obtained and the frequency of its publication. OMB will include the list of contact points in its annual report to Congress.

Four agencies recommended that reporting on the grace period be dropped because the grace period was eliminated for contracts awarded, contracts renewed, and contract options exercised on or after April 1, 1989. Because data are needed for the first six months of FY 1989 and because a number of invoices will continue to be paid for some time under contracts pre-dating April 1, 1989, OMB will retain this reporting requirement for FY 1989 and 1990.

One industry association recommended that the reporting requirements show separately invoices paid early because of a determination by the agency head and those paid early without this determination. Without such a distinction agencies might be reluctant to experiment with earlier payment dates within the seven-day payment window. OMB concurs.

Section 19. Effective dates

One industry association recommended that section 19.c(6) be dropped because the policy was in effect before enactment of the amendments. OMB concurs.

Section 20. Inquiries

One industry association recommended that the circular include information on where and how the lists of agency contacts can be obtained and where and how often they are published. Because this information is likely to change frequently, OMB has decided not to include it in the circular, but to add it to the reporting requirements and include the information in the annual report.

OMB Circular No. A-125 (Revised)

To: THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

Subject: Prompt Payment

Purpose. Circular A-125 (Revised) prescribes policies and procedures to be followed by Executive departments and agencies in paying for property and services acquired under Federal contracts pursuant to the Prompt Payment Act of 1982, as amended, and for entitlement payments under the Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*). The Prompt Payment Act, originally enacted as P.L. 97-177 on May 21, 1982, was amended on October 17, 1988, as P.L. 100-496.

Background. The Prompt Payment Act (the Act), as amended (Chapter 39 of Title 31, U.S.C.), requires Executive departments and agencies to make payments on time, to pay interest penalties when payments are late, and to take discounts only when payments are made on or before the discount date. Section 3903(a) of the Act requires the Director of the Office of Management and Budget to issue implementing regulations. These regulations provide for timely payment, better relationships with contractors, improved competition for Government business, and reduced costs to the Government for property and services.

Policy. Agencies must make payments under contracts as prescribed in the Act and the circular but not later than the due date, or, if appropriate, the discount date. Payment must be based on receipt of proper invoices or progress payment requests and satisfactory performance of contract terms. Agencies may take discounts only when payments are made on or before the discount date; if agencies take discounts after the discount date, or if they fail to make timely payment, interest penalties must be paid. Checks must be mailed and electronic fund transfers made on the payment date. Agencies must pay interest penalties automatically, without contractors having to request them, and must absorb the cost of interest penalty payments into funds available for the administration of the program for which the penalty was incurred. Temporary unavailability of funds does not relieve agencies of the obligation to pay interest penalties. Agencies must pay an additional penalty under specified circumstances. Agency implementation must be consistent with sound cash management practices, related Treasury regulations (*Treasury Financial Manual*, I TFM 6-8000, section 8040), and the Federal Acquisition Regulation (48 CFR 32.9 and 52.232).

Requirements and Responsibilities. The specific requirements and responsibilities of Executive departments and agencies are set forth in the attachment.

Additional Requirements. Additional procurement guidelines and requirements are set forth in applicable acquisition regulations (48 CFR 32.9 and 52.232).

Inquiries. Inquiries concerning this circular may be directed to the Office of Management and Budget, Credit and Cash Management Branch, Financial Management Division, Washington, DC 20503, telephone 202/395-3066. For information about specific inquiries, see the attachment.

Effective Date. Unless otherwise specified, this circular is effective 30 days after final publication. For specific effective dates, see the attachment.

Sunset Review Date. Three years from the date of issue of this circular, there will be an independent policy review to ascertain its effectiveness.

Richard G. Darman,

Director.

OMB Circular A-125 (Revised)—Prompt Payment

Attachment

1. *Definitions.* For the purposes of this circular, the following definitions apply:

a. *Acceptance*—acknowledgement by the Government that property and services received conform with the requirements of the contract.

b. *Agency*—has the same meaning as the term "agency" in Section 551(1) of Title 5, United States Code, which includes each authority of the United

States Government, whether or not it is within or subject to review by another agency, and excludes the Congress, the United States courts, governments of territories or possessions, the District of Columbia government, courts martial, military commissions, and military authority exercised in the field in time of war or in occupied territory. Agency also includes any entity (1) that is operated exclusively as an instrumentality of such an agency for the purpose of administering one or more programs of that agency, and (2) that is so identified for this purpose by the head of such agency. The term agency includes military post and base exchanges and commissaries. The Prompt Payment Act exempts the Tennessee Valley Authority from coverage by this circular. The Act exempts the United States Postal Service (USPS) from the reporting requirements of the Act and circular. The Postmaster General is responsible for issuing the implementing procurement regulations, solicitation provisions, and contract clauses for the USPS.

c. *Agency payment office*—the office or employee responsible for scheduling invoices for payment.

d. *Applicable interest rate*—the interest rate established by the Secretary of the Treasury for interest payments under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) which is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). The rate established under the Contract Disputes Act is referred to as the "Renegotiation Board Interest Rate," the "Contract Disputes Act Interest Rate," and the "Prompt Payment Act Interest Rate" and is published semiannually in the Federal Register on or about January 1 and July 1.

e. *Contract*—any enforceable agreement, including rental and lease agreements, purchase orders, delivery orders (including obligations under Federal Supply Schedule contracts), requirements-type (open-ended) service contracts, and blanket purchase agreements between an agency and a contractor for the acquisition of property or services and agreements entered into under the Agricultural Act of 1949 (7 U.S.C. 1421 *et seq*). Contracts must meet the requirements of Section 5.a of this circular.

f. *Contract financing payments*—authorized disbursement of monies prior to acceptance of supplies or services including advance payments, progress payments based on cost, progress payments (other than under construction contracts or architect-engineer contracts) based on a percentage or stage of completion, and interim payments on cost-type contracts. Contract financing payments do not include invoice payments or payments for partial deliveries.

g. *Contractor*—any person, organization, or business concern engaged in a profession, trade, or business and any not-for-profit entity operating as a contractor (including State and local governments but excluding Federal entities).

h. *Day*—calendar day(s), including weekends and holidays, unless otherwise indicated.

i. *Designated billing office*—the office or employee—governmental or non-governmental—designated in the contract to first receive invoices.

j. *Discount date*—the date by which, if payment is made, a specified invoice payment reduction, or discount, can be taken.

k. *Due date*—the date on which Federal payment should be made. Determination of such dates is discussed in section 4 of this circular.

l. *Invoice*—a bill or written request for payment provided by a contractor for property or services rendered. A proper invoice must meet the requirements of section 5.b. of this circular. The term invoice includes requests for progress payment under construction contracts which must meet the requirements of section 5.d. of this circular.

m. *Payment date*—the date on which a check for payment is dated or the date of an electronic fund transfer (EFT) payment (settlement date). Payments made by EFT mechanism will be made so as to be received by the contractor's financial institution by the established due date. Agencies should contact their Treasury Regional Finance Center (RFC) to establish the necessary delivery time needed to process payments.

n. *Receipt of invoice*—for the purposes of determining a payment due date and the date on which interest will begin to accrue, an invoice shall be deemed to be received:

(1) On the later of:

—The date a proper invoice is actually received by the designated billing office if the agency annotates the invoice with date of receipt at the time of receipt; or

—The seventh day after the date on which the property is actually delivered or performance of the services is actually completed; unless:

i. The agency has actually accepted the property or services before the seventh day (in which case the acceptance date shall substitute for the seventh day after the delivery date), or

ii. A longer acceptance period is specified in the solicitation and included in the contract to afford the agency a practicable opportunity to inspect, test, and accept the property or evaluate the services (in which case the date of actual acceptance or the date on which such longer acceptance period ends shall substitute for the seventh day after the delivery date—note that extended acceptance periods should not be a routine agency practice but should be included only when necessary to permit proper Government inspection and testing of the property delivered or services rendered); or

(2) On the date placed on the invoice by the contractor, in any case in which the agency fails to annotate the invoice with date of receipt at the time of receipt (such invoice must be a proper invoice).

o. *Receiving report*—written evidence of acceptance of property or services by a Government official. Receiving reports must meet the requirements of Section 5.c. of this circular.

2. *Application.*

a. This circular applies to all types of Federal contracts for the procurement of property or services (except contract financing payments as defined in subsection 1.f.) awarded by:

(1) All executive branch agencies except:

—The Tennessee Valley Authority, which is subject to the Prompt Payment Act but is not covered by this circular; and

—Agencies specifically exempted under 5 U.S.C. 551(1).

(2) The United States Postal Service, except for the reporting requirements. The Postmaster General is responsible for issuing implementing procurement regulations, solicitation provisions, and contract clauses for the United States Postal Service.

(3) The Commodity Credit Corporation pursuant to:

—Section 4(h) of the Act of June 29, 1948 (15 U.S.C. 714b(h)) relating to the procurement of property and services, and

—Payments to producers on a farm under the terms of an agreement entered into under the Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*).

b. Where agencies acquire utility services under terms required by other governmental authorities not subject to the Act (e.g., tariffs) this circular does not apply. If agencies acquire these services through contracts or other written request, payment terms should be specified and will prevail. If there is no contract or the contract is silent

about payment terms, the applicable tariff prevails.

c. For effective dates see section 15.

3. *Responsibilities.* Each agency head is responsible for the following:

a. Assuring timely payments and the payment of interest penalties where required.

b. Issuing internal instructions, as necessary, to implement this circular. Such instructions will include provisions for monitoring the causes of any interest penalties incurred, taking necessary corrective or disciplinary action; reporting accurately each year to OMB; and dealing with inquiries.

c. Assuring that effective internal control systems are established and maintained as required by OMB Circular A–123, "Internal Control Systems," to provide reasonable assurance that administrative activities required under Circular A–125 are effectively and efficiently carried out. In particular, internal management controls over receipt and acceptance should be strengthened.

d. Assuring that Inspectors General and internal auditors periodically review implementation, as they and the agency head deem appropriate. Copies of reports on audits and reviews should be provided to OMB upon issuance.

e. Establishing a quality control (QC) program to assess performance of payment systems and provide a reliable way to estimate payment performance. Agency QC programs must fulfill the following requirements:

(1) QC must be a systematic performance measurement system in place throughout the agency which provides managers information about problems and assists in targeting corrective action. QC data must be accurate to within established tolerances and should be used to fulfill the annual reporting requirements in section 14.

(2) Data should be gathered as frequently as needed by managers to identify and correct errors. Rapidly changing situations may require frequent data collection.

(3) Information must be collected through a process at least as thorough as the original payment decision process. QC reviewers must use original documents and repeat the original calculations.

(4) Where the number of payment actions is too numerous to permit a total review, data should be gathered on the basis of a statistically valid sample sufficient to assure the reliability of QC reviews conducted, without unduly burdening agency resources.

(5) Data must be collected by individuals who are independent from the original payment decision. Thus, supervisory reviews, while an excellent way to improve processing, are not QC reviews.

(6) Analysis of QC data will result in remedial action targeted to correct objectively determined error causes.

f. Publishing lists of designated agency contacts within their payment centers or finance offices to provide contractors assistance in determining the status of their invoices.

4. *Standards for Prompt Payment.* Agency payment practices shall conform to the following standards:

a. *Documentation.* Agencies will maintain documentation required in section 5. Copies of awarded contracts will be forwarded to the agency payment office immediately upon award.

b. *Review of invoices.* Agencies will use the following procedures in reviewing invoices:

(1) Invoices received by the designated billing office will be stamped or otherwise annotated with the date on the day they are received in that office;

(2) Each invoice will be reviewed as soon as practicable after receipt to determine whether the invoice is a proper invoice as defined in section 1 of this circular;

(3) Any invoice determined not to be a proper invoice shall be returned as soon as practicable, but not later than seven days (three days for meat or meat food products and five days for perishable agricultural commodities, dairy products, and edible fats and oils) after receipt, identifying the defects that prevent payment; and

(4) The number of days available to an agency to make a timely payment of an invoice without incurring an interest penalty shall be reduced by the number of days by which an agency exceeds the requirement to return the defective invoice.

c. *Receipt and acceptance.* Agencies will ensure that receipt and acceptance are executed as promptly as possible. Commercial items and services should not be subject to extended acceptance periods. Receiving reports will be forwarded in time to be received by the agency payment office by the fifth working day after acceptance, unless other arrangements are made. Receiving reports and invoices will be stamped or otherwise annotated with the date upon receipt in the agency payment office.

d. *Starting the payment period.* The period available to an agency to make a timely payment of an invoice without incurring an interest penalty shall begin on the date of receipt of invoice as defined in sections 1.n., 9, or 10 (except where no invoice is required, e.g., some periodic lease payments).

e. *Determining the payment due date.* Unless otherwise specified, the payment is due either:

(1) On the date(s) specified in the contract; or

(2) If a payment due date is not specified in the contract, 30 days after the start of the payment period as specified by paragraph 4.d.

f. *Determining the payment due date for certain commodities.* The payment due dates are as follows:

(1) For meat or meat food products, as defined in Section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)), including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product, payment will be made as close as possible to, but not later than, the seventh day after the date of delivery.

(2) Payment for perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), will be made as close as possible to, but not later than, the 10th day after the date of delivery, unless another date is specified in the contract.

(3) For dairy products (as defined in section 111(e) of the Dairy Production Stabilization Act of 1983, 7 U.S.C. 4502(e), and including, at a minimum, liquid milk, cheese, certain processed cheese products, butter, yogurt, and ice cream), edible fats or oils, and food products prepared from edible fats or oils (including, at a minimum, mayonnaise, salad dressings, and other similar products), payment will be made not later than 10 days after the date on which a proper invoice for the amount due has been received by the agency acquiring such dairy products, fats, oils, or food products. Nothing in the Act permits limitation to refrigerated products. When questions arise about coverage of a specific product, prevailing industry practices should be followed in specifying a contractual payment due date.

g. *Determining the payment due date for mixed invoices.* When an invoice is received which contains items with different payment periods, agencies:

(1) Should pay in accordance with the contractual payment provisions (which may not exceed the statutorily mandated periods specified in section 4.f.);

(2) Must pay interest if payment is made so that some items are paid for after their due dates;

(3) May split payments, making payment by the due date applicable to each category;

(4) May not require contractors to submit multiple invoices for payment of individual orders by the agency; and

(5) May encourage but may not require contractors to submit separate invoices for categories of products with different payment periods.

h. *Determining the payment due date when making certain payments to farm products.* Payment due dates shall be determined as specified in section 9.b.

i. *Determining the payment due date when discounts are taken.* When a time discount is taken, payment will be made as close as possible to, but not later than, the discount date. The period for taking the discount is calculated from the date placed on the proper invoice by the contractor to the discount date. If no date has been placed on the invoice by the contractor, the discount period will begin on the date a proper invoice is actually received by the designated billing office if the agency annotates the invoice with date of receipt at the time of receipt.

j. *Determining the payment due date for progress payments under construction contracts.* Payment due dates shall be determined as specified in section 10.

k. *Late payment.* When payments are made after the due date interest will be paid automatically in accordance with the procedures in sections 7, 8, 9, and 10 of this circular.

1. *Timely payment.* An agency shall make payments no more than seven days prior to the payment due date, unless the agency head or designee of such officer has determined, on a case-by-case basis for specific payments, that earlier payment is necessary. This authority must be used cautiously, weighing the requirement to make timely payment against the good stewardship inherent in effective cash management practices. Agencies are encouraged to experiment with the timing for release of their payments so as to pay proper invoices as close as possible to the due date without exceeding it.

m. *Taking discounts.* An agency offered a discount by a contractor from an amount due under a contract for property or services in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. Discounts will be taken whenever economically justified, but only after acceptance has occurred. (See I *Treasury Financial Manual* 6–8040.30.) If the agency takes the discount after the end of the specified time and does not repay it before the payment due date (as defined in paragraph 4.e), the agency shall pay an interest penalty on any amount remaining unpaid as prescribed in section 7.a.(6).

n. *Making the payment.* Checks will be mailed or transmitted on the same day for which the check is dated. Whenever possible, agencies should seek to enter into agreements with contractors for transmission of payments by electronic funds transfer (EFT). On Saturdays, Sundays, and legal holidays, when Federal government offices are closed and government business is not expected to be conducted, payments falling due may be made on the following business day without incurring late payment interest penalties.

o. *Partial payments.* Agencies shall pay for partial delivery of supplies or partial performance of services unless specifically prohibited by the contract. Payment is contingent upon submission of an invoice if an invoice is required by the contract.

p. *Paying interest penalties.* Agencies shall pay an interest penalty, without a request from the contractor, for late payments and improperly taken discount payments. Agencies shall use the procedures for paying penalties as prescribed in sections 7, 8, 9, and 10.

q. *Other regulations.* Agencies will make payments consistent with Treasury regulations (I *Treasury Financial Manual* 6–8040) and with the Federal Acquisition Regulation (48 CFR subparts 32.9 and 52.232).

5. *Required Documentation.* Agencies are required to ensure that the following documentation is established to support payment of invoices and interest penalties:

a. The following information from the contract is required as payment documentation:

(1) Payment due date(s):

(2) A notation that partial payments were prohibited in the contract, if applicable;

(3) For construction contracts, payment due dates for approved progress payments or milestone payments for completed phases, increments, or segments of the project;

(4) If applicable, a statement that the special payment provisions of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)) or the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)) apply;

(5) Where considered appropriate by the agency head, the specified acceptance period following delivery to inspect and/or test property furnished or to evaluate services performed;

(6) Name (where practicable), title, telephone number, and complete mailing address of officials of the Government's designated billing office and of the contractor receiving the payments; and

(7) Reference to requirements under the Prompt Payment Act including the payment of interest penalties on late invoice payments (including progress payments under construction contracts).

b. The following correct information constitutes a proper invoice and is required as payment documentation:

(1) Name of contractor and invoice date (contractors are encouraged to date invoices as close as possible to the date of mailing or transmission);

(2) Contract number, or other authorization for delivery of property or services (assignment of an invoice number by the contractor is recommended);

(3) Description, price, and quantity of property and services actually delivered or rendered.

(4) Shipping and payment terms.

(5) Other substantiating documentation or information as required by the contract.

(6) Name (where practicable), title, telephone number, and complete mailing address of responsible official to whom payment is to be sent.

c. The following information from the receiving report is required as documentation:

(1) Contract or other authorization number;

(2) Product or service description;

(3) Quantities received, if applicable;

(4) Date(s) property or services delivered and accepted; and

(5) Signature (or electronic alternative when supported by appropriate internal controls), printed name, title, telephone number, and mailing address of the receiving official.

d. The following information must be included in each request for a progress payment under a constructive contract:

(1) Substantiation of the amount(s) requested including:

—An itemization of the amounts requested related to the various elements of work required by the contract covered by the payment request;

—A listing of the amount included for work performed by each subcontractor under the contract;

—A listing of the total amount of each subcontract under the contract;

—A listing of the amounts previously paid to each such subcontractor under the contract; and

—Additional supporting data in a form and detail required by the contracting officer.

(2) Certification by the prime contractor, to the best of the contractor's knowledge and belief, that:

—The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

—Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of chapter 39, title 31, U.S.C.; and

—The application does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

6. *Required Notices to Contractors.* This section summarizes notices which agencies are required to provide to contractors.

a. *Notice of interest penalty.* When an agency pays a late payment interest penalty, the payment must be accompanied by a notice of the amount of the interest penalty included in the payment, the rate used by the agency to compute the penalty, and the number of days used by the agency to compute the penalty. The contract and invoice numbers should also be included in the notice to assist the contractor in reconciling the payment.

b. *Notice of defective invoice.* When an agency determines that an invoice is not a proper invoice suitable for payment (using criteria in section 5.b.) the agency must return the invoice to the contractor as soon as practicable, but not later than seven days (three days for meat or meat food products and five days for perishable agricultural commodities, dairy products, and edible fats and oils) after receipt, specifying the reasons why the invoice is not a proper invoice.

7. *Late Payment Interest Penalties.*

a. *Calculation.* Agencies will use the following procedures in calculating interest due on late payments:

(1) Interest will be calculated at the interest rate applicable on the day after the due date (the date the agency incurred the obligation to pay an interest penalty).

(2) Interest will be computed from the day after the due date through the payment date.

(3) Adjustments will be made for errors in calculating interest.

(4) When an interest penalty that is owed is not paid, interest will accrue on the unpaid amount until paid, except as described in paragraph (5) below. Interest penalties remaining unpaid for any 30-day period will be added to the principal, and interest penalties, thereafter, will accrue monthly on the total of principal and previously accrued interest.

(5) Interest penalties under the Prompt Payment Act will not continue to accrue:

—after the filing of a claim for such penalties under the Contract Disputes Act of 1978; or

—for more than one year.

(6) When an agency takes a discount after the discount date and does not repay it before the payment due date, the interest payment will be calculated on the amount of the discount taken, for the period beginning the day after the specified discount date through the payment date.

(7) When an agency fails to make notification of a defective invoice within seven days (three days for meat and meat food products, and five days for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils), the number of days allowed for payment of the corrected, proper invoice will be reduced by the number of days between the seventh day (third day for meat and meat food products, and fifth day for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils) and the day notification was transmitted to the contractor. Calculation of interest penalties, if any, will be based on an adjusted due date reflecting the reduced number of days allowable for payment.

(8) Interest penalties of less than one dollar need not be paid.

(9) When an agency cannot complete transmission of payment to a contractor by electronic funds transfer because of incorrect or incomplete account information provided by the contractor, the agency is exempted from payment of interest penalties for the period between the date of attempted transmission and the date on which the contractor supplies correct information to the agency, provided that the contractor has been given notice of the defective account information within seven days after the agency is notified of the defective information.

(10) The applicable interest rate may be determined by calling the Finance and Funding Branch, Department of the Treasury, telephone number 202/566–5651.

(11) Interest calculations are to be based on a 360 day year.

b. *Payment.* Agencies will meet the following requirements in paying interest penalties:

(1) Interest may be paid only after acceptance has occurred;

(2) Late payment interest penalties shall be paid without regard to whether the contractor has requested payment of such penalty;

(3) The temporary unavailability of funds to make a timely payment due for property or services does not relieve an agency from the obligation to pay these interest penalties or the additional penalties required under section 8;

(4) Each payment for which a late payment interest penalty is required to be paid shall be accompanied by a notice stating the amount of the interest penalty included in the payment, the rate by which the penalty was computed, and the number of days used in calculating the penalty (the contract number and any invoice number assigned by the contractor should also be included in the notice to assist the contractor in reconciling the payment); and

(5) Agencies shall pay any late payment interest penalties (including any additional penalties required under section 8) under this circular out of amounts made available to carry out the program for which the penalty is incurred. The Prompt Payment Act does not authorize the appropriation of additional amounts to pay penalties.

c. *Penalties Not Due.* Interest penalties are not required:

(1) When payment is delayed because of a disagreement between a Federal agency and a contractor over the amount of the payment or other issues concerning compliance with the terms of a contract (claims concerning disputes, and any interest that may be payable with respect to the period while the dispute is being settled will be resolved in accordance with the provisions in the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, except for interest payments required under 31 U.S.C. 3902 and (h)(2)); or

(2) When payments are made solely for financing purposes or in advance, except for interest payments required under 31 U.S.C. 3902 (h)(1) and (h)(2); or

(3) For a period when amounts are withheld temporarily in accordance with the contract.

8. *Additional penalties.*

a. A contractor shall be entitled to an additional penalty payment when the contractor:

(1) Is owed a late payment interest penalty by an agency;

(2) Receives a payment after the payment due date which does not include the interest penalty also due to the contractor;

(3) Is not paid the interest penalty by the agency within 10 days after the date on which such payment is made; and

(4) Makes a written request, not later than 40 days after the date on which such payment is made, that the agency pay such an additional penalty. The contractor request must specifically assert that late payment interest is due under a specific invoice and request payment of all overdue late payment interest penalty and such additional penalty as may be required. Attached to the contractor's request shall be a copy of the invoice on which late payment interest was due but unpaid and a certification that payment for the principal has been received, and the date of receipt. No additional data are required. To be valid the request must be postmarked by the 40th day after payment was made. If there is no postmark, the request will be valid if it is received and annotated with date of receipt by the agency by the 40th day. If the agency fails to annotate the request, the request will be valid if the date of mailing is placed on the request by the contractor by the 40th day.

b. The additional penalty shall be equal to one hundred (100) percent of the original late payment interest penalty beginning January 22, 1990.

c. The additional penalty shall not be greater than $2,500 for two years from January 22, 1990. After that time the additional penalty shall not be greater than $5,000. Regardless of the amount of the late payment interest penalty, the additional penalty paid shall not be less than $25. When the late payment interest penalty ceases to accrue at the end of one year as described in subparagraph 7.a(5), the additional penalty shall continue to accrue and be calculated as described in paragraph 7.a(4). For the purpose of determining the maximum and minimum penalty, the test shall be the interest due on each separate payment made for each separate contract. The penalty shall not be based on individual invoices unless the invoices are paid by separate payment. Where payments are consolidated for disbursing purposes, the penalty determination shall be made separately for each contract therein.

d. The additional penalty does not apply to the payment of utility bills because late payment penalties for these bills are determined through the rate-setting process.

9. *Interest Penalties Due Farm Producers.* In the case of a payment to which producers on a farm are entitled under the terms of an agreement entered into under the Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*):

a. An interest penalty shall be paid to the producers if the payment has not been made by the required payment or loan closing date. The interest penalty shall be paid:

(1) On the amount of payment or loan due;

(2) For the period beginning on the first day beginning after the required payment or loan closing date and ending on the date the amount is paid or loaned; and

(3) Out of funds available under section 8 of the Act of June 29, 1948 (15 U.S.C. 714f).

b. Payments to farm producers under such agreements shall be made as close as possible to the required payment or loan closing date, which is:

(1) For a purchase agreement, the 30th day after delivery of the warehouse receipt for the commodity subject to the purchase agreement;

(2) For a loan agreement, the 30th day beginning after the date of receipt of an application with all requisite documentation and signatures, unless the applicant requests that the disbursement be deferred;

(3) For refund of amounts received greater than the amount required to repay a commodity loan, the first business day after the Commodity Credit Corporation receives payment for such loan;

(4) For land diversion payments (other than advance payments), the 30th day beginning after the date of completion of the production adjustment contract by the producer;

(5) For an advance land diversion payment, 30 days after the date the Commodity Credit Corporation executes the contract with the producer;

(6) For a deficiency payment (other than advance payments) based upon a 12-month or 5-month period, 91 days after the end of such period; or

(7) For an advance deficiency payment, 30 days after the date the Commodity Credit Corporation executes the contract with the producer.

c. Provisions relating to the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*) in section 7.a.5. and section 13 do not apply.

10. *Interest Penalties Under Construction Contracts.*

a. In construction contracts agencies will pay interest on:

(1) A progress payment request (including a monthly percentage-of-completion progress payment or milestone payments for completed phases, increments, or segments of any project) that is approved as payable by the agency pursuant to section b, below, and remains unpaid for:

—A period of more than 14 days after receipt of the payment request by the designated billing office or

—A longer period, specified in the solicitation, if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract.

(2) Any amounts that the agency has retained pursuant to a prime contract clause providing for retaining a percentage of progress payments otherwise due to a contractor and that are approved for release to the contractor, if such retained amounts are not paid to the contractor by a date specified in the contract, or, in the absence of such a specified date, by the 30th day after final acceptance.

(3) Final payments, based on completion and acceptance of all work (including any retained amounts), and payments for partial performances that have been accepted by the agency if such payments are made after the later of:

—The 30th day from the date on which the designated billing office receives a proper invoice; or

—The 30th day after agency acceptance of the completed work or services. Acceptance shall be deemed to have occurred on the effective date of contract settlement on a final invoice where the payment amount is subject to contract settlement actions. For the purpose of computing interest penalties, acceptance shall be deemed to have occurred on the seventh day after work or services are complete in accordance with the terms of the contract.

b. An agency may not approve a request for progress payment under section a(1), above, unless the application includes:

(1) Substantiation of the amounts requested meeting the requirements of section 5.d.; and

(2) Certification by the prime contractor, to the best of the contractor's knowledge and belief, that:

—The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract,

—Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of Chapter 39 title 31 U.S.C., and

—The application does not include any amounts which the prime contractor

intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

c. The certification by the prime contractor is not to be construed as final acceptance of the subcontractor's performance.

d. The agency shall return any such payment request which is defective to the contractor within seven days after receipt, with a statement identifying the defect(s).

e. A contractor is obligated to pay interest to the Government on unearned amounts in its possession from:

(1) The eighth day after receipt of funds from the agency until the date the contractor notifies the agency that the performance deficiency has been corrected or the date the contractor reduces the amount of any subsequent payment request by an amount equal to the unearned amount in its possession, when the contractor discovers that all or a portion of a payment received from the agency constitutes a payment for the contractor's performance that fails to conform to the specifications, terms, and conditions of its contract with the agency, under 31 U.S.C. 3905(a); or

(2) The eighth day after the receipt of funds from the agency until the date the performance deficiency of a subcontractor is corrected or the date the contractor reduces the amount of any subsequent payment request by an amount equal to the unearned amount in its possession, when the contractor discovers that all or a portion of a payment received from the agency would constitute a payment for the subcontractor's performance that fails to conform to the subcontract agreement and may be withheld, under 31 U.S.C. 3905(e).

f. When a contractor is obligated to pay interest on unearned amounts to the Government under 31 U.S.C. 3905(a)(2) or 3905(e)(6), as described in paragraph e, the interest shall:

(1) Be computed at the rate of average bond equivalent rates of 91-day Treasury bills auctioned at the most recent auction of such bills prior to the date the contractor received the unearned amount;

(2) Be deducted from the next available payment to the contractor; and

(3) Revert to the Treasury.

11. *Grant Recipients.* Recipients of Federal assistance may pay interest penalties if so specified in their contracts with contractors. However, obligations to pay such interest penalties will not be obligations of the United States. Federal funds may not be used for this purpose, nor may interest penalties be used to meet matching requirements of federally assisted programs.

12. *Payment without evidence that supplies have been received.*

a. In limited situations, payment may be made without evidence that supplies have been received. Instead, a contractor certification that supplies have been shipped may be used as basis for authorizing payment. These payment procedures may be employed only when all of the following conditions are present:

(1) Individual orders do not exceed $25,000 (except that heads of executive agencies may permit a higher limit on a case-by-case basis);

(2) Deliveries of supplies are to occur where there is both a geographical separation and a lack of adequate communications facilities between Government receiving and disbursing activities that make it impracticable to make timely payments based on evidence of Federal acceptance;

(3) Title to the supplies will vest in the Government upon delivery to a post office or common carrier for mailing or shipment to destination or upon receipt by the Government if the shipment is by means other than Postal Service or common carrier; and

(4) The contractor agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements.

b. Agencies shall promptly inspect and accept supplies acquired under these procedures and shall ensure that receiving reports and payment documents are matched and steps are taken to correct discrepancies.

c. Agencies shall ensure that specific internal controls are in place to assure that supplies paid for are received.

13. *Relationship to other laws.*

a. Relationship to the Contract Disputes Act of 1978 (41 U.S.C. 605):

(1) A claim for an interest penalty (including the additional penalty for nonpayment of interest if the contractor has complied with the requirements of section 8 of this circular) not paid under this circular may be filed under section 6 of the Contract Disputes Act.

(2) An interest penalty under this circular does not continue to accrue after a claim for a penalty is filed under the Contract Disputes Act or for more than one year. This does not prevent an interest penalty from accruing under section 12 of the Contract Disputes Act after a penalty stops accruing under this circular. A penalty accruing under section 12 of the Contract Disputes Act may accrue on an unpaid contract payment and on the unpaid penalty under this circular.

(3) This circular does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a contractor over the amount of payment or compliance with the contract. A claim related to such a dispute and interest payable for the period during which the dispute is being resolved is subject to the Contract Disputes Act.

b. Relationship to the Small Business Act (15 U.S.C. 644(k)). This Act has been amended to require that any agency with an Office of Small and Disadvantaged Business Utilization must assist small business concerns to obtain payments, late payment interest penalties, or information due to the concerns.

14. *Reporting Requirements.* The Act requires the Director of OMB to report to Congress by the 120th day after the end of each fiscal year (January 28th), summarizing agency reports and analyzing progress made. In addition, OMB submits the annual prompt payment report to Congress with the President's Budget. Each Federal agency will report annually to the Director of OMB by November 30th the following information for the prior fiscal year:

a. Invoices subject to the Prompt Payment Act and OMB Circular A-125:
   (1) Dollar value of invoices,
   (2) Number;

b. Invoices paid after due date:
   (1) Dollar value of invoices,
   (2) Number,
   (3) Interest penalties paid:
      —Dollar amount
      —Number
      —Relative frequency
      —Frequency distribution,
   (4) Additional penalties paid:
      —Dollar amount
      —Number
      —Relative frequency,
   (5) Reasons why interest or other late payment penalties were incurred in order of frequency of occurrence
   —Delay in paying office's receipt of:
      Receiving report
      Proper invoice
      Purchase order or contract
   —Delay or error by paying office in:
      Taking discount
      Notifying contractor of defective invoice
      Computer or other system processing,
   (6) Interest and other late payment penalties which were due but not paid (Use interest rate in effect on the date obligation accrues):
   —Total:
      Interest dollars
      Number

—Because interest was less than $1.00:
Interest dollars
Number
—For other reason:
Interest dollars
Number
Specify reasons;

c. Invoices paid 1–15 days after due date, where appropriate:
(1) Dollar Amount,
(2) Number,
(3) Relative frequency;

d. Invoices paid 8 days or more before due date (except where cash discounts taken) subject to a determination by the agency head under subsection 4.1. of circular:
(1) Dollar amount,
(2) Number,
(3) Relative frequency;

e. Invoices paid 8 days or more before due date (except where cash discounts taken) without a determination by the agency head under subsection 4.1. of circular:
(1) Dollar amount,
(2) Number,
(3) Relative frequency;

f. Discounts:
(1) Number available,
(2) Number taken,
(3) Number not taken because not economically justified,
(4) Reasons for failing to take discounts;

g. For each payment center:
(1) Number of payments subject to the Act and the circular,
(2) Number and dollar amount of interest penalties paid;

h. Description of progress made, problems identified, and corrective actions taken in agency vendor payment systems during the fiscal year in implementing the provisions of the Act and OMB Circular A–125 (include a description of agency experience in determining the most appropriate timing for release of payment authorization so that invoices are paid as close as possible to the due date without exceeding it);

i. Updated description of agency quality control system;

j. Address and telephone number where the public may obtain updated list of designated agency contacts within payment centers or finance offices to provide assistance in determining the status of invoices and agency schedule for publishing the list.

In order to minimize the cost of reporting, statistical sampling may be used to derive the information above. Agency reports to OMB must be certified by the agency official with line authority over both procurement and payment processes.

15. *Effective Dates.* Unless otherwise specified, this circular is effective 30 days after final publication.

a. Effective for obligations incurred on or after January 1, 1989, the United States Postal Service (except for reporting requirements) and the Commodity Credit Corporation are explicitly covered by the Act and circular.

b. Effective for payments made under contracts awarded on or after October 1, 1989, payments requiring a late interest penalty must be accompanied by a notice stating the amount of the penalty included in the payment and the rate by which and period for which the penalty was computed.

c. Certain requirements of the Prompt Payment Act Amendments of 1988 are effective for payments under contracts awarded, contracts renewed, and contract options exercised on or after April 1, 1989. The requirements include:

(1) Rules governing the date an invoice is deemed to be received (section 1.n.);

(2) Definition of the payment date as the date an electronic fund transfer is made (section 1.m.);

(3) Clarification of the date from which the interest payment is calculated (section 7a.(1));

(4) Elimination of the grace period (section 4.e.);

(5) Due dates for payments for dairy and other products (section 4.f(3));

(6) Interest penalties on progress payments and retained amounts under construction contracts (section 10);

(7) Review and return of invoices (section 4.b (2), (3), and (4));

(8) Authority to make payments before the due date (section 4.1.);

(9) Calculation of interest owed by contractors (section 10.e.);

(10) Limitations on discount payments (section 4.i.);

(11) Payment provisions relating to construction contracts (section 10);

(12) Assistance to small businesses (section 13.b.); and

(13) Payment due date for poultry and egg products (section 4.f(1)).

d. Agencies are authorized to issue modifications to existing contracts to conform them to the payment procedures specified in Chapter 39, Title 31, U.S.C., this circular, and the implementing provisions of the Federal Acquisition Regulation.

16. *Inquiries.* Inquiries concerning this circular may be directed to the Credit and Cash Management Branch, Financial Management Division, Office of Management and Budget, Washington, DC 20503, telephone number 202–395–3066. Inquiries concerning the applicable interest rate may be directed to the Finance and Funding Branch, Department of the Treasury, telephone number 202–566–5651. Questions concerning delinquent payments should be directed to the agency designated billing office. Questions about disagreements over payment amount or timing should be directed to the contracting officer for resolution. Small business concerns may obtain additional assistance on payment issues by contacting the agency's Office of Small and Disadvantaged Business Utilization.

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Part VI

Environmental Protection Agency

40 CFR Part 761

Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 761

[OPTS-62059B; FRL 3607-5]

RIN 2070-AB83

Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing amendments to its disposal and storage regulations for polychlorinated biphenyls (PCBs). This document contains (1) notification requirements for certain entities that handle PCB waste, (2) requirements for certain entities to prepare and carry a manifest for purposes of tracking the disposal of PCB waste, and (3) requirements that a commercial storer of PCB waste, (i) obtain approval from the EPA Regional Administrator or from the Director of the Exposure Evaluation Division (Director, EED), Office of Pesticides and Toxic Substances, for a commercial storage facility that is part of a disposal facility for which the Director, EED issued the approval for disposal, (ii) develop closure plans for their facilities, and (iii) demonstrate financial responsibility for closure. Also, this notice amends the PCB recordkeeping requirements.

EFFECTIVE DATE: In accordance with 40 CFR 23.5 (50 FR 7271), this rule shall be promulgated for purposes of judicial review at 1 p.m. Eastern Daylight on January 4, 1990. These amendments shall be effective February 5, 1990.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Rm. E-543B Environmental Protection Agency, 401 M St., SW, Washington, DC 20460, (202) 554-1404, TDD: (202) 554-0557.

SUPPLEMENTARY INFORMATION: EPA issued a proposed rule under the authority of section 6(e)(1) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(e)(1), which was published in the **Federal Register** of September 26, 1988 (53 FR 37436), to amend its PCB storage and disposal regulations, which are codified in subpart D, 40 CFR part 761. The comment period was extended to end on November 25, 1988. A public hearing was requested and was held on December 13, 1988. Comments on the proposed rule were submitted by 62 entities. All comments were considered in the preparation of the final rule. A detailed analysis of these comments and EPA's response to them, titled "Response to Comments on the Proposed Notification and Manifesting Rule" is in the public record for this rule.

The preamble to the proposed rule included a description of the legal authority for the rule, background of the PCB disposal problems, Congressional concerns, definitions, description of persons affected by the rule, a discussion of the issues involved, and a summary of the economic consequences of the rule (53 FR 37436).

I. Overview of the Rulemaking

EPA regulates the disposal and storage for disposal of PCBs under its TSCA section 6(e)(1) authority, rather than its authority to regulate the management of hazardous waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA), unless the PCB waste also meets the definition of RCRA hazardous waste. EPA has identified several areas where improvements are needed in its TSCA program for PCB waste, and these improvements require the promulgation of additional disposal and storage requirements. EPA has concluded that the most pressing of the needed program improvements are the addition of an effective tracking system for PCB waste and the addition of an approval mechanism for the commercial storers who act as intermediate storers of PCB waste prior to its disposal.

This rule adds to the PCB disposal requirements a tracking system for PCB waste akin to the "cradle-to-grave" tracking system for hazardous wastes which EPA promulgated under RCRA Subtitle C. The rule includes a requirement that certain entities among those who handle (generate, transport, store and/or broker, or dispose) regulated PCB waste must notify EPA of their PCB-waste activities, so that the Agency may obtain basic information about the nature, location, and extent of these activities. The rule further requires that each such entity notifying EPA obtain from the Agency a unique identification number which will identify that entity in the shipping documents (manifests) and other records and reports that constitute the PCB waste tracking system. The rule also describes the manifest system that will be implemented to track the movement of PCB waste from the point of generation to the point of disposal, and it describes the recordkeeping and reporting requirements that complete the tracking system.

This rule also adds to the PCB storage regulations an approval mechanism for the commercial storers of PCB waste. The rule requires, among other things, that all commercial storers of PCB waste prepare closure plans for their facilities, and demonstrate their financial responsibility for the closure of their PCB storage areas. Storers of PCB waste who cannot demonstrate compliance with the rule's financial assurance for closure requirements will be required to cease operations and close their facilities.

II. Authority

This rule is issued pursuant to section 6(e)(1) of TSCA. Section 6(e)(1)(A) gives the Administrator the authority to promulgate rules prescribing the methods for disposal of PCBs. (15 U.S.C. 2605(e)(1)(A)). Furthermore, TSCA section 6(e)(1)(B) provides broad authority for EPA to promulgate rules that would:

> (B) * * * require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities. (15 U.S.C. 2605(e)(1)(B))

Consistent with this authority, EPA is implementing a waste tracking system for PCB waste which consists of shipping documents (manifests) and other records and reports under TSCA section 6(e)(1). Tracking requirements are necessary for effective management of PCB disposal by EPA, and the manifests contain warnings and instructions to be followed by others in connection with the processing, transport, and disposal of PCB waste. Therefore, promulgation of the tracking system for PCB waste is clearly authorized by TSCA section 6(e)(1).

EPA also regulates the storage of PCB waste prior to disposal under its TSCA section 6(e)(1) disposal authority for PCBs. The current requirements for PCB storage facilities are codified at 40 CFR 761.65. Therefore, these amendments to the storage regulations in § 761.65 are also promulgated under section 6(e)(1) of TSCA.

III. Discussion of the Rule and Comments Made on the Proposal

A. General Reaction to Proposed Rule

In general, the comments received on the proposed rule supported EPA's handling of the issues. There was strong support for retaining disposal of PCBs under TSCA rather than shifting the program to RCRA, and for adopting a PCB waste tracking system similar to the RCRA notification and manifesting process. Although some comments registered concern that a few States

have programs that do not mesh perfectly with the TSCA program, commentors stated that, for the most part, State programs would be aided by this rule in their efforts to track PCB waste beyond their borders. As explained in the proposal, the rule does not preempt State laws and deferred to all more stringent State-imposed requirements. Also, the final rule, as proposed, essentially adopts the same kind of identification numbers used under RCRA and requires use of the uniform manifest, to minimize conflicts with State requirements.

Commentors supported the proposed rule's emphasis on adopting approval requirements for commercial storers, including closure plan and financial responsibility requirements. Commentors also supported the definition of PCB waste generators in a manner that promotes consolidation of PCB waste from individual sites of use to users' storage yards. Also, commentors generally supported EPA's decision to limit the generator notification requirements only to generators who operate their own storage areas, and to use a relinquishment of control criterion to define when a generator must manifest waste. Commentors agreed with the decision to require approvals only for commercial storers, and not for all storage facilities. Coupled with comments that generally approved of the provisions of the proposed rule, were requests and suggestions to improve the regulation by clarifying its coverage and reducing the regulated community's paperwork burdens.

B. Generation of PCB Waste

The proposed rule defined and used the term generator of PCB waste in a manner to maintain as much consistency as possible with the RCRA tracking system for hazardous wastes, which forms the model for much of this rule.

The proposed rule defined "generator of PCB waste" as any person whose act or process produces PCBs that are regulated for disposal under TSCA, or whose act first causes a "PCB" or "PCB Item" to become subject to the subpart D disposal requirements of 40 CFR part 761. See the preamble to the proposed rule (53 FR 37438) for a discussion of which entities could qualify as generators under this definition.

The proposed definition is similar to the RCRA definition of "generator" at 40 CFR 260.10, but it differs from the RCRA definition in one important respect. In the context of the proposed rule, the term "generator of PCB waste" generally referred to the "person" (see 40 CFR 761.3) who creates PCB wastes, and not, as would be the case under RCRA, to the individual sites where particular PCBs or PCB Items were used before they became PCB waste.

Section 761.3 defines "person" to include individuals, government entities, corporations, and other business associations, so the intent of the proposed definition of "generator of PCB waste" generally was to promote the consolidation of all of the PCB waste created by a given "person" under one generator identification, regardless of the number of sites, i.e., each location where that "person" might use, own, or control items of electrical equipment. The only exception is where another regulation expressly calls for a site-specific meaning of the term "generator of PCB waste." In such a case, the site-specific requirement controls. The only site-specific reference to generator in the proposed rule is the requirement that the users, owners, or processors of PCBs or PCB Items who maintain their own § 761.65(b) storage facilities for PCBs must submit unique generator notifications to EPA for each of their PCB storage facilities. In cases where the "generator" owns or operates storage facilities, each site of generator storage is treated as a unique "generator of PCB waste" for purposes of this regulation. As such, PCB waste transported from the storage facilities would be manifested from the storage sites, and the manifests would reference the storage facilities' unique EPA identification numbers. Separate storage areas owned by the same generator on the same property would not require separate identification. The treatment of users' and owners' storage facilities as unique generators in the final rule is discussed further in Unit III.I.2.b. Otherwise, all PCB waste generated by a given individual or company is identified with the one consolidated generator who has a single unique identification number.

EPA received many comments on the definition of "generator of PCB waste." Most commentors approved of the definition. Particularly, they supported the definition to allow consolidation of PCB waste from a user's sites. Clarification is needed, they stated, to spell out the distinction between "use" activities and "waste" activities. There was also concern expressed that the proposal was unclear as to who was the generator when electrical equipment underwent servicing, both in the disposal and repair contexts.

The concept of "use" has not changed with this rule. PCBs and PCB-containing material are not "waste" until they are no longer used for the purpose they were intended for and the decision to dispose of them has been made. When equipment that has failed is shipped offsite for repair, it is still considered to be in use and remains in use while it is being serviced. The question of who is the generator of the PCB waste arises when the decision is made to dispose of, rather than repair the equipment.

To clarify the distinction of who is the generator of the PCB waste in the different servicing contexts, EPA has expanded the definition in the final rule to include a person "whose decision causes a PCB material still under his physical control to become subject to subpart D disposal requirements." Under the definition in the final rule, an owner of the PCB material would be the generator when the owner:

1. Ships electrical equipment off-site to be disposed of or serviced for reclassification, since these activities will produce regulated PCB waste.

2. Causes, that is, the owner drains or hires a service company to drain, on-or off-site, fluids containing PCBs at a concentration of 50 ppm or more to be shipped off-site for disposal, or for processing of equipment or fluid that will reduce its concentration, since regulated PCB waste will result. If a contractor drains the fluid on-site, the manifest would describe the fluid containers as PCB waste. If a contractor drains the fluid off-site, the owner's manifest would describe the equipment containing the fluid as PCB waste.

3. Causes PCB-containing treatment residuals to be generated on-site during servicing or processing for disposal operations conducted on-site by the owner or by a contractor.

In these three cases, the owner is the generator because he either performs the operation that produces the PCB waste himself or hires someone to perform the waste-producing operation, understanding that disposal of PCBs will occur. As a generator, the owner must manifest the PCB Item or equipment. The residuals generated during the processing, however, are generated by the processor. Thus the processor must manifest the PCB-containing residuals or fluids generated by the processing and continue the manifest chain for the equipment, if it is still regulated for disposal after processing.

The owner is not a generator of PCB waste when he ships PCB-containing equipment off-site for servicing, but has not yet made a decision whether to repair the equipment or to dispose of it. Thus, the owner need not manifest the equipment. There is no waste at this point as the equipment is still in use. Typically, the equipment must be

inspected before a decision can be made that the equipment will be disposed of or repaired for use. If either the servicing facility or the owner decides that the equipment cannot be serviced, the equipment becomes PCB waste and the servicer or processor becomes the generator of the PCB waste, (both the equipment and any residuals), and must manifest the PCB waste.

One commentor recommended the RCRA policy of allowing the parties involved in a transaction to determine who would be the responsible generator for compliance requirements. EPA is rejecting this policy for PCBs for the sake of uniformity of its PCB regulations. It is simpler for EPA to enforce this rule if it uses a general definition of responsibility for manifesting PCB waste.

A commentor suggested the term "shipment originator" rather than "generator" be used for a firm that commingles PCBs from different sources for shipment. This terminology would allegedly avoid the liability connotation of generator. EPA does not consider it advisable to introduce another definition since the term "generator" accurately describes the commingler. A shipment originator, who combines PCB waste from different sources into a new commingled shipment, is a generator of PCB waste under this rule and must manifest the commingled PCB waste.

Several comments raised the question of the status of laboratories and the samples they use for analysis. This issue will be discussed in Unit III.D.

As previously stated, the commentors supported the definition of generator which would promote the consolidation of waste from a user's different sites. Thus, one utility commented, it would be required to submit only 1 notification instead of 80. However, some large industrial commentors felt that since all facilities with their own storage areas would have to notify, the consolidation definition was meaningless. In that commentor's case, all 165 facilities have storage areas and all facilities would be required to notify EPA. As stated earlier in this unit, consolidation is employed as a tool to make the number of notifying generators manageable; however, tracking the shipment of PCB waste from storage areas is an essential feature of the cradle-to-grave tracking system. Most storage areas that meet the requirements in 40 CFR 761.65 store large quantities of PCBs in an ongoing manner and, therefore, remain in the category of those PCB waste facilities that the rule covers. While there may be limited exceptions where small quantities will be stored at such facilities, or where one company may operate many such facilities, EPA has decided to retain the notification requirement, as proposed, for generators with PCB storage facilities.

One large corporation wanted clarification that its subsidiaries had the option to notify EPA individually, and that not all were required to use the same identification number. This option exists. Any entity that requests it is given its own unique identification number.

Another comment suggested that where several companies occupy the same site, the site should be treated as one generator for purposes of the rule. These generators share a common storage facility, where their PCB waste is commingled, and feel that a single EPA identification number for the site would be environmentally acceptable and would not interfere with the tracking of the PCB waste generated from that site. EPA accepts this site-oriented treatment with the understanding that a site that stores PCB waste generated by unrelated generators is a commercial storage facility. The facility address would be issued an individual identification number in any event, since the EPA Identification Number system would identify the facility on the basis of the facility's address. The financial assurance demonstration for the common storage facility would have to incorporate adequate financial responsibility by all members of the agreement or one designated member to ensure adequate coverage if any of the participants decided to withdraw from the agreement.

C. Commercial Storers of PCB Waste

As was proposed, "Commercial Storer of PCB waste" means the owner or operator of a storage facility which is subject to the storage facility standards of 40 CFR 761.65 (a), (b), and (c) and which engages in storage activities involving PCB waste generated or owned by others. Commercial storers of PCB waste generally perform PCB waste storage services in exchange for a fee or other compensation, but the receipt of compensation is not necessary to qualify a storage facility as a commercial storer of PCB waste. It is sufficient that the facility stores PCB waste generated or owned by others. Commercial storers of PCB waste are required to comply with the § 761.65 facility standards, the storage facility approval requirements of § 761.65(d), the recordkeeping requirements of § 761.180, and the applicable requirements of the tracking system for PCB waste in this rule.

The definition of commercial storers received many comments regarding when service companies are commercial storers, whether storage of PCBs belonging to an affiliated or subsidiary company makes a facility a commercial storage facility, whether there should be a time or quantity cut-off consideration, the status of laboratories and their samples, and the status of natural gas distribution companies that collect PCB-containing liquids from their customers' equipment.

EPA has modified the definition of commercial storer in three ways in the final rule to address these comments. First, in the final rule, the "owned by others" criterion has been dropped in favor of language that limits coverage to PCB waste generated by others and PCB waste that is removed during servicing of others' electrical equipment and brokered for disposal. Second, EPA has added a de minimis quantity standard, so that a facility that stored 500 gallons or less of PCBs at any time would not require approval. Third, the definition in the final rule states that a generator who stores his own waste is not required to seek approval as a commercial storer unless the PCB waste was removed while servicing the equipment owned by others and brokered for disposal. The definition also states that those storage facilities that do not require approval under § 761.65(d) are still subject to the storage requirements of § 761.65(a), (b), and (c), where applicable.

The small quantity exception exempts from the commercial storage approval requirements those entities which acquire small quantities of PCB waste which others may have generated. This specific exception is consistent with EPA's decision to eliminate the "owned by others" language from the definition of commercial storer of PCB waste. These changes address many of the concerns raised by commentors that waste storage that was a small and incidental part of an entity's business would be subject to the burdens of the approval process. For example, comments suggested that the proposed definition would require approvals from companies performing remedial actions at Superfund sites, or from natural gas distribution companies who removed small quantities of condensates from their customers' equipment. These commentors pointed out that including such storage within the scope of the definition of commercial storage would not be consistent with EPA's avowed intention of improving its oversight over the activities of the commercial facilities that are in the business of brokering or storing waste. The final rule reflects EPA's agreement with these comments.

While comments suggested several alternative quantities and time limits for a small quantity/short time cut-off, EPA selected less than 500 gallons as a reasonable benchmark that would distinguish the merely incidental storage of PCB waste from storage that is more characteristic of a larger, commercial activity. Thus, the exception is for any facility whose total PCB waste holdings do not exceed 500 gallons at any time. The 500 gallon cut-off corresponds roughly to the contents of two medium-sized electrical transformers, or ten 55-gallon drums. EPA does not believe that it would be cost-effective to require the smaller, incidental storers to bear the significant costs of preparing storage approval applications. In addition, EPA believes that the resources which EPA will commit to the approval process would be more effectively utilized if focused on the larger commercial operations (*e.g.*, brokers) which were identified as the greatest problems in the oversight investigations by GAO.

Moreover, EPA does not believe that the potential risks associated with this exemption are great relative to the costs of extending the approval process to cover these facilities. Such facilities are nevertheless subject to the requirement to store the PCB waste in proper facilities described in 40 CFR 761.65 and to dispose of a container of PCB waste within 1 year from the date when the first quantity of the PCB waste in the container was removed from service for disposal.

EPA agrees with the comment that a service company is a commercial storer when it drains and stores for disposal a customer's fluid that has been determined to be PCB waste. EPA has expanded the definition of commercial storer in the final rule to clarify that the storage of PCB fluids (greater than 50 ppm) removed for disposal while servicing the equipment of others is an activity that makes one a commercial storer. EPA also agrees with the comment that a service company is not a commercial storer when it buys equipment for resale and subsequently drains the oil from the equipment for disposal. When the buyer drains the oil, the buyer is a generator of PCB waste, and the drained fluid must be stored in an area that meets the requirements in § 761.65 for storage for disposal. Also, service companies that drain customers' fluids for disposal are exempted from commercial storage approval requirements if they qualify for the small quantity exemption, that is, storage of less than 500 gallons of PCB fluid at any time.

The issue of storage between parent-subsidiaries, sibling companies, member companies of public power associations, and companies held by common holding companies has been reviewed. For the purposes of the final rule, storage of one company's PCB waste "by a related company" is not commercial storage. Therefore, storage between "related companies" is exempt in the final rule from "commercial storer" status. "Related companies" include a parent company and its subsidiaries, sibling companies owned by the same parent company, companies owned by a common holding company, and members of electric cooperatives. EPA assumes that a company will be self-protective enough to ensure that a related entity using its facility will have a role in the financial assurance for the storage area. "Related" does not include voluntary membership in the same trade association since there is no financial or managerial relationship between the entities. Common storage among non-related companies is commercial storage, as was discussed in Unit III.B.

Commentors pointed out that, under the proposed rule, natural gas distribution companies would be considered commercial storers requiring approval because they store waste collected from their customers' equipment or waste "owned by others." With the modification of the definition that eliminates the "owned by others" criterion, natural gas distribution companies will, for the most part, no longer be subject to the approval requirements. The fact that the waste is collected or "generated" by the natural gas distribution company and subsequently stored by them no longer makes them a commercial storer of PCB waste under the modified definition of commercial storer in this final rule. As long as the natural gas distribution company is the generator of the PCB waste and does not store PCB waste generated by others it will not be subject to the approval requirements for commercial storers of PCB waste.

D. Laboratories and Samples

Comments requested clarification of the status of laboratories which handle PCB sample material. The proposed rule did not address this issue. A comment suggested that samples should be tracked but treated less rigorously than other PCB wastes, by using a receipt from a laboratory rather than a manifest. Another comment suggested excluding laboratory samples altogether, as is done under RCRA, if certain conditions are met. Another comment urged that this regulation be consistent with EPA's interpretation that PCB samples being analyzed for enforcement cases are still in use, and therefore, not a waste.

EPA has considered these suggestions and is adopting an approach similar to RCRA's for handling laboratory samples, i.e., to exclude samples from regulation, until the sample is determined to be of a concentration greater than 50 ppm and its analytical use has ended. Since certain PCB requirements hinge on PCB concentration, testing is required to establish PCB concentration. Consequently, laboratory samples are implicitly authorized for use, as opposed to being under the disposal regulations, and are considered to remain in use until their use for analysis or for an enforcement case has ended. Under the RCRA approach, samples are not regulated as hazardous waste when they are being shipped to a laboratory, if requirements for packaging and accompanying information are met. The RCRA approach exempts temporary storage by collectors and laboratories prior to testing and also after testing for a "specific purpose" use, such as until the conclusion of a court case or enforcement action where further testing of a sample may be necessary. Thus, during this time there would be handling requirements to be met but no manifesting, and the laboratory would be exempt from the § 761.65 storage for disposal requirements for samples until their "use" authority ended. At this time the PCB waste would have to be manifested when shipped off-site for storage or disposal. Also, to prevent commingling of PCB waste generated by servicing activities, EPA will exempt laboratories from "commercial storer" approval requirements only when they are separate facilities, unaffiliated with any entity whose activities involve PCBs including servicing shops, and not when they are laboratory facilities at service operations. EPA will exempt an independent laboratory from "commercial storer" approval when the laboratory stores samples held for disposal in a facility complying with § 761.65(b)(1) (i) through (iv) standards and the laboratory complies with requirements to manifest off-site shipments of accumulated PCB waste. EPA has added § 761.65(i) to the final rule to clarify the status of independent laboratories and the samples of PCBs and PCB Items they handle.

E. Transfer Facility

"Transfer facility" was defined in the proposed rule as any transportation related facility, including loading docks, parking areas, storage areas and other

similar areas where shipments of PCB waste are held during the normal course of transportation. In the final rule, the words "storage area" were removed from the first sentence of the definition since storage areas are specifically dealt with in the third sentence of the definition. There are no further changes. As was proposed, PCB waste storage areas at transfer facilities are required to comply with the storage facility standards of § 761.65, but they are exempt from the approval requirements of § 761.65(d), unless they store the same PCB waste for a period longer than 10 consecutive days. Transport vehicles are not transfer facilities under this definition, unless they are used for the storage of PCB waste, rather than for actual transport activities. If transport vehicles are used for storage they must meet the requirements of § 761.65 (b) or (c)(7).

There were some requests for clarification of the definition of transfer facilities. Railroad facilities and "intermodal facilities," like other transfer facilities, are subject to § 761.65 storage facility standards in areas where they have a segregated area to store PCBs. However, a loading area, an area in which a trucked-in trailer is moved onto a railroad flatcar, an example given in one comment, is not a storage area. The 10-days of consecutive storage limitation is allowed to provide trains, trucks, and other transport vehicles a period in which to unload the PCB waste and hold it until the PCB waste can be loaded onto the next connecting transport vehicle. While the 10-day storage period exempts the transfer facility from storage approval requirements, it has no effect on the 1-year storage until disposal requirement. The 1-year limitation clock on storage prior to disposal continues to run during the period of time the PCB waste is at the transfer facility. Another commentor asked whether transporters with storage facilities must maintain annual documents. Only those transporters who hold PCB waste in storage for more than 10 days would have to maintain annual documents, and they would be required to comply with the recordkeeping requirements of § 761.180(b).

F. Transporter of PCB Waste

In the proposed rule "transporter of PCB waste" was defined to include any person engaged in the off-site transportation of regulated PCB waste by air, rail, highway, or water. Comments indicated concern that this definition could inadvertently include transportation of PCB waste for consolidation purposes by a generator prior to transportation to a commercial storer or disposer. EPA agrees. To avoid this possibility, EPA is changing the definition in the final rule to read "* * * any person engaged in the off-site transportation of regulated PCB waste for purposes other than consolidation by a generator * * *."

Other comments asked whether the owner or operator of a facility with an EPA identification number who also transports PCB waste from that storage facility to an affiliated commercial storer or disposer needs a separate identification number as a transporter. The answer is no. Only an independent transporter requires an identification number since the parent organization has not lost control of the PCB waste when an employee transports the PCB waste in a company vehicle. Also, the PCB waste can be tracked through the parent organization's identification number.

G. PCB Waste

The definition of PCB waste in the proposed rule is "* * * those PCBs and PCB Items that are subject to the disposal requirements of subpart D." Implicit in this definition are the answers to some of the questions asked in comments. PCBs and PCB Items become subject to disposal requirements under subpart D when it has been determined that they no longer serve their intended purpose and are to be disposed. Items unregulated for disposal, such as intact, non-leaking small capacitors and drained PCB-Contaminated equipment are not subject to subpart D disposal requirements and, therefore, are not included in this definition. As discussed in Unit III.D, laboratory samples do not become PCB waste until they are no longer used for analytical or enforcement purposes, and are to be disposed. Disposal of material that results from the cleanup of a spill of PCBs at a concentration of 50 ppm or greater is regulated and included in the definition. Dilution of waste material to bring its PCB concentration down to below 50 ppm to avoid any disposal requirements is prohibited under 40 CFR 761.1(b).

One comment suggested using waste codes to identify PCB waste streams to avoid a multiplicity of State waste codes assigned by States that regulate PCBs under RCRA. Some States plan to share a database and prefer to use a simplified waste code system. EPA accepts this suggestion since it will be helpful to States for tracking PCB waste to disposal. The two PCB waste codes to be used are PCB1 for PCB Articles, tranformers, capacitors, etc., and PCB2 for PCB Containers. Use of these waste codes does not preempt a State's right to use its own waste code system if it prefers. Use of these waste codes is intended to facilitate data exchange among cooperating States.

A commentor suggested that "disposer of PCB waste" be redefined to include the owner or operator of a "mobile technology approved by EPA for disposal of PCB wastes." This change is not necessary because the definition includes any facility, whether it is mobile or stationary, incinerator or alternative technology, approved by EPA for the disposal of PCBs.

H. Tracking System

The tracking system for PCB waste serves several objectives aimed at improving the management and enforcement of the national disposal program for PCBs. First, the notification requirement will provide EPA with basic information on the location of and activities engaged in by many of those persons who handle (generate, store, transport, or dispose of) PCB waste.

Second, the collection of this information will facilitate compliance monitoring and enforcement under TSCA by EPA inspectors. A database of PCB waste handlers will provide EPA with a basis for targeting facilities for site inspections.

Third, the submission of notifications by PCB waste handlers will be a prerequisite to the issuance by EPA of identification numbers to the notifying entities. Upon receipt of notifications, EPA will issue unique identification numbers to all entities required to notify under this rule, unless they have previously been issued numbers by EPA or by State agencies under RCRA hazardous waste authority. The use of the EPA identification numbers will be required in the manifests and the associated reports which together constitute the waste tracking system. When this rule is effective, generators of PCB waste may turn over their PCB waste only to commercial storers, transporters, and disposers of PCB waste who have notified EPA of their PCB waste activities and received EPA identification numbers and any required approvals. Likewise, commercial storers, transporters, and disposers of PCB waste may accept PCB waste only from generators, other commercial storers, transporters, and disposers who have notified EPA of their PCB waste activities and received identification numbers.

Fourth, by implementing the notification and manifesting requirements, EPA will be able to track shipments of PCB waste from the point of generation, through the commercial

storage facilities and other intermediate waste handlers, to the TSCA-permitted disposal units. This tracking device creates clear lines of accountability among PCB waste handlers. While owners and operators of storage and disposal facilities are required under the current PCB regulations to keep some records on their overall disposition of PCB waste, the preparation and retention of manifests among facilities' records will provide more uniform and detailed information on the handling of particular PCB waste shipments as they are moved from generator to ultimate disposal sites.

Fifth, the use of a manifest system will foster the proper handling of PCB waste while it is in transport for disposal. The information on the manifest will augment the marking and placarding requirements for containers and transport vehicles in the existing PCB regulations. The information recorded on the manifest will promote protection of health and the environment by serving a notice function for persons handling PCB waste as well as emergency response personnel.

There was general agreement among commentors that tracking is urgently needed during the peak period of PCB disposal and that tracking is appropriate for Federal regulation. Some comments indicated concern about the duplication of notification and manifesting requirements in States where PCBs are treated as hazardous PCB waste and under whose RCRA requirements generators are regulated and storers have permits. Some States also felt they would be burdened by requests for information on the TSCA rules and that they would be sent notification forms and copies of manifests.

EPA is aware that there may be some overlap in States that regulate PCBs and has attempted to minimize these differences. For example, where a PCB waste handler has been issued an identification number by EPA or a State under the RCRA program, EPA will use the same identification number, after verification, when that PCB waste handler notifies EPA of its PCB activity. Also, EPA is giving explicit instructions as to where notification forms and annual reports must be sent. EPA thinks that these problems are temporary and not very significant in comparison to the problems that the rule solves.

I. Notification

As proposed, certain persons who generate, store commercially, transport, or dispose of regulated PCB waste must notify EPA of such activities and receive an EPA identification number. This notification requirement would apply to brokers of PCB disposal services to the extent that they qualify as transporters, disposers, or as storers of PCB waste subject to the storage facility requirements of 40 CFR 761.65. There was strong support for the proposed notification requirement, the use of previously issued identification numbers, and the temporary use of a generic number until EPA issues a unique identification number. The final rule adopts the proposed notification requirements.

A comment inquired about what database the information received from the notifications will be placed on, who will have access to the database, and how the information will fit into the enforcement scheme. A contractor for EPA has set up the database for the information EPA receives from the notifications. EPA Headquarters, EPA regional offices, and the EPA contractor will have access to the database. Enforcement of this rule will be by the EPA regional offices either alone, or in conjunction with the States.

EPA proposed that the TSCA notification process be linked to manifesting under TSCA, which is another part of this rulemaking. This is similar to the system imposed under RCRA.

1. *Identification number.* To maintain consistency with the RCRA notification procedures already in place, and to avoid subjecting those who may already possess RCRA identification numbers to the burden of being assigned multiple numbers, EPA proposed to use the numbering system adopted under RCRA for this rule.

The RCRA numbering system currently assigns each notifier a 12-digit number. The first 2 characters indicate the State in which the facility is located; the remaining 10 characters are the Dun and Bradstreet Data Universal Numbering (DUN) system numbers. The DUN system provides a comprehensive listing of U.S. businesses. Federal agencies, which are not included in the DUN system, would be assigned their General Services Administration Real Property Number. State and local government installations would also be assigned unique numbers. Where notifications are submitted by mobile disposal facilities, EPA will issue each a unique number that ties it to the business' corporate headquarters or other business location identified in Item III of the notification form.

Upon notification and verification, persons will be issued a unique EPA identification number. As of June 4, 1990, it will be illegal to receive regulated PCB waste from a person who does not have an EPA identification number. Also, on this same date, it will be illegal to deliver any regulated PCB waste to another waste handler who does not have an identification number. Generators of PCB waste who are exempted from notification requirements under § 761.205(c)(1) will be deemed as having received by rule the identification number "40 CFR PART 761." In the event a person notified EPA within the 60-day period provided for notification, and EPA does not issue or confirm an identification number for that person, the person is entitled to use either the number "40 CFR PART 761" or a specific number assigned to that person by EPA or a State under RCRA, until EPA assigns or confirms the use of an identification number under this rule.

EPA received several comments on the identification numbers. One commentor suggested that the definition of "EPA identification number" be changed to mean the number assigned to a facility or "mobile technology." EPA is not making this change, since it is the individual generator, transporter, commercial storer, or disposer that receives an identification number and not a technology. Each mobile facility, i.e., unit, will receive a unique identification number.

Several comments questioned the use of the generic identification "40 CFR PART 761" for generators exempted from acquiring a unique identification number, and suggested leaving a blank, or allowing the use of one company number for all points of origin. EPA disagrees that the generic number serves no purpose. Filling in a number gives evidence that the manifester is aware of the rules and has consciously decided that the company does not require a unique identification number, if it is an exempted generator, or that it has not yet received its identification number, if it is a generator/storer, commercial storer, transporter, or disposer. A company that has a State or federally issued RCRA identification number must report that number, and EPA will confirm the use of that number for TSCA PCB disposal purposes, provided adequate information is submitted to enable EPA to verify the existing number.

A company seeking separate identification numbers for its different sites asked how to get them. The answer is that each site should request its own number, being careful to give that site's address. This answer also applies to a question concerning transformer service companies and salvage companies that do not maintain § 761.65 (b) or (c)(7) storage areas. Any facility that may have PCB waste manifested to it must

have an EPA number. Therefore, any such facility must notify EPA of its PCB waste activity, to receive an identification number.

The question arose in comments as to which State's manifest form a generator should use when there are conflicting requirements between the State in which the PCB waste was generated and the State to which the PCB waste was being transported. In particular, the Arkansas Department of Pollution Control and Ecology was concerned there might be a problem since Arkansas requires generators, from any State, that ship wastes to Arkansas to use its pre-printed manifests with a State-controlled document number. This requirement poses no problem. Any company shipping PCB waste to a State (the consignment State) that supplies and requires use of its manifest must use that State's manifest. If the consignment State does not require use of its own manifest, and the State in which the PCB waste was generated (the generator State) supplies and requires the use of its own manifest, the company shipping the PCB waste must use the generator State's manifest. If both States require use of their manifests, the manifest of the consignment State must be used. If neither the consignment State nor the generator State requires use of its own manifest, the shipping company should use the universal manifest. These requirements are in § 761.207 (b) through (f) of the final rule. This provision is identical to that used under RCRA for determining the State whose manifest should be used.

2. *Who must file notifications.* This rule requires certain generators and all disposers, transporters, and commercial storers of regulated PCB waste to file a notification form identifying their PCB waste facilities and activities. Each generator, transporter, disposer, and commercial storer of PCB waste who notifies under this rule will receive from EPA a unique identification number identifying each facility involved with the handling of PCB wastes. The only generators who must notify EPA as unique facilities under this rule are generators who store the PCB waste they generate at storage facilities which they own or operate, and which are subject to § 761.65 (b) or (c)(7) storage facility standards.

Generators, commercial storers, transporters, and disposers of PCB waste must check the appropriate box, or boxes on the form identifying their type of PCB waste activity.

a. *Facilities that have notified previously under RCRA.* In instances where facilities have previously been issued RCRA identification numbers, the facility must indicate on the space provided in Item II of the form their RCRA identification numbers. After verification, EPA will use for TSCA purposes the same identification numbers previously issued to facilities by EPA or States under RCRA. However, EPA emphasizes that facilities which have previously notified under RCRA are required to notify EPA again for purposes of identifying under TSCA the location and nature of their PCB waste activities, as well as the identification numbers previously issued to them.

b. *Notification by generators.* This rule adopts an approach which is different from that used under RCRA regarding the notification requirements that apply to generators of PCB waste. EPA has concluded that it would not be efficient to require separate notifications by all persons who generate PCB waste. The universe of PCB waste generators is dominated by many thousands of end users of PCB electrical equipment. While some of these users may possess substantial inventories of PCBs and PCB Items, and therefore routinely generate PCB waste, many of these users possess only a few PCB articles that would potentially be subject to TSCA disposal requirements. The utility to EPA of a database that contained information on the one-time or sporadic generators of PCB waste would be far outweighed by the costs of submitting and processing the information.

Therefore, EPA is requiring a modification of the RCRA approach for generators to focus upon the larger volume users, owners, and processors of PCBs who store PCB waste which they generate at their own § 761.65 storage facilities. These are the generators who may be expected to utilize PCB disposal services on a fairly regular and/or large-scale basis, and for whom it is administratively efficient to require particular information about their PCB waste generation activities. It is appropriate that these generator/storers be a part of EPA's database of regular handlers of PCB waste.

In submitting their notifications to EPA, members of this class of generator/storers will submit a notification form for each of their storage areas that is subject to § 761.65. EPA will issue a unique identification number to each notifying storage facility, and this identification number will correspond to the physical location of the facility. EPA anticipates that this class of generators will consist primarily of utilities and other heavy industrial users of PCB electrical equipment. These users typically operate storage and maintenance yards where PCB waste is likely to be generated or consolidated prior to off-site disposal. Also, members of the transformer service and repair industry are likely to be members of this class, because of the significant volumes of PCB waste which they may generate during the routine servicing, rebuilding, repairing, retrofilling, or salvaging of electrical equipment.

Although there was general support for EPA's universe of reporting entities, comments included various suggestions, such as including a "small quantity generator" exemption; excluding utilities, since they are all presumed to handle PCBs and already have RCRA numbers; requiring notification from any large quantity generator, regardless of whether the facility had a § 761.65(b) storage facility; and exempting permitted disposers from notifying.

EPA disagrees with these comments and has not made the requested changes for the following reasons:

A generator who has a § 761.65 storage area is rarely a "small quantity generator." EPA considers it more likely that generators of significant quantities of PCB waste will have § 761.65 facilities, while sporadic generators of small quantities of PCBs will not.

While utilities may usually handle PCBs and already have RCRA identification numbers (which will be used for PCB purposes after notification to and verification by EPA), EPA has determined that the rule does not impose so large a burden on any entity by requiring it to notify as to warrant making such an exemption.

Similarly, the burden associated with notification does not warrant creating an exemption for permitted disposal facilities.

c. *Generators who need not notify.* Other generators of PCB waste who do not maintain storage areas subject to the § 761.65 storage facility standards are exempt from the requirements to notify EPA and obtain unique identification numbers. These exempt generators will instead use the generic identification number "40 CFR PART 761" on their manifests in lieu of a unique facility identification number.

This exemption operates only as an exemption from the generator notification requirement; it does not exempt these generators from the obligation to prepare manifests to accompany their shipments of PCB wastes. As explained more fully in Unit III.J, this rule requires that all shipments involving PCB waste be fully manifested, if any part of the shipment contains PCBs at levels equal to or exceeding 50 ppm or less than 50 ppm as a result of dilution from greater than 50

ppm PCBs. Any generator initiating such a PCB waste shipment must initiate a manifest under this rule.

3. *Notification process.* EPA proposed a sample notification form and instructions for all those who were required to notify. Members of the public affected by the final rule were encouraged to obtain or make copies of the rule and the sample Notification Form, and to distribute them to the other generators, commercial storers, transporters, and disposers with whom they deal so that all may be in compliance with the requirement to file a notification form within 60 days of the final rule's effective date.

4. *When to notify.* The final rule provides for a 60-day period after the rule's effective date for notifications to be received by EPA.

EPA recognizes that this expedited schedule poses some potential for confusion among the generators desiring to procure PCB disposal services, as they will need to be certain that they are dealing with transporters, commercial storers, and disposers who have in fact complied with the notification requirements. Therefore, to facilitate an orderly notification process, EPA recommended that entities who perceived that they were likely to be affected by these notification requirements notify EPA during the 90-day period immediately after publication of the proposed rule. The sample notification form in the proposed rule was to be used to submit an early notification to EPA. EPA will process these early notifications first on a priority basis. These entitites should have no difficulty in demonstrating to their customers compliance with the requirement to submit a notification no later than 60 days after the final rule's effective date.

EPA believes that it will be able to process most of the notifications within 120 days of the final rule's effective date. However, EPA may not be able to issue all identification numbers within the 120-day period. Accordingly, in the event a person has notified EPA within the 90-day period provided in the proposed rule or the 60-day period provided in the final rule, and EPA has not issued or confirmed an identification number for that person within the 120-day period provided, the person is entitled to use either the number "40 CFR PART 761" or a specific number previously assigned to that person by EPA or a State under RCRA. The person is entitled to use this number only until EPA assigns or confirms the use of an identification number under this rule. Thus, no person who has notified EPA in a timely fashion will be prevented from continuing his PCB waste activities for lack of an identification number. EPA encourages persons to include a date-stamp and return copy and a self-addressed envelope, along with their notifications, to ensure proof of timely notification.

In addition, any non-exempt generator, commercial storer, transporter, or disposer of PCB waste who begins PCB waste activities after the effective date of the final rule is required, prior to handling any PCB waste, to notify EPA and receive an EPA identification number in accordance with this rule. Such new entrants into the regulated community will not be allowed to operate until they receive an identification number. In the case of disposers of PCB waste and commercial storers of PCB waste, new entrants into these businesses are required to obtain both EPA identification numbers and approvals before they commence disposal or storage operations. EPA recommends that applicants for TSCA disposal or storage approvals submit their notification forms during the period of review of their disposal or storage approval applications. EPA emphasizes that in no case will the requirements to notify and obtain identification numbers excuse non-compliance by any entity with the 1-year limit on storage prior to disposal under § 761.65(a).

A commentor asked that a 30-or 60-day grace period be given to a generator to obtain an identification number when he decides to convert to § 761.65(b) storage. EPA is not making this change because EPA is confident that there is sufficient time between the time a generator decides to include a § 761.65(b) storage facility at his site and the time the facility is actually ready to operate for the generator to notify EPA and get an identification number in time to operate the facility.

5. *Where to notify.* There are numerous Federal officials responsible for distinct areas of the PCB disposal program, and some States also regulate PCB disposal under their own regulatory programs. EPA believes that the notification process can work well only if administered centrally. Therefore, notifications by PCB waste handlers must be submitted to EPA Headquarters at the following address: Chief, Chemical Regulation Branch, Office of Toxic Substances (TS–798), Rm. NE–117, Environmental Protection Agency, 401 M St., SW, Washington, DC 20460.

6. *Information required for notification.* The proposed notification form was set out at § 761.205(a)(3) of the proposed rule, with the note that it would not be reprinted in the final rule. However, since some changes were made in the form in response to comments by the Office of Management and Budget (OMB) and others, the form is reprinted here in the preamble to the final rule and may be used to notify EPA of PCB waste handling activities. It does not appear in the codified text.

The proposed form was based on existing EPA Form 8700–12, "Notification of Hazardous Waste Activity." The form was tailored to the requirements specified under this rule for notification under TSCA. However, the general format of the Hazardous Waste Activity form was preserved as far as possible, to facilitate compliance and data entry.

There were some comments on the proposed notification form, and those suggestions which clarified the form have been incorporated into the final rule. However, no one who used the proposed form need notifiy again. Instructions in § 761.205(a)(4) now specify an area on the form in which to name the owner of the facility. Also, the burden box which estimates the public reporting burden for this collection of information, which did not appear on the form itself, is now on the form. The instructions on the form have been changed in Items III and IV, as suggested, to substitute "mobile facility" for "mobile incinerator," since not only incinerators, but all other approved alternative disposal systems also require notification to EPA. Also, in Item VI.A of the instructions on the form for a generator with an on-site storage facility, the references have been corrected to cite § 761.65 (b) or (c)(7).

An area at the top of the form is labeled "For Official Use Only." This unnumbered section is to be completed by EPA officials. In this space, EPA will enter any comments, the notifier's EPA identification number, an approval code, and the date on which EPA receives the notification form.

Items to be filled out by the respondent are numbered I through VII. The name of the facility and the name of the owner of the facility submitting the notification are to be indicated in Item I, and if the facility has already received an EPA identification number under RCRA, that number is to be supplied in Item II.

Item III requests the mailing address of the respondent, while Item IV asks for the actual location of the installation, since the location (a physical address) may not be the same as the mailing address. In the case of mobile disposal facilities, the respondent is instructed to write "mobile" on the space in Item IV, and to supply on the space in Item III, the mailing address of the facility's

installation contact identified in Item V. A commentor asked whether separate notification would be required for each mobile unit, or one notification for the process. Since notification is to facilitate tracking of PCB waste, not for a technology, each mobile unit must have its own identification number. Each unit must be identified on the form so that each can be assigned a unique number that is related to the parent organization.

Item V, Installation Contact, asks for the name of an individual at the facility who can be contacted by EPA to clarify information on the notification form or provide information in the event of a spill or other emergency. The individual's telephone number should be specified here as well.

Item VI, Type of PCB Waste Activity, asks the respondent to indicate whether the facility to which the notification applies is a generator, commercial storer, transporter, or approved disposer of PCB waste. "Commercial storer of PCB waste" here refers to those storage facilities which store PCB waste generated by others or PCB waste that was removed while servicing the equipment owned by others and brokered for disposal. The term does not apply to the storage sites maintained by the owners or users of PCBs who initially generate PCB waste when they remove PCBs from service. Where transporters and disposers also maintain storage facilities for PCB waste subject to § 761.65(b) or (c)(7), they should check both the commercial storer box and the relevant transporter or disposer box in this section.

The final section of the form, Item VII, Certification, must be signed and dated by the owner, operator, or authorized representative of the installation. An "authorized representative" is a person responsible for the overall operation of the facility. A commentor requested that the certification statement be replaced with the one required under the National Pollutant Discharge Elimination System program, which is based on the certifier's knowledge and belief. EPA has included a stringent certification to ensure that when a corporate manager makes the certification, the manager has personally ensured that the persons upon whom the manager has relied have themselves certified that the information is true. As EPA's system of regulating disposal of PCB waste depends on the accuracy of information submitted on the notification form, EPA finds submission of inaccurate information unacceptable. This certification is similar to that required under RCRA. The proposed certification remains in the final rule.

The revised Notification Form (EPA Form 7710–53) follows:

BILLING CODE 6560-50-M

EPA

United States Environmental Protection Agency
Washington, DC 20460

Notification of PCB Activity

Form Approved
OMB No. 2070-0112
Approval expires 12-31-92

No information on this form may be claimed as TSCA CBI.

Return To:

Chemical Regulation Branch
Office of Toxic Substances TS-798
U.S. Environmental Protection Agency
401 M St., SW
Washington, DC 20460

For Official Use Only

TSCA PCB ID Number

I. Name of Facility

Name of Owner of Facility

II. EPA Identification Number *(If already assigned under RCRA)*

III. Facility Mailing Address *(Street or PO Box, City, State, & ZIP Code)*

IV. Location of Facility *(No. & Street, City, State, & ZIP Code)*

V. Installation Contact *(Name and Title)*

Telephone Number *(Area Code and Number)*

VI. Type of PCB Activity *(Mark 'X' in appropriate box. See Instructions.)*

- ☐ A. Generator with onsite storage facility
- ☐ B. Storer *(Commercial)*
- ☐ C. Transporter
- ☐ D. Permitted Disposer

VII. Certification

Under civil and criminal penalties of law for the making or submission of false or fraudulent statements or representations (18 U.S.C. 1001 and 15 U.S.C. 2615), I certify that the information contained in or accompanying this document is true, accurate, and complete. As to the identified section(s) of this document for which I cannot personally verify truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate, and complete.

Signature	Name and Official Title *(Type or print)*	Date Signed

Paperwork Reduction Act Notice

The public reporting burden for this collection of information is estimated to average 1.5 hours per response. This estimate includes time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information to the Chief, Information Policy Branch (PM-223), US Environmental Protection Agency, 401 M Street, 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.

EPA Form 7710-53(12-89)

Item-by-Item Instructions for Completing EPA Form 7710-53

Return completed form to:

Chemical Regulation Branch
Office of Toxic Substances
TS-798
U.S. Environmental Protection Agency
401 M St., SW
Washington, DC 20460

No information on the form may be claimed confidential.

Type or print in black ink all items, except Item VII, "Certification". If you must use additional sheets, indicate clearly the number of the item on the form to which the information on the separate sheet applies. In the area marked "For Official Use Only" enter the name of the owner of the facility in the box provided.

Item I - Name of facility: Enter name of the facility.

Item II - EPA identification number (if already assigned under RCRA): Enter the identification number the facility was assigned under the RCRA hazardous waste notification regulations. If no identification number has been assigned, leave this space blank.

Items III and IV - Facility mailing address and location: Complete Items III and IV. Please note that the address you give in Item IV, "Location of Facility", must be a physical address, not a post office box or route number. If the mailing address and physical location are the same, you may enter "Same" i Item IV. If the facility is a mobile facility, you may enter "mobile" in Item IV, and provide the mailing address for the installation contact in Item III.

Item V - Installation contact: Enter the name, title, and business telephone number of the person who should be contacted regarding information submitted on this form.

Item VI - Type of PCB activity: Mark the appropriate box(es) to show which PCB activities are taking place at this facility.

A. Generator with onsite storage facility: You are a generator with an onsite storage facility under this notification requirement if you are a user, owner, or processor of PCBs or PCB items and you maintain your own storage facilities subject to 40 CFR 761.65(b) or (c)(7) for PCBs. If you are a generator with an onsite storage facility, mark an "X" in this box.

B. Commercial storer: You are a commercial storer if you own or operate a storage facility which is subject to the storage facility standards of 40 CFR 761.65(b) or (c)(7), and which engages in offsite storage activities involving the PCB waste generated by others. Most commercial storers of PCB waste perform waste storage services in exchange for a fee or other compensation, but the receipt of compensation is not necessary for your storage facility to qualify as a commercial storer of PCB wastes under this notification requirement. It is sufficient that your facility stores PCB wastes generated by others. See definition of commercial storer in 40 CFR 761.3. If you are a commercial storer, mark an "X" in this box.

C. Transporter: If you move PCBs by air, rail, highway, or water, then mark an "X" in this box.

D. Permitted disposer: If you currently hold a valid EPA permit to dispose of PCBs in concentrations exceeding 50 ppm in a landfill, through alternative technology or incineration, mark an "X" in this box.

Item VII - Certification: This certification must be signed by the owner, operator, or an authorized representative of the facility. An "authorized representative" is a person responsible for the overall operation of the facility (i.e., a plant manager or superintendent, or a person of equal responsibility). All notifications must include this certification to be complete.

BILLING CODE 6560-50-C

7. *Claims of confidentiality.* TSCA section 14 addresses the confidentiality of business information reported to EPA, or otherwise obtained by EPA, in administering TSCA. (15 U.S.C. 2613(a)). EPA's rules implementing section 14 appear in 40 CFR part 2.

While information submitted in a reporting form may ordinarily be claimed as confidential, EPA has purposely designed the notification form so that its preparation will not require the submission of any data that EPA believes would be confidential business information (CBI) under TSCA. The form merely asks for the most basic of information regarding the name, location, and general description of PCB waste handling activities engaged in by notifying entities. It does not ask for information on quantities processed, technical processes, financial information, or for any other information which, when linked to a company's name, could adversely affect a company's competitive position.

EPA has determined that the following information will not be treated as confidential business information: the name of the facility, other EPA identification numbers issued to the facility, the facility's mailing address, the name of the owner of the facility, the location of the facility, the facility's installation contact, or the type of PCB activities engaged in at the facility. The reasons for this determination are:

a. The information is reasonably available from other sources.

b. If disclosed, it is unlikely to affect adversely the submitter's competitive position.

c. The information is neither commercial nor financial information protected from disclosure under TSCA or the Freedom of Information Act.

This information will be disclosed to the public without further notice to the submitter unless the submitter provides a written justification (submitted with the notification information) which demonstrates extraordinary reasons why the information is entitled to confidential treatment.

EPA received no comments indicating a need for the submission of confidential business information.

8. *Relationship to CERCLA notifications.* In addition, EPA emphasizes that the notification requirements contained in this rule are in no way related to and do not affect the independent notification requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. The rule does not alter the responsibilities of a person in charge of an onshore or offshore facility or vessel to notify the National Response Center of the release of a reportable quantity (RQ) or more of PCBs or any other hazardous substance as defined under CERCLA.

Under CERCLA sections 103(a) and (b), any person in charge of an offshore or onshore facility or vessel is required to report to the National Response Center as soon as he or she has knowledge of any release of a hazardous substance that is equal to or greater than the RQ. However, as stated in a final rule published on April 4, 1985 (50 FR 13461) regarding RQs, disposal of hazardous substances at a disposal facility in accordance with EPA regulations is not subject to the CERCLA notification requirements. Thus, if PCB waste is properly disposed of in a TSCA-approved facility, and this is properly documented through manifests and other records, CERCLA notification is not required. However, spills and accidents which occur during disposal activities, and which result in releases of an RQ or more of PCB waste, must be reported to the National Response Center. Additionally, any PCB releases (as opposed to proper disposal) of an RQ or more from a TSCA storage or disposal facility must be reported under CERCLA.

J. Manifesting

The proposed rule discussed in detail the use of a manifest system by EPA under RCRA, and Congress' concern that the system be used for the disposal of PCBs (53 FR 37445, September 26, 1988).

1. *Uniform Manifest.* EPA proposed to require the use of the Uniform Hazardous Waste Manifest (Uniform Manifest) form by the handlers of PCB waste. The use of the Uniform Manifest for PCB waste shipments will facilitate compliance with both TSCA and RCRA, and it will avoid the confusion and expense that would arise from the requirement of any other document. EPA believes that the Uniform Manifest can be adapted fairly easily to PCB wastes, with only slight interpretive changes, and a slight change in the copy distribution requirements.

The final rule adopts the use of the Uniform Hazardous Waste Manifest as proposed.

2. *Who must originate a manifest.* EPA proposed that all generators of PCB waste at concentrations of 50 ppm or greater manifest their waste, and rejected the use of any "small quantity generator" exclusion. The proposed rule contained no small quantity cutoff provision because so much of the PCB universe consists of small quantities of relatively high concentration PCB waste, such a provision could lead to manifesting by utilities and large industrial users only and leave occasional disposal of high concentration PCB waste untracked.

There was little comment on the lack of distinction in the proposed rule between large and small quantity generators, and the final rule is not different from the proposed rule in this case.

EPA proposed to require manifests for shipments containing regulated PCB waste at the 50 to 499 ppm level, as well as for shipments containing higher concentration PCB waste at the 500 ppm or greater level. EPA solicited comment on the incremental burdens and cost effectiveness of requiring manifests at the 50 ppm level as compared with using 500 ppm as the trigger.

There was only one comment that opposed manifesting at the 50 rather than the 500 ppm level. This commentor felt that the 500 ppm level would significantly reduce the paperwork burden of those utilities which own only equipment containing less than 500 ppm. The commenter also suggested that the 32 States which do not currently require manifests for PCBs would probably follow EPA's lead and also use the 500 ppm level, thus making 500 ppm the level used by the majority.

EPA understands that raising the level for manifesting could ease the burden in some instances, but since the States that now do require manifests at the 50 ppm level would probably continue to do so, doubts that there would be much of an overall advantage. Since no commentors specifically challenged EPA's assertion in the proposed rule that overall, the environmental benefits of manifesting wastes greater than 50 ppm far outweighed the administrative costs, and since all other comments approved of the 50 ppm level for manifesting, there is no reason to change the requirement in the final rule, and the 50 ppm level remains.

Some of those who approved of the 50 ppm level requested some clarifications to make certain that items whose disposal is not regulated by the current regulations would not now require manifesting. Any PCB or PCB item that is not subject to disposal requirements is not subject to manifesting. Examples of these are drained PCB-Contaminated carcasses for salvage, decontaminated PCB Containers and drained PCB-Contaminated containers, and small capacitors; these items do not require manifesting. Shipments of empty waste containers, the concern of another commenter, do not require manifesting if the containers are to be continued to be

used and are not to be disposed. When the decision is made that they are no longer to be used and are to be disposed, the containers become PCB waste that must be manifested and disposed, unless decontaminated in accordance with procedures set out in § 761.79. As discussed in Unit III.D, PCB samples do not have to be manifested for disposal until the laboratory determines that their use for analytical or enforcement purposes has ended, at which time they become PCB waste stored for disposal.

This rule requires the manifest to be prepared by the generator at that time when the PCB waste is first introduced into commerce in a manner that will cause the waste to leave the generator's control. This latter condition will generally be triggered when the generator turns its PCB waste over to a transporter for delivery to an off-site storage or disposal facility. The condition will also be satisfied when the PCB waste is placed on the generator's own transport vehicle for shipment to a commercial off-site storage or disposal facility, since the PCB waste is then being introduced into commerce in a manner that will cause the generator to lose control of the waste. A manifest need not accompany the shipment via transport vehicle of PCB wastes to a storage or disposal facility owned or operated by the end user of PCBs and PCB Items, because these generators have not yet relinquished control over the PCB waste. This exception applies to both transport via the generator's vehicles and transport by an independent transporter, since, in the latter case, the transporter is presumed to be acting pursuant to the generator's instructions. Apart from the exception for shipments between the end user's own facilities, EPA construes the provision regarding when PCB waste leaves the generator's control strictly, so that the manifest requirements will have the broadest possible scope.

EPA emphasizes that this rule applies only to the Federal manifesting requirements for the transport of PCB wastes that are regulated for disposal under TSCA. No provision or exception contained in this rule is construed to alter or limit the applicability of any requirement in existing DOT regulations pertaining to the transport of hazardous materials, including PCBs.

3. *Information required on the manifest.* The manifest which generators will originate is designed to include only the information necessary to identify accurately the persons handling the PCB waste, and the nature and quantity of the waste. These information requirements consist essentially of the Federal Information Requirements described in the March 20, 1984 regulation which announced the adoption of a Uniform Manifest (49 FR 10497). Use of the manifest does not supersede any other requirements for PCB waste under 40 CFR part 761.

a. *Manifest document number.* The EPA identification number and the manifest document number consists of the generator's EPA 12-digit identification number, plus a unique suffix of up to 5 digits which the generator adds to ensure the uniqueness of the manifest document number for each shipment from each site of generation during a calendar year. The 12-digit identification number consists of the generator's unique identification number issued after notification to EPA, or the 12-digit reference "40 CFR PART 761" for those generators who are not required to notify specifically under this rule.

b. *Page number.* Generators are required to identify on the first page of a manifest the total number of pages in that manifest, i.e., the first page (EPA Form 8700-22) plus the number of continuation sheets, if any. For example, if the manifest consists of only one page, and there is no continuation sheet, then the correct entry would be "Page 1 of 1." If the manifest consists of one front page (Form 8700-22) and one continuation sheet, the correct entry is "Page 1 of 2."

c. *Generator name and address.* The address to be entered here is the mailing address of the generator facility to which the designated storage or disposal facility must return promptly a completed copy of the manifest. The generator enters the mailing address of the location that will administer the returning manifest forms, which could be the company's billing office, corporate headquarters, or the site of generation. While the address entered here need not identify the particular site of generation, the generator's manifest records will be maintained so that unique waste shipments (identified by the unique manifest document number assigned by the generator) can be identified with the actual sites of generation.

d. *Generator's telephone number.* This is the number of a person who can provide information about the shipment in the event of an emergency, such as when a transporter cannot deliver the PCB waste to the designated disposer or commercial storer.

e. *Transporter #1: company name and EPA ID number.* The name and U.S. EPA 12-digit identification number of the initial transporter of the waste is entered.

f. *Transporter #2: company name and EPA ID number.* The name and U.S. EPA 12-digit identification number of the second transporter, if applicable, is entered. Space for additional intermediate transporters is provided on the continuation sheet for entry in the order they are used.

g. *Designated facility name, site address, and U.S. EPA ID number.* The definition of "designated facility" has not been changed in the final rule. The generator enters the name, site address, and EPA 12-digit identification number of the off-site commercial storage or disposal facility which the generator has designated to receive its PCB waste. The site address is necessary to inform the transporter where the shipment must be delivered. The designated facility must always be an approved facility for the disposal of PCBs, or an off-site commercial storage facility with either interim or final approval under § 761.65(d). Ordinarily, transfer facilities and other temporary storage facilities used by transporters for storage of PCB waste during ordinary transport would not be listed here as designated facilities, unless the PCB waste will remain in storage at such a site for greater than 10 days. Likewise, an end user's own storage facility would not ordinarily be listed here as the designated facility, unless the laws of a State or local government require manifests for shipments between the generator's own facilities.

h. *Container number and type.* The generator indicates both the number of containers, and, using the instructions in Table 1 of the form instructions, the type of containers for each shipment.

i. *U.S. DOT description (including: proper shipping name, hazard class, and ID number).* The generator completes this section consistent with DOT's Hazardous Materials Regulations (HMR; 49 CFR parts 171 through 179). However, only those packages containing PCBs that meet the definition of hazardous substance in 49 CFR 171.8 are subject to the HMR. The DOT does not consider PCBs subject to the Uniform Hazardous Waste Manifest (UHWM) as specified in todays rulemaking as a hazardous waste. The DOT regulates as hazardous waste only those materials that are subject to the UHWM as specified in 40 CFR part 262 (see the definition of hazardous waste in 49 CFR 171.8). In accordance with the HMR, the generator has the option of using either of the following descriptions when the PCBs meet the definition of hazardous substance at 40 CFR 171.8: "RQ,

Hazardous substance, liquid *or* solid, n.o.s., ORM–E, NA9188 (Polychlorinated biphenyls *or* PCBs)" or "RQ, ORM–E, liquid *or* solid, n.o.s., NA9188, (Polychlorinated biphenyls *or* PCBs)". Section 172.203(c)(2) of 49 CFR allows the Letters "RQ" to be placed at either the beginning or the end of the DOT basic description.

Commentors also pointed out that the shipping description "Polychlorinated biphenyls, 9 (ORM#E), UN2315" is used only for international transportation. According to DOT, this description is occasionally used for transportation solely within the United States when shipments of PCBs are offered for transportation in accordance with either the "International Civil Aviation Organization Technical Instructions For Safe Transport of Dangerous Goods by Air" or the "International Maritime Dangerous Goods Code" (see 49 CFR 171.11 and 171.12). Though this is an acceptable shipping description for transportation by air or water repectively, the use of this description is not to be construed as an exemption from EPA to import or export PCBs. Compliance with the applicable provisions of the HMR, including subpart C of 49 CFR part 172 which deals with shipping paper requirements (e.g., the UHWM), is required for the transportation of hazardous materials.

When packages of PCBs do not meet the DOT definition of hazardous substance in 49 CFR 171.8, i.e., are not regulated by DOT as a hazardous material, the generator must use either of the following phrases in lieu of the DOT description: (1) "polychlorinated biphenyls"; or (2) "PCBs".

The generator also enters here the total quantity and unit of measure (volume or weight) of the shipment. This measurement would be gross weight when the waste container is to be discarded (e.g., a drum containing waste), and net weight when it is not discarded (e.g., bulk shipments by tank truck). The quantity description does not include fractions.

j. *Special handling instructions and additional information—date of removal from service for disposal.* This section is used by the generator for several purposes. For example, ICC Bill of Lading information, placarding and marking information required by EPA or DOT, or emergency response telephone numbers may be included on this space. The PCB waste code number, PCB1 or PCB2, as discussed in Unit III.G, should be entered here. However, the primary purpose of this space in the rule is to record the identification numbers and date of removal from service for disposal for the PCB Articles, PCB Containers, and PCB Article Containers contained in the PCB waste shipment.

The question has arisen whether the date of removal from service for disposal is different from the date the PCB waste is placed into storage for disposal. At the time § 761.65(a) was promulgated, EPA assumed that in the great majority of cases when an item was designated for disposal it went directly into a storage-for-disposal facility and there was no time lag between the date removed from service for disposal and the date it was placed into storage for disposal. Thus, the intent of § 761.65(a) was that PCB waste be disposed of within 1 year from the date it was designated for disposal, i.e., the date taken out of service for disposal.

If this space is not adequate for entering all the relevant dates, the generator must attach a typewritten continuation sheet to the manifest. The continuation sheet lists the PCBs and PCB Items contained in the shipment and their dates of removal from service for disposal.

Recording the date of removal from service for disposal on the manifest generated many comments. The requirement was proposed because the date of removal from service for disposal must be relayed to other handlers of the PCB waste to ensure that disposal takes place within 1 year of storage for disposal. This requirement appeared to be the simplest way to relay dates through middlemen and onto subsequent manifests in the chain of documents leading to a disposal facility. Comments called the requirement duplicative and burdensome, particularly, since the dates then had to be transposed to a facility's annual records. The requirement was also criticized for imposing EPA's enforcement responsibilities on generators and disposers. It was felt to be especially burdensome if each individual item and each item in a container was to be marked, resulting in a significant number of items and numbers being logged several ways.

EPA understands these concerns, but insists that including the dates of removal from service for disposal is essential to the tracking system. However, the system of date recording applies only to distinct PCB Articles, PCB Containers, and PCB Article Containers identified on a manifest, and not to the individual items in a PCB Container or PCB Article Container. The earliest date of removal from service for disposal applies to the entire contents of a container. To respond to claims of duplication, however, although the final rule requires that the dates be transferred to the annual document log, the final rule does not require transposing the dates to the annual report which must be submitted to the Regional Administrator.

The proposed rule did not specify that the date referred to for removal from service on the manifest was the date of removal for disposal, but that is the intended meaning for this date and the date to be used. Several comments indicated concern that the codified language did not include the date of removal from service for disposal as a requirement. The space provided for additional information on the form allows the use of the form for different purposes. The requirement to enter the date of removal from service for disposal appears at § 761.207(a) (1) through (3).

k. *Generator certification.* The generator is required to read, sign, and date the certification statement at the initiation of each PCB waste shipment. To the extent that the form requires a generator of PCB waste to certify to waste minimization efforts, the requirement is satisfied as long as the generator has not increased the volume of waste by any act that contravenes the dilution prohibition of the PCB disposal regulations. Generators whose generation of PCBs qualify as "excluded manufacturing processes" or "recycled PCB processes" could certify as long as they are in compliance with the PCB release restrictions set forth for these processes at § 761.3. Comments on the certification language included a preference for the kind of statement used for the National Pollution Discharge Elimination System. The decision to use the proposed certification language is discussed in Unit III.I.6.

l. *Acknowledgment of acceptance by transporter.* A transporter is required to acknowledge on the manifest the acceptance of the PCB waste shipment by signing the manifest and recording the date of acceptance, as was proposed.

m. *Discrepancy indication space.* The Discrepancy Indication Space is used for recording significant discrepancies, as defined below in Unit III.K.5, between the PCB waste described on the manifest and the PCB waste actually received by the designated PCB storage or disposal facility, as was proposed.

n. *Acknowledgment of acceptance by designated facilities.* The owner or operator of the designated commercial storage or disposal facility is required to acknowledge here the acceptance of the PCB waste shipment by signing the

manifest and recording the date of acceptance, as was proposed.

o. *Optional information required by States.* In addition, the Uniform Manifest form includes optional information spaces to meet the basic information requirements which States have the option of imposing. The optional State information items appear at the upper right portion of the manifest form, and they are shaded and headed by letters (rather than numbers) to set them apart.

4. *Copies of the form.* EPA will not print copies or sets of the manifest form for public use. Generators and others needing copies of the form should first contact their State office to determine if their State has printed copies available. If forms are not available from the State, camera-ready copies of the form for printing purposes can be obtained from the State, or the EPA Regional Office, or EPA Headquarters.

See the discussion in Unit III.I.1 to determine which State's manifest form a generator should use when there are conflicting requirements between the State in which the PCB waste was generated and the State to which the PCB waste is being transported.

5. *Use of the manifest.* The manifest under RCRA consists of at least the number of copies which will provide the generator, each transporter, and the owner or operator of the designated storage or disposal facility with one copy each for their records, and another copy to be returned to the generator. EPA proposed that manifests for PCB waste under TSCA also include sufficient copies for the generator, the initial transporter, each intermediate transporter, the designated commercial storage or disposal facility, and another copy to be returned to the generator by the designated facility. These requirements remain in the final rule.

In addition, the proposed rule would have required that generators of PCB waste prepare one additional copy of the manifest. The generator was to send this additional copy directly to the designated facility by Registered Mail, Return Receipt Requested, immediately after the consignment of the PCB waste to the initial transporter. This advance manifest copy was to have been sent to the designated facility independently of the delivery of the PCB waste. Under the proposed rule, the generator's obligation to send an advance copy of the manifest to the designated facility was to have been a non-delegable obligation which only the generator of PCB waste could perform.

EPA proposed this additional copy requirement on generators as a means of ensuring further the integrity of the manifest system. As previously indicated, the GAO report on detection of illegal hazardous waste disposal activities highlighted several instances in which transporters had forged the designated facility's copy of the manifest and returned it to the generator. The return of the forged copy signified to the generator that the PCB waste had arrived at the designated facility, when in fact, the transporter had dumped the PCB waste or otherwise handled it improperly. The transporter profited by retaining both the shipping fee and the disposal fee, rather than passing the disposal fee on to the designated disposal facility.

The submission of an advance copy of the manifest directly to the designated facility was expected to deter transporters or brokers from acting improperly with respect to the PCB waste. Disposers and commercial storers would have been alerted to expect the delivery of the PCB waste, and generators would have obtained a preliminary verification (the signed Return Receipt) of the disposal arrangements from the designated facility that was independent of the transporter's efforts.

In response to EPA's request for comment on the appropriateness and feasibility of this additional verification requirement, EPA received many more opposing than approving reactions. It was felt that this requirement would not solve the problems that inspired it for a number of reasons including, among others, that PCB waste could arrive before the advance copy of the manifest, that the generator might change his mind and ship the PCB waste to a different designated facility without notifying the original designated facility, that there were sufficient safeguards built in by the 45-day exception reports and final liability by the generator, and that it was unnecessarily burdensome.

EPA partially accepts these arguments and has eliminated the requirement from the final rule; however, the concern still remains for assuring the delivery of PCB waste to the designated facility. Therefore, EPA has substituted in the final rule a requirement that generators who use independent transporters verify receipt of the PCB waste by the designated facility with a telephone call, or other means of verification agreed upon by both parties, after receiving the signed copy of the manifest acknowledging acceptance of the shipment. EPA is requiring those generators to list confirmation calls in the annual document log. Thus, generators who use their own transportation vehicles or those of the designated facility will have no further verification obligation after sending the PCB waste out. Users of independent transporters will have only to make a telephone call, or use other agreed-upon verification, and keep a record of the call or other verification. In this way, the purpose of the advance copy of the manifest will have been served without causing any confusion or much extra effort.

The manifest system for PCB waste now parallels the operation of the manifest under the RCRA tracking system for hazardous waste. The generator signs the manifest certification by hand, and obtains the handwritten signature of the initial transporter (who must have an EPA ID Number) and the date of acceptance on all copies of the manifest. The generator retains a copy of the manifest for his records, and gives the remaining copies of the manifest to the initial transporter.

The transporter then carries the manifest with the PCB waste to the designated facility. If delivery to the designated facility is not possible, the transporter contacts the generator for further instructions, which are entered in the space provided for additional instructions. If intermediate transporters are involved, an additional copy of the manifest is prepared by the generator for each additional transporter that will handle the PCB waste. The initial transporter delivers the entire quantity of PCB waste to the designated subsequent transporter, and obtains the subsequent transporter's signature and the date of delivery on the manifest. A copy of the manifest is retained as a record by the initial transporter, and the remaining copies accompany the PCB waste. The subsequent transporter delivers the entire quantity of PCB waste to the designated storage or disposal facility, or to the next transporter, according to the instructions on the manifest. Until the signature of the designated facility or subsequent transporter is obtained, the PCB waste is considered to be in the custody of the transporter who last signed the manifest.

When the PCB waste is finally delivered to the designated PCB storage or disposal facility, the owner or operator of the designated facility (or his agent) signs and dates each copy of the manifest to certify that the PCB waste covered by the manifest was received at the facility. In addition, the designated facility notes on each copy of the manifest any significant discrepancies between the quantity or type of PCB waste identified on the manifest and the quantity or type of PCB waste received at its facility. For bulk waste, significant

discrepancies are variations greater than 10 percent in weight, and for batch waste, they are any variation in piece count, such as a discrepancy of one drum or other article in a truckload. Significant discrepancies in type are obvious differences which are discovered by inspection or analysis, such as when soil or other solids are substituted for liquids, or when PCB waste greater than 500 ppm is substituted for PCB waste below 500 ppm. The designated facility keeps one copy of the manifest for its records, and immediately gives the transporter at least one copy of the signed manifest. Within 30 days after the delivery, the designated facility sends a copy of the signed manifest to the generator at the mailing address indicated on the manifest. This transmission of the signed copy of the manifest to the generator signifies the proper completion of the disposal delivery transaction. As already discussed, whenever a generator uses an independent transporter, the generator confirms the authenticity of the signed copy he receives by contacting the designated facility.

Consistent with RCRA requirements, for shipments of PCB waste within the United States solely by water (bulk shipments only), the generator sends three copies of the manifest, each one dated and signed, to the owner or operator of the designated PCB facility. Copies of the manifest are not required for each transporter.

For shipments of PCB waste by rail within the United States that originate at the site of generation, the generator sends at least three copies of the manifest, dated and signed, to the next non-rail transporter, if any, or the designated facility.

The manifest requirements for shipments by rail or water parallel existing RCRA manifest requirements for these transportation industries. The rail and water transporters were exempted from manifesting under RCRA to avoid confusion and duplication of effort, since both industries have their own complex tracking systems that render additional tracking documentation unnecessary.

The preparation of sufficient copies of the manifest is the responsibility of the generator who initiates the PCB waste shipment. All copies of the manifest supplied by the generator are required to be legible. It is a violation of these requirements to ship PCB waste accompanied by a manifest or continuation sheet for which any copy or part is not legible. These TSCA provisions for manifesting PCB waste vary slightly from the current RCRA manifest requirements and in no way alter the existing RCRA manifest provisions.

K. Recordkeeping and Reporting

While notification and manifesting requirements form the core of the PCB waste tracking system, the tracking function is aided by several recordkeeping and reporting requirements. EPA proposed that PCB waste handlers comply with recordkeeping and reporting requirements which are based largely upon the existing TSCA and RCRA requirements. All recordkeeping and reporting requirements of this rule apply prospectively and do not require revision of past documents.

1. *Retention of manifests as records.* In the proposed rule, EPA solicited comments as to whether the 5-year record retention requirement for § 761.180(a) and § 761.180(b) should be changed to a 3-year recordkeeping requirement. Although there were few comments on the use of manifests as records, in the final rule EPA has changed the 5-year retention period to 3 years for recordkeeping, including manifests. Therefore, the final rule makes retention of manifests a 3-year requirement.

As was proposed, the originator of the manifest (i.e., generator) keeps his copy of each manifest until he receives the signed copy from the designated facility that received the PCB waste. This signed copy is retained as a record for at least 3 years from the date the PCB waste was accepted by the initial transporter who took the PCB waste off-site from the generator. If, however, the generator is subject to the § 761.180(a) annual document log requirement, he will retain his signed copies of manifests for the period required under § 761.180(a). The generator will retain his manifest records at the business location identified for records retention on his manifests. This location is also the site where the generator shall keep his § 761.180(a) annual document log, since the preparation of the annual document log is facilitated by including manifests. A commentor suggested that the company should determine where to maintain its records, and EPA agrees that a generator may choose the site at which he will maintain his records. The regulations require that all records for a facility be maintained in the same central place, since all the records must be available for inspection in the same place.

Likewise, the transporter must keep among his records a copy of the manifest signed by the generator and either the next transporter, if applicable or the commercial PCB storage or disposal facility that is designated for the delivery of the waste. The initial transporter must retain this copy among his records for at least 3 years from the date that he accepted the PCB waste.

The owner or operator of the designated commercial storage or disposal facility likewise must retain at his facility copies of manifests. The manifest copies must be retained for the same periods as required under § 761.180(b) for the facility's annual document logs. These records must be retained at the same location where the facility maintains its annual document logs.

In addition, EPA is requiring, as proposed, that the periods of retention for manifests by all PCB waste handlers be automatically extended during the course of any unresolved enforcement action regarding the regulated activity.

2. *Exception reporting.* Following the RCRA model, this rule requires, as proposed, Exception Reporting by all generators who must manifest their PCB waste. Any time a generator does not receive a copy of the manifest signed by the authorized representative of the designated storage or disposal facility within 35 days of the date the waste was accepted by the initial transporter, the generator is required to contact the transporter and/or the owner or operator of the disposal facility to determine the status of the PCB waste. If the problem is not reconciled within 45 days from the date the PCB waste was accepted by the initial transporter, the generator must file an Exception Report with the EPA Regional Administrator for the Region in which the waste generation site is located. The Exception Report must be filed if the generator has not received within the prescribed period of time a copy of the manifest signed by the authorized representative of the designated facility. The Exception Report includes:

a. A legible copy of the manifest for which the generator does not have confirmation of delivery.

b. A cover letter signed by the authorized representative of the generator explaining the efforts taken to locate the PCB waste and the results of those efforts.

EPA requested comments on whether there should be further tightening of the generator's recordkeeping requirements to ensure that generators do in fact perform their essential oversight role concerning the operation of the manifest system. The February 1985 GAO Report on problems with detection of illegal disposal of hazardous waste found that there had been very few Exception

Reports filed by generators under RCRA. The GAO concluded that the infrequency with which Exception Reporting has occurred is due largely to non-compliance by generators with the requirement to match their filed manifest copies with the signed copies they later receive from commercial storers and disposers. The GAO Report found that some generators were collecting both copies of the manifest, but were not keeping the copies in the same file location, or otherwise physically matching the manifest copies. The GAO Report also suggested that the miniscule number of Exception Reports may be attributed to a reluctance on the part of generators to "turn in" the low-bid transporters who haul away their waste.

EPA did not receive many suggestions on ways to improve the proposed requirements to ensure that the manifest system receives the attention from generators that is necessary to keep the system credible. There was a negative reaction to the possibility of requiring a generator to attach the signed designated facility copy to the generator's original copy, and to retain the matched copies in its files for 3 years as proof that the transaction was indeed verified. Although EPA considers this an excellent practice and strongly recommends that the regulated community adopt this approach, EPA has not added this as a requirement under the rule.

3. *One-year Exception Reporting.* Indefinite storage of waste at approved commercial storage facilities is not an acceptable form of PCB waste management. Section 761.65(a) of the TSCA storage rules for PCB waste limits the storage of PCB waste prior to disposal to a period of up to 1 year. Under EPA's existing compliance monitoring policies, the 1-year storage period is allocated between storage at approved disposal facilities and storage prior to receipt at the approved disposal facility. The initial generators of PCB waste (i.e., the PCB user, owner, or processor who first removes PCBs or PCB Items from service for disposal) are presumed to be in compliance with the 1-year limit on storage if they can demonstrate that the storage period prior to delivery to a disposal facility did not exceed 9 months.

EPA proposed an additional tracking device to facilitate its ability to track compliance with the 1-year storage restriction for PCB waste.

First, under the proposed rule, generators would be required to record the dates when their PCBs or PCB Items were removed from service on the manifests that accompany their PCB waste to commercial storage and disposal facilities. The dates when PCBs were removed from service and when placed into storage for disposal are existing record requirements in the § 761.180(a) annual document for such generators. The proposal required that the date of removal from service for disposal for each PCB or PCB Item contained in a waste shipment be recorded on the section of the manifest reserved for "Special Handling Instructions and Additional Information." As discussed in Unit III.J.3.j, the required date is the date the first item was placed in a container, while individual dates are required for separate items such as transformers and large capacitors. If this space is not adequate for entry of all the relevant dates, the generator would be required to attach to the manifest a typewritten continuation sheet containing this information. This information would then accompany the waste until it reaches the designated facility, thereby providing notice to waste handlers of the time by which lawful disposal must occur.

Under the proposed rule, when manifested PCB waste is received by commercial storers of PCB waste, the commercial storer would note the dates of removal from service for disposal in the facility's § 761.180(b)(2)(iii) annual document. At such time as the commercial storer initiates a waste shipment containing the PCBs or PCB Items to another storage or disposal facility, he would prepare a manifest which includes the dates of removal from service for disposal for individual PCB Articles and the first date PCB waste was placed in a PCB Article Container or a PCB Container. In this manner, the PCB waste would ultimately arrive at an approved disposal facility accompanied by the essential information on removal from service for disposal. The disposer of PCB waste would then enter the date of removal from service for disposal for each PCB or PCB Item in the facility's annual document which also requires the recording of the date of disposal.

The proposed rule would have required the submission of One-year Exception Reports under two types of circumstances. First, disposers would submit such Exception Reports when they receive PCBs or PCB Items on a date more than 9 months after their removal from service, as indicated on the manifest cover or continuation sheet, and because of other disposal commitments, the disposer could not dispose of the affected PCBs or PCB Items within 1 year of their removal from service for disposal.

Second, generators and commercial storers of PCB waste who transfer PCBs or PCB Items directly to disposers would file One-year Exception Reports under other circumstances. Such a Report would be submitted when the generator or commercial storer of PCB waste transferred PCBs or PCB Items to a disposer prior to the expiration of 9 months from their date of removal from service for disposal, but had not received a Certificate of Disposal confirming the disposal of the affected PCBs or PCB Items within 13 months of their removal from service for disposal. The proposal specified a 13-month period in this instance out of recognition that disposers are allowed 30 days from the date of disposal to forward their Certificates of Disposal. So, generators or commercial storers may receive confirmation of proper disposal as late as 1 year and 30 days after the date the PCB waste items were removed from service. Also, such an Exception Report would be required when a Certificate of Disposal confirmed a date of disposal for PCBs or PCB Items more than 1 year from their placement into storage for disposal.

EPA requested comments on the requirement to submit "One-year Exception Reports" in the manner proposed. Comments ranged from saying the proposal did not impose a significant burden, to suggestions that EPA placed too much significance on the 1-year storage limitation. Some commentors supported reporting by generators only, and others felt it was not clear when a disposer would be required to report: e.g., when the disposer suspects that he will not be able to dispose within 1 year, or when he reasonably believes he cannot dispose within 1 year, or when he actually has not disposed of the PCB waste within 1 year.

EPA has decided to retain the 1-year reporting requirement, as proposed. Although EPA agrees that ideally it should not be necessary to require this reporting, it is not realistic to expect that there will be adequate resources available to monitor compliance effectively without the reports. Therefore, all the proposed requirements for the 1-year reporting have been retained in the final rule. If the PCB waste was received later than 9 months from the date it was removed from service for disposal and other disposal commitments of the disposer prevented the timely disposal of the PCB waste, a disposer shall initiate a 1-year exception report when he has not actually disposed of the PCB waste within 1 year. A disposer should be able to

estimate accurately the facility's disposal schedule and consequently plan disposal in a manner that minimizes the facility's physical inability to dispose of PCB waste on time.

4. *Certificates of Disposal.* EPA further proposed and requested comments on a requirement that disposal facilities prepare written Certificates of Disposal. EPA is aware that many disposal facilities are already providing such certificates as a service to their PCB disposal clients. PCB waste generators desire the certificates to rebut any accusation that they have not acted properly with respect to their PCB waste. It must be noted that generators of PCB waste do not extinguish their potential liability for PCB disposal violations by merely entering into contracts with disposers to perform disposal services. However, a document containing the disposal facility's certification that disposal of specific PCB waste has occurred may be relevant in establishing the good faith of the generator's conduct.

As proposed, the Certificate of Disposal would become a uniform feature of the PCB disposal regulations. In addition to specifying the content of a proper Certificate, the proposal made the Certificate of Disposal the final step in the PCB waste tracking system. In particular, the Certificate of Disposal would be returned by the disposal facility one step back to the generator or commercial storer, if he generated the PCB waste, responsible for manifesting the PCB waste shipment to the disposer. While the disposer's return copy of the manifest confirms only the fact of arrival of PCB waste at a disposal facility, the Certificate of Disposal would confirm the fact of disposal itself. Thus, the Certificate of Disposal would be the final element in the tracking loop to ensure that disposal occurs within 1 year from the date that PCBs or PCB Items are stored for disposal. The Certificate of Disposal would be the basis for One-year Exception Reporting by generators and commercial storers, and it would remain as a record of disposal in the record collections of the disposers and the facilities (in some cases the original owner or user, in other cases a broker or storer) that receive them. From the Certificate of Disposal the PCB waste could be tracked back, if need be, to the original owner of the waste. While that original owner would not necessarily be the one to whom the Certificate is returned, tracking could be done through the manifest numbers included on the Certificate, and the records of any intermediate facility involved in the transaction.

The use and content of the Certificate of Disposal generated comments which varied from approval of the use, request for clarification and/or minor changes, to opposition to its use. The approvals indicated the Certificate is a better record of disposal than is the manifest. One comment supported the use of the Certificate but felt it was meaningless unless the effect was to place liability on the disposer, not the generator, if the certificate was untrue or the disposal was not proper. Another supporting comment questioned the requirement to retain the Certificate in the same location as the annual records. Suggestions for improving the Certificate included requiring a commercial storer, who received the Certificate as the generator of the final consolidated shipment, to break down the Certificate into individual certificates that would go back to the original generator(s) with necessary adjustments in timing of exception reports to allow another 30 days. A further suggestion was to allow the Certificate to record only the latest disposal date for items in a shipment, instead of separate dates for all in order to shorten the document.

EPA is retaining the Certificate of Disposal, as proposed. EPA thinks the Certificate of Disposal will perform a valuable function in tracking the disposal of large quantities of PCB waste and in enforcing the disposal regulations, despite imperfections in particular cases where commingling of waste may complicate complete tracking.

5. *Discrepancy reporting.* The proposed rule would also have required that PCB commercial storage and disposal facilities that receive off-site shipments of PCB waste comply with a Discrepancy Reporting requirement. Manifest discrepancies are differences between the quantity or type of PCB waste designated on the manifest and the quantity or type of PCB waste that a designated facility actually receives. These discrepancies were described above in the discussion in Unit III.J.5 of this preamble dealing with the use of the manifest. EPA proposed that, upon the discovery of a significant discrepancy by a designated storage or disposal facility, the owner or operator of the designated facility would attempt to reconcile the discrepancy with the appropriate party (e.g., generator or transporter). If the discrepancy is not resolved within 15 days after receiving the PCB wastes, the owner or operator of the designated facility would immediately submit to the Regional Administrator in the Region where its facility is located a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest at issue. EPA maintains this requirement in the final rule.

EPA received a comment on discrepancy reporting that suggested bulk waste discrepancy reporting should be triggered by 10 percent in weight or volume, not just weight. EPA has rejected this suggestion because it is simpler to weigh a drum than to attempt to measure the contents by volume.

6. *Unmanifested waste reporting.* EPA also proposed to incorporate into this rule another feature of the RCRA tracking system—the Unmanifested Waste Report. The proposed rule would have required a report from the owner or operator of a designated PCB storage or disposal facility whenever the designated facility received from an off-site source any PCB waste that was subject to manifesting requirements but which was not accompanied by the required manifest. The proposed rule would have required the owner or operator to submit a copy of the report to the Regional Administrator within 15 days after receiving the PCB waste. The Unmanifested Waste Report would include the following information:

a. The EPA identification number, name, and address of the designated facility.

b. The date the facility received the PCB waste.

c. The EPA identification number, name, and address of the generator, and transporter, if available.

d. A description of the quantities and types of PCB waste included in the unmanifested shipment.

e. The method of storage or disposal for the PCB wastes.

f. The certification signed by the owner or operator of the designated facility or his authorized representative.

g. A brief explanation of why the PCB waste was unmanifested, if known.

EPA emphasized that the preparation of an Unmanifested Waste Report should not be a frequent event for these facilities, since the proposed regulation would otherwise prohibit the acceptance by any transporter, off-site commercial storer, or disposer, of any unmanifested PCB waste for which these regulations require a manifest to accompany the PCB waste.

A comment questioned the need for such a report, since existing DOT regulations make it unlawful to transport PCBs (any hazardous substance) without the necessary shipping paper or manifest. Another comment objected to allowing a facility

to accept unmanifested waste. Another comment suggested sending the report to the Regional Administrator where the reporting facility is located, rather than where the disposer is located, since a disposer might not yet have been chosen.

Although it is unlikely that there will be a great quantity of unmanifested PCB waste received at either a storage or disposal facility, § 761.211 of the final rule has been modified to include the options available for the storage or disposal facility that receives such unmanifested PCB waste. A requirement to notify the Regional Administrator in the EPA region where the receiving facility is located has been added so that a Regional Administrator may determine whether the unmanifested PCB waste may be disposed. Otherwise the information required in the unmanifested PCB waste report has not changed from what was proposed, but the unmanifested PCB waste report must be sent both to the Regional Administrator in the region the receiving facility is located and the EPA region in which the PCB waste was generated, if known, within 15 days of receipt of the waste.

Depending on the type of facility that receives the unmanifested PCB waste, the owner or operator of that facility may opt to store or dispose of the PCB waste (unless its disposal is prohibited by the Regional Administrator) or send it back to its point of origin. The owner or operator of the facility should make all possible effort to find out from the transporter where the PCB waste originated and notify the generator that the PCB waste was illegally unmanifested, and have the generator determine whether it should be stored for disposal, disposed, or returned to the generator. The report to the Regional Administrators will include the decisions made on the disposition of the PCB waste.

7. *Annual documents and reports.* The existing PCB regulations impose annual document requirements on facilities that use and store their own PCBs or PCB Items (40 CFR 761.180(a)) and on disposal and storage facilities (40 CFR 761.180(b)). The user's annual document provides a summary for each calendar year of the total amounts of PCBs that were either in use or designated for disposal, as well as information about where and when PCB waste was shipped. For the storage and disposal facilities, the annual document constitutes a summary of the types and quantities of PCB waste received during the previous calendar year, the sources of the PCB waste, and the dates the PCB waste was received and either disposed of at the facility or transferred to another facility. The current regulations require each facility to have available, by July 1 of each year, the annual document summarizing the previous calendar year's (January through December) PCB activity. The documents are currently retained at the facilities, and thus are only available to EPA during facility inspections.

a. *Proposed amendments to 40 CFR 761.180(a).* EPA proposed several amendments to the annual document requirements in § 761.180(a). These amendments were intended to facilitate the tracking of PCB waste, to foster consistency with the RCRA tracking system for hazardous wastes, and to provide EPA with up-to-date information on the quantities and types of PCBs and PCB Items that are in service, or disposed, or projected for disposal. Significantly, the proposal required that commercial storers and disposers of PCB waste submit copies of their annual documents, by July 15 of each year, to the Regional Administrator in the EPA Region where the facility is located. It was determined that this proposed provision would have a minimal impact on the regulated facilities. These facilities are already required to prepare and retain the documents on-site, and the only additional cost incurred under the proposed rule would be the cost of copying the report and mailing it to the EPA. These minimal costs were judged to be greatly outweighed by the value of the information which EPA would have available each year and cumulatively about the PCB waste universe.

First, the annual document would be required to clearly identify the facility by name, owner, EPA identification number, and address. The owner or operator of multiple facilities could still elect to keep the annual documents for all of his facilities at one facility which he designates. The location of the annual document must be identified at each facility. The owner or operator who elected to maintain all of his annual documents at one facility was reminded that this option does not allow him to aggregate all of his use and storage data in one document; a distinct, written annual document would be prepared and maintained for each distinct facility. Also, where an owner or operator of multiple facilities designated one location for the retention of his annual documents, he would designate the same location identified as the location of his manifest records.

Second, § 761.180(a) was proposed to be amended so that the information required in the document included the EPA identification number, name, and address of each PCB disposal facility and commercial storage facility to which PCB waste was shipped off-site during the year. This information would be supplied for each PCB or PCB Item identified as removed from service for disposal.

Third, the proposed amendments would have also required that users who generated PCB waste and transfered it directly to disposers record the date of disposal for each PCB or PCB Item, as indicated on the Certificate of Disposal returned to them by disposers of PCB waste. These generators would also have kept copies of the Certificates of Disposal among their § 761.180(a) records, as an aid to verifying disposal and tracking violations of the 1-year limitation on storage of PCB wastes.

Also, the annual document would also have included the name and EPA identification number of each transporter used during the calendar year for off-site shipments of PCBs and PCB Items to disposal facilities or commercial storage facilities.

b. *Proposed amendments to 40 CFR 761.180(b).* The existing annual document requirement of § 761.180(b) applies to the owners and operators of storage facilities and approved PCB disposal facilities. The proposed rule would retain the basic information requirements already specified at § 761.180(b) for PCB waste received at each disposal or storage facility. The proposed amendments would require several additional items of information to facilitate the PCB waste tracking function, and would rearrange the information requirements into groupings that would facilitate the tracking of the storage and disposal histories of specific PCBs and PCB Items handled as waste during the calendar year.

First, the annual document would be required to identify clearly the disposal or storage facility by EPA identification number, name, owner, and address. The calendar year covered by the document would also be identified.

Second, in identifying any facility (i.e., generator, commercial storer, or other disposer) from which a PCB or PCB Item was received during the previous calendar year, the facility would be identified by its name, owner, and EPA identification number.

Third, where § 761.180(b) currently requires the owner or operator of a facility to identify any PCBs or PCB Items that were transferred to other storage or disposal facilities, the identification of the other storage or disposal facilities would include the

facilities' names, addresses, and EPA identification numbers. The identity of the PCBs and PCB Items transferred would be clearly stated, along with the dates of the transfers.

Fourth, facilities subject to § 761.180(b) would record for each PCB or PCB Item handled as waste during the calendar year the date of removal from service for disposal as indicated on the manifest cover or continuation sheet that accompanied the PCB waste when it was delivered to the facility. This record entry would enable commercial storage facilities to reenter this important information on their manifests which they prepare when the affected PCBs or PCB Items are later transferred to another storage or disposal facility. Disposal facilities would likewise enter the dates of removal from service for disposal among their § 761.180(b) records. These dates of removal from service for disposal could then be compared with the dates of disposal to determine compliance with the 1-year limit on storage of PCB wastes. These record entries, in addition to the requirement to retain copies of Certificates of Disposal, would provide the basis for the submission of One-year Exception Reports by commercial storers and disposers of PCB wastes.

The proposed amendments to § 761.180 were intended to clarify certain ambiguities in the existing annual document requirements that apply to storage facilities. The existing regulation imposes an annual document requirement at § 761.180(a) on PCB users, who are required to record information on both PCB use and storage at their facilities. Section 761.180(b), however, requires a distinct annual document to be prepared by storage and disposal facilities. Clearly, one annual document should suffice to summarize the PCB waste activities of the PCB users who store their PCBs at their own facilities for disposal. However, the existing regulation is not clear in specifying which types of storage facilities are subject to § 761.180(a), as opposed to § 761.180(b).

The proposed rule would clarify the scope of the annual document requirements by limiting the coverage of § 761.180(b) to disposal facilities and commercial storage facilities. The proposed amendment would codify the distinction between the storage facilities of a PCB user who is a "generator of PCB waste" and commercial storers facilities who store PCB waste generated by others. The user's storage sites would be subject only to § 761.180(a), regardless of whether the user chose to store at or contiguous to the site of use, or, at one of his storage facilities located off-site from the site of use. The commercial storage facilities ("Commercial storers of PCB waste") would be subject to the § 761.180(b) annual document requirements. Examples of the commercial storage facilities are storage facilities owned or operated by disposers, transporters, waste brokers, and electrical equipment service companies that drain PCBs from equipment which others own.

The proposed annual document required to be prepared and maintained by commercial storage and disposal facilities under § 761.180(b) would be a distinct written document which summarizes the facilities' PCB waste activities during the previous calendar year (January to December). The document would be prepared by July 1 of each year, and under the proposed rule, storage and disposal facilities would be required to submit a copy of their annual documents to the Regional Administrator by no later than July 15 of each year. The obligation to submit annual documents would continue until the submission of the annual document for the calendar year during which the facility ceases PCB storage or disposal operations.

Because some data contained in these annual documents might qualify as TSCA CBI, the proposed rule would have required that submitters follow the procedures set forth at 40 CFR 704.7 for asserting CBI claims with respect to their annual documents. Significantly, these procedures would require the submission of a complete copy (for internal use) indicating those parts claimed to be CBI, and a second copy from which any material alleged to be CBI has been deleted.

c. *Response to comments on proposed annual documents.* EPA received many comments on the burdens imposed by the additions to the annual document and the requirement to send a copy of them to the appropriate Regional Administrator, as proposed in § 761.180(b). In response to these comments, EPA has made some changes to the annual document requirements in the final rule. EPA is requiring the same information but minimizing duplication, so that physical records are maintained at a facility along with logs summarizing the PCB waste movement in some detail, and only generalized totals and information are to be submitted as annual reports by commercial storers and disposers.

The final rule requires owners or operators of facilities that are neither a commercial storer or disposer under § 761.180(a) to retain "records" and "annual document logs" but does not require submission of an annual report. Records are manifests and certificates of disposal of the PCB Containers, PCB Articles, and PCB Article Containers shipped for storage and disposal. The written annual document log includes the facility's EPA Identification number, manifest numbers of PCB waste disposed during the year, and a summary of other data. This is the same information that was included in the proposed rule. This collection of information on the year's PCB activities, augmented by other data on quantities of PCBs on hand and disposed during the year, will be retained at the individual facility or the designated facility and available for inspection by EPA.

Section 761.180(b) applies to disposers and commercial storers. Each facility will compile from the annual document log a brief summary of each category of information, and then submit only the brief summary as the annual report. The annual report does not duplicate annual log information, it is a brief summary of that information. If clarification of the brief summary is needed, the information on the document log will be available to EPA inspectors. In response to concerns about preparing a duplicate annual report which did not contain any confidential business information, EPA has decided that the annual report submitted to the Regional Administrator should not contain any confidential business information. Financial information, for example, will not appear in the annual report.

The annual reports received by the Regional Administrator from commercial storers and disposers will enable the Regional Administrator to determine the adequacy of PCB waste storage for disposal and disposal activity in that Region. From these reports EPA will be able to determine how well PCBs are being managed on a nationwide basis, and to prepare census-type data on the quantities of PCBs in commerce for disposal during each calendar year.

L. Approvals for Commercial Storers of PCB Waste

1. *Background.* Prior to this final rule the PCB storage and disposal regulations did not contain any permitting or approval authority for commercial PCB storage facilities. For this reason EPA was the subject of Congressional criticism, particularly as it related to the brokers and other intermediate handlers of PCB waste who engaged in off-site, commercial storage of PCB waste prior to the delivery of the

PCB waste to approved disposal facilities. Also, in the case of the storage areas associated with approved PCB disposal facilities, there were no specific approval conditions and closure plans for their commercial storage operations.

Commercial storers of PCB waste have been subject to the storage facility requirements of 40 CFR 761.65 without additional oversight enabling the EPA both to pass on the qualifications of the facility's principals, and impose appropriate facility standards in the facility's conditions of approval. There was no established procedure for EPA to grant or withhold approval to conduct commercial storage operations on the basis of a facility's ability to close properly its commercial PCB storage sites, or to ensure that adequate funds would be available to meet the anticipated closure costs. Since such facilities operated outside of an approval process, the approval revocation and suspension sanctions which may have operated as deterrents to regulatory and approval violations could not be utilized. Congressional hearings in August of 1986 highlighted these shortcomings in EPA's ability to oversee effectively the activities of the commercial storers of PCB waste and Congress further directed EPA to take the appropriate steps in alleviating these shortcomings.

The proposed rule proposed an approval mechanism for commercial storers to enable EPA to evaluate the qualifications and financial responsibility of those entities who engage in the commercial storage of PCB waste, i.e., PCB waste generated or owned by others. Comments on the proposed approval process were generally favorable towards the use of such a mechanism but asked that EPA limit and clarify some aspects of the process, most notably, the reporting of past violations, the definition of principals and key employees, inquiries into other businesses outside of waste handling, the approval/disapproval process and enforcement procedures, and the types of facilities required to submit applications. In addition, while commentors did not oppose the requirement that a commercial storer of PCB waste prepare an acceptable closure plan and demonstrate the financial resources necessary to close the facility, they did request that EPA make certain clarifications and changes to the proposed language. Today's final rule modifies the proposal in response to substantive comments received on the proposed rule.

2. *Principals and key employees.* The proposed rule stated that to receive approval from the Regional Administrator to operate a storage for disposal facility, the owner must meet the requirements of § 761.65 and submit relevant information bearing upon the qualifications of the facility's principals and key employees to engage in the business of commercial storage of PCB waste. Relevant considerations included not only the technical qualifications of the principals and key employees, but also previous experience in waste handling activities and any past State and Federal environmental violations involving the same business or other businesses with which they were associated.

A number of commentors requested that EPA use more objective definitions of the terms principals and key employees so as to clear up the ambiguity as to whether they applied to those responsible for the facility's operation or management, or to other persons in the parent corporation. In addition, numerous commentors said that the reporting of past violations should be limited in time and scope. Comments indicated that environmental violations should be limited to those that were finally determined by judicial decision or consent order or on which either a civil or criminal fine or criminal penalty had been or is being levied. Commentors also suggested that reporting of past violations should have some time limitation, i.e., 3, 5, or 10 years prior to submitting the application and that EPA limit its inquiries on a business' past environmental violations to those related to PCB waste or hazardous waste transportation, storage, and disposal.

In today's final rule EPA has included in § 761.65(d)(3) language suggested by two commentors that clearly indicates from whom and how far back EPA is seeking information. The language sets clear parameters on how far up the corporate ladder EPA is seeking information. EPA is limiting the scope of those included as principals and key employees to include the owner or operator of the facility, including all general partners of a partnership, any limited partner of a partnership, any stockholder of a corporation, or any participant in any other type of business organization who owns or controls, directly or indirectly, more than 5 percent of such a partnership, corporation or other business organization and all officials with direct management responsibility for the facility. Direct management responsibility includes the person or persons responsible for the overall operations of the facility (i.e., a plant manager or a superintendent or a person of equal responsibility) and any other supervisory employees who are or will be responsible for the operation of the facility. In addition, applicants need only supply the EPA with information on environmental violations that occurred within 5 years of the day the application is submitted. By limiting the scope of inquiry for principals and key employees to those that are affiliated with the overall operation of the facility, and limiting the information required to State and Federal environmental violations associated with waste handling activities that occurred within 5 years of submitting the application, EPA reduces the burden on the regulated community while still receiving the relevant information it needs to assess adequately the qualifications and history of the submitting party prior to granting or denying an approval.

In addition to decreasing the burden for applicants, EPA resources are better utilized by limiting inquiries to those associated with the handling of waste over a specified period of time. There was some concern that EPA would be overtaxing its resources if it attempted to review thoroughly and accurately all the information applicants would have been required to submit under the provisions of the proposed rule. The changes made in response to the comments will focus the scope of inquiry on a more narrow and relevant base of information, making the approval process less burdensome on applicants and EPA. This approach also ensures there will be an adequate number of storage facilities promptly approved to handle the expected increase in PCB waste slated for disposal over the next few years.

3. *Facilities subject to approval process.* The proposed rule stated that, on the effective date of the final rule, existing storers of PCB waste would have interim approvals for 180 days if the owner or operator had applied for final approval during the 180-day period. The 180-day period of interim approval may be extended until EPA makes a final determination to grant or deny the application. The proposal did not address, however, existing approved disposal operations under TSCA or RCRA that have storage areas. Numerous commentors suggested that EPA not require approval, additional approval, or modification of existing permits for the following types of storage operations: those incidental or ancillary to approved disposal facilities, facilities approved for research and development (R&D) activities, or

treatment facilities that have a small amount of waste stored for use in treatability studies.

EPA agrees that it would be burdensome to require the submission of duplicative information from a storage facility that has an existing RCRA or TSCA disposal approval. However, these facilities and their existing approvals must be evaluated on a case-by-case basis by the Regional Administrator or the Director, EED, if a disposal approval had been issued by the Director, EED, before they are allowed to operate under the auspices of the storage for disposal approval outlined here in today's final rule.

For example, PCB storage areas at RCRA-permitted facilities may be exempt from obtaining a separate TSCA storage approval upon a showing to the Regional Administrator's satisfaction that the existing RCRA closure plan and financial assurance demonstration account for their PCB inventories. The closure plan must meet the spirit of TSCA closure requirements, even if they are not exactly the same as those required under TSCA. However, the technical qualifications and backgrounds of principals and key employees and closure plan as integral parts of the plan must be addressed and deemed acceptable by the Regional Administrator.

In addition, EPA would waive any technical differences between financial responsibility requirements in a RCRA permit and those in the TSCA rule, if the cost estimates clearly take PCB costs into account and the financial demonstration is already approved under RCRA. For example, EPA would accept a RCRA permit with a 10-year pay-in period, rather than the 3-year pay-in period unless the RCRA pay-in period were due to expire in less than 3 years, in which case, the 3-year pay-in period would apply. EPA would also accept the longer pay-in period under RCRA in cases where the RCRA approval did not include financial assurance for PCB inventories and such assurance is now required under this rule.

EPA, with this limited exemption, does not wish to review a RCRA permit for purposes of complying with similar criteria for PCB waste under TSCA. If the RCRA permittee has fulfilled RCRA financial responsibility requirements and those requirements provide for commercial storage of PCBs, no further financial assurance will be required. For this reason EPA strongly encourages the submission of one integrated closure plan and financial demonstration for dual RCRA/TSCA-authorized facilities.

Many commentors point out that numerous TSCA disposal authorizations already require closure plans and financial responsibility as a condition of approval, and that to require an additional separate approval for storage sites ancillary to TSCA-authorized disposal facilities is unnecessary and overly burdensome. EPA agrees and will exempt such facilities if the following conditions exist:

First, the current TSCA PCB disposal authorization's closure and financial responsibility conditions must specifically extend to storage areas ancillary to disposal. Second, the current disposal authorization's closure and financial responsibility conditions must provide for annual adjustments for inflation, and for modification when changes in operations would affect closure costs. Third, the current disposal authorization must contain conditions on closure and financial responsibility that are at least as stringent as those in this final rule. However, EPA will waive, as is the case for existing RCRA facilities, the 3-year PCB closure trust pay-in period when there are existing pay-in provisions already approved for a TSCA-approved facility. Last, the existing disposal authorization must contain an expiration date. Any existing TSCA disposal authorization, for a facility ancillary to a commercial storage facility, that is deficient in any of these four conditions will be called in and modified by EPA within 180 days of the effective date of this final rule, or the owner or operator may exercise the option of submitting a separate application for approval, which includes the information required in § 761.65 (d) through (h) for the storage for disposal facility.

The call-in requirement for disposal approvals will allow EPA to provide equivalent storage closure plan and financial responsibility requirements through one consolidated approval, and avoid the burden of dual approvals. In addition, the requirement that a disposal approval have an expiration date is relevant to the expected date of closure of the storage areas.

4. *Closure plans.* Closure refers to the period in a facility's existence that begins when PCB waste is no longer accepted for storage, and during which the owners or operators of the storage facility are required to remove all PCB waste from the facility and decontaminate their equipment, structures, and land. Under this final rule, facility owners or operators are required to prepare detailed closure plans that identify the steps necessary to bring about final closure. The closure plan will be an essential condition of approval for those facilities that apply for and receive a storage approval. These closure plans must identify in detail the means by which the facility will close in a manner that will eliminate or minimize the post-closure escape of PCBs to the environment.

The preparation of a detailed closure plan is necessary to ensure that owners and operators analyze their future closure responsibilities and bring their present operating practices into line with those responsibilities. Further, a detailed closure plan is essential to accurate cost estimates and adequate financial assurance. EPA's experience with closure plans under RCRA demonstrates that poorly detailed plans have been accompanied by inadequate cost estimates. Thus, acceptable closure plans must be sufficiently detailed to enable a third party to conduct closure in accordance with the plan in the event the owner or operator fails to do so.

The closure plan contents specified in this final rule are derived from the RCRA experience and regulations. The RCRA closure plan standards were first published on January 12, 1981 (46 FR 2851), and amended in regulations issued by EPA and published in the **Federal Register** on May 2, 1986 (51 FR 16422). The 1986 amendments were a response to litigation and several years' experience under the existing subpart G closure standards of 40 CFR parts 264 and 265. The purpose of the 1986 amendments was to clarify the required content of closure plans for RCRA facilities. EPA believes that the revised RCRA closure plan standards are an appropriate framework for the closure plan standards that this final rule requires as part of the TSCA approval process for commercial storers of PCB waste.

The core requirements of acceptable closure plans are specified in § 761.65(e)(1). First, the closure plan must describe with particularity the means by which the PCB storage areas of the facility will be closed in a manner that eliminates the potential for post-closure releases of PCBs which would present unreasonable risks to human health or the environment. This threshold requirement is essentially the performance standard that governs all closure operations. Closure may occur with respect to the entire facility or with respect to distinct storage areas contained in the facility. Where such distinct storage areas are closed, the closure is referred to as partial closure.

Second, the extent of projected PCB storage activities during the facility's active life must be identified. The active

life of a facility would extend until the time when the completion of closure is certified to the Regional Administrator, or to the Director, EED if the commercial storage area is ancillary to a disposal facility approved by the Director, EED, under § 761.65(e)(8).

For each PCB storage area, and the facility overall, the owner or operator must identify the extent of PCB storage that will occur relative to other wastes, and the maximum projected inventory of PCB wastes that will ever be handled at one time. This information is essential, because it bears upon the facility's ability to demonstrate that it in fact has the capacity to store PCB waste in accordance with the § 761.65 storage requirements. Further, the maximum projected inventory of PCB wastes forms the basis for designating a maximum storage capacity for the facility, and for estimating the costs of closure. Financial assurance would be demonstrated in an amount sufficient to close the facility when closure costs would be at a maximum, and that eventuality would usually correspond to the maximum allowed inventory of stored PCB waste.

Third, the facility owner or operator must identify in detail the methods and arrangements that will be used during closure for actually removing PCB waste from the facility, and providing for its transportation off-site to other commercial storage or disposal facilities. The commercial storer of PCB waste that removes PCBs in accordance with his closure plan would then be a generator of PCB waste.

Fourth, the closure plan must identify with particularity the steps that the owner or operator will follow during closure to remove PCB residues presenting unreasonable risks to human health or the environment, if any, from the facility's equipment and structures and from the soil surrounding the facility. Unlike RCRA closure plans, where decontamination goals and sampling methods are to be developed as elements of the closure plan, the commercial storer of PCB waste under TSCA would identify the steps needed, such as cleanup methods, cleanup goals, and sampling methods, to accomplish compliance with the levels specified in the risk-based, nationwide PCB Spills Cleanup Policy, which was published in the Federal Register of April 2, 1987 (52 FR 10688). This description would include any other activities, e.g., ground water monitoring, run-on and run-off control, and facility security, that will be necessary during closure to ensure compliance with the closure performance standard.

In addition, for each § 761.65 (b) and (c)(7) PCB storage area at a commercial storage facility, the closure plan must include a schedule for closure that identifies the total time required to complete closure, and the time required for the various intervening activities entailed by final closure. The closure plan must include a closure cost estimate which bears upon the amount paid each year of the "pay-in" period for funding the trust.

Finally, the final rule includes provisions specifying the criteria and procedures for modifying a facility's closure plan. These provisions describe what action may be initiated by either the facility owner or operator, or the Regional Administrator or the Director, EED if the commercial storage area is ancillary to a disposal facility approved by the Director, EED, when cause exists to believe that changed circumstances will affect the closure plan, the time for closure, or the closure costs. The changed circumstances that would justify a closure plan modification are described at 40 CFR 761.65(e) (4) and (5).

The final rule also includes a closure schedule for when certain closure events must occur and when required notices must be given. Generally, the commencement of closure would be preceded by written notice to the Regional Administrator, or the Director, EED if the commercial storage area is ancillary to a disposal facility approved by the Director, EED, at least 60 days prior to the date when final closure is expected to begin. The date when closure is expected to begin would ordinarily be no later than 30 days after the receipt of the last shipment of PCB waste for storage at the facility. This date may be extended for good cause by the Regional Administrator, or the Director, EED if the commercial storage area is ancillary to a disposal facility approved by the Director, EED.

The timetable in § 761.65(e)(6) requires that all PCB waste that was in commercial storage at the facility be removed in accordance with the closure plan within 90 days of the receipt of the last quantities of PCB waste. All closure activities must be completed within 180 days, and the facility must certify the completion of closure (or partial closure) in a written notice to the Regional Administrator within 60 days of the date that closure is completed. The certification that closure has been completed in accordance with the closure plan must be signed by an independent professional engineer, as well as the facility's owner or operator. The deadlines in § 761.65(e)(6) may be extended by the Regional Administrator, or the Director, EED, if the storage facility is ancillary to a disposal facility approved by the Director, EED, for reasonable periods where good cause for the delay is shown.

EPA solicited and received comments on its proposal to require closure plans as part of its approval criteria for commercial storers of PCB waste. These commentors asked EPA to clarify certain issues such as the appropriateness of using the Spill Cleanup Policy for closure standards and the need for an additional closure plan for approved disposal facilities that have existing closure plans for their storage areas.

Comments addressing the appropriateness of the use of the Spills Cleanup Policy for closure standards will be addressed in the Support Document, "Response to Comments on the Proposed Notification and Manifest Rule, August 1989." The comments centered on historic spills and spills cleaned up prior to the policy. The final rule includes the use of the Spill Cleanup Policy for closure standards as proposed.

5. *Financial assurance of closure.* The final rule includes at § 761.65(f) a procedure for preparing a written estimate of the cost measured in current dollars of closing the PCB storage areas of the facility in accordance with the closure plan. The current closure cost estimate which will be kept at the facility is the closure cost estimate adjusted annually for the effects of inflation and any approved modifications to the closure plan. The closure cost estimate must assume that closure occurs during that time when the closure costs would be most expensive. The cleanup cost estimate must assume closure by a third party not related in any way to the commercial storer, using current market costs for disposal, storage, and decontamination.

The final rule requires that the commercial storers of PCB waste demonstrate financial responsibility for closure by passing specific financial tests or by acquiring specific financial instruments that will make available adequate funds to meet the closure cost estimates. The final rule allows owners or operators to choose from a number of mechanisms, including trust funds, surety bonds, letters of credit, corporate guarantees, insurance policies, and the financial test. EPA justifies the imposition of these requirements based upon the several instances in which facilities that went out of business or were forced to close possessed insufficient resources at the time of closure to provide for an adequate cleanup. If the expenditure of public resources is to be avoided, it is incumbent that owners and operators of

approved facilities make provision for closure funds during the active life of their facilities.

The financial assurance mechanisms in today's final rule for commercial storers of PCB wastes are essentially the same as the mechanisms allowed under RCRA regulations at 40 CFR parts 264 and 265, subpart H. The development of these mechanisms and the specifics of their operation have been discussed in numerous RCRA-related rule documents which EPA has issued and which were published in the **Federal Register**. The reader is referred to the following **Federal Register** documents for a detailed discussion of these mechanisms: 45 FR 33260, May 19, 1980; 46 FR 2821, January 12, 1981; 47 FR 15032, April 7, 1982; and 51 FR 16422, May 2, 1986. This preamble only briefly describes the financial mechanisms, with particular attention to any changes from the RCRA mechanisms.

To determine the costs of financial assurance for the purposes of this rule, several assumptions were made. Financial assurance costs would be incurred by facilities that do not currently have financial assurance. These costs are assumed to be equal to the difference between the costs these facilities would have incurred in the baseline of proper closure and the costs they incur in the course of complying with the financial assurance requirements. The magnitude of the financial assurance costs is affected by three variables: the total amount needed to close the site; the time lag between the set-aside of the closure funds and closure; and the difference between the rate at which funds must be borrowed and the rate at which they can be loaned (opportunity cost of capital).

Because financial assurance costs are based on the differenc between the present values of two alternative methods of funding future closure costs, estimates of closure costs are required. For this analysis, costs for closure were based on estimates of costs for a similar facility under RCRA. A typical facility was assumed to have a laboratory, a truck facility, a storage building, and two storage tanks. Costs for closure were estimated as follows:

Laboratory	$10,000
Truck facility (ramps, loading docks, etc.)	15,000
Storage building (500 drum capacity)	100,000
Tanks (two 15 to 20,000 gal. capacity)	20,000
Inspection, soil sampling, etc.	100,000
10 Percent contingency	24,500
Total	269,500

For this analysis, a facility that does not currently have financial assurance is assumed to face baseline costs for closure equal to a constant stream of payments for 23 years, accumulated at the firm's private rate of discount (7 percent), that is just sufficient to pay for these closure costs. That is, each facility is assumed to amortize the closure costs over the expected lifetime of the facility (23 years) in the baseline.

Because not all facilities will necessarily remain solvent throughout the 23 years between the present and the expected time of future closure, the financial assurance requirement is designed to ensure that the funds required for proper closure will be avaiable regardless of the financial health of the facility in the future. Consequently, this analysis assumes that each facility makes a single payment into a fund that accumulates at the government (risk-free) rate of interest (assumed to be 3 percent) until the end of the useful life of the facility. This single payment will be due 3 years from the date of promulgation of the rule. Hence, under the financial assurance requirement modeled in this analysis, instead of making a stream of payments for 23 years that accumulates at 7 percent, facilities make a single lump-sum payment 3 years from the present that accumulates (with certainty) at the lower, risk-free government rate.[1]

Finally, regardless of the discount rate assumption used for deriving present values of these cash flows, the 7 percent and 3 percent rates underlying the cash flow do not change. This causes incremental costs of the one-time payment straategy required under financial assurance relative to the 23-year stream of payments assumed to be made in the baseline to rise as the discount rate rises. This occurs because the present value of the baseline costs fall more rapidly as the discount rate rises than does the present value of the one-time payment within 3 years of the rule's promulgation.

The difference between the present values of these two alternative methods of financial closure costs measures the costs to these firms of the financial assurance requirement. This construction of the costs of a financial assurance requirement has intuitive appeal. First, because facilities already must comply with proper closure procedures, the cost of financial assurance itself must be less than the costs of closure. Second, the construction used here assumes that all facilities assume that they will pay these closure costs in the future. Thus, the baseline consists of facilities that intend to comply with the preexisting rules concerning proper closure. Finally, this definition of the cost of financial assurance captures the incremental cost to industry and to society of funding future closure activities earlier and with greater certainty relative to the baseline funding plans that would be followed by the facilities. Indeed, it is precisely because some facilities may be insolvent 23 years from the present that the expected rate of return is assumed to be 7 percent rather than 3 percent—the financial markets require compensation for the risk of insolvency. But the fact that some facilities may be insolvent in the future means that the future value of all of the facilities' "ear-marked" accounts for closure will be less than the total necessary to properly close all of the facilities. Consequently, funding these costs earlier and with certainty eliminates this possibility.

The incremental cost of financial assurance derived in this way differs depending on the discount rate used to derive the present values of these alternative payment streams.

Discount rate (%)	Baseline cost	One-time cost	Incremental cost
0	$115,998	$149,216	$33,218
3	82,932	136,553	53,621
7	56,850	121,805	64,955
10	44,802	112,108	67,306

As shown above, the incremental cost for financial assurance for a facility is $33,218 (0 percent), $53,621 (3 percent), $64,955 (7 percent), and $67,307 (10 percent). The cost of financial assurance increases as the discount rate rises because the present value of the stream of amortization payments assumed to be made in the baseline falls at a much faster rate than the present value of the payment required under the financial assurance requirement. Although somewhat counterintuitive, the result is correct given that the 3 percent and the 7 percent rates of interest underlying the alternative cash flow scenarios for funding future closure costs remain

[1] Since it is unlikely that firms will be able to obtain insurane for closure, this analysis assumes that financial assurance would be provided by an instrument similar to a trust fund. The present value of closure (at a discout rate of 7 percent) must be paid into a trust fund within 3 years of promulgation of the rule.

constant despite a changing social discount rate assumption.

Several comments were made in response to the estimated costs of financial assurance as described in the proposed rule. Commentors suggested that EPA had seriously underestimated the costs associated with closure. The Hazardous Waste Treatment Council (HWTC) estimated the cost of closure for a full scale authorized facility to be $3 to $5 million. Another commentor provided data that showed closure costs for a single, middle-sized storage facility to be slightly less than $600,000. Claiming that EPA may have underestimated the cost for closure, commentors argued that the associated trust pay-in period should be extended beyond the 3 years proposed by the EPA. Commentors suggested anywhere from a 5- to 10-year pay-in period to be more consistent with RCRA's 10-year pay-in period.

EPA rejects HWTC's cost estimates because it includes the costs for closure of a disposal facility as well as the storage facility. The cost for closure is not the same as the cost for financial assurance. Accepting this higher cost of closure estimate of $600,000 for a middle-sizes storage facility, EPA agrees that typical facilities' closure costs will probably fall within the $270,000 to $600,000 range. The associated costs of financial assurance for closure costs of $270,000 to $600,000 would be $33,000 to $73,000 (undiscounted) or $65,000 to $144,000 at a discount rate of 7 percent. This is the real cost to the facility, i.e., the cost to obtain financial assurance. The Regulatory Impact Analysis for the proposed rule estimated that a typical facility would spend approximately $33,000 (undiscounted) in complying with the financial assurance requirements. EPA does not agree, however, that the trust pay-in period should be extended beyond 3 years and accordingly retains that timeframe in this final rule. This issue will be discussed further in Unit III.L.5.b.

a. *Financial test.* The financial test consists of criteria that compare the closure cost estimate to specific ratios composed of net worth, net income, total liabilities, current assets and liabilities, net working capital, and current bond issuance ratings. These ratios are specified at 40 CFR 264.143(f)(7)(i). Once the elements are identified in the firm's financial statements, the calculation of the test ratios is straightforward. The demonstration of financial assurance capability is presented in a letter from the firm's chief financial officer, which would be supported by reports from the firm's independent certified public accountant. The financial test is not intended as a test of potential insolvency; rather, it is designed to ensure that those who pass the test will have adequate resources to pay in full the cost of closure. Should the firm in subsequent years fail the test, the firm must exercise one of the alternative forms of financial assurance.

EPA, in today's final rule, is utilizing the same financial test criteria that are currently in effect for hazardous waste facilities under 40 CFR 264.143(f). Also, the demonstration of financial assurance would be satisfied by a letter from the firm's chief financial officer containing wording similar to that specified at 40 CFR 264.151(f). The only variations from the RCRA requirements are language changes intended only to make the provisions conform to TSCA statutory and regulatory authorities. The financial test mechanism will be satisfied when a parent corporation which meets the test's criteria guarantees that it will perform closure or establish a closure trust fund in the event that its subsidiary corporation fails to perform in accordance with its closure plan. In addition to meeting the financial test criteria, the guarantor corporation would submit a written corporate guarantee with the wording specified at 40 CFR 264.151(h), modified only to conform to the TSCA statutory and regulatory authorities.

In cases where a storage facility is jointly owned or operated by two or more unrelated companies, a decision must be made by the parties involved with respect to who will be responsible for the financial assurance of the facility. The chosen party will be responsible for complying with all the provisions of § 761.65 (d) through (h) of this final rule.

b. *Closure trust fund.* Under this mechanism, the owner or operator (or entity designated in a jointly owned facility) of the commercial PCB storage facility would enter into a written trust agreement appointing a trustee to manage a fund established by the owner(s) or operator(s) of the storage facility for the benefit of EPA. The fund would be established to meet the costs of closure, and the trust instrument would set forth the powers and obligations of the trustee with respect to the management and use of the fund. When instructed by the Regional Administrator or the Director, EED if the commercial storage area is ancillary to a disposal facility approved by the Director, EED, the trustee would reimburse the owner(s) or operator(s), or other persons, for expenditures made in closing the facility, in the amounts directed by the Regional Administrator or the Director, EED. The "corpus" of the trust would consist of the annual payments made by the owner(s) or operator(s) to the fund during the "pay-in" period, and these amounts would be invested or otherwise managed by the trustee.

In the final rule, owners or operators of commercial PCB storage facilities may satisfy their financial assurance obligations by establishing a closure trust fund under the conditions described in 40 CFR 264.143(a), utilizing a trust instrument with the wording specified at 40 CFR 264.151(a). This rule modifies the RCRA language to the extent of conforming it to TSCA statutory and regulatory authorities.

In the proposed rule, EPA proposed a pay-in period for commercial storers of PCB waste to be a period not exceeding 3 years. Commentors requested that EPA extend this trust pay-in period to a period anywhere between 5 to 10 years. The reasons for requesting an extended pay-in period were many, including: EPA's underestimation of closure costs; the argument that accelerated pay-in would force the abandonment of some facilities; service companies, which are primarily small businesses, would need at least 5 years for pay-in to build up the necessary funds; and the need for a more equitable and less burdensome approach of retaining an option of pay-in keyed to the planned closure date or a maximum 10-year pay-in, whichever came first.

The proposed pay-in period differs from the maximum 10-year period system used under RCRA because of the difference between the types of storage facilities regulated under RCRA and under this rule. Under RCRA, storage facilities for the management of hazardous wastes can include land disposal units (e.g., landfills or surface impoundments), while under the TSCA PCB rules, PCB storage facilities are locations where PCB Articles and PCB Containers are stored for less than 1 year prior to disposal. RCRA trust funds allow for an extended pay-in period because of a concern for the substantial costs associated with such measures as capping and securing the facility at closure, as well as the continuing costs of conducting long-term ground water monitoring for a closed landfill or surface impoundment. In the case of closing a PCB storage area, however, one need not typically take into account the post-closure care associated with these types of land disposal units. Once the PCB storage facility has been closed according to the standards set forth in this rule, there should be no long-term

costs. Thus, there is no compelling case for extending the "pay-in" period for the 10 or more years allowed for "pay-in" under RCRA, and EPA believes that 3 years represents a sufficient period of time to fund a commercial storage facility's closure trust fund.

EPA agrees it may have underestimated the cost of closure in the Regulatory Impact Analysis for the proposed rule and that closure of a typical facility will likely cost between $300,000 and $600,000. EPA does not agree, however, that these revised amounts warrant extending the pay-in period. EPA is maintaining the 3-year trust pay-in period in this final rule for the above reasons and it is EPA's policy that any company intending to enter, or currently engaged in the business of commercially storing PCB waste, should be sufficiently viable, either through current assets or loans, to cover the cost associated with the 3-year trust pay-in period.

In the case of existing facilities that opt for the use of a closure trust fund, the first payment into that fund must be made within 30 calendar days after the facility has received a notice of conditional approval from EPA. This notice of conditional approval states that the application to commercially store PCBs has been reviewed by EPA but final approval to operate will not be granted until EPA has received notice that the first payment into the trust fund has been made within the 30-day period. EPA will send a notice to the facility after receipt of verification of payment into the trust fund that the facility has been granted final approval. If this payment is not made within this 30-day period final approval will be denied and interim approval to operate will be canceled.

In the case of new facilities that opt for the use of the closure trust fund, EPA will also provide the facility with a notice of conditional approval; final approval will be granted once EPA receives verification that the first payment has been made into the trust fund.

c. *Surety bonds.* This final rule also incorporates two additional RCRA financial assurance mechanisms that allow surety companies to act as guarantors of closure obligations. The first is a surety bond that guarantees the payment of the "penal sum of the bond" into a standby closure trust fund, in the event the owner or operator of the facility fails to perform the guaranteed closure obligations. The second is a surety bond under which the surety company guarantees that upon the owner's or operator's breach of his closure obligations, it will either perform closure as guaranteed by the bond, or, deposit the amount of the "penal sum of the bond" into a standby trust fund.

In this final rule, commercial storers of PCB waste under TSCA, including those with jointly owned facilities, may satisfy their financial assurance obligations by obtaining surety bonds conforming to the requirements of either 40 CFR 264.143(b) (guaranteeing payment into trust funds) or 40 CFR 264.143(c) (guaranteeing performance of closure). The only modifications to the RCRA language are those necessary to cause the requirements and instruments to conform to TSCA statutory and regulatory authorities.

d. *Closure letter of credit.* Consistent with §§ 264.143(d) and 264.151(d) of the RCRA regulations, commercial storers of PCB waste under TSCA may choose to demonstrate financial assurance for closure by obtaining an irrevocable letter of credit from their bank or other financial institution. The irrevocable letter of credit instrument assures that the financial institution that issues it will make available a specific sum of money over a specific time period on behalf of its customer (the facility owner or operator) for the benefit of the party in whose favor the letter is written. The beneficiary can draw on the credit by presenting the sight drafts or other documents specified in the letter. The financial institution would issue the letter in favor of the appropriate Regional Administrator or the Director, EED if the commercial storage area is ancillary to a disposal facility approved by the Director, EED, and the facility owner or operator would establish the account in the amount of the current closure cost estimate. The funds shall be paid into a standby closure trust fund from which closure expenditures will be reimbursed.

Irrevocable letters of credit for closure under TSCA must comply with the requirements specified for these instruments under RCRA, modified only to the extent necessary to conform to TSCA and its implementing regulations.

e. *Closure insurance.* To the extent such insurance is available to cover a PCB storage facility's closure obligations, this final rule allows closure insurance, as described at 40 CFR 264.143(e), as another means of satisfying the financial responsibility obligations under TSCA. This final rule includes only those modifications to the §§ 264.143(e) and 264.151(e) language as are necessary to conform to TSCA statutory and regulatory authorities. As required under RCRA, the face amount of the policy must equal at least the current closure cost estimate, and the policy must guarantee the availability of funds up to the face amount to cover closure expenditures. The insurer would reimburse persons who present itemized bills to the Regional Administrator or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director, EED, for closure expenditures which are determined by the Regional Administrator or the Director, EED, to be in accordance with the closure plan or otherwise justified.

f. *Combination of mechanisms.* In today's final rule, the owner or operator of a commercial PCB storage facility could meet his financial assurance obligations by establishing more than one mechanism for his facility. The combination would be limited to trust funds, letters of credit, insurance policies, and surety bonds guaranteeing payment into trusts. The combined instruments would meet the financial responsibility requirements of TSCA if the combination of mechanisms provides financial assurance in an amount at least equaling the current closure cost estimate. The Regional Administrator, or the Director, EED, if the commercial storage is ancillary to a disposal facility approved by the Director, EED, shall seek recourse from any or all of the instruments to provide for closure of the facility.

6. *Approval/disapproval process and enforcement procedures.* In today's final rule EPA has narrowed the definition of principals and key employees and limited its review of the history of environmental violations to 5 years. In addition, violation history will be limited to those violations which resulted in either a civil or criminal fine or a criminal penalty, or civil injunctive relief, and which involved storage, disposal, transport, or other waste handling activities. By narrowing the scope of inquiry, EPA can better utilize its resources during its review of the application and focus its attention on the most relevant information.

EPA received comments on the fact that the proposed rule does not speak to the issue of the approval/disapproval process or enforcement procedures relating to the applicants seeking approval of commercial storage facilities.

EPA has developed a guidance document, which is part of the rulemaking record, titled "TSCA Guidance Manual for Review of Commercial PCB Storage Facility Applications," October 1989. The guidance document may be used by both EPA application reviewers and the regulated community. For the EPA application reviewer, it is a useful tool

to assist in the review of incoming applications in order to ensure completeness. For those in the regulated community who submit applications for approval to EPA, this document serves to explain further what EPA expects in a completed application. The guidance document also addresses the closure plan and financial responsibility requirements that are essential components of the approval process. EPA retains the discretion to approve or disapprove an application for approval for a commercial PCB storage facility based on factors which include but are not limited to, a poor enforcement history, misrepresentation of enforcement history or technical qualifications on the application, inadequate closure plan or financial responsibility documents, and falsification of financial assurance or other application documents. EPA maintains enforcement and compliance data bases that were created for its environmental protection statutes that will be used to verify an applicant's representations regarding compliance history.

After the regional office has received the application and reviewed it for completeness, it will provide the names of the principals and key employees and other information on the applicant to EPA Headquarters. This information will then be published in the **Federal Register** and sent to the EPA regional offices and appropriate State offices for local publication. The public will be given an opportunity to comment on issues like the firm's past environmental enforcement history as well as any relevant information on the principals and key employees of the firm. This public input will supplement EPA's database searches on the applicant's past compliance history.

The regional office will coordinate with Headquarters on the review of applications. Based on the results of this review and any public comments received by EPA, the Regional Administrator, or the Director, EED, if the commercial storage is ancillary to a disposal facility authorized by the Director, EED, will approve or deny the application. EPA will ultimately publish the list of approved PCB commercial storers in the **Federal Register**.

Specific actions which may result in the denial of an applicant's request for approval include criminal activities by the firm, principal or key employee; or civil/judicial administrative actions resulting in either a consent agreement or final order and which involved major violations. EPA could issue a denial, an approval with appropriate conditions or a time limit on the approval in those cases where the violations were not so serious as to warrant automatic denial, or, where prior conduct appears to have been rehabilitated. These criteria for approval or denial are discussed in more detail in the guidance document.

7. *States and the Federal Government.* EPA received a comment which recommended that States and the Federal Government be exempted from closure cost estimates and financial assurance requirements as they have been under the RCRA permitting requirements of 40 CFR 264.140(c). EPA agrees and has added the exemption in § 761.65(j) of the final rule. EPA recognizes that, because Federal and State government entities are permanent and stable institutions that exist to safeguard health and welfare, they have the requisite financial strength and incentives to cover the costs of closure. EPA believes, therefore, that it is not necessary to impose closure cost estimate and financial assurance requirements on Federal and State entities. This exemption is consistent with the approach adopted under RCRA under 40 CFR 264.140(c). While EPA recognizes that many local governments, like Federal and State governments, are permanent entities and act to secure the well-being of their citizens, EPA is concerned that local governments cannot provide the same guarantee that they will be able to access adequate funds to pay for environmental costs in a timely manner. For that reason, EPA has chosen not to exempt local governments from the closure cost estimate and financial assurance requirements.

IV. Relationship to State Law

Unlike the RCRA program for hazardous wastes, the TSCA section 6(e)(1) disposal program for PCB waste is fundamentally a Federal program, administered by the EPA Regional Administrators and the Director of the Exposure Evaluation Division, Office of Pesticides and Toxic Substances. The enforcement of the Federal program has been delegated to the Regional Administrators, while the authority to issue approvals for PCB disposal processes is currently shared by the Regional Administrators and the Director of the Exposure Evaluation Division. At the same time, the States may concurrently regulate PCB disposal within their jurisdictions, without supplanting or being supplanted by the Federal requirements. As of May 1989, at least 18 States have elected to regulate various aspects of PCB disposal, often pursuant to their authorized RCRA hazardous waste programs.

A major component of this rule is the requirement imposed on certain generators, transporters, commercial storers, and disposers of PCB waste to notify EPA of their PCB waste handling activities and obtain identification numbers to use on their manifests and other records. This TSCA requirement is independent of any requirement under State or local law or under a State-administered RCRA program. Thus, a generator exempt from the notification requirements imposed by this rule may be independently required to obtain and use a unique identification number by a State or local government. Any such State or local requirement is not preempted by these Federal requirements.

Persons subject to this rule and to State-administered RCRA programs will be able to use the same identification number for the manifesting and recordkeeping requirements of both programs. The identification numbers to be used under this rule, as well as those used under State-administered RCRA programs, are the Dun and Bradstreet Data Universal Numbering (DUN) system numbers. Persons subject to notification under this rule who have already been issued an identification number under a State-administered RCRA program are required to supply EPA with the previously issued number in their TSCA notifications. EPA will verify that these numbers are unique and conform to the DUN system, and authorize as far as possible the use for TSCA purposes of previously issued identification numbers. Under this process, regulated persons will benefit from the administrative convenience of using the same number for both State and TSCA purposes. EPA will issue such persons a distinct TSCA identification number only in those cases where a previously issued number does not conform to the DUN system, or is not unique.

This rule also requires PCB waste handlers to comply with manifesting requirements for the regulated PCB waste which they handle. This rule utilizes the RCRA Uniform Manifest to facilitate implementation of this requirement throughout the United States. The Uniform Manifest includes optional information spaces to meet basic information requirements which States have the option of imposing. The optional State information items appear at the upper right portion of the manifest form, and they are shaded and headed by letters (rather than numbers) to set them apart.

As required by Department of Transportation (DOT) regulations issued under section 112 of the Hazardous Materials Transportation Act, 49 U.S.C. 1811(a), States are not permitted to require any information on the space of the Uniform Manifest specified for "special handling instructions and additional information," on the back of the form, or on any continuation sheet, as a condition of transportation.

Since PCB waste generators may obtain pre-printed or camera-ready copies of the Uniform Manifest from State agencies, it should be noted that the instructions which may accompany these manifests do not reflect all the requirements which EPA has included in the final rule. Specifically, the following elements of the PCB waste tracking system under TSCA are not covered on the pre-printed instructions accompanying the Uniform Manifest:

(1) One-Year Exception Reporting and the related requirement to note dates of removal from service for disposal of PCBs, PCB Containers, PCB Articles, and PCB Article Containers on manifests.

(2) Requirements related to Certificates of Disposal for PCB waste.

It is essential that all PCB waste handlers understand fully any deviations from the RCRA tracking requirements that appear in the final rule, since reliance upon pre-printed instructions issued by States with the Uniform Manifest will not excuse their responsibility to comply fully with TSCA requirements for PCB waste.

This rule also imposes new TSCA approval requirements for commercial storers of PCB waste who store PCB waste generated by others at storage facilities subject to the storage facility standards specified at 40 CFR 761.65. The rule requires, among other things, that commercial storers of PCB waste develop closure plans and financial responsibility mechanisms similar to those required of facilities which manage hazardous waste under RCRA. In those States which regulate PCB storage and disposal practices under their State-administered RCRA programs, the new TSCA approval requirements for commercial storers are independent of the State requirements. Thus, the fact that a facility storing PCB waste commercially may have a RCRA permit or RCRA interim status would not excuse the requirement to obtain a Federal approval under TSCA to store PCB waste commercially. Likewise, the fact that such a facility is already covered by a State's RCRA closure plan and financial responsibility requirements would not excuse the new TSCA requirements to develop closure plans and demonstrate financial responsibility for closure. However, the burden of these concurrent State and Federal approval requirements should be mitigated, since in many cases, compliance with the RCRA closure and financial responsibility standards shall be sufficient to establish compliance with the similar TSCA approval standards.

V. Economic Impact

EPA analyzed the economic impacts associated with the notification, manifesting, recordkeeping and reporting, and storage approval requirements in the proposed rulemaking. The Regulatory Impact Analysis for the proposed rule is available for review in the public docket. This unit summarizes the economic impacts of compliance with the provisions of the proposed rule, as presented in the Regulatory Impact Analysis, and discusses changes made in response to comments. A revised Regulatory Impact Analysis, reflecting new data EPA received, was prepared for the final rule and is also in the public docket.

1. *Notification.* This rule states that storers, transporters, and disposers handling PCBs at concentrations at or above 50 ppm must notify EPA of their PCB activities. EPA estimates that 5,651 facilities will be required to notify EPA at a cost to industry of $290,000.

2. *Manifesting.* In development of the manifest requirements, EPA consulted with States which regulate PCB disposal and with the operators of TSCA-approved disposal facilities. EPA found that each of the approved disposal facilities required a manifest to accompany any shipment of regulated PCB waste, regardless of PCB concentration. These disposal firms require manifests for the PCB waste they accept as a means of preserving records of firms potentially responsible for contributing toward any remedial actions which might arise at the disposal site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Also, among the 18 States that currently require a manifest to accompany PCB waste, all but one require a manifest for PCB waste containing PCBs at the 50 to 500 ppm level. Because current practice is consistent with the 50 ppm trigger for manifesting, there does not appear to be a significant incremental burden to industry associated with the requirement.

3. *Submission of annual reports.* EPA currently requires that annual reports be maintained by generators, storers, and disposal firms handling PCB wastes. This rule requires commercial storers and disposers handling PCBs at concentrations at or above 50 ppm to submit annual reports to EPA. The estimated number of firms expected to comply with this provision of the rule is 130. EPA did not receive any information with which to revise this estimate. The incremental costs of submitting these reports to EPA is estimated to be minimal. At the suggestion of OMB, EPA is estimating 1 hour for the preparation of the annual report at a cost of $21.94 per report.

4. *Storage approvals.* EPA is also requiring that all commercial storers of PCB waste obtain EPA approval. To obtain approval, commercial storage firms must, among other things, develop closure plans for their facilities and meet financial assurance requirements.

EPA estimates the cost to industry for the development and submission of the closure plan will be $35,000 for a facility that is not permitted under RCRA and $25,000 for a facility with a RCRA permit.

EPA estimates the costs for financial assurance to be between $33,000 and $73,000 (undiscounted) per typical facility which has not already met the requirements. These costs are costs of financial assurance and not closure costs. The cost of closing a typical facility is estimated to be between $270,000 and $600,000. A typical facility was assumed to have a laboratory, a truck facility, a storage building, and two storage tanks.

5. *Total economic impacts.* EPA estimates that the total costs to industry associated with this rule, undiscounted, would be between $3.2 million and $5.6 million, of which, between $2.59 million and $4.78 million represents the total cost to industry of complying with the approval requirements for commercial storers of PCB waste. EPA also estimates that the total costs to the U.S. Government would be between $1.95 million and $2.84 million.

VI. Official Rulemaking Record

In accordance with the requirements of section 19(a)(3) of TSCA, EPA established the record of this rulemaking with the proposed rule. This record includes basic information considered by EPA in developing the proposed rule, including appropriate Federal Register notices, reports prepared by the General Accounting Office (GAO), testimony from Congressional committee hearings, communications before proposal, and economic analyses of the proposal, and now includes the proposed rule,

comments on the proposed rule, and other material that has been added since publication of the proposed rule.

Any Confidential Business Information (CBI) that is a part of the record for this rulemaking is not available for public review. A public version of the record, from which CBI has been deleted, is available for inspection at the TSCA Public Docket Office, in Room NE-G004, 401 M St., SW., Washington, DC. The following documents for this final rule are in the public record:

(1) Official Rulemaking Record from "Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities," Proposed Rule, Docket No. OPTS-62059, 53 FR 37436, September 26, 1988.

(2) 53 FR 27322, July 19, 1988, USEPA, "Polychlorinated Biphenyls in Electrical Transformers."

(3) 53 FR 45288, November 9, 1988, USEPA, "Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities; Extension of Public Comment Period."

(4) Transcript of Hearings on the Proposed Notification and Manifest Rule held on December 13, 1988, in Washington D.C.

(5) USEPA, EED, CRB, "Response to Comments on the Proposed Notification and Manifesting Rule" (August 1989).

(6) Memo from OMB to Sandy Farmer, IRSD, OPPE, USEPA, Denial of Approval of Proposed ICR, November 18, 1988.

(7) USEPA, OPTS, EED, CRB, "TSCA Guidance Manual for Review of Commercial PCB Storage Facility Applications" (October 1989).

(8) USEPA, OPTS, ETD, "Regulatory Impact Analysis in Support of the Final Notification and Manifesting Rule," (May 1989, revised October 1989).

VII. Other Regulatory Requirements

A. Executive Order 12291

Under Executive Order 12291, issued February 17, 1981, EPA must judge whether a rule is a "major rule" and therefore, subject to the requirement that a Regulatory Impact Analysis be prepared. EPA has determined that this rule is not a major rule as the term is defined in section 1(b) of the Executive Order because the annual effect of the rule on the economy will be less than $100 million; it will not cause a major increase in costs or prices for any section of the economy or for any geographic region; and it will not result in any significant adverse effects on competition, employment, investment, productivity, or innovation or on the ability of U.S. enterprises to compete with foreign enterprises in domestic or foreign markets.

This rule may in fact result in substantial economic benefits in the long run. The purpose of the rule is to ensure proper disposal of PCB waste. There have been historical cases of improper storage or disposal of PCB waste which have resulted in the creation of Superfund sites. Because the cleanup of these sites is often extremely expensive, this rule has the potential to benefit the economy as well as the environment.

The rule was submitted to the Office of Management and Budget (OMB) prior to publication as required by the Executive Order.

B. Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act (5 U.S.C. 603 et seq. Pub. L. 96-354, September 19, 1980), requires EPA to prepare and make available for comment a regulatory flexibility analysis in connection with rulemaking. The initial regulatory flexibility analysis must describe the impact of the proposed rule on small business entities. If, however, a regulation will not have a significant impact on a substantial number of small entities, no such regulatory impact analysis is required.

EPA lacks information about the universe of PCB generators, storers, transporters, and disposers. This lack of information is a major reason for issuing the rule. Because EPA lacks such knowledge about the degree to which this rule would affect small business, it could not determine whether a regulatory flexibility analysis was necessary. Using what data were available, EPA performed a Regulatory Impact Analysis for the proposed rule, which is in the public record. EPA received no comments on the effect the proposed rule would have, if promulgated, on small business entities; therefore, EPA now concludes that the rule will not have a significant impact on a substantial number of small business entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* authorizes the Director of OMB to review certain information collection requests by Federal agencies. EPA has determined that the recordkeeping and reporting requirements of this rule constitute a "collection of information" as defined at 44 U.S.C. 3502(4).

EPA submitted the proposed information collection requirements to OMB for approval. OMB did not approve them. OMB's reasons for disapproval and EPA's responses in the final rule follow.

1. The burden box did not appear on the Notification Form (EPA No. 7710-53). This was the only reason for non-approval of the form. The burden box followed the form in the **Federal Register**. EPA has adjusted the form so that the burden box now is on the form.

2. OMB felt that the requirement to submit annual reports to EPA, instead of just maintaining them for inspection when requested, might not be the least burdensome approach as required by 5 CFR 1320.4(b)(1), and that the exception and discrepancy reports give EPA much more critical information for targeting inspections. OMB also felt that the burden of 1 hour should be attributed to submitting an annual report, rather than the de minimis expenditure EPA attributed to it. EPA has retained submission of the annual reports in the final rule since experience with the requirement to maintain the information at a facility proved conclusively to EPA that submission of the information was what was needed to target inspections for best results with the limited resources available. Further, EPA has found from experience under RCRA that so few exception or discrepancy reports are submitted to EPA that such reports would be inadequate for use in targeting inspections. EPA accepts OMB's suggestion that a small amount of time be added to the reporting burden for submission of the annual report and is adding 1 hour to the reporting burden estimate for submitting an annual report.

In addition, OMB instructed EPA to respond to public comments and consider alternatives to the closure plan and financial responsibility requirements in the proposed rule that might be less burdensome yet still create incentives for proper disposal and/or hold commercial storers responsible for cleanup. In particular, OMB suggested considering requiring storage facilities to disclose their closure plans and financial assurance mechanism plans during contract negotiations with PCB generators. EPA always gives consideration to comments received on a proposed rule, and in response to comments has made some adjustments to the closure plan and financial assurance requirements which are retained in the final rule. Most comments supported the closure plans and financial assurance requirements; none of them suggested that EPA involve itself in contract negotiations between generators and commercial storers or disposers. The closure plan requirements and financial assurance remain in the final rule.

The information collection requirements of this rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and have been approved under OMB control number 2070–0112.

The public reporting burden for this collection of information is estimated to average 1.5 hours per response for the notification requirements, 3 hours per response for the Exception and Discrepancy Reporting requirements, 1 hour for the annual report, and 325 to 460 hours per response (for only an estimated 75 of the total 5,651 respondents) for the financial assurance and closure requirements. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Chief, Information Policy Branch (PM–223), Environmental Protection Agency, 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.

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous materials, Labeling, Polychlorinated biphenyls, Reporting and recordkeeping requirements.

Dated: November 29, 1989.

William K. Reilly,

Administrator.

Therefore, 40 CFR chapter I, part 761 is amended as follows:

1. The authority citation for part 761 is revised to read as follows:

PART 761—[AMENDED]

Authority: 15 U.S.C. 2605, 2607, 2611, 2614, and 2616.

2. In § 761.3 by adding and alphabetically inserting definitions for "annual document log," "annual report," "certification," "commercial storer of PCB waste," "designated facility," "disposer of PCB waste," "EPA identification number," "generator of PCB waste," "laboratory," "manifest," "PCB waste(s)," "transfer facility," and "transporter of PCB waste" to read as follows:

§ 761.3 Definitions.

* * * * *

"Annual document log" means the detailed information maintained at the facility on the PCB waste handling at the facility.

* * * * *

"Annual report" means the written document submitted each year by each disposer and commercial storer of PCB waste to the appropriate EPA Regional Administrator. The annual report is a brief summary of the information included in the annual document log.

* * * * *

"Certification" means a written statement regarding a specific fact or representation that contains the following language:

Under civil and criminal penalties of law for the making or submission of false or fraudulent statements or representations (18 U.S.C. 1001 and 15 U.S.C. 2615), I certify that the information contained in or accompanying this document is true, accurate, and complete. As to the identified section(s) of this document for which I cannot personally verify truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate, and complete.

* * * * *

"Commercial storer of PCB waste" means the owner or operator of each facility which is subject to the PCB storage facility standards of § 761.65, and who engages in storage activities involving PCB waste generated by others, or PCB waste that was removed while servicing the equipment owned by others and brokered for disposal. The receipt of a fee or any other form of compensation for storage services is not necessary to qualify as a commercial storer of PCB waste. It is sufficient under this definition that the facility stores PCB waste generated by others or the facility removed the PCB waste while servicing equipment owned by others. A generator who stores only the generator's own waste is subject to the storage requirements of § 761.65, but is not required to seek approval as a commercial storer. If a facility's storage of PCB waste at no time exceeds 500 gallons of PCBs, the owner or operator is not required to seek approval as a commercial storer of PCB waste.

"Designated facility" means the off-site disposer or commercial storer of PCB waste designated on the manifest as the facility that will receive a manifested shipment of PCB waste.

* * * * *

"Disposer of PCB waste," as the term is used in subparts J and K of this part, means any person who owns or operates a facility approved by EPA for the disposal of PCB waste which is regulated for disposal under the requirements of subpart D of this part.

* * * * *

"EPA identification number" means the 12-digit number assigned to a facility by EPA upon notification of PCB waste activity under § 761.205.

* * * * *

"Generator of PCB waste" means any person whose act or process produces PCBs that are regulated for disposal under subpart D of this part, or whose act first causes PCBs or PCB Items to become subject to the disposal requirements of subpart D of this part, or who has physical control over the PCBs when a decision is made that the use of the PCBs has been terminated and therefore is subject to the disposal requirements of subpart D of this part. Unless another provision of this part specifically requires a site-specific meaning, "generator of PCB waste" includes all of the sites of PCB waste generation owned or operated by the person who generates PCB waste.

* * * * *

"Laboratory" means a facility that analyzes samples for PCBs and is unaffiliated with any entity whose activities involve PCBs.

* * * * *

"Manifest" means the shipping document EPA form 8700–22 and any continuation sheet attached to EPA form 8700–22, originated and signed by the generator of PCB waste in accordance with the instructions included with the form and subpart K of this part.

* * * * *

"PCB waste(s)" means those PCBs and PCB Items that are subject to the disposal requirements of subpart D of this part.

* * * * *

"Transfer facility" means any transportation-related facility including loading docks, parking areas, and other similar areas where shipments of PCB waste are held during the normal course of transportation. Transport vehicles are not transfer facilities under this definition, unless they are used for the storage of PCB waste, rather than for actual transport activities. Storage areas for PCB waste at transfer facilities are subject to the storage facility standards of § 761.65, but such storage areas are exempt from the approval requirements of § 761.65(d) and the recordkeeping requirements of § 761.180, unless the same PCB waste is stored there for a period of more than 10 consecutive days between destinations.

* * * * *

"Transporter of PCB waste" means, for the purposes of subpart K of this part, any person engaged in the transportation of regulated PCB waste by air, rail, highway, or water for purposes other than consolidation by a generator.

* * * * *

3. In § 761.65 by adding paragraphs (d), (e), (f), (g), (h), and (i) and the OMB control number to the end of the section to read as follows:

§ 761.65 Storage for disposal.

* * * * *

(d) *Approval of commercial storers of PCB waste.* (1) All commercial storers of PCB waste shall have interim approval to operate commercial facilities for the storage of PCB waste until [insert date 224 days after date of publication in the **Federal Register**]. Commercial storers of PCB waste are prohibited from storing any PCB waste at their facilities after [insert date 224 days after date of publication in the **Federal Register**] unless they have submitted by [insert date 224 days after date of publication in the **Federal Register**] a complete application for a final storage approval under paragraph (d)(2) of this section. The period of interim approval shall continue until the Regional Administrator (or the Director of the Exposure Evaluation Division (Director, EED) in cases involving commercial storage ancillary to a facility approved for disposal by the Director, EED) makes a final decision on the storage application at which time such interim approval shall terminate.

(2) The Regional Administrator for the region in which the storage facility is located (or the Director, EED, if the commercial storage area is ancillary to a facility approved for disposal by the Director, EED) shall grant written, final approval to engage in the commercial storage of PCB waste upon a determination by the Regional Administrator or the Director, EED, that the criteria in paragraph (d)(2)(i) through (d)(2)(vii) of this section have been met by the applicant:

(i) The applicant, its principals, and its key employees responsible for the establishment or operation of the commercial storage facility are qualified to engage in the business of commercial storage of PCB waste.

(ii) The facility possesses the capacity to handle the quantity of PCB waste which the owner or operator of the facility has estimated will be the maximum quantity of PCB waste that will be handled at any one time at the facility.

(iii) The owner or operator of the facility has certified compliance with the storage facility standards in paragraphs (b) and (c)(7) of this section.

(iv) The owner or operator has developed a written closure plan for the facility that is deemed acceptable by the Regional Administrator (or the Director, EED, if the commercial storage is ancillary to a disposal facility permitted by the Director, EED) under the closure plan standards of paragraph (e) of this section.

(v) The owner or operator has included in the application for final approval a demonstration of financial responsibility for closure that meets the financial responsibility standards of paragraph (g) of this section.

(vi) The operation of the storage facility will not pose an unreasonable risk of injury to health or the environment.

(vii) The environmental compliance history of the applicant, its principals, and its key employees shall be deemed to constitute a sufficient basis for denial of approval whenever in the judgment of the Regional Administrator (or Director, EED) two or more related civil violations or a single environmental criminal conviction evidence a pattern or practice of non compliance that demonstrate the applicant's unwillingness or inability to achieve and maintain its operations in a compliance status.

(3) Applicants for storage approvals shall submit a written application that includes any relevant information bearing upon the qualifications of the facility's principals and key employees to engage in the business of commercial storage of PCB wastes. This information shall include, but is not limited to:

(i) The identification of the owner and the operator of the facility, including all general partners of a partnership, any limited partner of a partnership, any stockholder of a corporation or any participant in any other type of business organization or entity who owns or controls, directly or indirectly, more than 5 percent of each partnership, corporation, or other business organization and all officials of the facility who have direct management responsibility for the facility.

(ii) The identification of the person responsible for the overall operations of the facility (i.e., a plant manager, superintendent, or a person of similar responsibility) and the supervisory employees who are or will be responsible for the operation of the facility.

(iii) Information concerning the technical qualifications and experience of the persons responsible for the overall operation of the facility and the employees responsible for handling PCB waste or other wastes.

(iv) Information concerning any past State or Federal environmental violations involving the same business or another business with which the principals or supervisory employees were affiliated directly that occurred within 5 years preceding the date of submission and which relate directly to violations that resulted in either a civil penalty (irrespective of whether the matter was disposed of by an adjudication or by a without prejudice settlement) or judgment of conviction whether entered after trial or a plea, either of guilt or nolo contendere or civil injunctive relief and involved storage, disposal, transport, or other waste handling activities.

(v) A list of all companies currently owned or operated in the past by the principals or key employees identified in paragraphs (d)(3)(i) and (d)(3)(ii) of this section that are or were directly or indirectly involved with waste handling activities.

(vi) The owner's or operator's estimate of maximum PCB waste quantity to be handled at the facility.

(vii) A written statement certifying compliance with paragraph (b) or (c) of this section and containing a certification as defined in § 761.3.

(viii) A written closure plan for the facility, as described in paragraph (e) of this section.

(ix) The current closure cost estimate for the facility, as described in paragraph (f) of this section.

(x) A demonstration of financial responsibility to close the facility, as described in paragraph (g) of this section.

(4) The written approval issued by the Regional Administrator (or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director, EED) shall include, but not be limited to, the following:

(i) The determination that the applicant has satisfied the requirements set forth in paragraph (d)(2) of this section, and a brief statement setting forth the basis for the determination.

(ii) Incorporation of the closure plan submitted by the facility owner or operator and approved by the Regional Administrator (or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director, EED).

(iii) A condition imposing a maximum PCB storage capacity which the facility shall not exceed during its PCB waste storage operations. The maximum storage capacity imposed under this condition shall not be greater than the

estimated maximum inventory of PCB waste included in the owner's or operator's application for final approval.

(iv) Such other conditions as deemed necessary by the Regional Administrator (or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director, EED) to ensure that the operations of the PCB storage facility will not pose an unreasonable risk of injury to health or the environment.

(5) Storage areas at transfer facilities are exempt from the requirement to obtain approval as a commercial storer of PCB waste under this paragraph, unless the same PCB waste is stored at these facilities for a period of time greater than 10 consecutive days between destinations.

(6) Storage areas at RCRA-permitted facilities may be exempt from the separate TSCA storage approval requirements in this paragraph (d) upon a showing to the Regional Administrator's satisfaction that the facility's existing RCRA closure plan is substantially equivalent to this rule's closure plan standards, and that such facility's closure cost estimate and financial assurance demonstration account for maximum PCB waste inventories, and the requirements of paragraph (d)(3)(i) through (d)(3)(v) and (d)(3)(vii) of this section are met. A pay-in period of longer than 3 years after approval of the storage facility pursuant to this rule, will be acceptable to EPA if that pay-in period has already been established for a valid RCRA facility or previously approved TSCA facility.

(7) Storage areas ancillary to TSCA-approved disposal facilities may be exempt from a separate facility approval provided all of the following conditions are met:

(i) The current disposal approval contains an expiration date.

(ii) The current disposal approval's closure and financial responsibility conditions specifically extend to storage areas ancillary to disposal.

(iii) The current disposal approval's closure and financial responsibility conditions provide for annual adjustments for inflation, and for modification when changes in operation would affect closure costs.

(iv) The current disposal approval contains conditions on closure and financial responsibility that are at least as stringent as those in paragraphs (e) and (g) of this section. However, the provision for a 3-year closure trust pay-in period, as specified in paragraph (g)(1)(i) of this section, would be waived in a case in which an approved TSCA facility or RCRA facility that covers PCB storage has a longer pay-in period for the trust.

(v) The current disposal approval satisfies the requirements of paragraph (d)(3)(i) through (d)(3)(v) of this section.

(8) The approval of any existing TSCA-approved disposal facility ancillary to a commercial storage facility that is deficient in any of the conditions of paragraph (d)(7)(i) through (d)(7)(v) of this section shall be called in by the Regional Administrator or the Director, EED, if it was the Director, EED who issued it. The approval shall be modified to meet the requirements of paragraph (d)(7) of this section within 180 days of the effective date of this final rule, or a separate application for approval of the storage facility may be submitted to the Regional Administrator or the Director, EED, in the cases where the Director, EED issued the approval.

(e) *Closure.* (1) A commercial storer of PCB waste shall have a written closure plan that identifies the steps that the owner or operator of the facility shall take to close the PCB waste storage facility in a manner that eliminates the potential for post-closure releases of PCBs which may present an unreasonable risk to human health or the environment. An acceptable closure plan must include, at a minimum, all of the following:

(i) A description of how the PCB storage areas of the facility will be closed in a manner that eliminates the potential for post-closure releases of PCBs into the environment.

(ii) An identification of the maximum extent of storage operations that will be open during the active life of the facility, including an identification of the extent of PCB storage operations at the facility relative to other wastes that will be handled at the facility.

(iii) An estimate of the maximum inventory of PCB wastes that could be handled at one time at the facility over its active life, and a detailed description of the methods or arrangements to be used during closure for removing, transporting, storing, or disposing of the facility's inventory of PCB waste, including an identification of any off-site facilities that will be used.

(iv) A detailed description of the steps needed to remove or decontaminate PCB waste residues and contaminated containment system components, equipment, structures, and soils during closure in accordance with the levels specified in the PCB Spills Cleanup Policy in subpart G of this part, including a description of the methods for sampling and testing of surrounding soils, and the criteria for determining the extent of removal or decontamination.

(v) A detailed description of other activities necessary during the closure period to ensure that any post-closure releases of PCBs will not present unreasonable risks to human health or the environment. This includes activities such as ground-water monitoring, run-on and run-off control, and facility security.

(vi) A schedule for closure of each area of the facility where PCB waste is stored or handled, including the total time required to close each area of PCB waste storage or handling, and the time required for any intervening closure activities.

(vii) An estimate of the expected year of closure of the PCB waste storage areas, if a trust fund is opted for as the financial mechanism.

(2) A written closure plan determined to be acceptable by the Regional Administrator (or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director, EED) under this section shall become a condition of any approval granted under paragraph (d) of this section.

(3) A separate and new closure plan need not be submitted in cases where a facility is currently covered by a TSCA approval or a RCRA permit, upon a showing to the satisfaction of the Regional Administrator (or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director, EED) that the existing closure plan is substantially equivalent to closure plans required under paragraphs (d) through (g) of this section, and that the plan adequately accounts for PCB waste inventories.

(4) The commercial storer of PCB waste shall submit a written request to the Regional Administrator (or the Director, EED, if he approved the closure plan) for a modification to its storage approval to amend its closure plan, whenever:

(i) Changes in ownership, operating plans, or facility design affect the existing closure plan.

(ii) There is a change in the expected date of closure, if applicable.

(iii) In conducting closure activities, unexpected events require a modification of the approved closure plan.

(5) The Regional Administrator or the Director, EED, if he approved the closure plan, may modify the existing closure plan under the conditions described in paragraph (e)(4) of this section.

(6) Commercial storers of PCB waste shall comply with the following closure schedule:

(i) The commercial storer shall notify in writing the Regional Administrator or

the Director, EED if he approved the closure plan, at least 60 days prior to the date on which final closure of its PCB storage facility is expected to begin.

(ii) The date when a commercial storer of PCB waste "expects to begin closure" shall be no later than 30 days after the date on which the storage facility received its final quantities of PCB waste. For good cause shown, the Regional Administrator or the Director, EED if he approved the closure plan, may extend the date for commencement of closure for an additional 30-day period.

(iii) Within 90 days after receiving the final quantity of PCB waste for storage, a commercial storer of PCB waste shall remove all PCB waste in storage at the facility from the facility in accordance with the approved closure plan. For good cause shown, the Regional Administrator or the Director, EED if he approved the closure plan, may approve a reasonable extension to the period for removal of the PCB waste.

(iv) A commercial storer of PCB waste shall complete closure activities in accordance with the approved closure plan and within 180 days after receiving the final quantity of PCB waste for storage at the facility. For good cause shown, the Regional Administrator or Director, EED if he approved the closure plan, may approve a reasonable extension to the closure period.

(7) During the closure period, all contaminated system component equipment, structures, and soils shall be disposed of in accordance with the disposal requirements of subpart D of this part, or, if applicable, decontaminated in accordance with the levels specified in the PCB Spills Cleanup Policy at subpart G of this part. When PCB waste is removed from the storage facility during closure, the owner or operator becomes a generator of PCB waste subject to the generator requirements of subpart J of this part.

(8) Within 60 days of completion of closure of each facility for the storage of PCB waste, the commercial storer of PCB waste shall submit to the Regional Administrator (or Director, EED if he approved the closure plan), by registered mail, a certification that the PCB storage facility has been closed in accordance with the approved closure plan. The certification shall be signed by the owner or operator and by an independent registered professional engineer.

(f) *Closure cost estimate.* (1) A commercial storer of PCB wastes shall have a detailed estimate, in current dollars, of the cost of closing the facility in accordance with its approved closure plan. The closure cost estimate shall be in writing, be certified by the person preparing it (using the certification defined in § 761.3) and comply with all of the following criteria:

(i) The closure cost estimate shall equal the cost of final closure at the point in the PCB storage facility's active life when the extent and manner of PCB storage operations would make closure the most expensive, as indicated by the facility's closure plan.

(ii) The closure cost estimate shall be based on the costs to the owner or operator of hiring a third party to close the facility, and the third party shall not be either a corporate parent or subsidiary of the owner or operator, or member in joint ownership of the facility.

(iii) The owner or operator shall include in the estimate the current market costs for off-site commercial disposal of the facility's maximum estimated inventory of PCB wastes, except that on-site disposal costs may be used if on-site disposal capacity will exist at the facility at all times over the life of the PCB storage facility.

(iv) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of wastes, facility structures or equipment, land, or other assets associated with the facility at the time of closure.

(2) During the active life of the PCB storage facility, the commercial storer of PCB waste shall adjust annually for inflation the closure cost estimate within 60 days prior to the anniversary date of the establishment of the financial instruments used to demonstrate financial responsibility for closure, except that owners or operators who use the financial test or corporate guarantee shall adjust their closure cost estimates for inflation within 30 days after the close of the storer's fiscal year. The adjustment may be made by recalculating the maximum costs of closure in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its *Survey of Current Business*. The Implicit Price Deflator for Gross National Product is included in a monthly publication titled *Economic Indicators*, which is available from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. The inflation factor used in the latter method is the result of dividing the latest published annual Deflator by the Deflator for the previous year. The adjustment to the closure cost estimate is then made by multiplying the most recent closure cost estimate by the latest inflation factor.

(3) Where the Regional Administrator (or the Director, EED, if he approved the closure plan) approves a modification to the facility's closure plan, and that modification increases the cost of closure, the owner or operator shall revise the closure cost estimate no later than 30 days after the modification is approved. Any such revision shall also be adjusted for inflation in accordance with paragraph (f)(2) of this section.

(4) The owner or operator of the facility shall keep at the facility during its operating life the most recent closure cost estimate, including any adjustments resulting from inflation or from modifications to the closure plan.

(g) *Financial assurance for closure.* A commercial storer of PCB waste shall establish financial assurance for closure of each PCB storage facility that he owns or operates. In establishing financial assurance for closure, the commercial storer of PCB waste may choose from the following financial assurance mechanisms or any combination of mechanisms:

(1) The "closure trust fund," as specified in § 264.143(a) of this chapter, except for paragraph (a)(3) of § 264.143. For purposes of this paragraph, the following provisions also apply:

(i) Payments into the trust fund shall be made annually by the owner or operator over the remaining operating life of the facility as estimated in the closure plan, or over 3 years, whichever period is shorter. This period of time is hereafter referred to as the "pay-in period." For an existing facility, the first payment must be made within 30 calendar days after EPA has notified the facility of its conditional approval. Interim approval to operate is canceled and the application is denied if EPA does not receive verification that the payment was made in that 30-day period.

(ii) For a new facility, the first payment into the closure trust fund shall be made before EPA grants final approval of the application and before the facility may accept the initial shipment of PCB waste for commercial storage. A receipt from the trustee shall be submitted by the owner or operator to the Regional Administrator (or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director EED) before this initial delivery of PCB waste. The first payment shall be at least equal to the current closure cost estimate, divided by the number of years in the pay-in period, except as provided in paragraph (g)(7) of this section for multiple mechanisms. Subsequent payments shall be made no later than 30

days after each anniversary date of the first payment. The amount of each subsequent payment shall be determined by subtracting the current value of the trust fund from the current closure cost estimate, and dividing this difference by the number of years remaining in the pay-in period.

(iii) If an owner or operator of a facility existing on the effective date of this paragraph establishes a trust fund to meet the financial assurance requirements of this paragraph, and the value of the trust fund is less than the current closure cost estimate when a final approval is granted for the facility, the amount of the current closure cost estimate still to be paid into the trust fund shall be paid in over the pay-in period as defined in paragraph (g)(1)(i) of this section. Payments shall continue to be made no later than 30 days after each anniversary date of the first payment made into the trust fund. The amount of each payment shall be determined by subtracting the current value of the trust fund from the current closure cost estimate, and dividing this difference by the number of years remaining in the pay-in period.

(iv) The submission of a trust agreement with the wording specified in § 264.151(a)(1) of this chapter, including any reference to hazardous waste management facilities, shall be deemed to be in compliance with the requirement to submit a trust agreement under this subpart.

(2) The "surety bond guaranteeing payment into a closure trust fund," as specified in § 264.143(b) of this chapter, including the use of the surety bond instrument specified at § 264.151(b) of this chapter and the standby trust specified at § 264.143(b)(3) of this chapter. The use of the surety bonds, surety bond instruments, and standby trust agreements specified in § § 264.143(b) and 264.151(b) of this chapter shall be deemed to be in compliance with this subpart.

(3)(i) The "surety bond guaranteeing performance of closure," as specified at § 264.143(c) of this chapter, except for paragraph (c)(5) of § 264.143 of this chapter. The submission and use of the surety bond instrument specified at § 264.151(c) of this chapter and the standby trust specified at § 264.143(c)(3) of this chapter shall be deemed to be in compliance with the requirements under this subpart relating to the use of surety bonds and standby trust funds.

(ii) For the purposes of this paragraph, and under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Liability is established by a final administrative determination pursuant to section 16 of TSCA that the owner or operator has failed to perform final closure in accordance with the closure plan and other approval or regulatory requirements when required to do so.

(4)(i) The "closure letter of credit" specified in § 264.143(d) of this chapter, except for paragraph (d)(8). The submission and use of the irrevocable letter of credit instrument specified in § 264.151(d) of this chapter and the standby trust specified in § 264.143(d)(3) of this chapter shall be deemed to be in compliance with the requirements of this subpart relating to the use of letters of credit and standby trust funds.

(ii) For the purposes of this paragraph, the Regional Administrator (or the Director, EED, if the commercial storage area is ancillary to a disposal facility approved by the Director, EED) may draw on the letter of credit following a final administrative determination pursuant to section 16 of TSCA that the owner or operator has failed to perform final closure in accordance with the closure plan and other approval or regulatory requirements when required to do so.

(5) "Closure insurance," as specified in § 264.143(e) of this chapter, utilizing the certificate of insurance for closure specified at § 264.151(e) of this chapter. The use of closure insurance as specified in § 264.143(e) of this chapter and the submission and use of the certificate of insurance specified in § 264.151(e) of this chapter shall be deemed to be in compliance with the requirements of this subpart relating to the use of closure insurance.

(6) The "financial test and corporate guarantee for closure," as described in § 264.143(f) of this chapter, including a letter signed by the owner's or operator's chief financial officer as specified at § 264.151(f) of this chapter and, if applicable, the written corporate guarantee specified at § 264.151(h) of this chapter. The use of the financial test and corporate guarantee specified in § 264.143(f) of this chapter, the submission and use of the letter specified in § 264.151(f) of this chapter, and the submission and use of the written corporate guarantee specified at § 264.151(h) of this chapter shall be deemed to be in compliance with the requirements of this subpart relating to the use of financial tests and corporate guarantees.

(7) The use of multiple financial mechanisms, as specified in § 264.143(g) of this chapter is permitted.

(h) *Release of owner or operator.* Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Regional Administrator or the Director, EED, if he approved the closure plan, will notify the owner or operator in writing that the owner or operator is no longer required by this section to maintain financial assurance for final closure of the facility, unless the Regional Administrator or the Director, EED, if he approved the closure plan, has reason to believe that final closure has not been completed in accordance with the approved closure plan. The Regional Administrator or the Director, EED, if he approved the closure plan, shall provide the owner or operator with a detailed written statement stating the reasons why he believed closure was not conducted in accordance with the approved closure plan.

(i) *Laboratories and samples.* (1) A laboratory is conditionally exempt from the notification and approval requirements for a commercial storer under § 761.65 (d) through (h) when it stores samples held for disposal in a facility that complies with the standards in § 761.65(b)(1)(i) through (b)(1)(iv).

(2) A laboratory sample is exempt from the manifesting requirements in § 761.208 when:

(i) The sample is being transported to a laboratory for the purpose of testing.

(ii) The sample is being transported back to the sample collector after testing.

(iii) The sample is being stored by the sample collector before transport to a laboratory for testing.

(iv) The sample is being stored in a laboratory before testing.

(v) The sample is being stored in a laboratory after testing but before it is returned to the sample collector.

(vi) The sample is being stored temporarily in the laboratory after testing for a specific purpose (for example, until conclusion of a court case or enforcement action where further testing of the sample may be necessary).

(3) In order to qualify for the exemption in paragraph (d)(2)(i) and (d)(2)(ii) of this section, a sample collector shipping samples to a laboratory and a laboratory returning samples to a sample collector must:

(i) Comply with applicable U.S. Department of Transportation (DOT) or U.S. Postal Service (USPS) shipping requirements, found respectively in 49 CFR 173.345 and U.S. Postal Regulations 652.2 and 652.3.

(ii) Assure that the following information accompanies the sample:

(A) The sample collector's name, mailing address, and telephone number.

(B) The laboratory's name, mailing address, and telephone number.

(C) The quantity of the sample.

(D) The date of shipment.

(E) A description of the sample.

(iii) Package the sample so that it does not leak, spill, or vaporize from its packaging.

(4) When the concentration of the PCB sample has been determined, and its use is terminated, the sample must be properly disposed. A laboratory must either manifest the PCB waste to a disposer or commercial storer, as required under § 761.208, retain a copy of each manifest, as required under § 761.209, and follow up on exception reporting, as required under § 761.215 (a) and (b), or return the sample to the sample collector who must then properly dispose of the sample. If the laboratory returns the sample to the sample collector, the laboratory must comply with the shipping requirements set forth in paragraph (i)(3)(i) through (i)(3)(iii) of this section.

(j) *States and the Federal Government.* States and the Federal Government are exempt from the requirements of paragraphs (f) and (g) of this section.

(Approved by the Office of Management and Budget under control number 2070–0112)

Subpart J—General Records and Reports

4. By revising the heading for subpart J to read as set forth above.

5. By revising paragraphs (a) and (b) and adding the OMB control number to the end of § 761.180 to read as follows:

§ 761.180 Records and monitoring.

* * * * *

(a) *PCBs and PCB Items in service or projected for disposal.* Beginning February 5, 1990, each owner or operator of a facility, other than a commercial storer or a disposer of PCB waste, using or storing at any one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB Container(s), or one or more PCB Transformers, or 50 or more PCB Large High or Low Voltage Capacitors shall develop and maintain at the facility, or a central facility provided they are maintained at that facility, all annual records and the written annual document log of the disposition of PCBs and PCB Items. The written annual document log must be prepared for each facility by July 1 covering the previous calendar year (January through December). The annual document log shall be maintained for at least 3 years after the facility ceases using or storing PCBs and PCB Items in the quantities prescribed in this paragraph. Annual records (manifests and certificates of disposal) shall be maintained for the same period. The annual records and the annual document log shall be available for inspection at the facility where they are maintained by authorized representatives of EPA during normal business hours, and each owner or operator of a facility subject to these requirements shall know the location of these records. All records and annual documents required to be prepared and maintained by this section prior to February 5, 1990 shall continue to be maintained at the facility for the same time as the annual records and the annual document log. The annual document required for 1989 shall cover the period from January 1, 1989 to February 5, 1990.

(1) The annual records shall include the following:

(i) All signed manifests generated by the facility during the calendar year.

(ii) All Certificates of Disposal that have been received by the facility during the calendar year.

(2) The written annual document log shall include the following:

(i) The name, address, and EPA identification number of the facility covered by the annual document log and the calendar year covered by the annual document log.

(ii) The unique manifest number of every manifest generated by the facility during the calendar year, and from each manifest and for unmanifested waste that may be stored at the facility, the following information:

(A) For bulk PCB waste (*e.g.*, in a tanker or truck), its weight in kilograms, the first date it was removed from service for disposal, the date it was placed into transport for off-site storage or disposal, and the date of disposal, if known.

(B) The serial number (if available) or other means of identifying each PCB Article (*e.g.*, transformer or capacitor), the weight in kilograms of the PCB waste in each transformer or capacitor, the date it was removed from service for disposal, the date it was placed in transport for off-site storage or disposal, and the date of disposal, if known.

(C) A unique number identifying each PCB Container, a description of the contents of each PCB Container, such as liquid, soil, cleanup debris, etc., including the total weight of the material in kilograms in each PCB Container, the first date material was placed in each PCB Container for disposal, and the date each PCB Container was placed in transport for off-site storage or disposal, and the date of disposal if known.

(D) A unique number identifying each PCB Article Container, a description of the contents of each PCB Article Container, such as pipes, capacitors, electric motors, pumps, etc., including the total weight in kilograms of the contents of each PCB Article Container, the first date a PCB Article was placed into each PCB Article Container for disposal, the total weight of the PCB Articles in kilograms in each PCB Article Container, and the date the PCB Article Container was placed in transport for off-site storage or disposal, and the date of disposal if known.

(iii) The total number by specific type of PCB Articles and the total weight in kilograms of PCBs in PCB Articles, the total number of PCB Article Containers and total weight in kilograms of the contents of PCB Article Containers, the total number of PCB Containers and the total weight in kilograms of the contents of PCB Containers, and the total weight in kilograms of bulk PCB waste that was placed into storage for disposal or disposed during the calendar year.

(iv) The total number of PCB Transformers and total weight in kilograms of PCBs contained in the transformers remaining in service at the end of the calendar year.

(v) The total number of Large High or Low Voltage PCB Capacitors remaining in service at the end of the calendar year.

(vi) The total weight in kilograms of any PCBs and PCB Items in PCB Containers, including the identification of container contents, remaining in service at the facility at the end of the calendar year.

(vii) For any PCBs or PCB item received from or shipped to another facility owned or operated by the same generator, the information required under paragraph (a)(2)(ii)(A) through (a)(2)(ii)(D) of this section.

(viii) A record of each telephone call, or other means of verification agreed upon by both parties, made to each designated commercial storer or designated disposer to confirm receipt of PCB waste transported by an independent transporter, as required by § 761.208.

(b) *Disposers and commercial storers of PCB waste.* Beginning February 5, 1990, each owner or operator of a facility (including high efficiency boiler operations) used for the commercial storage or disposal of PCBs and PCB Items shall maintain annual records on the disposition of all PCBs and PCB items at the facility and prepare and maintain a written annual document log that includes the information required by paragraphs (b)(2) of this section for

PCBs and PCB Items that were handled as PCB waste at the facility. The written annual document log shall be prepared by July 1 for the previous calendar year (January through December). The written annual document log shall be maintained at each facility for at least 3 years after the facility is no longer used for the storage or disposal of PCBs and PCB Items except that, in the case of chemical waste landfills, the annual document log shall be maintained at least 20 years after the chemical waste landfill is no longer used for the disposal of PCBs and PCB Items. The annual records shall be maintained for the same period. The annual records and written annual document log shall be available at the facility for inspection by authorized representatives of the EPA. All records and annual documents required to be prepared and maintained by this section prior to February 5, 1990 shall continue to be maintained at the facility for the same time as the annual records and the annual document log. The annual document for 1989 shall cover the period from January 1, 1989 to February 5, 1990. From the written annual document log the owner or operator of a facility must prepare the annual report containing the information required by paragraphs (b)(3)(i) through (b)(3)(vi) of this section for PCBs and PCB Items that were handled as PCB waste at the facility during the previous calendar year (January through December). The annual report must be submitted by July 15 of each year for the preceding calendar year. If the facility ceases commercial PCB storage or disposal operations, the owner or operator of the facility shall provide at least 60 days advance written notice to the Regional Administrator for the region in which the facility is located of the date the facility intends to begin closure.

(1) The annual records shall include the following:

(i) All signed manifests generated or received at the facility during the calendar year.

(ii) All Certificates of Disposal that have been generated or received by the facility during the calendar year.

(2) The written annual document log shall include the following:

(i) The name, address, and EPA identification number of the storage or disposal facility covered by the annual document log and the calendar year covered by the annual document log.

(ii) For each manifest generated or received by the facility during the calendar year, the unique manifest number and the name and address of the facility that generated the manifest the following information:

(A) For bulk PCB waste (*e.g.*, in a tanker or truck), its weight in kilograms, the first date PCB waste was placed in the tanker or truck for disposal, the date it was received at the facility, the date it was placed in transport for off-site disposal (if applicable), and the date of disposal, if known.

(B) The serial number or other means of identifying each PCB Article, not in a PCB Container or PCB Article Container, the weight in kilograms of the PCB waste in the PCB Article, the date it was removed from service for disposal, the date it was received at the facility, the date it was placed in transport for off-site disposal (if applicable), and the date of disposal (if known).

(C) The unique number assigned by the generator identifying each PCB Container, a description of the contents of each PCB Container, such as liquid, soil, cleanup debris, etc., including the total weight of the PCB waste in kilograms in each PCB Container, the first date PCB waste was placed in each PCB Container for disposal, the date each PCB Container was placed in transport for off-site storage or disposal (as applicable), and the date the PCB Container was disposed (if known).

(D) The unique number assigned by the generator identifying each PCB Article Container, a description of the contents of each PCB Article Container, such as pipes, capacitors, electric motors, pumps, etc., including the total weight in kilograms of the PCB waste in each PCB Article Container, the first date a PCB Article was placed in each PCB Article Container for disposal, the date each PCB Article Container was placed in transport for off-site storage or disposal (as applicable), and the date the PCB Article Container was disposed (if known).

(E) Disposers of PCB waste shall include the confirmed date of disposal for items in paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(D) of this section.

(iii) For any PCB waste disposed at a facility that generated the PCB waste or any PCB waste that was not manifested to the facility, the information required under paragraph (b)(2)(ii)(A) through (B)(2)(ii)(E) of this section.

(3) The owner or operator of a PCB disposal or commercial storage facility shall submit an annual report, which briefly summarizes the records and annual document log required to be maintained and prepared under paragraphs (b)(1) and (b)(2) of this section, to the Regional Administrator of the EPA region in which the facility is located by July 15 of each year, beginning with July 15, 1991. The first annual report submitted on July 15, 1991, shall be for the period starting February 5, 1990 and ending December 31, 1990. The annual report shall contain no confidential business information. The annual report shall consist of the information listed in paragraphs (b)(3)(i) through (b)(3)(vi) of this section.

(i) The name, address, and EPA identification number of the facility covered by the annual report for the calendar year.

(ii) A list of the numbers of all signed manifests of PCB waste initiated or received by the facility during that year.

(iii) The total weight in kilograms of bulk PCB waste, PCB waste in PCB Transformers, PCB waste in PCB Large High or Low Voltage Capacitors, PCB waste in PCB Article Containers, and PCB waste in PCB Containers in storage at the facility at the beginning of the calendar year, received or generated at the facility, transferred to another facility, or disposed of at the facility during the calendar year. The information must be provided for each of these categories, as appropriate.

(iv) The total number of PCB Transformers, the total number of PCB Large High or Low Voltage Capacitors, the total number of PCB Article Containers, and the total number of PCB Containers in storage at the facility at the beginning of the calendar year, received or generated at the facility, transferred to another facility, or disposed of at the facility during the calendar year. The information must be provided for each of these categories, as appropriate.

(v) The total weight in kilograms of each of the following PCB categories: bulk PCB waste, PCB waste in PCB Transformers, PCB waste in PCB Large High or Low Voltage Capacitors, PCB waste in PCB Article Containers, and PCB waste in PCB Containers remaining in storage for disposal at the facility at the end of the calendar year.

(vi) The total number of PCB Transformers, the total number of PCB Large High or Low Voltage Capacitors, the total number of PCB Article Containers, and the total number of PCB Containers remaining in storage for disposal at the facility at the end of the calendar year.

(vii) The requirement to submit annual reports to the Regional Administrator continues until the submission of the annual report for the calendar year during which the facility ceases PCB storage or disposal operations. Storage operations have not ceased until all PCB waste, including any PCB waste generated during closure, has been removed from the facility.

(4) Whenever a commercial storer of PCB waste accepts PCBs or PCB Items

at his storage facility and transfers the PCB waste off-site to another facility for storage or disposal, the commercial storer of PCB waste shall initiate a manifest under subpart K of this part for the transfer of PCBs or PCB Items to the next storage or disposal facility.

Note: Any requirements for weights in kilograms of PCBs may be calculated values if the internal volume of PCBs in containers and transformers is known and included in the reports, together with any assumptions on the density of the PCBs contained in the containers or tranformers. If the internal volume of PCBs is not known, a best estimate may be used.

* * * * *

(Approved by the Office of Management and Budget under control numbers 2070-0061 and 2070-01112

6. By adding a subpart K, consisting of §§ 761.202 through 761.218, to read as follows:

Subpart K—PCB Waste Disposal Records and Reports

Sec.

761.202 EPA identification numbers.
761.205 Notification of PCB waste activity (EPA Form 7710-53).
761.207 The manifest—general requirements.
761.208 Use of the manifest.
761.209 Retention of manifest records.
761.210 Manifest discrepancies.
761.211 Unmanifested waste report.
761.215 Exception reporting.
761.218 Certificate of Disposal.

Subpart K—PCB Waste Disposal Records and Reports

§ 761.202 EPA identification numbers.

(a) *General.* Any generator, commercial storer, transporter, or disposer of PCB waste who is required to have an EPA identification number under this subpart must notify EPA of his/her PCB waste handling activities, using the notification procedures and form described in § 761.205. EPA will confirm the EPA identification number of facilities already assigned one, and will assign an EPA identification number to facilities that do not have one.

(b) *Prohibitions.* After June 4, 1990:

(1) A generator of PCB waste shall not:

(i) Process, store, dispose of, transport, or offer for transportation PCB waste without having received an EPA identification number from the Agency. A generator of PCB waste who is exempted from notification under § 761.205(c)(1) or who notifies EPA in a timely manner under § 761.205(c)(2)(i), but has not yet received a unique identification number, shall be regarded as having received from EPA the identification number "40 CFR PART 761."

(ii) Offer the PCB waste to transporters, disposers, or commercial storers of PCB waste who have not received an EPA identification number.

(2) A transporter of PCB waste shall not:

(i) Transport PCB waste without having received an EPA identification number from EPA.

(ii) Deliver PCB waste to transporters, disposers, or commercial storers of PCB waste that have not received an EPA identification number.

(3) A commercial storer of PCB waste shall not accept any PCB waste for storage without having received an EPA identification number from EPA.

(4) A disposer of PCB waste shall not accept any PCB waste for disposal without having received an EPA identification number from EPA. A disposer of PCB waste who owns more than one disposal facility or mobile treatment unit shall not accept waste unless the disposer has received an EPA identification number for each facility or mobile unit.

(c) *PCB waste handled prior to effective date of this subpart.* Generators (other than generators exempt from notification under § 761.205(c)(1)), commercial storers, transporters, and disposers of PCB waste who are required to have EPA identification numbers under this subpart, and who were engaged in PCB waste handling activities on or prior to February 5, 1990, are not subject to the prohibitions of paragraph (b) of this section if they have applied for an EPA identification number in accordance with the applicable notification procedures of § 761.205. Such persons shall use the EPA identification number "40 CFR PART 761," or a number assigned to the persons by EPA or a State under RCRA, until EPA issues to such persons a specific identification number under § 761.205(a), (b), or (c).

(d) *PCB waste first handled after effective date of this subpart.* Generators (other than generators exempt from notification under § 761.205(c)(1)), commercial storers, transporters, and disposers of PCB waste who are required to have EPA identification numbers under this subpart, and who first engage in PCB waste activities after February 5, 1990, are subject to the prohibitions in paragraph (b) of this section.

§ 761.205 Notification of PCB waste activity (EPA Form 7710-53).

(a)(1) All commercial storers, transporters, and disposers of PCB waste who were engaged in PCB waste handling activities on or prior to February 5, 1990 shall notify EPA of their PCB waste activities by filing EPA Form 7710-53 with EPA by no later than April 4, 1990. Upon receiving the notification form, EPA will assign an EPA identification number to each entity that notifies.

(2) All generators (other than generators exempt from notification under paragraph (c)(1) of this section), commercial storers, transporters, and disposers of PCB waste who first engage in PCB waste handling activities after February 5, 1990, shall notify EPA of their PCB waste activities by filing EPA Form 7710-53 with EPA prior to engaging in PCB waste handling activities.

(3) Any person required to notify EPA under this section shall file with EPA Form 7710-53. Copies of EPA Form 7710-53 are available from the Chemical Regulation Branch (TS-798), Office of Toxic Substances, Environmental Protection Agency, 401 M St. SW, Washington, DC 20460. Descriptive information and instructions for filling in the form are included in paragraphs (a)(4) (i) through (vii) of this section.

(4) All of the following information shall be provided to EPA on Form 7710-53:

(i) The name of the facility, and the name of the owner or operator of the facility.

(ii) EPA identification number, if any, previously issued to the facility.

(iii) The facility's mailing address.

(iv) The location of the facility.

(v) The facility's installation contact and telephone number.

(vi) The type of PCB waste activity engaged in at the facility.

(vii) Signature of the signer of the certification statement, typed or printed name and official title of signer, and date signed.

(viii) EPA has determined that the information in paragraphs (a)(4)(i) through (a)(4)(vii) of this section shall not be treated as confidential business information. This information will be disclosed to the public without further notice to the submitter unless the submitter provides a written justification (submitted with the notification form) which demonstrates extraordinary reasons why the information should be entitled to confidential treatment.

(b) Generators (other than those generators exempt from notification under paragraph (c)(1) of this section), commercial storers, transporters, and disposers of PCB waste who have previously notified EPA or a State of hazardous waste activities under RCRA

shall notify EPA of their PCB waste activities under this part by filing EPA Form 7710–53 with EPA by no later than April 4, 1990. The notification shall include the EPA identification number previously issued by EPA or the State and upon receipt of the notification, EPA shall verify and authorize the use of the previously issued identification number for PCB waste activities.

(c)(1) Generators of PCB waste need not notify EPA and receive unique EPA identification numbers under this section, unless their PCB waste activities are described in paragraph (c)(2) of this section. Generators exempted from notifying EPA under this paragraph shall use the generic identification number "40 CFR PART 761" on the manifests, records, and reports which they shall prepare under this subpart, unless such generators elect to use a unique EPA identification number previously assigned to them under RCRA by EPA or a State.

(2) Generators of PCB waste who use, own, service, or process PCBs or PCB Items shall notify EPA of their PCB waste activities only if they own or operate PCB storage facilities subject to the storage requirements of § 761.65 (b) or (c)(7). Such generators shall notify EPA in the following manner:

(i) Generators storing PCB waste subject to the storage requirements of § 761.65 (b) or (c)(7) shall notify EPA by filing EPA Form 7710–53 with EPA by no later than April 4, 1990.

(ii) Generators who desire to commence storage of PCB waste after February 5, 1990 shall notify EPA and receive an EPA identification number before they may commence storage of PCBs at their facilities established under § 761.65 (b) or (c)(7).

(iii) A separate notification shall be submitted to EPA for each PCB storage facility owned or operated by generators of PCB waste. Upon receiving these notifications, EPA will assign generators unique EPA identification numbers for each storage facility notifying EPA under this section.

(d) Persons required to notify under this section shall file EPA Form 7710–53 with EPA by mailing the form to the following address: Chief, Chemical Regulation Branch (TS–798), Office of Toxic Substances, Environmental Protection Agency, Rm. NE–117, 401 M St., SW, Washington, DC 20460.

(e) The requirements under this section to notify EPA and obtain EPA identification numbers shall in no case excuse compliance by any person subject to the 1-year limit on storage prior to disposal under § 761.65(a).

(Approved by the Office of Management and Budget under control number 2070–0112.)

§ 761.207 The manifest—general requirements.

(a) A generator who relinquishes control over PCB wastes by transporting, or offering for transport by his own vehicle or by a vehicle owned by another person, PCB waste for commercial off-site storage or off-site disposal shall prepare a manifest on EPA Form 8700–22, and if necessary, a continuation sheet. The generator shall specify:

(1) For each bulk load of PCBs, the identity of the PCB waste, the earliest date of removal from service for disposal, and the weight in kilograms of the PCB waste.

(2) For each PCB Article Container or PCB Container, the unique identifying number, type of PCB waste (*e.g.*, soil, debris, small capacitors), earliest date of removal from service for disposal, and weight in kilograms of the PCB waste contained.

(3) For each PCB Article not in a PCB Container or PCB Article Container, the serial number if available, or other identification if there is no serial number, the date of removal from service for disposal, and weight in kilograms of the PCB waste in each PCB Article.

(b) EPA does not maintain supplies of printed copies of Form 8700–22 for public use, although printed copies of the manifest may be available from State offices. Camera-ready copies of the form are available for printing purposes from State offices, EPA Regional Offices, and EPA Headquarters.

(c) If the State to which the shipment is manifested (i.e., consignment State) supplies the manifest and requires its use, then the generator must use that manifest.

(d) If the consignment State does not supply the manifest, but the State in which the generator is located (i.e., generator State) supplies the manifest and requires its use, then the generator must use that State's manifest.

(e) If both the consignment State and the generator State supply manifests and require their use, the generator must use the consignment State's manifest.

(f) If neither the generator State nor the consignment State supplies the manifest, the generator may obtain the manifest from any source.

(g) A generator shall designate on the manifest one off-site commercial storage or disposal facility approved under this part for the commercial storage or disposal of the PCBs and PCB Items described on the manifest.

(h) If the transporter is unable to deliver the PCB waste to the designated disposer or commercial storer, the transporter must contact the generator of the PCB waste for instructions. The generator shall either designate another approved disposer or commercial storer, or instruct the transporter to return the PCB waste back to the generator.

(i) The manifest which accompanies the PCB waste shall consist of at a minimum the number of copies required to provide the generator, the initial transporter, each subsequent transporter, and the owner or operator of the designated commercial storage or disposal facility with one legible copy each for their records, and one additional copy to be returned to the generator by the owner or operator of the first designated commercial storage or disposal facility.

(j) The requirements of this section apply only to PCB wastes as defined in § 761.3. This includes PCB wastes with PCB concentrations below 50 ppm where the PCB concentration below 50 ppm was the result of dilution; these PCB wastes are required, under § 761.1(b), to be managed as if they contained PCB concentrations greater than 50 ppm. An example of such a PCB waste is spill cleanup material containing less than 50 ppm PCBs when the spill involved material containing greater than 50 ppm.

§ 761.208 Use of the manifest.

(a)(1) The generator of PCB waste shall:

(i) Sign the manifest certification by hand.

(ii) Obtain the handwritten signature of the initial transporter and date of acceptance on the manifest.

(iii) Retain one copy among its records in accordance with § 761.209(a).

(iv) Give to the transporter the remaining copies of the manifest that will accompany the shipment of PCB waste.

(2) For bulk shipments of PCB waste within the United States transported solely by water, the generator shall send three copies of the manifest dated and signed in accordance with this section directly to the owner or operator of the designated commercial storage or disposal facility. Copies of the manifest are not required for each transporter.

(3) For rail shipments of PCB waste within the United States which originate at the site of generation, the generator shall send at least three copies of the manifest dated and signed in accordance with this section to:

(i) The next non-rail transporter, if any.

(ii) The designated commercial storage or disposal facility if transported solely by rail.

(4) When a generator has employed an independent transporter to transport the PCB waste to a commercial storer or disposer, the generator shall confirm by telephone, or by other means of confirmation agreed to by both parties, that the commercial storer or disposer actually received the manifested waste. The generator shall confirm receipt of the waste by close of business the day after he receives the manifest hand-signed by the commercial storer or disposer, in accordance with paragraph (c)(1)(iv) of this section. If the generator has not received the hand-signed manifest within 35 days after the independent transporter accepted the PCB waste, the generator shall telephone, or communicate with by some other agreed-upon means, the disposer or commercial storer to determine whether the PCB waste has actually been received. If the PCB waste has not been received, the generator shall contact the independent transporter to determine the disposition of the PCB waste. If the generator has not received a hand-signed manifest from an EPA-approved facility within 10 days from the date of the telephone call or other agreed upon means of communication, to the independent transporter, the generator shall submit an exception report to the EPA Regional Administrator for the Region in which the generator is located, as specified in § 761.215. The generator shall retain a written record of all telephone or other confirmations to be included in the annual document log, in accordance with § 761.180.

(b)(1) A transporter shall not accept PCB waste from a generator unless it is accompanied by a manifest signed by the generator in accordance with paragraph (a)(1) of this section, except that a manifest is not required if any one of the following conditions exists:

(i) The shipment of PCB waste consists solely of PCB wastes with PCB concentrations below 50 ppm, unless the PCB concentration below 50 ppm was the result of dilution, in which case § 761.1(b) requires that the waste be managed as if it contained PCBs at the concentration prior to dilution.

(ii) The PCB waste is accepted by the transporter for transport only to a storage or disposal facility owned or operated by the generator of the PCB waste.

(2) Before transporting the PCB waste, the transporter shall sign and date the manifest acknowledging acceptance of the PCB waste from the generator. The transporter shall return a signed copy to the generator before leaving the generator's facility.

(3) The transporter shall ensure that the manifest accompanies the PCB waste.

(4) A transporter who delivers PCB waste to another transporter, or to the designated commercial storer or disposer of PCB waste, shall:

(i) Obtain the date of delivery and the handwritten signature of the subsequent transporter of PCB waste, or of the owner or operator of the designated commercial storage or disposal facility on the manifest.

(ii) Retain one copy of the manifest in accordance with § 761.209(b).

(iii) Give the remaining copies of the manifest to the accepting transporter of PCB waste, or to the designated commercial storage or disposal facility.

(5) The requirements of paragraphs (b)(3) and (4) of this section shall not apply to transporters of bulk shipments by water if all of the following conditions are met:

(i) The PCB waste is delivered by water (bulk shipment) to the designated commercial storage or disposal facility.

(ii) A shipping paper containing all the information required on the manifest (excluding EPA identification number, generator certification, and signatures) accompanies the PCB waste.

(iii) The transporter delivering the PCB waste obtains the date of delivery and handwritten signature of the owner or operator of the designated commercial storage or disposal facility on either the manifest or the shipping paper.

(iv) The person delivering the PCB waste to the initial water (bulk shipment) transporter obtains the date of delivery and signature of the water (bulk shipment) transporter on the manifest and forwards it to the designated facility.

(v) A copy of the shipping paper or manifest is retained by each water (bulk shipment) transporter in accordance with § 761.209(b).

(6) For shipments involving rail transportation, the requirements of paragraphs (b)(3) and (b)(4) of this section shall not apply. Instead, the requirements described at § 263.20(f) of this chapter for the rail transportation of hazardous waste apply to such shipments. The rail transporter shall retain one copy of the manifest or rail shipping paper in accordance with § 761.209(b).

(7) The transporter shall deliver the entire quantity of PCB waste accepted from a generator or transporter to either of the following destinations:

(i) The designated commercial storage or disposal facility listed on the manifest.

(ii) The next designated transporter of PCB waste.

(8) If the PCB waste cannot be delivered in accordance with paragraph (b)(7) of this section, the transporter shall contact the generator for further directions and shall revise the manifest and/or return the PCB waste according to the generator's instructions.

(9) No provision of this section shall be construed to affect or limit the applicability of any requirement applicable to transporters of PCB waste under regulations issued by the Department of Transportation (DOT) and set forth at 49 CFR part 171.

(c)(1) If a commercial storage or disposal facility receives an off-site shipment of PCB waste accompanied by a manifest, the owner or operator, or his agent, shall:

(i) Sign and date each copy of the manifest to certify that the PCB waste covered by the manifest was received.

(ii) Note any significant discrepancies in the manifest (as defined in § 761.210(a)(1)) on each copy of the manifest.

(iii) Immediately give the transporter at least one copy of the signed manifest.

(iv) Within 30 days after the delivery, send a copy of the manifest to the generator.

(v) Retain a copy of each manifest among the facility's records in accordance with § 761.209(d).

(2) If a commercial storage or disposal facility receives PCB waste from a rail or water (bulk shipment) transporter accompanied by a shipping paper containing all the information required on the manifest except the EPA identification numbers, generator's certification, and signatures, the owner or operator, or his agent, shall:

(i) Sign and date each copy of the manifest or shipping paper to certify that the PCB waste covered by the manifest or shipping paper was received.

(ii) Note any significant discrepancies in the manifest or shipping paper on each copy of the manifest or shipping paper.

(iii) Immediately give the rail or water transporter at least one copy of the manifest or shipping paper, if applicable.

(iv) Within 30 days after the delivery, send a copy of the signed and dated manifest to the generator; however, if the manifest has not been received within 30 days after delivery, the owner or operator shall send a copy of the shipping paper signed and dated to the generator.

(v) Retain at the commercial storage or disposal facility a copy of the manifest and shipping paper, if signed in lieu of the manifest, in accordance with § 761.209(d).

(3) Whenever an off-site shipment of PCB waste is initiated from a commercial storage or disposal facility, the owner or operator of the commercial storage or disposal facility shall comply with the manifest requirements that apply to generators of PCB waste.

§ 761.209 Retention of manifest records.

(a) A generator of PCB waste shall keep a copy of each manifest signed in accordance with § 761.208(a)(1) until the generator receives a signed copy from the designated commercial storage or disposal facility which received the PCB waste. The copy signed by the commercial storer or disposer shall be retained for at least 3 years from the date the PCB waste was accepted by the initial transporter. A generator subject to annual document requirements under § 761.180 shall retain copies of each manifest for the period required by § 761.180(a).

(b)(1) A transporter of PCB waste shall keep a copy of the manifest signed by the generator, transporter, and the next designated transporter, if applicable, or the owner or operator of the designated commercial storage or disposal facility. This copy shall be retained for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(2) For shipments of PCB waste delivered to the designated commercial storage or disposal facility by water (bulk shipment), each water (bulk shipment) transporter shall retain a copy of the shipping paper described in § 761.208(b)(5)(ii) for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(3) For shipments of PCB waste by rail within the United States:

(i) The initial rail transporter shall keep a copy of the manifest and the shipping paper required to accompany the PCB waste for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(ii) The final rail transporter shall keep a copy of the signed manifest, or the required shipping paper if signed by the designated facility in lieu of the manifest, for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(c) The owner or operator of a PCB commercial storage or disposal facility that receives off-site shipments of PCB waste shall retain at the facility for at least 3 years a copy of each manifest or shipping paper that the owner or operator signs in accordance with § 761.208(c)(1) or (c)(3).

(d) The periods of record retention required by this section shall be extended automatically during the course of any outstanding enforcement action regarding the regulated activity.

(Approved by the Office of Management and Budget under control number 2070–0112)

§ 761.210 Manifest discrepancies.

(a) Manifest discrepancies are differences between the quantity or type of PCB waste designated on the manifest or shipping paper and the quantity or type of PCB waste actually delivered to and received by a designated facility.

(1) Significant discrepancies in quantity are:

(i) Variations greater than 10 percent in weight of PCB waste in containers.

(ii) Any variation in piece count, such as a discrepancy of one PCB Transformer or PCB Container or PCB Article Container in a truckload.

(2) Significant discrepancies in type of PCB waste are obvious differences which may be discovered by inspection or waste analysis, such as the substitution of solids for liquids or the substitution of high concentration PCBs (above 500 ppm) with lower concentration materials.

(b) Upon discovering a significant discrepancy, the owner or operator of the designated commercial storage or disposal facility shall attempt to reconcile the discrepancy with the waste generator or transporter. If the discrepancy is not resolved within 15 days after receiving the PCB waste, such owner or operator shall immediately submit to the Regional Administrator for the Region in which the designated facility is located a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest or shipping paper at issue.

(Approved by the Office of Management and Budget under control number 2070–0112)

§ 761.211 Unmanifested waste report.

(a) After April 4, 1990, if a PCB commercial storage or disposal facility receives any shipment of PCB waste from an off-site source without an accompanying manifest or shipping paper (where required in place of a manifest), and any part of the shipment consists of any PCB waste regulated for disposal, then the owner or operator of the commercial storage or disposal facility shall attempt to contact the generator, using information supplied by the transporter, to obtain a manifest or to return the PCB waste.

(b) If the owner or operator of the commercial storage or disposal facility cannot contact the generator of the PCB waste, he shall notify the Regional Administrator of the EPA region in which his facility is located of the unmanifested PCB waste so that the Regional Administrator can determine whether further actions are required before the owner or operator may store or dispose of the unmanifested PCB waste.

(c) Within 15 days after receiving the unmanifested PCB waste, the owner or operator shall prepare and submit a report to the Regional Administrator for the Region in which the commercial storage or disposal facility is located and to the Regional Administrator for the Region in which the PCB waste originated, if known. The report may be submitted on EPA Form 8700–13B, or by a written letter designated "Unmanifested Waste Report." The report shall include the following information:

(1) The EPA identification number, name, and address of the PCB commercial storage or disposal facility.

(2) The date the commercial storage or disposal facility received the unmanifested PCB waste.

(3) The EPA identification number, name, and address of the generator and transporter, if available.

(4) A description of the type and quantity of the unmanifested PCB waste received at the facility.

(5) A brief explanation of why the waste was unmanifested, if known.

(6) The disposition made of the unmanifested waste by the commercial storage or disposal facility, including:

(i) If the waste was stored or disposed by that facility, was the generator identified and was a manifest subsequently supplied.

(ii) If the waste was sent back to the generator, why and when.

(Approved by the Office of Management and Budget under control number 2070–0112)

§ 761.215 Exception reporting.

(a) A generator of PCB waste, who does not receive a copy of the manifest with the handwritten signature of the owner or operator of the designated PCB commercial storage or disposal facility within 35 days of the date the waste was accepted by the initial transporter, shall immediately contact the transporter and/or the owner or operator of the designated facility to determine the status of the PCB waste.

(b) A generator of PCB waste shall submit an Exception Report to the Regional Administrator for the Region in which the generator is located if the generator has not received a copy of the manifest with the handwritten signature

of the owner or operator of the designated facility within 45 days of the date the waste was accepted by the initial transporter. The Exception Report shall include the following:

(1) A legible copy of the manifest for which the generator does not have confirmation of delivery.

(2) A cover letter signed by the generator or his authorized representative explaining the efforts taken to locate the PCB waste and the results of those efforts.

(c) A disposer of PCB waste shall submit a One-year Exception Report to the Regional Administrator for the Region in which the disposal facility is located whenever the following occurs:

(1) The disposal facility receives PCBs or PCB Items on a date more than 9 months from the date the PCBs or PCB Items were removed from service for disposal, as indicated on the manifest or continuation sheet; and

(2) Because of contractual commitments or other factors affecting the facility's disposal capacity, the disposer of PCB waste could not dispose of the affected PCBs or PCB Items within 1 year of the date of removal from service for disposal.

(d) A generator or commercial storer of PCB waste who manifests PCBs or PCB Items to a disposer of PCB waste shall submit a One-year Exception Report to the Regional Administrator for the Region in which the generator or commercial storer is located whenever the following occurs:

(1) The generator or commercial storer transferred the PCBs or PCB Items to the disposer of PCB waste on a date more than 9 months from the date of removal from service for disposal of the affected PCBs or PCB Items, as indicated on the manifest or continuation sheet; and

(2) The generator or commercial storer either has not received within 13 months from the date of removal from service for disposal a Certificate of Disposal confirming the disposal of the affected PCBs or PCB Items, or the generator or commercial storer receives a Certificate of Disposal confirming disposal of the affected PCBs or PCB Items on a date more than 1 year after the date of removal from service.

(e) The One-year Exception Report shall include:

(1) A legible copy of any manifest or other written communication relevant to the transfer and disposal of the affected PCBs or PCB Items.

(2) A cover letter signed by the submitter or an authorized representative explaining:

(i) The date(s) when the PCBs or PCB Items were removed from service for disposal.

(ii) The date(s) when the PCBs or PCB Items were received by the submitter of the report, if applicable.

(iii) The date(s) when the affected PCBs or PCB Items were transferred to a designated disposal facility.

(iv) The identity of the transporters, commercial storers, or disposers known to be involved with the transaction.

(v) The reason, if known, for the delay in bringing about the disposal of the affected PCBs or PCB Items within 1 year from the date of removal from service for disposal.

(Approved by the Office of Management and Budget under control number 2070–0112)

§ 761.218 Certificate of disposal.

(a) For each shipment of manifested PCB waste that the owner or operator of a disposal facility accepts by signing the manifest, the owner or operator of the disposal facility shall prepare a Certificate of Disposal for the PCBs and PCB Items disposed of at the facility, which shall include:

(1) The identity of the disposal facility, by name, address, and EPA identification number.

(2) The identity of the PCB waste affected by the Certificate of Disposal including reference to the manifest number for the shipment.

(3) A statement certifying the fact of disposal of the identified PCB waste, including the date(s) of disposal, and identifying the disposal process used.

(4) A certification as defined in § 761.3.

(b) The Certificate of Disposal shall be sent to the generator identified on the manifest which accompanied the shipment of PCB waste within 30 days of the date that disposal of the PCB waste identified on the manifest was completed.

(c) The disposal facility shall keep a copy of each Certificate of Disposal among the records that it retains under § 761.180(b).

(d)(1) Generators of PCB waste shall keep a copy of each Certificate of Disposal that they receive from disposers of PCB waste among the records they retain under § 761.180(a).

(2) Commercial storers of PCB waste shall keep a copy of each Certificate of Disposal that they receive from disposers of PCB waste among the records the retain under § 761.180(b).

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Part VII

National Science Foundation

Academic Research Facilities Modernization Program; Draft Guidelines; Notice

NATIONAL SCIENCE FOUNDATION

Academic Research Facilities Modernization Program; Draft Guideline

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: As required by the Academic Research Facilities Modernization Act of 1988, (102 Stat. 2873, 42 U.S.C. 1862a–1862d), the National Science Foundation (NSF) is hereby publishing the program solicitation for the Academic Research Facilities Modernization Program. Draft program guidelines were published for comment in the **Federal Register** on April 20, 1989. A summary of the comments received and revised guidelines based on those comments were included in NSF's June 1989 report to Congress, *Modernizing Academic Research Facilities: A Comprehensive Plan* (NSF 89–61). The final program solicitation now being published contains additional information, changes in dates and other minor changes from those earlier guidelines.

DATES: FEBRUARY 15, 1990: Notification of intention to submit a proposal; MARCH 1, 1990: Submission of Phase I proposals; JUNE 15, 1990: Submission of invited Phase II proposals.

ADDRESSES: Copies of the program solicitation (NSF 89–127), which includes required forms, are available from: Forms and Publication Unit, Room 232 National Science Foundation, 1800 G Street, NW., Washington, DC 20550.

Requests may also be transmitted electronically via either BITNET or INTERNET; send requests to <pubs@note.nsf.gov>.

FOR FURTHER INFORMATION CONTACT: Altie H. Metcalf, Staff Associate, Research Facilities Office, National Science Foundation, 202–357–9785.

SUPPLEMENTARY INFORMATION: The text (excluding required forms) of the programs solicitation (NSFG 89–127) follows:

Academic Research Facilities Modernization Program Program Solicitation

Background

The Academic Research Facilities Modernization Program was established by the National Science Foundation Authorization Act of 1988 (102 Stat. 2873, 42 U.S.C. 1862a–1862d) to assist in modernizing and revitalizing the nation's research facilities. The Program will be carried out through projects which involve the repair, renovation, or, in exceptional cases, replacement of obsolete science and engineering research facilities at eligible organizations.

Proposals submitted in response to this program solicitation will be competing for FY90 and FY91 funds. The FY90 funds available for this program are approximately $19 million.

Goals

The goals of the Academic Research Facilities Modernization Program are to:

Promote the modernization of science and engineering research laboratories and related facilities at institutions of higher education (including graduate and undergradaute institutions), independent nonprofit research institutions, research museums, and consortia thereof.

Assist those academic institutions (including graduate and undergraduate institutions) that historically have received relatively little Federal research and development funds to improve their academic science and engineering infrastructures and broaden and strengthen the nation's science and engineering base.

Scope

The purpose of the program is to repair or renovate, or, in exceptional cases, replace scientific or engineering research and research training facilities. It is *not* the intent of the program to fund construction or renovation of: (1) New facilities; (2) facilities not devoted to scientific or engineering research; (3) major, highly specialized research facilities, such as research vessels, airplanes, telescopes, supercomputer centers or Federally Funded Research and Development Centers; or (4) facilities used in fields of research not normally funded by NSF, e.g. biomedical research with disease-related goals; nor is it intended to fund: (5) the operation and maintenance of facilities; or (6) non-fixed laboratory equipment or instrumentation.

Definitions

The following definitions apply specifically to the Academic Research Facilities Modernization Program and this program solicitation:

Institution: A separate legal and fiscal entity, whether at the central or system level, main campus level, or branch campus level, which can receive awards and which is separately and consistently identified at that level for federal research and development reporting purposes.

Institutions of Higher Education: Institutions legally authorized and accredited at the college level by a nationally recognized accrediting agency to offer and which are offering at least a two-year program of college-level studies leading toward a degree.

Independent Nonprofit Research Institutions: Independent legal entities, other than institutions of higher education, which are generally recognized as separately incorporated, nonprofit, tax exempt organizations, and which conduct research as one of their primary purposes.

Research Museums: Independent nonprofit science museums, zoological parks, aquaria, natural history museums, etc., which conduct research as one of their primary purposes.

Consortia: Recognized groups consisting exclusively of two or more eligible organizations. For the purposes of evaluation and review, a consortium proposal will be identified with the organization where the facility proposed for renovation is located. This does not preclude a third-party organization from submitting a proposal on behalf of two or more eligible organizations.

Research Facilities: The physical plant in which sponsored or non-sponsored research activities (including research training) take place, including related infrastructure and systems (e.g., HVAC and power systems, toxic waste removal systems), and fixed equipment (e.g., clean rooms, fume hoods). This includes all or parts of buildings in which research activities take place some percentage of the time.

Repair: Fixing existing research facilities or otherwise putting them in a usable, adequate and acceptable condition.

Renovation: The renewing, restoring, upgrading, updating, or modernizing of existing research facilities.

Replacement: Taking the place of an existing research facility which is obsolete, beyond repair or for which renovation is not cost-effective. Replacement includes, but is not limited to: razing an existing research facility and constructing one in its place; and relocating or consolidating existing research facilities.

Research Training: Training of individuals (including advanced undergraduates and graduate students) in research techniques where such activities utilize the same facilities as research activities. Research training does not include introductory science or engineering instruction, whether in a classroom or instructional laboratory.

Minority Institutions: Historically Black colleges and universities defined as "part B institutions" by section 322(2) of the Higher Education Act of 1965 (20 U.S.C. 1061(2)) and other institutions whose enrollments are: (a) More than 50

percent of a combination of any of the following groups: Alaskan Native (Eskimo or Aleut), American Indian, Black, Hispanic, or Native Pacific Islander; or (b) 20 percent or more of any one of the above eligible minorities.

Eligible Organizations

Proposals may be submitted by institutions of higher education, independent nonprofit research institutions, research museums, and consortia thereof.

Eligible Fields of Science

Proposals will be considered for research facilities used for any field of science, mathematics and engineering ordinarily supported by the National Science Foundation, including astronomy, atmospheric sciences, biological and behavioral sciences, chemistry, computer sciences, earth sciences, engineering, information science, materials research, mathematical sciences, oceanography, physics, and social sciences. The research activities being conducted in these facilities need not be supported by NSF or the federal government.

Matching Requirements

Organizations must propose matching or cost-sharing at the level of at least 50% of total eligible project costs. The matching or cost-sharing may be from any private or non-Federal public source and may be in cash or in kind, fairly evaluated (see OMB Circular A–110, Attachment E).

Proposals

Proposals must be either for the repair, renovation, or replacement of one facility (single or multi-disciplinary) or for the repair, renovation, or replacement of facilities within one discipline. Proposals are limited to one per eligible organization per proposal cycle. In addition, an eligible organization may participate in one consortium proposal each proposal cycle.

Although this solicitation is self-contained, general information about NSF's policies and procedures on proposals, declinations, and awards is contained in Grants for Research and Education in Science and Engineering (NSF 83–57, October 1989).

In order to simplify and facilitate proposal preparation and processing and to manage the proposal evaluation process efficiently and effectively, the program is conducted in two phases. This two-phase process requires organizations to submit proposals in the first phase without detailed specifications or construction plans. Based on the evaluation criteria below, the Foundation will select from Phase I those organizations with the most competitive Phase I proposals. Those organizations will be invited to submit more detailed Phase II proposals.

Phase I Proposals

Phase I proposals are directed at describing the current research activities, the research facility problem and the proposed repair, renovation, or replacement project. Phase I proposals should be concise and address the following:

1. *Research Activities.* Describe the type(s) of research and research training being conducted in the research facility. Identify by number and types (e.g., senior personnel, postdocs, graduate students, undergraduate students) the personnel using the facility for research and research training on a regular basis.

2. *Description of the Research Facility and Needs.* Identify and describe the research facility including its nature, location, size, configuration, purpose, age, condition, and date of last renovation, if any. Discuss the adequacy, limitations, and constraints of the facility. Provide an estimate of the percentages of time or space or combination thereof the facility is used for research and research training.

3. *Project Impacts.* Describe how the repair/renovation/replacement will contribute to improving the organization's research and research training capabilities, improving the academic science and engineering infrastructure, and broadening and strengthening the nation's science and engineering base.

4. *Project and Management Plans.* Describe the scope, extent, and nature of the proposed repair/renovation/replacement project. If the project is for replacement, describe why it is necessary and why repair or renovation is inappropriate. Indicate whether this project is included in the institution's overall facilities plan. If not, provide explanation.

5. *Budget and Funding.* Using the budget format provided in this solicitation, indicate the estimated total eligible project costs and the amount NSF is being asked to fund. Explain basis for cost estimate. If more than one facility within one discipline is involved (see Section on "Proposals") provide a separate budget for each and a budget for the total. (No awards will be made in the Phase I part of the proposal process; awards will follow selection of successful Phase II proposals.) Identify the expected sources of matching funds.

Note: Eligible project costs are those total project costs properly and reasonably allocable to the research facility portion of the project based on the percentage of time or space or combination thereof that the facility is used for research and research training. Eligible project costs may include: A&E services, testing, inspections, relocation, demolition, removal, construction, fixed equipment, contingencies, and related construction management costs. Indirect costs of the proposing organization, instrumentation costs, and operation and maintenance costs are not allowed. Costs incurred prior to the effective date of an award under this program are not eligible project costs.)

Proposal Format

Proposals are limited to five (5) single-spaced (maximum 400 words per page; text on one side only), standard size, typewritten pages, excluding the Cover Page, Supplemental Information Sheet, Budget, and Form 1225 (all of which must be included). No other attachments are permitted.

Where To Submit

Nine (9) copies of the Phase I proposal, one of which bears the original signatures of the Project Director and Authorized Organizational Representative, should be submitted to the following address: Proposal Processing Unit, Room 223, National Science Foundation, 1800 G Street NW., Washington, DC 20550, Attn: Research Facilities/Phase I Proposal.

In addition, one copy of the Phase I proposal should be submitted directly to the Research Facilities Office.

Deadlines and Timing

To facilitate proposal processing, each institution should confirm plans to submit a Phase I proposal by sending a brief notification to NSF's Research Facilities Office indicating the intention to submit a proposal and identifying the science or engineering discipline(s) involved in the proposal project. The notification should be received by February 15, 1990; it may be sent by letter or via Bitnet (rfo@nsf) or Internet (rfo@note.nsf.gov).

Phase I proposals are due March 1, 1990. It is expected that in April 1990 proposers will be notified as to the status of their proposals. Each proposing organization either will be invited to submit a Phase II proposal or its proposal will be declined. (No awards will be made in the Phase I part of the proposal process; awards will follow selection of successful Phase II proposals.)

Phase II Proposals

Only those who submitted a Phase I proposal and are invited to submit a Phase II proposal are eligible to compete in Phase II. In addition to the NSF Cover Page, indicating the NSF proposal number assigned to the Phase I proposal, Supplemental Information Sheet, and the Table of Contents, containing page numbers of the major sections of the proposal, Phase II proposals should include on a separate page a Project Summary of no more than 200 words describing the nature and purpose of the project and the expected impact. Phase II proposals should be self contained, address all of the information required in Phase I (in greater detail, as appropriate), address any points requested in the letter of invitation, and in addition address the following:

1. *Research Activities.* Describe the research activities and projects being conducted in the research facility and sources of support, if any. (The research activities need not be supported by NSF or the federal govemnent.) Identify the senior personnel using the facility for research or research training, and for each provide a brief biographical sketch and list up to five recent publications most relevant to the research being conducted in the research facility.

2. *Description of the Research Facility and Needs.* Describe in detail the adverse impacts the limitations have on the quality of research and research training performed by those who utilize the facility. Indicate the percentage of time or space or combination thereof the facility is used for research and research training and how the percentage was determined. Provide one set of no more than three (3) photographs (8" X 10" glossy) that best illustrate typical current conditions of the facility.

3. *Project Impacts.* Describe how the upgraded facility will contribute to meeting the research needs of the organization, the region, and the nation. Discuss the potential of the improved facility to contribute to the improvement of the quality, distribution and effectiveness of the nation's research and research training capabilities. Indicate how the project will attract researchers and students and contribute to increasing the number of students entering the pipeline leading to advanced degrees in science and engineering and improving the quality of their research training.

4. *Project and Management Plans.* Describe the management organization for the conduct of the project. Idenfify the project team including brief vitae and relevant experience. Indicate percentages of time to be devoted to the project. State the overall schedule for completion of the project. Provide detailed plans on the proposed repair/renovation/replacement. Explain who will do the work, e.g., in-house personnel or competitive contracting. One set of schematic drawings showing existing conditions as well as work to be done and outline specifications should be provided as an appendix to the Phase II proposal. Indicate whether more advanced drawings and specifications are available.

Provide detailed schedules through project completion. Discuss the relationship to other organizational facility plans and activities, the expected use of experts, plans for continuing current research activities during the renovation phase, and other relevant plans. Also indicate plans and funding for the operation/maintenance of the facility.

Budget and Funding. Provide a detailed budget of total eligible project costs in the budget format provided in this solication. Explain basis for cost estimate. If more than one facility within one discipline is involved (see Section on "Proposals") provide a separate budget for each and a budget for the total. Specify the expected sources and estimated amounts of cost-shared or matching funds (e.g., state appropriations, endowment, debt financing); the plans for obtaining matching; and when cost-sharing or matching will be available.

(Note: Eligible project costs are those total project costs properly and reasonably allocable to the research facility portion of the project based on the percentage of time or space or combination thereof that the facility is used for research and research training. Eligible project costs may include: A&E services, testing, inspections, relocation, demolition, removal, construction, fixed equipment, contingencies, and related construction management costs. Indirect costs of the proposing organization, instrumentation costs, and operation and maintenance costs are not allowed. Costs incurred prior to the effective date of an award under this program are not eligible project costs.)

6. *Previous Federal Awards.* Identify by agency, purpose, date of award, and amount any federal awards received for the repair, renovation, construction, or replacement of academic facilities in the previous five years.

Proposal Format

Proposals are limited to fifteen (15) single-spaced (maximum 400 words per page; text on one side only), standard size, typewritten pages, excluding the Cover Page, Supplemental Information Sheet, Project Summary, Budget, and Form 1225 (all of which must be included). One set of schematic drawings, showing existing conditions as well as work to be done, outline specifications, and one set of no more than three (3) current photographs (8" X 10" glossy) of the facility should be provided as appendices.

Where To Submit

Fourteen (14) copies of the Phase II proposal, one of which bears the original signatures of the Project Director and Authorized Organizational Representative, should be submitted to the following address: Proposal Processing Unit, Room 223, National Science Foundation, 1800 G Street NW., Washington, DC 20550, Attn: Research Facilities/Phase II Proposal.

In addition, one copy of the Phase II proposal should be submitted directly to the Research Facilities Office.

Deadlines and Timing

Phase II proposals are due June 15, 1990.

Review and Selection

For the purposes of competition, review, evaluation, and final rankings, Phase I and Phase II proposals will be separated into three different groups based on the average amount of NSF research and development funds received by the proposing organization in the previous three fiscal years (as determined by NSF).

Group I consists of those organizations that have received an average of $2 million or more;

Group II consists of those organizations that have received an average of less than $2 million but equal to or greater than $400,000;

Group III consists of those organizations that have received an average of less than $400,000 and includes those organizations which have not received R&D funds from NSF or the federal government.

(Attachment 1 indicates the organizations in Groups I and II. Organizations not identified in I or II assume they are in Group III, unless otherwise advised by NSF. Inclusion on the listing does not necessarily mean an organization is eligible under this program; see the section on "Eligible Organizations," above.)

A percentage range of program funds will be targeted for each group. Group I organizations are expected to receive from 45 to 55 percent of available program funds. Group II and Group III organizations are each expected to receive from 20 to 30 percent of available program funds.

Phase I and Phase II proposals will be evaluated on the basis of merit review. Reviews may include staff reviews, ad hoc mail reviews, panel reviews, and site visits. Outside reviewers will be broadly representative of the various types of eligible organizations.

Evaluation Criteria Will Include

1. *Research Merit.* Consideration of the existing research (and research training) activities, whether sponsored or non-sponsored and regardless of funding source, and assessment of the impact the facility renovation repair/replacement project will have on the overall quality and significance of the current and expected research and research training activities carried out in the facility.

2. *Facility Need.* The adequacy and appropriateness of the facility for current and expected research activities and research training, as well as any demonstrated need based on age and condition analysis.

3. *Project Impacts.* The contribution of the project toward:

(a) The future research (including research training) needs of the nation and the research mission of the Foundation;

(b) Meeting national, regional, and organizational research and related training needs;

(c) Improving the organization's academic scientific and engineering infrastructure and broadening the nation's science and engineering base; and

(d) Improving the quality, distribution, or effectiveness of the nation's scientific and engineering research (including research training) capabilities.

4. *Plans and Funding.* Project and management plans and budget and funding, specifically the qualifications and experience of the project director and project team to plan, lead, coordinate, and manage the project. The technical soundness of the proposed plans and approach. The reasonableness and appropriateness of the costs and budget, matching, and organizational and management plans.

The first two criteria are of approximately equal weight. The third and fourth criteria are of lesser weight than the first two. The fourth criterion is of critical importance, and projects must be acceptable in this area in order to be funded.

Additional Considerations

In addition to the four evaluation criteria stated above, NSF must, by law, consider the following factors in making awards under this program:

- Equitable distribution of funds among organizations of different sizes and geographic locations;
- The extent to which an organization has received awards for the repair, renovation, construction, or replacement of academic facilities from any other federal funding source within the 5-year period immediately preceding the application; and,
- A minimum 12% of the funds available under this program must go to minority institutions as defined in this program solicitation.

Awards

It is anticipated that award decisions will be made between September–December 1990.

Awards will be grants or other assistance instruments. NSF award amounts may range from $100,000 to $7 million. Total awards under this program to any eligible organization shall not exceed $7 million during any five year period.

Costs incurred prior to the effective date of an award under this program are not eligible project costs.

NSF awards may be made contingent on the awardee obtaining the required matching or cost-sharing within a specified time period. However, NSF award funds cannot be expended until required matching or cost-sharing commitments have been met. The duration of NSF awards is not expected to exceed three years. Awards and supported projects may be subject to certain federal or other standards, codes, regulations, or requirements. In addition, award conditions may specify special reports, on-site inspections, or other requirements.

Inquiries

Inquiries about the NSF Academic Research Facilities Modernization Program should be addressed to: Research Facilities Office, Room 1240, National Science Foundation, 1800 G Street, NW., Washington, DC 20550, (202) 357–9785,
BITNET: rfo@nsf
INTERNET: rfo@note.nsf.gov

Attachment 1

List of Group I and Group II Organizations

Group I Organizations

Arizona State University
Boston University
Brandeis University
Brown University
California Institute of Technology
Carnegie-Mellon University
Case Western Reserve University
Children's TV Workshop
Colorado State University
Columbia University
Consortium for Scientific Computing
Cornell University
CUNY/City College
Dartmouth College
Drexel University
Duke University
Flordia State University
Georgia Institute of Technology-All Campuses
Harvard University
Indiana University-All Campuses
Iowa State University of Science & Technology
Johns Hopkins University
Joint Oceanographic Institutions, Inc.
Lehigh University
Louisiana State University-All Campuses
Massachusetts Institute of Technology
Mathematical Science Research Institute
Michigan State University
National Academy of Sciences
New York University
North Carolina State University-Raleigh
Northeastern University
Northwestern University
Ohio State University-All Campuses
Oregon State University
Pennsylvania State University-All Campuses
Princeton University
Purdue University-All Campuses
Rensselaer Polytechnic Institute
Rice University
Rutgers State University of New Jersey
SRI International
Stanford University
SUNY-Albany
SUNY-Buffalo
SUNY-Stony Brook
Syracuse University-All Campuses
Texas A&M University-All Campuses
University of Alaska-Fairbanks
University of Arizona
University of California-Berkeley
University of California-Davis
University of California-Irvine
University of California-Los Angeles
University of California-Riverside
University of California-San Diego
University of California-Santa Barbara
University of California-Santa Cruz
University of Chicago
University of Cincinnati-All Campuses
University of Colorado
University of Connecticut
University of Delaware
University of Florida
University of Georgia
University of Hawaii-Manoa
University of Houston
University of Illinois-Chicago
University of Illinois-Urbana
University of Iowa
University of Kansas
University of Kentucky

University of Maryland-College Park
University of Massachusetts-System Office
University of Miami (FL)
University of Michigan
University of Minnesota
University of Missouri-Columbia
University of Nebraska-Lincoln
University of New Mexico
University of North Carolina-Chapel Hill
University of Notre Dame
University of Oklahoma
University of Oregon
University of Pennsylvania
University of Pittsburgh
University of Rhode Island
University of Rochester
University of South Carolina-All Campuses
University of Southern California
University of Tennessee-Knoxville
University of Texas-Austin
University of Utah
University of Virginia
University of Washington
University of Wisconsin-Madison
University of Wyoming
Utah State University
Vanderbilt University
Virginia Polytechnic Inst & State University
Washington State University
Washington University
Woods Hole Oceanographic Institute
Yale University

Group II Organizations

American Association of Physics Teachers
American Mathematical Society
American Statistical Association
American University
Auburn University-All Campuses
Baylor College of Medicine
Boston College
Brigham Young University-All Campuses
California State Univ., Fullerton
California State Univ., Los Angeles
Carnegie Institution of Washington
Catholic University of America
Clarkson University
Clemson University
Cold Spring Harbor Lab
College of William and Mary
Colorado School of Mines
Columbia University Teachers College
Center for Advanced Study Behavioral Science
CUNY-Brooklyn College
CUNY-Hunter College
CUNY-Mount Sinai School of Medicine
CUNY-Queens College
DOSECC, Inc.
Education Development Center
Emory University
Field Museum of Natural History
Franklin Institute-Bartol Research Foundation
George Washington University
Georgetown University
Georgia State University
Howard University
Illinois Institute of Technology
Institute for Cancer Research
Kansas State University of Ag & Applied Science
Kent State University-All Campuses
Marine Biological Lab
Marquette University
Medical University of South Carolina
Meharry Medical College
Miami University-All Campuses (OH)
Michigan Technological University
Missouri Botanical Garden
Montana State University
N E Research Foundation
National Opinion Research Center
National Public Radio
National Bureau of Economic Research, Inc.
National Science Teachers Association
N E Radio Observatory Center
New Mexico Institute of Mining & Technology
New Mexico State University-All Campuses
New York Botanical Garden
Northern Arizona University
Northern Illinois University
Ohio University-All Campuses
Oklahoma State University
Old Dominion University
Oregon Graduate Center
Polytechnic University
Portland State University
Rand Corporation
Rockefeller University
Saint Louis University
San Diego State University
San Jose State University
Scripps Clinic and Research Foundation
South Dakota School of Mines
Southern Illinois University
Southern Methodist University
SUNY-Binghamton
Swarthmore College
Technical Education Research Center
Temple University
Texas Tech University
Tufts University
Tulane University of Louisiana
University of Akron-All Campuses
University of Alabama
University of Alabama-Birmingham
University of Alabama-Huntsville
University of Arkansas-Fayetteville
University of California-San Francisco
University of Denver
University of Idaho
University of Maine-Orono
University of Maryland-Baltimore
University of Medicine & Dentistry of New Jersey
University of Mississippi
University of Missouri-Rolla
University of Nevada-Reno
University of New Hampshire
University of Puerto Rico-Mayaguez
University of South Florida
University of Southern Mississippi
University of Texas-Dallas
University of Texas-Health Science Center Dallas
University of Texas-Health Science Center San Antonio
University of Toledo
University of Tulsa
University of Vermont
University of Wisconsin-Milwaukee
Virginia Commonwealth University
Wayne State University
Wesleyan University
West Virginia University
Worcester Polytechnic Institute
Yeshiva University

William B. Cole, Jr.,

Executive Officer, Research Facilities Office, National Science Foundation.

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Reader Aids

Federal Register

Vol. 54, No. 244

Thursday, December 21, 1989

INFORMATION AND ASSISTANCE

Federal Register

Index, finding aids & general information	523-5227
Public inspection desk	523-5215
Corrections to published documents	523-5237
Document drafting information	523-5237
Machine readable documents	523-5237

Code of Federal Regulations

Index, finding aids & general information	523-5227
Printing schedules	523-3419

Laws

Public Laws Update Service (numbers, dates, etc.)	523-6641
Additional information	523-5230

Presidential Documents

Executive orders and proclamations	523-5230
Public Papers of the Presidents	523-5230
Weekly Compilation of Presidential Documents	523-5230

The United States Government Manual

General information	523-5230

Other Services

Data base and machine readable specifications	523-3408
Guide to Record Retention Requirements	523-3187
Legal staff	523-4534
Library	523-5240
Privacy Act Compilation	523-3187
Public Laws Update Service (PLUS)	523-6641
TDD for the deaf	523-5229

FEDERAL REGISTER PAGES AND DATES, DECEMBER

49745-49954.....1
49955-50228.....4
50229-50338.....5
50339-50478.....6
50479-50602.....7
50603-50730.....8
50731-51008.....11
51009-51184.....12
51185-51288.....13
51289-51348.....14
51349-51736.....15
51737-51866.....18
51867-52010.....19
52011-52332.....20
52333-52762.....21

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:

6080.....50599
6081.....50601
6082.....51185
6083.....51187
6084.....51865

Executive Orders

Apr. 17, 1926
Amended by PLO 6759 of Dec. 14, 1989).....51882

4 CFR

31.....51867

5 CFR

Ch. I.....50229
Ch. XVI.....50229
430.....50307
432.....50307
532.....52011
536.....51009
540.....50307
890.....52333
1210.....50603
1810.....50479

7 CFR

52.....50731
68.....51344
246.....51289
272.....51349
273.....51349
274.....51349
276.....51349
301.....51009, 51189
422.....50607
906.....51737
907.....49745, 50607, 51352
910.....49747, 50479, 50609, 51354
919.....50480
966.....51296
984.....50481
989.....50231
1006.....49955
1007.....49955
1011.....49955
1012.....49955
1013.....49955
1030.....49955
1032.....49955
1033.....49955
1036.....49955
1040.....49955
1046.....49955
1049.....49955
1050.....49955
1064.....49955
1065.....49955
1068.....49955
1076.....49955
1079.....49955
1093.....49955
1094.....49955
1096.....49955
1097.....49955
1098.....49955
1099.....49955
1106.....49955
1108.....49955
1120.....49955
1124.....49955
1126.....49955
1131.....49955
1132.....49955
1134.....49955
1135.....49955, 50732
1137.....49955
1138.....49955
1139.....49955
1405.....52011
1421.....52011
1430.....52011
1435.....52011
1446.....52011
1900.....50306
1957.....50306
2810.....52013
2811.....52013
3010.....51868
3011.....51868

Proposed Rules:

51.....50626
907.....51202
908.....51202
920.....50765
945.....51749
967.....50766
979.....50767
1002.....51749
1004.....51749
1079.....51340
1421.....51403, 52040

8 CFR

103.....51869
210.....50339
214.....51816
245a.....49963
264.....50340, 51816

9 CFR

327.....50733, 51355
381.....50733

10 CFR

2.....50610, 50735, 52342
21.....52342
50.....50611, 50735
51.....50735
52.....50735
170.....50735

435.....50341
Proposed Rules:
61.....51033
71.....51033
170.....49763

12 CFR

Ch. V.....50582
202.....50482
203.....51356
204.....51010
226.....50342
327.....51372
337.....51012
506.....51739
545.....50613
600.....50735
612.....50736
614.....50736
615.....50736
618.....50736
700.....52014
701.....51381, 51383
705.....51383
741.....51381
Proposed Rules:
202.....50514
203.....51404
226.....51341
229.....51203, 51405
330.....52399
331.....52399
611.....51763

13 CFR

101.....50614
121.....52634

14 CFR

21.....51870
23.....50736, 51870
39.....49748, 49964–49966, 50232, 50343–50347, 50487–50491, 51015, 51191–51195, 51739, 51740, 51816, 51874–51876, 51972
71.....50043, 50307, 50492, 50737, 50982, 51018, 51877, 52015, 52016, 52678
73.....50043, 51286
93.....50990
97.....51019
129.....51972
206.....49749
Proposed Rules:
Ch. I.....49999
21.....50688
27.....50688
29.....50688
39.....49771, 50409–50413, 50515, 51034, 51411–51419, 51888–51895
71.....50768–50771, 51896, 51897
91.....50688

15 CFR

776.....52017
799.....49970, 52017
806.....51877
942.....52342
Proposed Rules:
799.....51898
942.....52418

16 CFR

305.....52022
1501.....52343
Proposed Rules:
432.....50771
1500.....52418

17 CFR

30.....50348, 50356
200.....50307
211.....51880

18 CFR

2.....52344
284.....52344
Proposed Rules:
272.....51902

19 CFR

24.....50493, 52506
122.....50307
132.....50493, 52506
141.....50493, 52506
142.....50493, 52506
143.....50493, 52506
Proposed Rules:
133.....51035
175.....51764
177.....51765

20 CFR

10.....52023
404.....50233
Proposed Rules:
404.....51036
626.....50584
627.....50584
629.....50584
637.....50584

21 CFR

175.....50499
177.....51342
310.....50364
436.....51816
442.....50472, 50686, 51816
452.....50472
510.....50364, 51020
520.....50614, 51385
522.....50235, 50364, 51551
524.....51020
558.....51021, 51385
801.....52395
878.....50737
888.....51342
1313.....49750
Proposed Rules:
Ch. I.....49772
226.....52421
291.....50226
310.....51136
333.....51136
349.....50240
872.....50592
1020.....50472

23 CFR

658.....50365

24 CFR

90.....52396
576.....52396
579.....52397
888.....49886
968.....52686
Proposed Rules:
570.....50952
965.....52000
990.....52000

26 CFR

1.....50043, 50367, 51021
31.....51021
301.....50367
602.....51021
Proposed Rules:
1.....51038
31.....51038
602.....51038

27 CFR

Proposed Rules:
9.....51039

28 CFR

0.....50738
545.....49944
Proposed Rules:
76.....51206
540.....50241

29 CFR

102.....51196, 52506
1910.....49971, 50372, 52024
1917.....49971
1926.....52024
2619.....51386
2676.....51387

30 CFR

44.....50042
218.....50615
250.....50615
251.....50615
252.....50615
256.....50615
700.....52092
702.....52092
750.....52092
870.....52092
905.....52092
906.....50739
910.....52092
912.....52092
914.....51388
917.....51391
921.....52092
922.....52092
925.....50744
933.....52092
935.....51395, 51742
937.....52092
939.....52092
941.....52092
942.....52092
943.....50750
946.....49751
947.....52092
Proposed Rules:
16.....50213
44.....50730
56.....50158, 50209
57.....50158, 50209
70.....50209
71.....50209
75.....50062, 50714
104.....50730
715.....51904
817.....50414
901.....52042
914.....50626
916.....49773
917.....49774
935.....52044
944.....50242

31 CFR

129.....50373
210.....50618

32 CFR

198.....49754
Proposed Rules:
58a.....50243
255a.....51766

33 CFR

100.....50235, 50500
117.....50501, 51397
165.....52028
167.....51972
326.....50708
Proposed Rules:
110.....49776

34 CFR

222.....51881
255.....51029
300.....50476
303.....50478

36 CFR

4.....51197
Proposed Rules:
1220.....51768
1228.....51768

37 CFR

1.....50942, 51550
2.....50942, 51550
304.....49976

38 CFR

3.....51199
4.....49754
21.....49755, 49977
Proposed Rules:
14.....50772

39 CFR

111.....49978, 50618

40 CFR

35.....52126
52.....50501, 51029, 51398, 52028, 52030
60.....50754, 51550, 51818, 51820, 52031, 52188
61.....50887, 51654, 52031
81.....51297
142.....52126
228.....50619
261.....50968
271.....50968
302.....50968
372.....51298
712.....51131
716.....51131
761.....52716
799.....49760–49844
Proposed Rules:
35.....49848
51.....49999, 52251
52.....49999, 50718, 50773, 51303, 51421, 52251
60.....52190, 52207, 52209, 52251

61.....51423
80.....49999
81.....49999, 50774
85.....50776, 51306
136.....50216
160.....49844
180.....49844
185.....49844
186.....49844
300.....50306
372.....49948
795.....49844

41 CFR

Proposed Rules:
101–17.....50251
105–5.....49777
302–6.....51300

42 CFR

57.....50373, 51744
435.....50755
436.....50755

Proposed Rules:
57.....51852, 51858

43 CFR

Public Land Orders:
6758.....51882
6759.....51882
1038 (partially revoked by PLO 6757).....49760
8360.....51031

44 CFR

64.....50236, 51882

46 CFR

1.....50374
2.....50374
3.....50374
10.....50374
12.....50374
15.....50374
24.....50374
30.....50374
38.....50958
42.....50374
50.....50374
54.....50958
69.....50374
70.....50374
90.....50374
98.....50958
107.....50374
110.....50374
146.....50374
147.....50374
147A.....50374
148.....50374
150.....50374
151.....50374, 50958
153.....50374
154.....50374
159.....50374
160.....50316
167.....50374
168.....50374
169.....50374
170.....50374
175.....50374
188.....50374
197.....50374

Proposed Rules:
540.....51423
572.....51214
580.....50001
581.....50001

47 CFR

1.....50237, 51550
2.....49979, 50237
25.....49979
32.....49995
43.....49761
64.....49761, 50622
69.....50623
73.....49761, 49996, 49997, 50503–50504, 50763, 51301, 51302, 51400, 51550, 52397
80.....49979
87.....49979
90.....50237

Proposed Rules:
73.....49779, 49780, 50001–50004, 50517, 50628, 50777–50778, 51307, 51308, 51424, 51425, 52421–52424
90.....51425

48 CFR

1.....50718
3.....50718
4.....50718
9.....50718
15.....50718
31.....51401
37.....50718
43.....50718
52.....50718
501.....51885
503.....51745
505.....51745
515.....51885
536.....51885
552.....51745, 51885
553.....51885
1529.....49997
1552.....49997

Proposed Rules:
3.....51730
15.....50337
52.....50337
217.....50472
252.....50472
1201.....51426
1202.....51426
1204.....51426
1206.....51426
1209.....51426
1212.....51426
1215.....51426
1219.....51426
1222.....51426
1225.....51426
1227.....51426
1233.....51426
1245.....51426
1252.....51426
1501.....50778

49 CFR

40.....49854, 49878
107.....50382
171.....50382
172.....49998, 51031
173.....50382
176.....50382
177.....50382
178.....50382, 51031
180.....50382
199.....51842
325.....50382
396.....50722, 50726
541.....52033
1011.....50382
1039.....51401
1043.....52033
1090.....51745
1171.....52034

Proposed Rules:
57.....50254
192.....50780, 51816
240.....50890
393.....50005
571.....49781, 50005, 50254, 50783
572.....52425

50 CFR

204.....51718
216.....50763
229.....51718
270.....50504
280.....50504
281.....50504
282.....50504
285.....50504
290.....50504
296.....50504
299.....50504
371.....51746
611.....50306, 50386
620.....50386
655.....52035
662.....52398
663.....51886
669.....50624
672.....50386
675.....50386, 51200, 51886

Proposed Rules:
17.....50006, 51432, 52340
23.....51432
228.....50785
628.....51437
655.....51550
672.....51042
675.....51042

LIST OF PUBLIC LAWS

Last List December 20, 1989

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H.R. 901/Pub. L. 101-237
Veterans' Benefits Amendments of 1989. (Dec. 18, 1989; 103 Stat. 2062; 37 pages) Price: $1.25

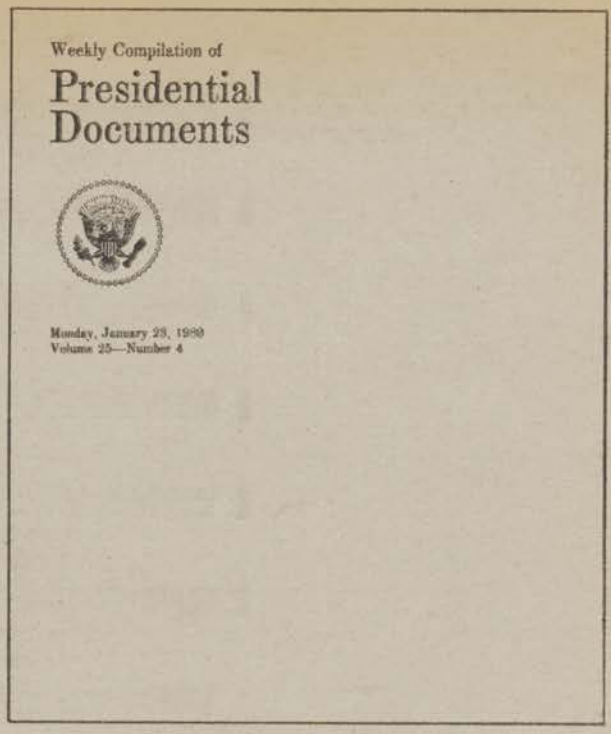
H.R. 3259/Pub. L. 101-238
Immigration Nursing Relief Act of 1989. (Dec. 18, 1989; 103 Stat. 2099; 7 pages) Price: $1.00

H.R. 3299/Pub. L. 101-239
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