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Tuesday
February 14, 1989

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WHAT IT IS AND HOW TO USE IT

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WHO: The Office of the Federal Register.

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2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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WASHINGTON, DC

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88-NM-215-AD; Amdt. 39-6141]

Airworthiness Directives; Canadair Model CL-44D4 and CL-44J Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Canadair Model CL-44D4 and CL-44J series airplanes, which requires visual and non-destructive testing (NDT) inspection for corrosion on the upper wing skin between the front and rear spars, over the total wing span, and repair, if necessary. This amendment is prompted by reports of extensive exfoliation corrosion found on the wings of several airplanes during recent overhaul. This condition, if not corrected, could result in reduction of the structural integrity of the wing, and could eventually lead to failure of the wing.

EFFECTIVE DATE: March 7, 1989.

ADDRESSES: The applicable service information may be obtained from Bombardier, Inc., Canadair Aerospace Group, P.O. Box 6087, Station A, Montreal, Quebec H3C 3G9, Canada. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: Mr. Lester Lipsius, Aerospace Engineer, Airframe Branch (ANE-172), New York Aircraft Certification Office, FAA, New England Region, 181 South Franklin Avenue, Valley Stream, New York 11581; telephone (516) 791-6220.

SUPPLEMENTARY INFORMATION: During a recent overhaul of three U.S.-registered Model CL-44D4 series airplanes, extensive corrosion damage, such as raised blistering and bulging, was found on the upper wing skin between the front and rear spars on all three planes. This condition, if not corrected, could lead to weakening of the wing structure, and could eventually lead to failure of the wing.

Canadair has issued Alert Wire 44T-1340/2431, dated October 28, 1988, which describes procedures for visual and NDT inspections for corrosion damage of the upper wing skin. Transport Canada, which is the airworthiness authority for Canada, has issued Canadian Airworthiness Directive CF-88-21, dated November 2, 1988, making compliance with the Canadair Alert Wire mandatory.

This airplane model is manufactured in Canada and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this situation is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD requires repetitive visual and NDT (ultrasonic or eddy current) inspections in accordance with the alert wire previously described, and repair, if necessary, in accordance with a method approved by the FAA.

Additionally, this action requires that operators submit a report of the results of their inspections to Canadair for evaluation and a determination of an appropriate repair scheme.

Since a situation exists that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB Control Number 2120-0056.

The regulations adopted herein 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, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required).

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

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

PART 39—[AMENDED]

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

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

2. By adding the following new airworthiness directive:

§ 39.13 [Amended]

Canadair: Applies to Model CL-44D4 and CL-44J series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent wing failure due to exfoliation corrosion on the wing upper skin, accomplish the following:

A. Within 225 hours time-in-service or 30 days after the effective date of this AD, whichever occurs first, and thereafter at

intervals not to exceed 12 months, perform a visual inspection of the upper wing skin area between the front and rear spars over the total wing span for corrosion, including raised blistering or bulging, in accordance with Canadair Alert Wire 44T-1340/2431, dated October 28, 1988.

1. If the extent of such corrosion exceeds 20 sq.in. in any one skin panel, between chordwise joints, prior to further flight conduct a non-destructive testing (NDT) inspection, using ultrasonic or eddy current inspection techniques, to determine the skin thickness, in accordance with the Alert Wire. Repair the corrosion area prior to further flight, in accordance with a method approved by the Manager, New York Aircraft Certification Office, FAA, New England Region.

2. If the extent of such corrosion exists within an area equal to or less than 20 sq.in. in any one skin panel, between chordwise joints, repair corrosion area within 900 hours time-in-service or 6 months after the effective date of this AD, whichever occurs first. Repair must be accomplished in accordance with a method approved by the Manager, New York Aircraft Certification Office, FAA, New England Region.

B. Within 48 hours after performing the inspections required by paragraph A., above, submit a report of results to Canadair, in accordance with Canadair Alert Wire 44T-1340/2431, dated October 28, 1988. The report must include information as to the extent and location of the corrosion, and the inspection method used.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, New York Aircraft Certification Office, FAA, New England Region.

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

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

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to Bombardier, Inc., Canadair Aerospace Group, P.O. Box 6087, Station A, Montreal, Quebec H3C 3G9, Canada. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

This amendment becomes effective March 7, 1989.

Issued in Seattle, Washington, on February 6, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-3364 Filed 2-13-89; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 88-NM-156-AD; Amdt. 39-6143]

Airworthiness Directives; Fokker Model F-27 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Fokker Model F-27 series airplanes, which requires a one-time inspection of the upper brace strut in the nacelle center section, to ensure the struts are of the correct configuration, and replacement, if necessary. This amendment is prompted by reports of a broken upper brace strut due to fatigue cracking. This condition, if not corrected, could result in engine separation and subsequent structural damage to the airplane aft of the engine.

EFFECTIVE DATE: March 28, 1989.

ADDRESSES: The applicable service information may be obtained from Fokker Aircraft USA, Inc., 1199 N. Fairfax Street, Alexandria, Virginia 22314. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Quam, Standardization Branch, ANM-113; telephone (206) 431-1978. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations, to include a new airworthiness directive applicable to certain Fokker Model F-27 series airplanes, which requires a one-time inspection of the upper brace strut in the nacelle center section to ensure that the struts are of the correct configuration, and replacement of the strut, if necessary, was published in the **Federal Register** on November 17, 1988 (53 FR 46464).

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received in response to the proposal.

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

It is estimated that 11 airplanes of U.S. registry will be affected by this AD, that it will take approximately 4 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be $1,760.

The regulations adopted herein 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, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane ($160). A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

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

PART 39—[AMENDED]

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

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

2. By adding the following new airworthiness directive:

§ 39.13 [Amended]

Fokker: Applies to Model F–27 series airplanes, Serial Numbers 10102 through 10307, certificated in any category. Compliance is required as indicated unless previously accomplished.

To prevent engine separation and subsequent structural damage to the airplane aft of the engine, accomplish the following:

A. Within 60 days after the effective date of this AD, inspect both the right and left upper nacelle brace struts, in accordance with Fokker Service Bulletin F27/54–44, dated July 7, 1988. If any brace strut is found with a self-tapping screw, prior to the accumulation of 30,000 landings on the strut, or within the next 500 landings after the effective date of this AD, whichever occurs later, replace the brace strut in accordance with the referenced service bulletin.

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

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

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Fokker Aircraft USA, Inc., 1199 N. Fairfax Street, Alexandria, Virginia 22314. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective March 28, 1989.

Issued in Seattle, Washington, on February 6, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–3365 Filed 2–13–89; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 770, 771, 772, 773, 774, 775, 776, and 777

[Docket No. 90118–9018]

Export Licenses; Forms BXA–622P, BXA–622P–A, BXA–622P–B, BXA–685P, and BXA–699P

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Export Administration Regulations are being amended to reflect revisions to the forms used to apply for export licenses (BXA–622P, BXA–622P–A, BXA–622P–B, formerly ITA–622P), amendments to exports licenses (BXA–685P, formerly ITA–685P), and reexport authorizations (BXA–699P, formerly ITA–699P). This rule provides for the replacement of the current forms with Optical Character Recognition (OCR) forms. The OCR forms allow the direct recording of export license information into the Commerce Department computer data base, thus, eliminating the need for manual entry as required under the current forms. Use of the OCR forms on a voluntary basis has proved successful. The OCR forms will result in significant cost savings and in streamline processing of license applications. Furthermore, use of the OCR forms will incur no added expense for U.S. business. In addition, this rule provides that the OCR forms are revised to carry the "BXA" designation (*e.g.*, BXA–622P) in order to reflect the establishment of the Bureau of Export Administration as a separate entity from the International Trade Administration within the U.S. Department of Commerce. The current forms, which carry the "ITA" designation, will be acceptable for use until February 15, 1989. After that date, only the OCR compatible forms, which carry the "BXA" designation, will be accepted by BXA.

EFFECTIVE DATE: February 14, 1989.

FOR FURTHER INFORMATION CONTACT: Tom deButts, Office of Export Licensing, Bureau of Export Administration, Telephone: (202) 377–4811.

SUPPLEMENTARY INFORMATION:

Rulemaking Requirements

1. This rule complies with Executive Order 12291 and Executive Order 12661.

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

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

4. This rule contains a collection of information requirement under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). These collections have been approved by the Office of Management and Budget under control numbers 0694–0005, 0694–0007, and 0694–0010. The public reporting burden for BXA Form 622P is estimated to average forty-five minutes per response, BXA Form 685P is estimated to average fifteen minutes per response, and BXA Form 699P is estimated to average twenty-five minutes per response. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Administration, Bureau of Export Administration, Room 3889, Department of Commerce, Washington, DC 20230 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

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

Accordingly, it is being issued in final form. However, as with other Department of Commerce rules, comments from the public are always welcome. Comments should be submitted to: Willard Fisher, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20004.

List of Subjects in 15 CFR Parts 770–777

Exports, Reporting and recordkeeping requirements.

Accordingly, 15 CFR Parts 770, 771, 772, 773, 774, 775, 776, and 777 (15 CFR Parts 768–799) are amended as follows:

PARTS 770 THROUGH 777 [AMENDED]

1. The authority citation for Parts 770, 774, 775, and 776 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, and Pub. L. 100–418 of August 23, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985).

2. The authority citation for Parts 771, 772, and 773 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, and Pub. L. 100–418 of August 23, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95–223 of December 28, 1977 (50 U.S.C. 1701 *et seq.*); E.O. 12532 of September 9, 1985 (50 FR 36861, September 10, 1985) as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99–440 of October 2, 1986 (22 U.S.C. 5001 *et seq.*); and E.O. 12571 of October 27, 1986 (51 FR 39505, October 29, 1986).

3. The authority citation for 15 CFR Part 777 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, by Pub. L. 100–180 of December 4, 1987, by Pub. L. 100–418 of August 23, 1988, and by Pub. L. 100–449 of September 28, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); sec. 103, Pub. L. 94–163 of December 22, 1985 (42 U.S.C. 6212), as amended by Pub. L. 99–58 of July 2, 1985; sec. 101, Pub. L. 93–153 of November 16, 1973 (30 U.S.C. 185); sec. 28, Pub. L. 95–372 of September 18, 1978 (43 U.S.C. 1354); E.O. 11912 of April 13, 1976 (41 FR 15825, April 15, 1976), as amended; secs. 201(1) and 201(11)(e), Pub. L. 94–258 of April 5, 1976 (10 U.S.C. 7420 and 7430(e)); Presidential Finding of June 14, 1985 (50 FR 25189, June 18, 1985); and sec. 125, Pub. L. 99–64 of July 12, 1985 (46 U.S.C. 466(c)).

4. The phrase "Form ITA–622P" is revised to read "Form BXA–622P" in the following places:

§ 773.7 (d)(1)(iv)(B) (2 references)
§ 773 Supplement No. 6(c)
§ 776.4 (c)(1)
§ 776.9 (b)(1)
§ 776.9 (b)(2)
§ 776.9 (b)(3)
§ 777.6 (a)

5. The phrase "Form DIB–622P" is revised to read "Form BXA–622P" in the following places:

§ 772.4 (a)(1)(ii) (2 references)
§ 772.4 (a)(1)(iii) (2 references)
§ 772.8 (b)(1)
§ 773.7 (d)(1)(ii)(B)

6. The phrase "Form DIB–699P" is revised to read "Form BXA–699P" in the following places:

§ 774.5 (b)(1) (2 references)

7. The phrase "Form ITA–685P" is revised to read "Form BXA–685P" in the following places:

§ 773.2 (e)(2)(iii)
§ 774.3 (a)(2)(ii) (2 references) and concluding text to paragraph (a)(2)
§ 774.5 (b) (2 references)
§ 774.f (2 references)

8. The phrase "Form DIB–685P is revised to read "Form BXA–685P" in the following places:

§ 774.5 (b) (4 references)
§ 775.9 (e)(3)(i)
§ 775.9 (e)(3)(ii)

9. Section 772.4(a)(1) is amended by revising the paragraph heading, adding a paragraph heading to (a)(1), and revising the first two sentences of (a)(1) to read as follows:

§ 772.4 How to apply for a validated license.

(a) *Form and manner of filing*—(1) *Application form.* An application for a validated license must be submitted on Form BXA–622P, Application for Export License, or on Form ITA–622P, Application for Export License, revised July 1981 or later. After February 15, 1989, only Form BXA–622P will be acceptable. * * *

* * * * *

10. In § 772.11, paragraph (i)(1) is revised to read as follows:

§ 772.11 Amending export licenses.

* * * * *

(i) * * *

(1) *Approved*—The Office of Export Licensing will validate the yellow copy of an approved Form BXA–685P by imprinting a facsimile of the U.S. Department of Commerce seal followed by the letter "D" and a series of numbers indicating the year, month and day of validation. The yellow copy will be forwarded to the Applicant.

* * * * *

§§ 772.11 and 772.13 [Amended]

11. The phrase "Return Copy of Amendment Notice To" is revised to read "Applicant" in §§ 772.11 (i)(2) and (i)(3) and 772.13(e)(1) [three references in § 772.13(e)(1)].

§§ 772.12, 772.13 and 773.3 [Amended]

12. The phrase "Amend License to Read as Follows" is revised to read "State Specifically the Way the License Should Read" in §§ 772.12(a)(3), 772.13 (c)(1)(i), and 773.3(1)(4)(i).

13. Supplement No. 1 to Part 772 is revised to read as follows:

Supplement No. 1 Part 772—Instructions for Preparing Application for a Validated License

Item 1. Enter the name and telephone number of the person who can answer questions about the commodities or other aspects of the application.

Item 2a. Place an (X) in appropriate block(s) when other form(s) are attached.

Item 2b. Identify document(s) on file by placing an (X) in the appropriate block(s). These document(s) are to be retained by the applicant, consistent with the provisions of § 787.13, for Country Groups S and V (except the People's Republic of China). All other supporting documentation must be submitted with the application.

Item 3. Enter original case number if the original case was returned without action.

Item 4. Complete only if stipulated in the Export Administration Regulations.

Item 5. Applicant as defined in the Export Administration Regulation § 772.3(b)(1).

Item 6. The ultimate consignee in the country of ultimate destination is the party who will actually receive the material for the end-use designated in Item 12. A bank, freight forwarder, forwarding agent, or other intermediary is not acceptable as an ultimate consignee, but should be listed in Item 8 as an intermediate consignee. GOVERNMENT PURCHASING ORGANIZATIONS ARE ACCEPTABLE CONSIGNEES IN THOSE INSTANCES WHEN THE COMMODITIES OR TECHNICAL DATA DESIGNATED IN ITEM 9(b) ARE TO BE TRANSFERRED TO THE ULTIMATE END-USER, PROVIDED ACTUAL END-USE(S) ARE CLEARLY IDENTIFIED IN SUPPORTING DOCUMENTATION.

Note.—If a temporary export, applicant should be shown as ultimate consignee in care of person or entity who will have control of the goods abroad. Do NOT leave this item blank.

Item 7. The purchaser is the party abroad who has entered into the export transaction with the applicant or order party. If same as ultimate consignee, place "X" in the block located after "Same as Item #6." Do NOT leave this item blank.

Item 8. An intermediate consignee is any intermediary in a foreign country who participates as an agent for the exporter or for the purchaser or ultimate consignee to effect delivery of the export to the purchaser or ultimate consignee. All known intermediate consignees must be named. If more than one, state in Item #15. If the same as purchaser, place an "X" in the block located after "Same as Item #7". In none state "None"; if unknown, state "Unknown" in the same space. Do NOT leave this space blank.

Note.—For Items 9(a) through 9(d)—Use Supplement Form BXA 622P–A if additional space is needed.

Item 9(a). Give the quantity to be shipped, as identified in the Export Control Commodity Number (ECCN) located in Supplement No. 1 to 799.1. If no specific unit of quantity is required by the entry or footnote, show the unit of quantity commonly used in the trade.

Item 9(b). PDR-Expressed in megabits per second. ONLY insert numerical value in PDR column. If not applicable insert N/A. Place model # before description, followed by a colon (:). End description with ECCN paragraph reference. Do NOT put model number in 9(b) on form if model number exceeds 30 characters. Instead type the word "various," followed by a colon (:). Put the model number(s) on a plain sheet of paper with the Application Control Number, and attach to the application.

Describe commodities or technical data. Furnish additional details as prescribed by the Export Administration Regulations when necessary to identify the specific items to be so classified. Include characteristics shown in the specific ECCN, such as basic ingredients, composition, electrical parameters, size, gauge, grade, horsepower, etc. These characteristics must be identified for the commodities or technical data proposed for export, which may be different from the characteristics described in the promotional brochure(s). Where the specific ECCN entry states "specify by name," list by name on the application all the commodities to be included in the shipment. Include the ECCN paragraph reference at the end of the description. Processing Code: Enter the two character processing codes designated in the ECCN. Only one processing code may be entered per application.

Item 9(c). Enter the Export Control Commodity Number that corresponds to the commodity adjacent to the corresponding commodity description.

Item 9(d). Enter the unit price except where a large variety of products within a single ECCN makes such a breakdown extremely difficult. In such cases show only total price. Give the fair market value in U.S. dollars. Round to the nearest dollar the amount entered in the total price column. Give the exact value if less than $0.50. Where the normal trade practice makes it impractical to establish a firm contract price, state in Item 15 the precise terms upon which the price is to be ascertained and from which the contract price may be objectively determined.

Item 10. The Office of Export Licensing will transmit the license to the party designated in this space. Leave blank if the license is to go to the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant.

Item 11. Provide manufacturer name of the total or assembled commodity(ies). Do NOT include address. If more than one name, separate names by commas. If additional space is needed, continue in Item #15.

Note.— Leave this item blank only if the ECCN is 1564.

Item 12. Provide a complete and detailed description for the end-use intended by the ultimate consignee. If additional space is needed, use Supplemental Form BXA–622P–A or B.

Item 13. Complete only if end-user is not the ultimate consignee named in Item 6. If more than one end-user, insert the word "various" in the space and use Supplemental Form BXA–622P–B.

Item 14. A Foreign Availability Submission (FAS) may be submitted with an export license application. The applicant may also provide a FAS to the Office of Foreign Availability up to 90 days after a license denial on National Security grounds. See part 791 of the Export Administration Regulations before providing submission.

Item 15. When information is a continuation of a previous item(s) first state the item number(s). Do NOT put information from item 9(a) through 9(d) in this space. Enter additional data pertinent to the transaction as required by the Export Administration Regulations. Include special certifications, names of parties in interest not disclosed elsewhere, such as foreign principal or supplier, explanation of documents attached, etc. If the application represents a transaction previously rejected, give prior case number issued by the Office of Export Licensing. Use Supplemental Form BXA–622P–A or B if additional space is needed.

Item 16. All three spaces must be completed and THE APPLICATION MUST BE MANUALLY SIGNED by the applicant or duly authorized agent of the applicant. If signed by agent of the applicant, show title and firm name or agent. (Rubber-stamped or other facsimile signatures are not acceptable.)

Item 17. Where the applicant did not receive the order directly from the foreign purchaser or ultimate consignee named in the application, or through his or her agent abroad, the party in the United States that conducted the negotiations with the foreign party and originally received the order (the order party) must complete this item and sign the application.

12. Supplement No. 1 to Part 774 is revised to read as follows:

Supplement No. 1 Part 774—Instructions for Preparing Form BXA–699P, "Request for Reexport Authorization."

Item 1. Enter the name and telephone number of the person who can answer questions about the application.

Item 2a. Place an (X) in appropriate block(s) when other form(s) are attached.

Item 2b. Identify documents on file by placing an (X) in the appropriate block(s). These documents are to be retained by the applicant, consistent with the provisions of § 787.13, for Country Groups S and V (except the People's Republic of China). All other supporting documentation must be submitted with the application.

Item 3. Enter original case number if the original case was returned without action.

Item 4. Complete only if stipulated in the Export Administration Regulations.

Item 5. Applicant as defined in the Export Administration Regulation § 772.3(b)(1).

Item 6. The ultimate consignee in the country of ultimate destination is the party who will actually receive the material for the end-use designated in Item 12. A bank, freight forwarder, forwarding agent, or other intermediary is not acceptable as an ultimate consignee, but should be listed in Item 8 as an intermediate consignee. GOVERNMENT PURCHASING ORGANIZATIONS ARE ACCEPTABLE CONSIGNEES IN THOSE INSTANCES WHEN THE COMMODITIES OR TECHNICAL DATA DESIGNATED IN ITEM 9(b) ARE TO BE TRANSFERRED TO THE ULTIMATE END-USER, PROVIDED ACTUAL END-USE(S) ARE CLEARLY IDENTIFIED IN SUPPORTING DOCUMENTATION.

Note.—If a temporary reexport, applicant should be shown as ultimate consignee in care of person or entity who will have control of the goods abroad. Do NOT leave this item blank.

Item 7. The validated license number under which the commodity(ies) or technical data were originally exported.

Item 8. The original ultimate consignee is the entity listed in the original application for export in item 6.

Note.—For Items 9(a) through 9(d)—Use Supplement Form BXA 622P–A if additional space is needed.

Item 9(a). Give the quantity to be shipped, as identified in the Export Control Commodity Number (ECCN) located in Supplement No. 1 to § 799.1. If no specific unit of quantity is required by the entry or footnote, show the unit of quantity commonly used in the trade.

Item 9(b). PDR–Expressed in megabits per second. ONLY insert numerical value in PDR column. If not applicable insert N/A. Place model # before description, followed by a colon (:). Put the model number(s) on a plain sheet of paper with the Application Control Number, and attach to the application.

Describe commodities or technical data. Furnish additional details as prescribed by the Export Administration Regulations when necessary to identify the specific items to be so classified. Include characteristics shown in the specific ECCN, such as basic ingredients, composition, electrical parameters, size, gauge, grade, horsepower, etc. These characteristics must be identified for the commodities or technical data proposed for reexport, which may be different from the characteristics described in the promotional brochure(s).

Where the specific ECCN entry states "specify by name," list by name on the application all the commodities or technical data to be included in the shipment. Include the ECCN paragraph reference at the end of the description. Processing Code: Enter the two character processing codes designated in the ECCN. Only one processing code may be entered per application.

Item 9(c). Enter the Export Control Commodity Number that corresponds to the commodity adjacent to the corresponding commodity description.

Item 9(d). Enter the unit price except where a large variety of products within a single ECCN makes such a breakdown extremely difficult. In such cases show only total price. Give the fair market value in U.S. dollars. Round to the nearest dollar the amount entered in the total price column. Give the exact value if less than $0.50. Where the normal trade practice makes it impractical to establish a firm contract price, state in item 15 the precise terms upon which the price is to be ascertained and from which the contract price may be objectively determined.

Item 10. The Office of Export Licensing will transmit the reexport authorization to the party designated in this space. Leave blank if the license is to go to the applicant. Designation of another party to receive the

license does not alter the responsibilities of the applicant.

Item 11. Provide a complete and detailed description for the end-use intended by the new ultimate consignee listed in Item 6. For guidance on completion of the item, refer to Supplement 1, Part 772 of the Export Administration Regulations. If additional space is needed, use Supplement Form BXA–622P–A or B.

Item 12. Complete only if end-user is not the ultimate consignee named in Item 6. If more than one end-user, insert the word "various" in the space and use Supplemental Form BXA–622P–B.

Item 13. Mark appropriate block with an (X) to identify if the commodity(ies) or technical data are to be reexported, sold or other. If "other" indicate disposition.

Item 14. When information is a continuation of a previous item(s) first state the item number(s). Do NOT put information from Item 9(a) through 9(d) in this space. Enter additional data pertinent to the transaction as required by the Export Administration Regulations. Include special certifications, names of parties in interest not disclosed elsewhere, such as foreign principal or supplier, explanation of documents attached, etc. If the application represents a transaction previously rejected, give prior case number issued by the Office of Export Licensing. Use Supplemental Form BXA–622P–A or B if additional space is needed.

Item 15. All three spaces must be completed and THE APPLICATION MUST BE MANUALLY SIGNED by the applicant or duly authorized agent of the applicant. If signed by agent of the applicant, show title and firm name or agent. (Rubber-stamped or other facsimile signatures are not acceptable.)

§ 773.2 [Amended]

13. In § 773.2, paragraph (c)(2)(ii)(B) is amended by revising the phrase "Item 7, Consignee in Country of Ultimate Destination" to read "Item 6, Ultimate Consignee" and paragraph (c)(2)(ii)(C) is amended by revising the phrase "Description of Commodity or Technical Data" to read "Commodity Manufacturer's Description of Commodity".

§ 773.7 [Amended]

14. In § 773.7, paragraph (d)(1)(iv)(B)(*2*) is amended by revising the phrase "Consignee in Country of Ultimate Destination" to read "Country of Ultimate Destination".

Supplement No. 5—[Amended]

15. Supplement No. 5 to Part 773 is amended as follows:

A. Paragraphs (b) and (c) are removed;

B. Paragraph (a) is redesignated as paragraph (b). Newly redesignated paragraph (b) is amended by revising the references to "Item 1(a)" to read "Item 3";

C. New paragraph (a) is added to read "(a) Items 1 and 2 are self explanatory.";

D. Paragraphs (d), (e), (f), (g) and (h) are redesignated as paragraphs (c), (d), (e), (f), and (g);

E. Newly redesignated paragraph (d) is amended by revising the reference to "Item 6, 8, 13, 14, 17" to read "Items 7, 8, 14, 17";

F. Newly redesignated paragraph (e) is amended by revising the reference to "Item 7" to read "Item 6" and the reference to "Attachment Item 7" to read "Attachment Item 6";

G. The phrase "Form ITA–622P" is revised to read "Form BXA–622P in the heading to Supplement No. 5 and in the newly redesignated paragraph (f), introductory text.

H. Newly redesignated paragraph (f)(1) is amended by revising the words "an attachment to the Form ITA–622P (labeled Attachment Item 9(b) product description")" to read "Form BXA–622P–A, "Commodity Description Supplement";

H. Newly redesignated paragraph (f)(2) is amended by revising the reference to "the attachment" to read "Form BXA–622P–A";

I. Newly redesignated paragraph (g) is amended by revising the words "at the bottom of the attachment to Item 9(b)" to read "in Item 15 of Form BXA–622P–A".

Dated: February 6, 1989.

Michael E. Zacharia,

Assistant Secretary for Export Administration.

[FR Doc. 89–3152 Filed 2–13–89; 8:45 am]

BILLING CODE 3510–DT–M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Parts 1031 and 1032

Commission Participation and Commission Employee Involvement in Voluntary Standards

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission is revising its regulations governing the Commission's participation in voluntary standards activities. The revised regulations reflect the policies set forth by Congress in the Consumer Product Safety Amendments of 1981, Pub. L. 97–35, and make several changes in the agency's policies on employee participation in voluntary standards development activities. Also, the revised regulations combine former Part 1031, Employee Membership and Participation in Voluntary Standards Organizations, and Part 1032, Commission Involvement in Voluntary Standards Activities, into a new Part 1031, Commission Participation and Commission Employee Involvement in Voluntary Standards Activities.

EFFECTIVE DATE: March 16, 1989.

FOR FURTHER INFORMATION CONTACT: Colin Church, Voluntary Standards Coordinator, Consumer Product Safety Commission, Washington, DC 20207, telephone: (301) 492–6550.

SUPPLEMENTARY INFORMATION:

Background

Congress enacted the Consumer Product Safety Act in 1972, codified at 15 U.S.C. 2051, et. seq., to protect consumers against unreasonable risks of injury associated with consumer products. In furtherance of that goal, Congress established the Consumer Product Safety Commission as an independent regulatory agency, and granted it broad authority to promulgate mandatory safety standards for consumer products as a necessary alternative to industry self-regulation. 15 U.S.C. 2056(a)(1)(A). The Commission was also given the authority to require manufacturers to provide consumer label warnings or instructions about their products, 15 U.S.C. 2056(a)(2), and to promulgate standards for products falling under the purview of the Refrigerator Safety Act, 15 U.S.C. 1211–1214, the Poison Prevention Packaging Act of 1970, 15 U.S.C. 1471–1476, the Flammable Fabrics Act, 15 U.S.C. 1191–1204, and the Federal Hazardous Substances Act, 15 U.S.C. 1261–1276. As originally enacted, neither the Consumer Product Safety Act nor the other statutes administered by the Commission contained any language referring to voluntary standards.

In 1978, the Commission issued regulations describing the extent and form of Commission involvement in the development of voluntary standards, 43 FR 19216, 16 CFR Part 1032—Commission Involvement in Voluntary Standards Activities. In the Background section, the Commission acknowledged the contribution which voluntary standards had made to reducing hazards associated with consumer products, and stated that it supported an effective voluntary standards program. Nonetheless, the Commission asserted that "While there might be circumstances in which a particular voluntary standard can substitute for a mandatory standard, the Commission generally views voluntary standards as complementary to and not a substitute

for mandatory standards". It stated, also, its belief that a proper combination of voluntary and mandatory standards can have a higher "payoff" in increased product safety than either mandatory or voluntary activities alone could have.

In 1981, Congress amended the Consumer Product Safety Act, the Federal Hazardous Substances Act, and the Flammable Fabrics Act, to mandate that the Commission give preference to voluntary standards over promulgating mandatory standards, if it determines that a voluntary standard will eliminate or adequately reduce an injury risk, and that there will be a likelihood of substantial compliance with the standard. 15 U.S.C. 2056(b), 15 U.S.C. 1262(g)(2), 15 U.S.C. 1193(h)(2). The amendments also require the Commission to provide administrative and technical assistance to organizations engaged in voluntary standards development. 15 U.S.C. 2054(a) (3) and (4).

Thereafter, the Commission conducted its activities in accordance with the policies of the 1981 Amendments by deferring to voluntary standards in those cases where a voluntary standard would adequately reduce an unreasonable risk of injury and there was a reasonable likelihood of substantial compliance with the standard. However, the Commission's policy statement in 16 CFR Part 1032 is inconsistent with the policy stated in the 1981 Amendments.

The Commission proposed, at 53 FR 44892, November 7, 1988, a new part 1031 to conform the Commission's policy with the 1981 Amendments. The proposed new Part 1031 also incorporated, with changes, the provisions of current 16 CFR Part 1031, the Commission's regulations governing employee membership and participation in voluntary standards organizations, which were initially promulgated on June 20, 1975, 40 FR 26023. The part specified which Commission officers and employees can be members of voluntary standards bodies or can participate in voluntary standards development activities. The comments received, and the Commission's responses, are discussed later. The substantive changes made by this final regulation are discussed below.

Explanation of Changes and Additions in Part 1031

Subpart A, General Policies, is a revision of current 16 CFR Part 1032, Commission Involvement in Voluntary Standards Activities. Subpart A is substantially the same as existing Part 1032, except as described below.

Section 1031.1(b) has been added to define "voluntary standards bodies" and "voluntary standards development bodies". The definitions are similar to those in OMB Circular A–119 and reflect the language Congress employed in section 5(a) (3) and (4) of the Consumer Product Safety Act as to which organizations the Commission should assist in voluntary standards activities, i.e., "public and private organizations or groups of manufacturers." The definitions are stated in broad terms so as to encompass any organization that has the capability of developing a voluntary standard.

Section 1031.2, Background, a complete revision of current § 1032.1, explains the policy of the Commission regarding voluntary standards. Section 1031.2(b) explains the statutory requirements of the 1981 Amendments regarding voluntary standards. Section 1031.2(c) describes the policies set forth in office of Management and Budget Circular No. A–119 pertaining to federal participation in the development and use of voluntary standards. The Circular encourages government participation in the standards-related activities of voluntary standards bodies and standards-developing groups when such participation is in the public interest and is compatible with the agencies, missions, authorities, priorities, and budget resources.

Section 1031.3, Consumer Product Safety Act Amendments, incorporates the text of several sections from the Act, as amended in 1981, which pertain to the Commission's participation in the development and use of voluntary standards. The provisions are provided in the text of the regulation for the reader's convenience.

Section 1031.4(a)(2) modifies current § 1032.6(a)(2), so that one of the criteria for the Commission's determination that a voluntary standard is adequate to eliminate or reduce a risk of injury associated with a consumer product is changed from the language that "there is a sufficiently high degree of conformance to the voluntary standard" to language "it is likely that there will be substantial and timely compliance with the voluntary standard." The new language reflects provisions in the 1981 Amendments that allows the Commission to defer to proposed voluntary standards under appropriate circumstances.

Section 1032.6(b) in the current regulations is deleted since it is inconsistent with the 1981 Amendments.

Section 1031.4(b) is a new provision that provides for the Commission to initiate a proceeding for the development of a mandatory standard in the event it determines there is no voluntary standard that will eliminate or adequately reduce a risk of injury.

Section 1031.4(c) revises the language in current 16 CFR 1032.6(d), which requires the Commission to consider the provisions of a voluntary standard when it initiates a development proceeding under "section 7 of the Consumer Product Safety Act." As originally enacted, section 7, referred to as the "offeror process", provided that the Commission could solicit "offers" from private sector organizations to develop a mandatory standard. However, section 7 was revised by the 1981 Amendments to abolish the "offeror process"; thus, reference to that section is inappropriate. The proposed § 1031.4(c) references, instead, the provisions of the Consumer Product Safety Act, the Federal Hazardous Substances Act, and the Flammable Fabrics Act which prescribe the process for issuing a mandatory consumer product safety rule.

Section 1031.5 sets forth the criteria for Commission participation in voluntary standards activities. They are substantially the same criteria set forth in the former 16 CFR 1032.5, except that two new criteria (subsections (a) and (b)) have been added to conform to criteria prescribed by the 1981 Amendments and their legislative history.

Section 1031.5(f) provides criteria superseding the criterion set forth in former 16 CFR 1032.5(e) for Commission consideration to determine whether to participate in the development of a voluntary standard. The former provision merely required that the Commission consider the degree and ascertainability of industry conformance with a voluntary standard once it is issued. The new section requires the Commission to consider any reasonable industry arrangements for achieving substantial industry compliance with a voluntary standard once it is issued and the means of ascertaining such compliance based on overall market share of product production. The latter requirement reflects the Congressional direction that, in most instances, compliance should be measured in terms of complying consumer products rather than in terms of the number of complying industry members. See the Conference Report to accompany H.R. 3982, H. R. Rep. NO. 97–208, 97th Cong., lst Sess., 871 (1981).

Section 1031.5(i) revises former 16 CFR 1032.5(a) to state that participants in a voluntary standard development have "knowledge or expertise in the

area under consideration," rather than "technical expertise," so as to encourage broader participation by those affected by the standard. See the discussion of this section in "Comments received and Commission responses" below.

Section 1031.6(c)(2) replaces and revises former 16 CFR 1032.2(b)(2), which described examples of Commission participation in voluntary standards activities, by adding language allowing the Commission to provide administrative assistance (e.g., travel costs, hosting meetings, and performing secretarial functions) in support of the development and implementation of voluntary standards. This provision is derived from section 5 of the Consumer Product Safety Act, as amended in 1981.

Section 1031.6(d) is added to conform to the policy set forth in OMB Circular A–119, that, normally, agencies should not provide greater support to a voluntary standards activity than that of all the non-federal participants.

Section 1031.7(a)(7) replaces and revises 16 CFR 1032.4(b)(7) by adding a clause that indicates that the Commission's support of voluntary standards activities may include encouraging states and local governments to participate in government or industrial model code development activities so as to develop uniformity and to minimize conflicting state and local regulations, as provided by section 2(b)(3) of the Consumer Product Safety Act.

Section 1031.7(a)(8) provides a new example of the type of support the Commission may use in assisting voluntary standards development, i.e., monitoring the number and market share of products conforming to a voluntary safety standard. This will enable the Commission to ascertain industry compliance with a voluntary standard by market share.

16 CFR 1032.4(b)(9) has been deleted.

Section 1031.7(a)(9) is a new provision. It acknowledges that one form of Commission support for voluntary standards development is providing for the involvement of agency personnel in voluntary standards activities as described in Subpart B of this part.

Sections 1031.7(a) (10) and (11) are new provisions. They indicate that the Commission may provide administrative and financial support to a voluntary standards development activity, as authorized by the 1981 Amendments.

Section 1031.8 is a new provision. It describes the functions of the Voluntary Standards Coordinator, a Commission employee responsible for coordinating agency participation in voluntary standards activities and managing the voluntary standards program.

Subpart B, Employee Involvement in Voluntary Standards Activities, supersedes the former 16 CFR Part 1031. The subpart has the same general effect as the former Part 1031 except for the changes noted below.

Section 1031.9(c)(1) revises former § 1031.1(a) to state that the Commission's participation in voluntary standards programs is consistent with the federal policy set forth in OMB Circular No. A–119, as well as the Consumer Product Safety Act and other statutes administered by the Commission.

Section 1031.9(c)(4) is a new provision. It states that Commission employee participation in voluntary standards activities should take into account Commission resources and priorities. This provision conforms to language in the legislative history of the 1981 Amendments directing the Commission to consider its resources and priorities when determining what assistance it will provide to voluntary standards development. Conference Report to H.R. 3982, p. 884.

Section 1031.10 is a new section. It defines, for the purpose of Subpart B on employee involvement in voluntary standards activities, the terms membership, participation, monitoring, observation, and communication.

Section 1031.11(b) is a new provision which requires employees, who participate in the development of a voluntary standard and then later advise the Commission regarding that standard, to advise the Commission on the extent of their involvement. Also, the provision requires that evaluations and recommendations by such employees should strive to be as objective as possible and should be reviewed by higher level Commission officials prior to submission to the Commission.

Section 1031.12(a) lists those Commission officials who may not become members of a voluntary standards group because they have the responsibility for making final decisions, or objectively advising those who make final decisions, on whether to rely on a voluntary standard, promulgate a consumer product safety standard, or to take other action to prevent or reduce an unreasonable risk of injury associated with a product. The list is the same as that in former § 1031.4, except that Program Managers in the Office of Program Management and Budget have been deleted because their work and recommendations are reviewed by supervisory officials before being given to the Commission. It has also been revised to reflect the Commission's functions regarding voluntary standards which emanate from the 1981 Amendments, i.e., to determine whether a voluntary standard will adequately address a problem involving an unreasonable risk. The predecessor provision referred to the Commission's functions relating to the "offeror process" which, as noted above, was abolished by the 1981 Amendments.

Section 1031.12(c) is a new provision. It requires employees who have obtained approval from the Executive Director to accept membership in a voluntary standards organization to so inform the General Counsel and the Voluntary Standards Coordinator prior to their acceptance. This will allow the General Counsel and the Voluntary Standards Coordinator to be aware of the membership and an opportunity for them to provide any necessary guidance to the employee.

Section 1031.12(d) is a new provision that requires employees who seek membership in a voluntary standards organization in their individual capacity to seek approval from the Commission's Ethics Official in accordance with the Commission's Employee Standards of Conduct, 16 CFR Part 1030.

Section 1031.13(a), like its predecessor provision § 1031.5(d), provides that Commission employees, except for those who are specifically listed, may participate in or monitor voluntary standards development. The proposed provision differs from its predecessor in that it requires approval for employee participation or monitoring by the employee's supervisor and any other person required to do so by internal agency management procedures, whereas approval under the former regulations is required to be given by the Executive Director alone.

Section 1031.14, Observation criteria, supersedes the last sentence in former § 1031.5(d). The new provision requires employees who wish to attend voluntary standards meetings for the sole purpose of observation to obtain approval from their supervisor and any other person required to approve pursuant to internal agency management procedures. Under the former provision, approval had to be provided by the Executive Director. The new provision also requires the employee to notify the Voluntary Standards Coordinator prior to observing a voluntary standard meeting.

Section 1031.15, Communication criteria, is a new provision providing the conditions for officials and employees to communicate with voluntary standards groups and representatives.

Commission officials and employees, who are authorized to be members of a voluntary standards group in their official capacity under section 1031.12(b), may communicate with a voluntary standard group or representative incidental to their membership. Likewise, those officials or employees, who are approved to participate in or monitor a voluntary standard development under § 1031.13 (a) and (b), may communicate with the voluntary standard body or its representatives as part of their approved participation in, or monitoring of, a standard under development.

Agency employees and officials who do not fall within either of the above categories, and are not prohibited from membership in a voluntary standards organization by virtue of § 1031.12(a), may be authorized to communicate with a voluntary standards group, representative, or other committee member on substantive matters, as defined in § 1031.15(a)(1). Approval must be given by the person to whom an employee would apply to obtain approval for participation or monitoring pursuant to § 1031.13. Those same employees and officials may communicate with a voluntary standards group, representative, or other committee member on non-substantive matters within the scope of their duties without specific authorization.

Substantive matters are defined in § 1031.15(a)(1) as those matters that pertain to the formulation of the technical aspects of a specific voluntary standard or the course of conduct for developing a voluntary standard. Nonsubstantive matters would include those relating to scheduling meetings, obtaining status reports, and other administrative matters.

Section 1031.15(b) is a new provision. It requires that employees communicate with voluntary standards organizations in accordance with any internal agency procedures.

Section 1031.15(c) is a new provision. It provides that the Commissioners can engage in written communications with voluntary standards bodies or representatives on voluntary standards matters providing they state that any substantive views expressed are only their individual views, and not necessarily those of the Commission acting in its collegial capacity. This provision changes the former regulation in § 1031.5—self-imposed by the Commission in 1978—that precluded the Commissioners from personally communicating with voluntary standards organizations concerning the development of voluntary standards. The new provision permits the Commissioners to actively encourage and support the development and use of voluntary standards to alleviate product hazards. The disclaimer is intended to preclude any misunderstanding on the part of a recipient of a letter as to whether the views expressed therein are those of the individual Commissioner or those of the Commission. Of course, the Commission may always communicate with parties on voluntary standards matters upon which they agree in their official collegial capacity.

Section 1031.15(d) is a new provision. It requires that Commission officials and employees furnish a copy of each written communication of a substantive nature, and a report of each substantive oral conversation with voluntary standards groups or individuals, to the Voluntary Standards Coordinator. This requirement will enable the Coordinator to monitor all the voluntary standards activities the Commission and its employees are engaged in.

Comments Received and Commission Responses

In response to the notice at 53 FR 44892, November 7, 1988, the Commission received comments from the Alliance of American Insurers, the American Gas Association Laboratories, the American Petroleum Institute, the American Society for Testing and Materials, the Consumer Federation of America, the Department of Defense, the Council of American Building Officials, the National Institute of Standards and Technology, the Whirlpool Corporation, the Underwriters Laboratories, and the ANSI Z21 Accredited Standards Committee. Several Commission staff members also made additional comments. The issues raised by these comments and the Commission's resolution of those issues are discussed below.

Section 1031.1(b)

The Consumer Federation of America recommended that § 1031.1(b) be amended to indicate the Commission's preference and support for standards development organizations that utilize a consensus process and other due process considerations. CFA cites the Conference Report on the 1981 Amendments that states that voluntary standards that the Commission rely on should have been adopted in accordance with reasonable procedures such as those utilized by groups that develop national consensus standards.

The Commission agrees with CFA's comment that preference be given to those voluntary standards that have been developed by a consensus process. This preference is expressed in § 1031.5(f) as a factor the Commission will consider in deciding whether to participate in the the development of a voluntary standard. That section requires standards development groups to establish procedures that "provide for meaningful participation" by the participants, including consumers and small business. However, there may be situations where an existing voluntary standard that was not developed by consensus procedures will, nevertheless, eliminate or adequately reduce the risk of injury presented by a hazard. Thus, the Commission has decided not to impose a consensus procedure as a mandatory requirement for Commission deferral to a standard but, instead, continue to encourage the use of consensus procedures by standards bodies.

The Alliance of American Insurers (AAI) recommends that the sentence in § 1031.1(b) that defines voluntary standards development bodies be revised to require that subgroups within the definition be "accredited subgroups" to encompass those committees whose procedures are accredited in the ANSI system of standards development.

The Commission decided not to accept this recommendation for the reason that it may be unnecessarily restrictive. The Conference Report for the 1981 Amendments indicated that Congress contemplated that voluntary standards should be developed and adopted "in accordance with reasonable procedures, such as those utilized by groups that develop national consensus standards". As stated above, the procedures that a voluntary development group will employ will be a factor in the Commission's determination whether to participate in a standard development. However, the Commission chooses not to mandate the development procedures. Likewise, it does not believe that accreditation should be a prerequisite to Commission participation in a development effort or reliance on a voluntary standard developed by a non-accredited group.

Section 1031.4(a)(2)

CFA recommends that § 1031.4(a)(2) be amended to allow deferral to a voluntary standard only where there will be compliance with the standard in a timely fashion, as was stated in the Conference Report to the 1981 Amendments.

The Commission agrees with this comment and, accordingly, has revised the subsection to require that industry compliance with a voluntary standard be "timely" as well as "substantial". As CFA noted, the Conference Report to the

1981 Amendments stated "In evaluating whether there will be substantial compliance with a voluntary standard, the Commission should determine whether or not there will be sufficient compliance to eliminate or adequately reduce an unreasonable risk of injury in a timely fashion." Conference Report, H.R. Rep. No. 97–208, July 29, 1981, at 871, 874. The timeliness language was also added to § 1031.5(f), the criterion concerning industry arrangements for achieving substantial industry compliance once a voluntary standard is issued.

Section 1031.4(a)(3)

Whirlpool Corporation commented on the language in this section that indicated the allocation of Commission staff involvement in evaluating voluntary standards as it would a mandatory standard. Whirlpool questions whether Commission involvement in voluntary standards setting is necessary or appropriate and whether Commission resources could be utilized in a better manner.

The Commission is, of course, concerned with the allocation of staff time and resources. However, the criteria for the Commission relying on a voluntary standard instead of a mandatory standard is set forth in sections 7 and 9 of the Consumer Product Safety Act, i.e., the voluntary standard must eliminate or adequately reduce the risk of injury addressed, and it is likely that there will be substantial compliance with such voluntary standard. Thus, the Commission is obligated to expend adequate staff time and resources to be able to determine whether the criteria in sections 7 and 9 is met.

Section 1031.4(a)(4)

AAI suggests that the language in the first sentence be revised to substitute the word "few" instead of "one or two" areas where a voluntary standard is considered by the Commission to be inadequate. The comment is that the words "one or two" are unnecessarily restrictive and forces the Commission to make a judgment based on numbers rather than a broader consideration of issues involved in deciding to defer to a voluntary standard modification.

The Commission agrees with the commentor and has revised the language as suggested.

In the same first sentence AAI suggests that the words "or its accredited subgroup operator" appear immediately after the words "voluntary standards groups".

The Commission does not accept this suggestion for the reason that the definitions of voluntary standards bodies or voluntary standards development bodies encompass their subgroups. Also, as stated above, the Commission chooses not to mandate that organizations or subgroups be accredited as a prerequisite to their developing or modifying a voluntary standard.

CFA stated its belief that § 1031.4(a)(4), a provision which allows the Commission to extend the deferral period, contradicts the requirement that a voluntary standard be promulgated in a timely fashion. It recommends that the section be revised to say that if a voluntary standard is not developed or modified in an expeditious manner, then the Commission will immediately commence to develop a mandatory standard.

The Commission agrees that the development or modification of a voluntary standard to address a product hazard should always be done as expeditiously as possible and that is a consideration in its decision whether to defer to the voluntary standard development or to commence a mandatory rulemaking immediately. However, the Commission does not believe that the language of this section has to be changed since it is implicit in the Commission's decision whether to defer mandatory standards development or to commence it immediately. The Commission will consider whether the initial deferral period was adequate or whether additional time is reasonable under the circumstances.

Section 1031.5(f)

As CFA commented on § 1031.4(a)(2), discussed above, it suggests the language in this section be revised to require that substantial compliance be reached in a "timely" fashion.

The Commission agrees with the commentor and has revised the language to revise the criteria for Commission participation to require Commission consideration of "timely," as well as "substantial" compliance.

Section 1031.5(g)

AAI suggests that this section be made more specific as to what types of marking requirements should be included in a voluntary standard to permit Commission investigation of such products at a later time. The commentor suggested several examples.

Although the examples given by the commentor would be appropriate, the Commission does not cite specific examples since they may not be appropriate to every voluntary standard. Accordingly, the Commission prefers to state the marking requirement in broad terms.

Section 1031.5(i)

CFA expressed its concern that the last sentence in § 1031.5(i) could be interpreted to mean that representatives of consumers and small business in a voluntary standard development have technical expertise in the areas under consideration.

The Commission agrees that the sentence could be misread and thus has revised it to make it clear that technical expertise, as that term is commonly used, should not be a prerequisite for consumer and small business participation in a voluntary standard development process. There may be situations where the voluntary standard development group would want non-technical input from consumer and small business representatives, e.g., on frequency of use of a product, consumer awareness of the meaning of proposed labels, etc. Likewise, as CFA suggests, these representatives can play an important role in questioning the rationale for a standard without having technical expertise. Accordingly, the Commission has replaced the expression "technical expertise" with the expression "knowledge or expertise."

Whirlpool inquired whether the listing of the representatives in this section means that, unless all the groups are included in each voluntary standards proceeding, the Commission will expand its involvement. The commentor suggests that participation by so many groups could be counterproductive and could impede the voluntary standards setting process.

The purpose of this provision is to encourage voluntary standards groups to conduct their activities openly and to include in their development activities those parties who will be affected by the voluntary standard under development. The Commission does not expect that each and every entity listed in this provision be represented on every voluntary standard development group; the composition of each development group will necessarily depend on the nature of the subject matter.

Whirlpool also suggested that some groups may not have the technical expertise to participate in voluntary standards development.

The Commission does not believe that participation is appropriate only for persons or groups with purely technical expertise. In accordance with its discussion of CFA's comments on § 1031.5(i), it has broadened the definition of "openness" by calling for participation of parties having "knowledge or expertise."

Section 1031.7(a)(4)

AAI recommended that the term "technical support" be broadened by including the words "engineering support such as innovative product design", and the words "safety and" immediately before the words "health science data."

The Commission believes that the section, as written, adequately describes the type of assistance the Commission may provide to support a voluntary standard development activity. Also, the Commission's use of the term "health science data" includes safety data. Thus, it prefers to leave the section unchanged.

Section 1031.7(a)(6)

AAI suggests that the phrase "including labels/markings" be added at the end of the sentence to permit the Commission staff to not only evaluate the technical adequacy of a standard in reducing injuries, but also to evaluate the labels and markings that must be included in the standard as part of the safety strategy.

The Commission believes that this addition is unnecessary because it is understood that the staff will evaluate all relevant aspects of a standard, including labels and markings. Thus, the Commission decided to leave this section unchanged.

Section 1031.7(a)(9)

Representatives of the Commission staff recommended that this section (formerly 16 CFR 1032.4(b)(9)) be deleted since the Commission will not approve the preparation of a listing of voluntary standards that adequately address specific hazards in view of a previous Commission decision regarding the recognition of voluntary standards. See Minutes of Commission Action dated January 16, 1985. The Commission agrees with the staff's recommendation and, therefore, has deleted this section. Accordingly, proposed §§ 1031.7(a)(10) through 1031.7(a)(13) have been renumbered as §§ 1031.7(a)(9) through 1031.7(a)(12).

Section 1031.10(a)

AAI suggests that the language in the last sentence, stating that membership includes all oral and written communications "which are incidental to such membership" may not be sufficiently clear, and recommends that the last sentence in subparagraph (b) be substituted in (a).

The Commission believes the language in this section is sufficiently clear that the definition of "membership" encompasses communications relating to a membership. Also, the suggested substitute language from subparagraph (b) would be inappropriate since it pertains to communications relating to active participation in a voluntary standard activity. Membership, as used in this section, could be passive membership. Thus, the Commission has decided to leave this section unchanged.

Section 1031.11(d)

Several commentors criticized the Commission policy in this section which prohibits Commission employees from voting or otherwise formally indicating approval or disapproval of a voluntary standard during its development and adoption. They suggested that the no-voting policy is inconsistent with active participation of Commission employees in standards development activities. Also, several commentors pointed out that the OMB Circular A–119 encourages agencies to actively participate in the development of voluntary standards, including voting on issues in the course of the development process. On the other hand, several other commentors applauded the Commission policy.

The Commission's no-voting policy is premised on the Commission's status as a regulatory agency and on the role of the Commission staff in ultimately recommending whether the Commission should defer setting a mandatory standard because a voluntary standard addresses the hazard in question. Additionally, the Commission is able to provide technical and administrative assistance to those organizations and groups developing standards. The Commission, through its employees, have been able to provide that assistance to many voluntary standard development activities over the course of years without formally voting. Also, the no-voting policy is intended to preclude any appearance that the Commission, through its representative, is endorsing a particular standard or is committing it to supporting that standard to the exclusion of alternative regulatory actions. Although the OMB Circular encourages active participation and voting by agency representatives, it recognizes that agencies may prohibit such voting. See Circular, section 7.b.(5). For the reasons stated, the Commission continues to believe the no-voting policy is a prudent and well-considered one. Thus, the Commission has decided to leave this section unchanged.

Section 1032.12(b)

The Associate Director for Industry and Standards, National Institute of Standards and Technology, commented that the no-voting policy should apply to employees serving on voluntary standards development groups or committees, but not to employees serving on standards advisory groups that are not responsible for the development and approval of standards. The Associate Director suggested several such groups.

Although the advisory groups referred to in this section may not directly engage in the development of voluntary standards, they frequently establish policies that could impact on voluntary standard activities of the particular organization. As with voluntary standards development groups, the Commission does not want its employees formally participating in the policy decisions of a voluntary standards board or advisory group for the reason that an employee's formal vote may give the appearance of Commission action or the Commission's position on the matter. The policy also precludes a possible conflict of interest situation where an employee who voted on a matter is later required to address the same matter in his or her capacity as a Commission employee. Further, the Commission believes it can provide information and assistance to these policy committees without having to vote on particular issues or policy matters. In this regard, the Commissioners and Commission staff may freely communicate with voluntary standards groups or representative in accordance with § 1032.15. For these reasons, the Commission has decided not to change this section.

Sections 1031.13(a) and 1031.15(b)

A staff member commented that the last sentence in these two paragraphs could be understood that an employee who is participating in or monitoring a voluntary standard development would have to obtain consensus review and approval of Commission officials at every stage of the development process, and that voluntary standards groups would be reluctant to have a Commission employee as a member on that basis.

The Commission did not intend to imply that staff review and consensus of an employee's participation or monitoring is required at each and every stage of a voluntary standard development process. Instead, the statement was intended to state an employee's participation or monitoring shall be in accordance with any internal Commission procedures that the Commission or Commission management may have established. However, to avoid any

misunderstanding, the last sentence in both these paragraphs have been revised to delete the phrase "designed to assure staff review and consensus".

Section 1031.13(c)

CFA commented that § 1031.13(c), which allows Commission employees to participate in closed meetings of voluntary standards development groups under extraordinary circumstances, be amended to require that meeting logs from such closed meeting be made available to the public upon request.

In fact, the Commission's regulations setting forth its meetings policy (16 CFR Part 1012) already requires employees to prepare and submit a meeting summary to the Office of the Secretary within twenty calendar days after a meeting for which a summary is required to be made. These summaries are available to the public as permitted by law. The Commission agrees that the section should be revised to reference the meeting summary requirement.

CFA recommends that the last sentence in § 1031.13(c), requiring Commission employees to provide notice of their attendance at a voluntary standard development meeting in the public calendar, also be included in § 1031.11, the section setting forth the procedural safeguards to assure employee objectivity and for avoiding conflict of interest situations.

The Commission agrees that the meetings policy requirements are procedural safeguards that permit public monitoring of Commission involvement of voluntary standards activities. Thus, a new subsection, similar to the last sentence in § 1031.13(c), has been added as § 1031.11(f) to reference the Commission's meetings policy requirement.

Section 1031.15(a)

AAI commented that this section may be unclear as to whether the term "representative" is restricted to an official of the voluntary standard organization or whether it could pertain to another member of a voluntary standard development group who is not an official of the sponsoring voluntary standard organization.

The Commission agrees that the paragraph, as written, could be read as restricting communications to representatives of the sponsoring voluntary standard organization. The Commission did not intend to restrict communications between its employees and other members who may both be serving together on a voluntary standard committee. Thus, the language in this section is revised to add "or other committee member" immediately after the phrase "voluntary standard group or representative".

Section 1031.15(a)(2)

AAI states that it cannot understand the need for communication which is nonsubstantive in nature and requests a clarification.

The Commission distinguishes between substantive and nonsubstantive communications because substantive communications require supervisory approval whereas nonsubstantive communications do not. Nonsubstantive communications would cover administrative matters such as the date and place of the next meeting of the voluntary standard group, travel arrangements, etc. With these examples, and the definition of substantive matters in § 1032.15(a)(1) as "matters that pertain to the formulation of the technical aspects of a voluntary standard or the course of conduct for developing a standard", the meaning of anything else, i.e., "non-substantive" matters, is sufficiently clear. Thus, the Commission decided not to revise the section.

Certification of No Significant Economic Impact on Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) requires that whenever a federal agency publishes a proposal under the Administrative Procedure Act (5 U.S.C. 553), it must give particular consideration to small businesses, small non-profit organizations, and small local governments (collectively called "small entities"). The proposed regulations are only for the information of the public and industry. They will not have the force of law, and will not impose any substantive obligation or duty on any person or firm, including any small firm. Therefore, in accordance with section 605(b) of the Regulatory Flexibility Act, the Commission certifies that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

Environmental Considerations

The proposal published below will have little or no potential for affecting the human environment. For this reason, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects

16 CFR Part 1031

Business and industry, Conflict of interest, Consumer protection, Voluntary standards.

16 CFR Part 1032

Business and industry, Consumer protection, Voluntary standards.

For the reasons set out in the preamble, Title 16, Chapter II of the Code of Federal Regulations is amended as follows:

PART 1032—[REMOVED]

1. Part 1032 is removed.

2. Part 1031 is revised to read as follows:

PART 1031—COMMISSION PARTICIPATION AND COMMISSION EMPLOYEE INVOLVEMENT IN VOLUNTARY STANDARDS ACTIVITIES

Subpart A—General Policies

Sec.

Subpart B—Employee Involvement

Authority: 15 U.S.C. 2051–2083, 15 U.S.C. 1261–1276, 15 U.S.C. 1191–1204.

Subpart A—General Policies

§ 1031.1 Purpose and scope.

(a) This Part 1031 sets forth the Consumer Product Safety Commission's guidelines and requirements on participating in the activities of voluntary standards bodies. Subpart A sets forth general policies on Commission participation, and Subpart B sets forth policies and guidelines on employee involvement in voluntary standards activities.

(b) For purposes of both Subpart A and Subpart B of this Part 1031, voluntary standards bodies are private sector domestic or multinational organizations or groups, or combinations thereof, such as, but not limited to, all non-profit organizations, industry associations, professional and technical societies, institutes, and test laboratories, that are involved in the planning, development, establishment,

revision, review or coordination of voluntary standards. Voluntary standards development bodies are voluntary standards bodies, or their subgroups, that are devoted to developing or establishing voluntary standards.

§ 1031.2 Background.

(a) Congress enacted the Consumer Product Safety Act in 1972 to protect consumers against unreasonable risks of injury associated with consumer products. In order to achieve that goal, Congress established the Consumer Product Safety Commission as an independent regulatory agency and granted it broad authority to promulgate mandatory safety standards for consumer products as a necessary alternative to industry self regulation.

(b) In 1981, the Congress amended the Consumer Product Safety Act, The Federal Hazardous Substances Act, and the Flammable Fabrics Act, to require the Commission to rely on voluntary standards rather than promulgate a mandatory standard when voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with the voluntary standards. (15 U.S.C. 2056(b), 15 U.S.C. 1262(g)(2), 15 U.S.C. 1193(h)(2)). The 1981 Amendments also require the Commission, after any notice or advance notice of proposed rulemaking, to provide technical and administrative assistance to persons or groups who propose to develop or modify an appropriate voluntary standard. (15 U.S.C. 2054(a)(3)). Additionally, the amendments encourage the Commission to provide technical and administrative assistance to groups developing product safety standards and test methods, taking into account Commission resources and priorities (15 U.S.C. 2054(a)(4)). Although the Commission is required to provide assistance to such groups, it may determine the level of assistance in accordance with the level of its own administrative and technical resources and in accordance with its assessment of the likelihood that the groups being assisted will successfully develop a voluntary standard that will preclude the need for a mandatory standard.

(c) In 1982, the Office of Management and Budget revised Circular No. A–119, Federal Participation in the Development and Use of Voluntary Standards. The Circular establishes the policy to be followed by executive agencies, including the Commission, in working with voluntary standards bodies and in adopting and using voluntary standards. The Circular encourages government participation in the standards-related activities of voluntary standards bodies and standards-developing groups when such participation is in the public interest and is compatible with the agencies, missions, authorities, priorities, and budget resources. The Circular recognizes, however, that voluntary standards activities, if improperly conducted, can suppress free and fair competition, impede innovation and technical progress, exclude safer and less expensive products, or otherwise adversely affect trade, commerce, health, or safety. Thus, agencies are urged to take full account of the impact on the economy, applicable Federal laws, policies and national objectives, including, for example, laws and regulations relating to antitrust, national security, small business, product safety, environment, technological development, and conflicts of interest.

§ 1031.3 Consumer Product Safety Act Amendments.

The Consumer Product Safety Act, as amended, contains several sections pertaining to the Commission's participation in the development and use of voluntary standards.

(a) Section 7(b) provides that the Commission shall rely on voluntary consumer product safety standards prescribing requirements described in subsection (a) whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards. (15 U.S.C. 2056(b)).

(b) Section 5(a)(3) provides that the Commission shall, following publication of an advance notice of proposed rulemaking or a notice of proposed rulemaking for a product safety rule under any rulemaking authority administered by the Commission, assist public and private organizations or groups of manufacturers, administratively and technically, in the development of safety standards addressing the risk of injury identified in such notice. (15 U.S.C. 2054(a)(3)).

(c) Section 5(a)(4) provides that the Commission shall, to the extent practicable and appropriate (taking into account the resources and priorities of the Commission), assist public and private organizations or groups of manufacturers, administratively and technically, in the development of product safety standards and test methods. (15 U.S.C. 2054(a)(4)).

§ 1031.4 Effect of voluntary standards activities on Commission activities.

(a)(1) The Commission, in determining whether to begin proceedings to develop mandatory standards under the acts it administers, considers whether mandatory regulation is necessary or whether there is an existing voluntary standard that adequately addresses the problem and the extent to which that voluntary standard is complied with by the affected industry.

(2) The Commission acknowledges that there are situations in which adequate voluntary standards, in combination with appropriate certification programs, may be appropriate to support a conclusion that a mandatory standard is not necessary. The Commission may find that a mandatory standard is not necessary where compliance with an existing voluntary standard would eliminate or adequately reduce the risk of injury associated with the product, contains requirements and test methods that have been evaluated and found acceptable by the Commission, and it is likely that there will be substantial and timely compliance with the voluntary standard. Under such circumstances, the Commission may agree to encourage industry compliance with the voluntary standard and subsequently evaluate the effectiveness of the standard in terms of accident and injury reduction for products produced in compliance with the standard.

(3) In evaluating voluntary standards, the Commission will relate the requirements of the standard to the identified risks of injury and evaluate the requirements in terms of their effectiveness in eliminating or reducing the risks of injury. The evaluation of voluntary standards will be conducted by Commission staff members, including representatives of legal, economics, engineering, epidemiological, health sciences, human factors, other appropriate interests, and the Voluntary Standards Coordinator. The staff evaluation will be conducted in a manner similar to evaluations of standards being considered for promulgation as mandatory standards.

(4) In the event that the Commission has evaluated an existing voluntary standard and found it to be adequate in all but a few areas, the Commission may defer the initiation of a mandatory rulemaking proceeding and request the voluntary standards organization to revise the standard to address the identified inadequacies expeditiously. In such cases, the Commission may monitor or participate in the development of these revisions.

(b) In the event the Commission determines that there is no existing voluntary standard that will eliminate or adequately reduce a risk of injury the Commission may commence a proceeding for the development of a consumer product safety rule or a regulation in accordance with section 9 of the Consumer Product Safety Act, 15 U.S.C. 2058, section 3(f) of the Federal Hazardous Substances Act, 15 U.S.C. 1262(f), or section 4(a) of the Flammable Fabrics Act, 15 U.S.C. 1193(g), as may be applicable. In commencing such a proceeding, the Commission will publish an advance notice of proposed rulemaking which shall, among other things, invite any person to submit to the Commission an existing standard or portion of an existing standard, or to submit a statement of intention to modify or develop, within a reasonable period of time, a voluntary standard to address the risk of injury.

(c) The Commission will consider those provisions of a voluntary standard that have been reviewed, evaluated, and deemed to be adequate in addressing the specified risks of injury when initiating a mandatory consumer product safety rule or regulation under the Consumer Product Safety Act, the Federal Hazardous Substances Act, or the Flammable Fabrics Act, as may be applicable. Comments will be requested in the advance notice of proposed rulemaking on the adequacy of such voluntary standard provisions.

§ 1031.5 Criteria for Commission participation in voluntary standards activities.

The Commission will consider the extent to which the following criteria are met in considering Commission participation in the development of voluntary safety standards for consumer products:

(a) The likelihood the voluntary standard will eliminate or adequately reduce the risk of injury addressed and that there will be substantial and timely compliance with the voluntary standard.

(b) The likelihood that the voluntary standard will be developed within a reasonable period of time.

(c) Exclusion, to the maximum extent possible, from the voluntary standard being developed, of requirements which will create anticompetitive effects or promote restraint of trade.

(d) Provisions for periodic and timely review of the standard, including review for anticompetitive effects, and revision or amendment as the need arises.

(e) Performance-oriented and not design-restrictive requirements, to the maximum practical extent, in any standard developed.

(f) Industry arrangements for achieving substantial and timely industry compliance with the voluntary standard once it is issued, and the means of ascertaining such compliance based on overall market share of product production.

(g) Provisions in the standard for marking products conforming to the standard so that future Commission investigation can indicate the involvement of such products in accidents and patterns of injury.

(h) Provisions for insuring that products identified as conforming to such standards will be subjected to a testing and certification (including self-certification) procedure, which will provide assurance that the products comply with the standard.

(i) The openness to all interested parties, and the establishment of procedures which will provide for meaningful participation in the development of such standards by representatives of producers, suppliers, distributors, retailers, consumers, small business, public interests and other individuals having knowledge or expertise in the areas under consideration, and procedures for affording other due process considerations.

§ 1031.6 Extent and form of Commission involvement in the development of voluntary standards.

(a) The Commission shall approve agency "participation", as defined below, in the development and support of voluntary safety standards for consumer products. The Executive Director shall approve Commission activities that are defined below as "monitoring." The extent of Commission involvement will be dependent upon the Commission's interest in the particular standards development activity and the commission's priorities and resources.

(b) The Commission's interest in a specific voluntary standards activity will be based in part on the frequency and severity of injuries associated with the product, the involvement of the product in accidents, the susceptibility of the hazard to correction through standards, and the overall resources and priorities of the Commission. Commission involvement in voluntary standards activities generally will also be guided by the Commission's operating plan and budget.

(c) There are two levels of Commission involvement in voluntary standards activities, each of which reflects a different level of Commission involvement as set forth below:

(1) *Monitoring.* Monitoring involves maintaining an awareness of the voluntary standards development process through oral or written inquiries, receiving and reviewing minutes of meetings and copies of draft standards, or attending meetings for the purpose of observing and commenting during the standards development process in accordance with Subpart B of this part. For example, monitoring may involve responding to requests from voluntary standards organizations, standards development committees, trade associations and consumer organizations; by providing information concerning the risks of injury associated with particular products, NEISS data, summaries and analyses of in-depth investigation reports; discussing Commission goals and objectives with regard to voluntary standards and improved consumer product safety; responding to requests for information concerning Commission programs; and initiating contacts with voluntary standards organizations to discuss cooperative voluntary standards activities.

(2) *Participating.* Participating involves regularly attending meetings of a standard development committee or group and taking an active part in the discussions of the committee and in developing the standard, in accordance with Subpart B of this part. Under certain conditions, the Commission will contribute to the deliberations of the committee by expending resources to provide technical assistance (e.g., research, engineering support, and information and education programs) and administrative assistance (e.g., travel costs, hosting meetings, and secretarial functions) which would support the development and implementation of voluntary standards. Participating may also include Commission support of voluntary standards activities as described in § 1031.7.

(d) Normally, the total amount of Commission support given to a voluntary standards activity shall be no greater than that of all non-Federal participants in that activity, except where it is in the public interest to do so.

(e) In the event of duplication of effort by two or more groups (either inside or outside the Commission) in developing a voluntary standard for the same product or class of products, the Commission shall encourage the several groups to cooperate in the development of a single voluntary standard.

§ 1031.7 Commission support of voluntary standards activities.

(a) The Commission's support of voluntary safety standards development

activities may include any one or a combination of the following actions:

(1) Providing epidemiological and health science information and explanations of hazards for consumer products.

(2) Encouraging the initiation of the development of voluntary standards for specific consumer products.

(3) Identifying specific risks of injury to be addressed in a voluntary standard.

(4) Performing or subsidizing technical assistance, including research, health science data, and engineering support, in the development of a voluntary standard activity in which the Commission is participating.

(5) Providing assistance on methods of disseminating information and education about the voluntary standard or its use.

(6) Performing a staff evaluation of a voluntary standard to determine its adequacy and efficacy in reducing the risks of injury that have been identified by the Commission as being associated with the use of the product.

(7) Encouraging state and local governments to reference or incorporate the provisions of a voluntary standard in their regulations or ordinances and to participate in government or industrial model code development activities, so as to develop uniformity and minimize conflicting State and local regulations.

(8) Monitoring the number and market share of products conforming to a voluntary safety standard.

(9) Providing for the involvement of agency personnel in voluntary standards activities as described in Subpart B of this Part.

(10) Providing administrative assistance, such as hosting meetings and secretarial assistance.

(11) Providing funding support for voluntary standards development, as permitted by the agency budget.

(12) Taking other actions that the Commission believes appropriate in a particular situation.

(b) [Reserved.]

§ 1031.8 Voluntary Standards Coordinator.

(a) The Executive Director shall appoint a Voluntary Standards Coordinator to coordinate agency participation in voluntary standards bodies so that:

(1) The most effective use is made of agency personnel and resources, and

(2) The views expressed by such personnel are in the public interest and, at a minimum, do not conflict with the interests and established views of the agency.

(b) The Voluntary Standards Coordinator is responsible for managing the Commission's voluntary standards program, as well as preparing and submitting to the Commission a semiannual summary of its voluntary standards activities. The summary shall set forth, among other things, the goals of each voluntary standard under development, the extent of CPSC activity (monitoring or participation; the current status of standards development and implementation) and, if any, recommendations for additional Commission action. The Voluntary Standards Coordinator shall also compile information on the Commission's voluntary standards activities for the Commission's annual report.

Subpart B—Employee Involvement

§ 1031.9 Purpose and scope.

(a) This subpart sets forth the Consumer Product Safety Commission's criteria and requirements governing membership and involvement by Commission officials and employees in the activities of voluntary standards development bodies.

(b) The Commission realizes there are advantages and benefits afforded by greater involvement of Commission personnel in the standards activities of domestic and international voluntary standards organizations. However, such involvement might present an appearance or possibility of the Commission giving preferential treatment to an organization or group or of the Commission losing its independence or impartiality. Also, such participation may present real or apparent conflict of interest situations.

(c) The purpose of this subpart is to further the objectives and programs of the Commission and to do so in a manner that ensures that such membership and participation:

(1) Is consistent with the intent of the Consumer Product Safety Act and the other acts administered by the Commission, as well as with federal policy as set forth in the current version of OMB Circular No. A–119, Federal Participation in the Development and Use of Voluntary Standards;

(2) Is not contrary to the public interest;

(3) Presents no real or apparent conflict of interest, and does not result in or create the appearance of the Commission giving preferential treatment to an organization or group or the Commission compromising its independence or impartiality; and

(4) Takes into account Commission resources and priorities.

(d) In general, Commission employees must obtain approval from their supervisor and appropriate agency management to be involved in voluntary standards activities. They should also strive to apprise the Voluntary Standards Coordinator, where practicable, as to their involvement in voluntary standards activities.

(e) All Commission employees involved in voluntary standards activities are subject to any restrictions for avoiding conflicts of interest and for avoiding situations that would present an appearance of bias.

§ 1031.10 Definitions.

For purposes of describing the level of involvement in voluntary standards activities for which Commission employees may be authorized, the following definitions apply:

(a) *Membership.* Membership is the status of an employee who joins a voluntary standards development or advisory organization or subgroup and is listed as a member. It includes all oral and written communications which are incidental to such membership.

(b) *Participation.* Participation is the active, ongoing involvement of an official or employee in the development of a new or revised voluntary standard pertaining to a particular consumer product or to a group of products that is the subject of a Commission hazard project. These projects should be one of those that are approved by the Commission, either by virtue of the agency's annual budget or operating plan, or by other specific agency authorization or decision, and are in accord with Subpart A. Participation includes regularly attending meetings of a standards development committee or group, taking an active part in discussions and technical debates, registering opinions and expending other resources in support of a voluntary standard development activity. It includes all oral and written communications which are part of the participation process.

(c) *Monitoring.* Monitoring is involvement by an official or employee in maintaining an awareness of the voluntary standards development process by attendance at meetings, receiving and reviewing minutes of standards development meetings and copies of draft standards, and commenting during the standards development process. It involves all oral and written communications which are part of the monitoring process. These monitoring activities must be related to general voluntary standards projects set forth in the agency's annual budget or operating plan or otherwise approved by the agency.

(d) *Observation.* Observation is the attendance by an official or employee at a meeting of a voluntary standards development group for the purpose of observing and gathering information.

(e) *Communication.* Communication is the oral or written contact by an official or employee with a representative or committee of a voluntary standards organization or advisory group.

§ 1031.11 Procedural safeguards.

(a) Subject to the provisions of this subpart and budgetary and time constraints, Commission employees may be involved in voluntary standards activities that will further the objectives and programs of the Commission, are consistent with ongoing and anticipated Commission regulatory programs as set forth in the agency's operating plan, and are in accord with the Commission's policy statement on participation in voluntary standards activities set forth in Subpart A of this part.

(b) Commission employees who are involved in the development of a voluntary standard and who later participate in an official evaluation of that standard for the Commission shall describe in any information, oral or written, presented to the Commission, the extent of their involvement in the development of the standard. Any evaluation or recommendation for Commission actions by such employee shall strive to be as objective as possible and be reviewed by higher-level Commission officials or employees prior to submission to the Commission.

(c) Involvement of a Commission official or employee in a voluntary standards committee shall be predicated on an understanding by the voluntary standards group that participation by Commission officials and employees is on a non-voting basis.

(d) In no case shall Commission employees or officials vote or otherwise formally indicate approval or disapproval of a voluntary standard during the course of a voluntary standard development process.

(e) Commission employees and officials who are involved in the development of voluntary standards may not accept voluntary standards committee leadership positions, e.g., committee chairman or secretary. Subject to prior approval by the Executive Director, a Commission employee or official may accept other committee positions only if it appears to be clearly in the public interest for the employee to carry out the functions of that specific position.

(f) Attendance of Commission personnel at voluntary standards meetings shall be noted in the public calendar and meeting summaries shall be submitted to the Office of the Secretary as required by the Commission's meetings policy, 16 CFR Part 1012.

§ 1031.12 Membership criteria.

(a) The Commissioners, their special assistants, and Commission officials and employees holding the positions listed below, may not become members of a voluntary standards group because they either have the responsibility for making final decisions, or advise those who make final decisions, on whether to rely on a voluntary standard, promulgate a consumer product safety standard, or to take other action to prevent or reduce an unreasonable risk of injury associated with a product.

(1) The Commissioners;

(2) The Commissioners' Special Assistants;

(3) The General Counsel and General Counsel Staff;

(4) The Executive Director, the Deputy Executive Director, and special assistants to the Executive Director;

(5) The Associate Executive Directors and Office Directors;

(6) The Director of the Office of Program Management and Budget and any Special Assistants to the Director.

(b) All other officials and employees not covered under § 1031.12(a) may be advisory, non-voting members of voluntary standards development and advisory groups with the advance approval of the Executive Director. In particular, the Commission's Voluntary Standards Coordinator may accept such membership.

(c) Commission employees or officials who have the approval of the Executive Director to accept membership in a voluntary standards organization or group pursuant to paragraph (b) of this section shall apprise the General Counsel and the Voluntary Standards Coordinator prior to their acceptance.

(d) Commission officials or employees who desire to become a member of a voluntary standards body or group in their individual capacity must obtain prior approval of the Commission's Ethics Counselor for an outside activity pursuant to the Commission's Employee Standards of Conduct, 16 CFR Part 1030.

§ 1031.13 Participation and monitoring criteria.

(a) Commission officials, other than those positions listed in § 1031.12(a), may participate in or monitor the development of voluntary safety standards for consumer products, but only in their official capacity as employees of the Commission and if permitted to do so by their supervisor and any other person designated by agency management procedures. Such participation or monitoring shall be in accordance with Commission procedures.

(b) Employees in positions listed in § 1031.12(a) (4), (5), and (6) may, on a case-by-case basis, participate in or monitor the development of a voluntary standard provided that they have the specific advance approval of the Commission.

(c) Except in extraordinary circumstances and when approved in advance by the Executive Director in accordance with the provisions of the Commission's meetings policy, 16 CFR Part 1012, Commission personnel shall not become involved in meetings concerning the development of voluntary standards that are not open to the public for attendance and observation. Attendance of Commission personnel at a voluntary standard meeting shall be noted in the public calendar and meeting logs filed with the Office of the Secretary in accordance with the Commission's meetings policy.

(d) Generally, Commission employees may become involved in the development of voluntary standards only if they are made available for comment by all interested parties prior to their use or adoption.

(e) Involvement by Commission officials and employees in voluntary standards bodies or standards-developing groups does not, of itself, connote Commission agreement with, or endorsement of, decisions reached, approved or published by such bodies or groups.

§ 1031.14 Observation criteria.

A Commission official or employee may, on occasion, attend voluntary standards meetings for the sole purpose of observation, with the advance approval of his or her supervisor and any other person designated by agency management procedures. Commission officials and employees shall notify the Voluntary Standard Coordinator, for information purposes, prior to observing a voluntary standards meeting.

§ 1031.15 Communication criteria.

(a) Commission officials and employees, who are not in the positions listed in § 1031.12(a), or who are not already authorized to communicate with a voluntary standards group or representative incidental to their approved membership in a voluntary standard organization or group or as part of their participation or monitoring of a voluntary standard, may:

(1) Communicate, within the scope of their duties, with a voluntary standard group, representative, or other committee member, on voluntary standards matters which are substantive in nature, i.e., matters that pertain to the formulation of the technical aspects of a specific voluntary standard or the course of conduct for developing the standard, only with the specific advance approval from the person or persons to whom they apply to obtain approval for participation or monitoring pursuant to § 1031.13. The approval may indicate the duration of the approval and any other conditions.

(2) Communicate, within the scope of their duties, with a voluntary standard group, representative, or other committee member, concerning voluntary standards activities which are not substantive in nature.

(b) Commission employees may communicate with voluntary standards organizations only in accordance with Commission procedures.

(c) Commissioners can engage in substantive and non-substantive written communications with voluntary standards bodies or representatives, provided a disclaimer in such communications indicates that any substantive views expressed are only their individual views and are not necessarily those of the Commission. Where a previous official Commission vote has taken place, that vote should also be noted in any such communication. Copies of such communications shall thereafter be provided to the other Commissioners, the Office of the Secretary, and the Voluntary Standards Coordinator.

(d) The Voluntary Standards Coordinator shall be furnished a copy of each written communication of a substantive nature and a report of each oral communication of a substantive nature between a Commission official or employee and a voluntary standards organization or representative which pertains to a voluntary standards activity. The information shall be provided to the Voluntary Standards Coordinator as soon as practicable after the communication has taken place.

Dated: February 8, 1989.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 89-3342 Filed 2-13-89; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 178

[Docket No. 87F-0309]

Indirect Food Additives; Adjuvants, Production Aids, and Sanitizers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of a mixture of dodecyltin S,S',S"-tris (isooctylmercaptoacetate) and di(*n*-dodecyl)tin S,S'-di(isooctylmercaptoacetate) as a thermal stabilizer for vinyl chloride homopolymers and copolymers intended for use in contact with food. This action responds to a petition filed by Sherex Chemical Co., Inc.

DATES: Effective February 14, 1989; written objections and requests for a hearing by March 16, 1989.

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

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

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of October 7, 1987 (52 FR 37525), FDA announced that a petition (FAP 5B3873) had been filed by Sherex Chemical Co., Inc., P.O. Box 646, Dublin, OH 43017, proposing that § 178.2650 *Organotin stabilizers in vinyl chloride plastics* (21 CFR 178.2650) be amended to provide for the safe use of a mixture of dodecyltin tri(isooctylmercaptoacetate) and di(dodecyl)tin di(isooctylmercaptoacetate) as a stabilizer in polyvinyl cloride and vinyl chloride copolymers intended for use in contact with food.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed use of the additive is safe, and that the regulations should be amended in 21 CFR 178.2650 by revising the introductory paragraph, by adding new paragraph (a)(7), and by adding new paragraph (b)(1)(iii). The agency is also modifying the nomenclature for the two organotin chemicals in this additive. The agency is listing them as "dodecyltin S,S',S"-tris(isooctylmercaptoacetate)" and "di(*n*-dodecyl)tin S,S'-di(isooctylmercaptoacetate)." The agency concludes that this nomenclature is more descriptive than that set out in the filing notice and is also more consistent with the nomenclature used for other chemicals appearing in 21 CFR 178.2650.

Additionally, the agency is making editorial changes in the introductory text and in the introductory text of paragraph (a) of § 178.2650. It is changing the term "octyltin," used to describe tin compounds in these paragraphs, to read "organotin." This term more accurately describes the tin compounds in the referenced paragraphs. It is also changing the reference to "polyvinyl chloride and vinyl chloride copolymers" to read "vinyl chloride homopolymers and copolymers" to reflect the terminology used in the agency's proposal on these substances. See 51 FR 4177, February 3, 1986.

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

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

Any person who will be adversely affected by this regulation may at any time on or before March 16, 1989 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made

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

List of Subjects in 21 CFR Part 178

Food additives, Food packaging, Incorporation by reference.

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

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

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

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

2. Section 178.2650 is amended by revising the introductory text and the introductory text of paragraph (a), by adding new paragraph (a)(7), and by adding new paragraph (b)(1)(iii), to read as follows:

§ 178.2650 Organotin stabilizers in vinyl chloride plastics.

The organotin chemicals identified in paragraph (a) of this section may be safety used alone or in combination, at levels not to exceed a total of 3 parts per hundred of resin, as stabilizers in vinyl chloride homopolymers and copolymers complying with the provisions of § 177.1950 or § 177.1980 of this chapter and that are identified for use in contact with food of types I, II, III, IV (except liquid milk), V, VI (except malt beverages and carbonated nonalcoholic beverages), VII, VIII, and IX described in table 1 of § 176.170(c) of this chapter, except for the organotin chemical identified in paragraph (a)(3) of this section, which may be used in contact with food of types I through IX at temperatures not exceeding 75 °C (167 °F), and further that the organotin chemicals identified in paragraphs (a)(5) and (6) of this section may be used in contact with food of types I through IX at temperatures not exceeding 66 °C (150 °F), conditions of use D through G described in table 2 of § 176.170(c) of this chapter, and further that dodecyltin chemicals identified in paragraph (a)(7) of this section which may be used in contact with food of types I, II, III, IV (except liquid milk), V, VI (except malt beverages and carbonated nonalcoholic beverages), VII, VIII, and IX described in table 1 of § 176.170(c) of this chapter at temperatures not exceeding 71 °C (160 °F), in accordance with the following prescribed conditions:

(a) For the purpose of this section, the organotin chemicals are those listed in paragraphs (a) (1), (2), (3), (4), (5), (6), and (7) of this section.

* * * * *

(7) The dodecyltin stabilizer is a mixture of 50 to 60 percent by weight of *n*-dodecyltin S,S',S''-tris(isooctylmercaptoacetate) (CAS Reg. No. 67649–65–4) and 40 to 50 percent by weight of di(*n*-dodecyl)tin S,S'-di(isooctylmercaptoacetate) (CAS Reg. No. 84030–61–5) having 13 to 14 percent by weight of tin (Sn) and having 8 to 9 percent by weight of mercapto sulfur. It is made from a mixture of dodecyltin trichloride and di(dodecyl)tin dichloride which has not more than 0.2 percent by weight of dodecyltin trichloride, not more than 2 percent by weight of dodecylbutyltin dichloride and not more than 3 percent by weight of tri(dodecyl) tin chloride. The isooctyl radical in the mercaptoacetate is derived from oxo process primary octyl alcohols.

(b) * * *

(1) * * *

(iii) Subsequent determinations for the dodecyltin mixture described in paragraph (a)(7) of this section shall be at a minimum of 24-hour intervals for aqueous solvents and 2-hour intervals for heptane. These tests shall yield di(*n*-octyl)tin S,S'-bis(isooctylmercaptoacetate), or di(*n*-octyl)tin maleate polymer, or (C_{10}-C_{16})-alkylmercaptoacetate reaction products with dichlorodioctylstannane and trichlorooctylstannane, or *n*-octyltin S,S',S''-tris(isooctylmercaptoacetate), tris(isooctylmercaptoacetate) and di(*n*-dodecyl)tin bis(isooctylmercaptoacetate) or any combination thereof, not to exceed 0.5 parts per million as determined by an analytical method entitled "Atomic Absorption Spectrophotometric Determination of Sub-part-per-Million Quantities of Tin in Extracts and Biological Materials with Graphite Furnace," *Analytical Chemistry*, Vol. 49, pp. 1090-1093 (1977), which is incorporated by reference in accordance with 5 U.S.C. 552(a). The availability of this incorporation by reference is given in paragraph (b)(1)(ii) of this section.

* * * * *

Dated: February 1, 1989.

Richard J. Ronk,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 89–3383 Filed 2–13–89; 8:45 am]

BILLING CODE 4160–01–M

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21 CFR Parts 510 and 520

Oral Dosage Form New Animal Drugs Not Subject to Certification; Dichlorophene and Toluene Capsules

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Elite Chemical Corp., Inc., providing for safe and effective use of dichlorophene/toluene capsules in treating dogs and cats for certain helminth infections.

EFFECTIVE DATE: February 14, 1989.

FOR FURTHER INFORMATION CONTACT: Marcia K. Larkins, Center for Veterinary Medicine (HFV–112), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–3430.

SUPPLEMENTARY INFORMATION: Elite Chemical Corp., Inc., P.O. Box 1947, Norcross, GA 30091, filed NADA 140–850, providing for the use of a capsule containing dichlorophene and toluene for single dose administration to dogs and cats for removal of certain ascarids and hookworms and as an aid in the removal of certain tapeworms. The NADA is approved and 21 CFR 250.580(b)(1) is amended to reflect the approval. The basis of approval is discussed in the freedom of information summary. The regulations are further amended in 21 CFR 510.600(c) (1) and (2) to add the firm to the list of sponsors of approved NADA's.

In accordance with the freedom of information provisions of Part 20 (21 CFR Part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii)), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen

in the Dockets Management Branch (HFA-305), Food and Drug Administration, Room 4-62, 5600 Fishers Lane, Rockville, MD 20857, from 9 a.m. to 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.24(d)(1)(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessement nor an environmental impact statement is required.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, Parts 510 and 520 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR Part 510 continues to read as follows:

Authority: Secs. 512, 701(a) (21 U.S.C. 360b, 371(a)); 21 CFR 5.10 and 5.83.

2. Section 510.600 is amended in paragraph (c)(1) by alphabetically adding the new entry "Elite Chemical Corp., Inc." and in paragraph (c)(2) by numerically adding the new entry "055025" to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Elite Chemical Corp., Inc., P.O. Box 1947, Norcross, GA 30091	055025
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
055025	Elite Chemical Corp., Inc., P.O. Box 1947, Norcross, GA 30091.
* * * * *	

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

3. The authority citation for 21 CFR Part 520 continues to read as follows:

Authority: Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)); 21 CFR 5.10 and 5.83.

4. Section 520.580 is amended by revising paragraph (b)(1) to read as follows:

§ 520.580 Dichlorophene and toluene capsules.

* * * * *

(b) *Sponsor.* (1) For single dose only, see 000010, 000115, 000842, 000856, 010888, 011536, 011614, 015563, 017135, 023851, 049968, 050906, and 055025 in § 510.600(c) of this chapter.

* * * * *

Dated: February 7, 1989.

Richard H. Teske,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. 89-3382 Filed 2-13-89; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 10

[Docket No. 80866-9013]

Requests for Reconsideration in Patent and Trademark Office Disciplinary Proceedings

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: This final rule sets forth an amendment to 37 CFR 10.156. The purpose of the amendment is to prescribe a date on which the decision of the Commissioner of Patents and Trademarks in a Patent and Trademark (PTO) disciplinary proceeding becomes final agency action for purposes of judicial review, and to provide for one request for reconsideration or modification of such decision by a party.

EFFECTIVE DATE: April 1, 1989.

FOR FURTHER INFORMATION CONTACT: Harris A. Pitlick by telephone at (703) 557-4035 or by mail marked to his attention and addressed to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: Present rules do not explicitly provide for requests for reconsideration or modification of Commissioner's decisions in appeals from initial decisions of administrative law judges in PTO disciplinary proceedings. 37 CFR 10.156 presently provides that such a Commissioner's decision is a final agency action.

In a recent case, *Klein v. Peterson*, 6 USPQ 2d 1556 (D.D.C. 1988), a first decision of the Commissioner was withdrawn and ultimately replaced with a second decision. The respondent sought judicial review of the first decision under 35 U.S.C. 32 after its finality had already been withdrawn and then sought judicial review of the second decision. The authority of the Commissioner to, in effect, reconsider his decision in a disciplinary proceeding was challenged in the cited case. The district court held that since there was no express statutory authority proscribing the Commissioner from reconsidering the first decision, there was implicit authority to do so consistent with long-standing precedent in the area of federal administrative law.

While *Klein* confirmed that the Commissioner has inherent authority to reconsider a decision, at least before an appeal has been noted, the PTO believes that a rule explicitly providing for a time in which requests for reconsideration may be made by a party and a date certain for when Commissioner's decisions in disciplinary proceedings become final will both promote greater certainty in this area of disciplinary proceeding practice and eliminate the possibility of multiple appeals. The final rule is not intended to preclude the Commissioner from *sua sponte* reconsidering or modifying a decision in a disciplinary proceeding at any time where conditions warrant and a respondent's due process rights are not violated, consistent with long-standing federal administrative law precedent.

A notice of proposed rulemaking was published in the **Federal Register** on October 3, 1988 (53 FR 38740) and the *Official Gazette* on October 25, 1988 (1095 O.G. 44). Interested parties were requested to submit written comments on or before December 1, 1988. No comments were received.

Other Considerations

The rule change is in conformity with the requirements of the Regulatory Flexibility Act (Pub. L. 96-354), Executive Orders 12291 and 12612 and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

The General Counsel has certified to the Chief Counsel for Advocacy, Small Business Administration that the rule change is not expected to have a significant adverse economic impact on a substantial number of small entities (Regulatory Flexibility Act, Pub. L. 96–354) because in merely codifying the inherent right of the PTO to reconsider its decisions *sua sponte*, the rule extends the right to each party in a PTO disciplinary proceeding to seek reconsideration.

The Patent and Trademark Office has determined that this rule change is not a major rule under Executive Order 12291. The annual effect on the economy will be less than $100 million. There will be no major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. There will be no 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.

The Patent and Trademark Office has also determined that this notice has no Federalism implications affecting the relationship between the National government and the States as outlined in Executive Order 12612.

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

List of Subjects in 37 CFR Part 10

Administrative practice and procedure, Courts, Inventions and patents, Lawyers, Trademarks.

For the reasons set out in the preamble and under the authority granted to the Commissioner of Patents and Trademarks by 35 U.S.C. 6, the Patent and Trademark Office amends 37 CFR Part 10 as follows:

PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

1. The authority citation for 37 CFR Part 10 would continue to read as follows:

Authority: 5 U.S.C. 500; 15 U.S.C. 1123; 35 U.S.C. 6, 31, 32, 41.

2. Section 10.156 is amended by revising paragraph (a) and adding new paragraph (c) to read as follows:

§ 10.156 Decision of the Commissioner.

(a) An appeal from an initial decision of the administrative law judge shall be decided by the Commissioner. The Commissioner may affirm, reverse or modify the initial decision or remand the matter to the administrative law judge for such further proceedings as the Commissioner may deem appropriate. Subject to paragraph (c) of this section, a decision by the Commissioner does not become a final agency action in a disciplinary proceeding until 20 days after it is entered. In making a final decision, the Commissioner shall review the record or those portions of the record as may be cited by the parties in order to limit the issues. The Commissioner shall transmit a copy of the final decision to the Director and to the respondent.

* * * * *

(c) A single request for reconsideration or modification of the Commissioner's decision may be made by the respondent or the Director if filed within 20 days from the date of entry of the decision. Such a request shall have the effect of staying the effective date of the decision. The decision by the Commissioner on the request is a final agency action in a disciplinary proceeding and is effective on its date of entry.

Dated: January 11, 1989.

Donald J. Quigg,

Assistant Secretary and Commissioner of Patents and Trademarks.

[FR Doc. 89–3465 Filed 2–13–89; 8:45 am]

BILLING CODE 3510–16–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD–FRL–3468–4]

Standards of Performance for New Stationary Sources; Amendments to Test Methods and Procedures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On February 19, 1988 (53 FR 5082), EPA proposed amendments to the test methods and procedures sections of the subparts in 40 CFR Part 60 to consolidate all test methods and procedures necessary to determine compliance with the applicable standards or related monitoring requirements and to clarify certain procedures. Today's action promulgates these amendments.

EFFECTIVE DATE: February 14, 1989.

Under section 307(b)(1) of the Clean Air Act, judicial review of the actions taken by this notice is available *only* by the filing of a petition for review in the U.S. Courts of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under section 307(b)(2) of the Clean Air Act, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESSES: Docket No. A–87–15, containing information considered by EPA in developing the promulgated rule, is available for public inspection and copying between 8:00 a.m. and 3:30 p.m., Monday through Friday, at EPA's Central Docket Section, South Conference Center, Room 4, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Roger T. Shigehara, Emission Measurement Branch (MD–19), Technical Support Division, U.S. EPA, Research Triangle Park, NC 27711, telephone (919) 541–1058.

SUPPLEMENTARY INFORMATION:

I. The Rulemaking

The test methods and procedures section of each subpart has been revised primarily to clarify the section by consolidating all procedures that pertain to one measurement (e.g., particulate matter concentrations) under one paragraph, to delete repetitions of methods already referenced within a cited method (e.g., Methods 1, 2, and 3 are referenced by Method 5 and, therefore, have not been listed again), and to separate alternative methods from reference methods. In addition, other changes have been made for consistency from one subpart or one section to another, procedures that were overlooked in the promulgation for requirements already in the subparts have been included, and technical errors have been corrected. Major amendments besides clarifications are listed below:

1. *Section 60.2:* Since the standards are based on reference methods, the applicable subpart rather than Appendix A is being used to define the reference methods. The title of Appendix A is being revised from "Reference Methods" to "Test Methods" in another rulemaking action to allow the inclusion of alternative methods in Appendix A.

2. *Section 60.8 (b) and (e):* Certain phrases or requirements are repeated in each subpart or in a number of subparts. Since they are generally applicable to all subparts, these phrases and requirements have been incorporated into the General Provisions.

3. *Section 60.44a:* Lignite fuel subject to the 340 ng/J standard is being added to the equation and a clarifying footnote is being added to the table.

4. *Sections 60.46 and 60.48a:* The use of F_c factors has been incorporated into the procedures. This change was the result of comments received during proposal.

5. *Section 60.54:* A procedure for Method 3 for a facility without a wet scrubber is being added. The grab-sampling technique of Method 3 is also being added.

6. *Sections 60.93, 60.123, and 60.133:* Sampling rate is being changed to sample volume.

7. *Sections 60.165, 60.175, 60.185:* The requirement for compressing the recorder scale during the performance evaluation test is being deleted.

8. *Sections 60.166, 60.176 and 60.186:* The specification for monitoring system drift not to exceed 2 percent of span value which is in Subpart P and overlooked in Subparts Q and R is being added. In addition, dry basis measurements of the SO_2 concentration are being specified.

Subparts Db, J, EE, MM, QQ, RR, SS, TT, WW, and FFF are not being amended at this time. It has been determined that Subparts K, Ka, HHH, JJJ, and KKK require no amendments.

This rulemaking does not impose emission measurement requirements beyond those specified in the current regulations, nor does it change any emission standard. Rather, the rulemaking would simply clarify and in some instances add a procedure associated with emission measurement or process monitoring requirements that would apply irrespective of this rulemaking.

II. Public Participation

The amendments were proposed in the **Federal Register** on February 19, 1988 (53 FR 5082). To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed amendments, a public hearing was scheduled for April 4, 1988, at the Research Triangle Park, North Carolina, but was not held because no one wished to make an oral presentation. The public comment period was from February 19, 1988, to May 4, 1988. Three comment letters were received.

III. Significant Comments and Changes to the Proposed Amendments

The three comment letters on the proposed amendments were from industry and a utility *ad hoc* group, and all comments concerned only § 60.8, Subpart D (Fossil-Fuel Fired Steam Generators), and Subpart Da (Electric Utility Steam Generating Units). There were no comments on the amendments made to the other 39 subparts.

All three commenters objected to the withdrawal of Methods 6A and 6B primarily because no clear justification was given. The primary reason for the proposed withdrawal of Methods 6A and 6B for emission performance tests and continuous monitoring relative accuracy tests is due to the slightly greater variability of the F_c factor than the F_d factor (6 percent vs. 3 percent). Both Methods 6A and 6B are based on the F_c factor.

The first commenter suggested that if the difference between the F_c and F_d factors was of concern, ultimate analysis of coal samples could be used to prove the appropriateness of the F_c factor. After considering the commenter's suggestion, EPA has decided to allow the use of Methods 6A and 6B as alternative methods with one restriction. If the average F_c factor in Method 19 is used and when the emission rate is from 0.97 to 1.00 of the emission standard or the relative accuracy is from 17 and 20 percent, then a check of the acceptability of the F_c factor is made.

This same commenter suggested that Method 8 and Method 7D be designated as alternatives to Method 6. In section 2.1 of Method 6, Method 8 is designated as an acceptable alternative to Method 6 provided that a heated filter is placed between the probe and isopropanol impinger. Since this applies to wherever Method 6 is used, it is unnecessary to repeat its acceptability as an alternative in § 60.46(d)(3). Method 7D cannot be added without going through the rulemaking process. The Agency plans to consider this action in the near future.

The second commenter stated that the proposed amendment to § 60.8(e)(1) could be made clearer by referencing appropriate sections of Method 1. The Agency feels that paragraph (e)(1)(i), which states "constructing the air pollution control system such that volumetric flow rates and pollutant emission rates can be accurately determined by applicable test methods and procedures," is sufficiently clear to give the necessary intent. In the case of particulate matter, Methods 1, 2, and 5 are the applicable procedures, which contain criteria and procedures for ensuring that measurements of flow and emission rates are accurate. The Agency agrees that paragraph (e)(1)(ii) could be made clearer. It has been revised as follows: "providing a stack or duct free of cyclonic flow during performance tests, as demonstrated by applicable test methods and procedures."

This same commenter suggested that § 60.45(f) can be shortened by referencing section 3 of Method 19. The Agency agrees and plans to revise this paragraph under a separate action.

This commenter also asked whether the expressions "The owner or operator may use" and "at the sole discretion of the owner and operator" have the same impact to EPA. Both expressions mean the same thing. Only the source owner or operator may choose to use the alternative methods for determining compliance. However, it does not mean that only the owner or operator may use the alternative methods. Alternative methods are those that have been shown to produce results adequate for determining compliance and may have no bias, a positive bias, or a slightly negative bias. The intent of such expression was to indicate that control agencies should not mandate the use of alternative methods if the owner or operator chooses not to use them. However, the alternative status does not preclude the control agency from using the method for compliance purposes; it only means that an agency must consider positive biases, if any (some alternative methods have been shown not to exhibit any bias), when using alternative methods.

The second commenter suggested that reference to § 60.46 in §§ 60.a (c)(4) and (d)(1) be deleted. The reference was made to § 60.46 to indicate that only F_d factors should be used. However, with the changes allowing the use of the F_c factors, the reference has been deleted.

This same commenter stated that the first equation in § 60.43a(h)(2) has no meaning and therefore is unnecessary. The EPA realizes that the first equation would not be applicable. The equation was included to satisfy the requirements of section 111(a) of the Clean Air Act, as amended.

Two of the commenters pointed out several typesetting errors. These have been noted.

As a result of an EPA internal review, the proposed addition of a minimum sampling time of 120 minutes to §§ 60.386(b)(3) and 60.675(b)(3) has been rescinded because an averaging time was not considered essential for determining compliance in these subparts.

IV. Administrative

A. Docket

The docket is an organized and complete file of all the information submitted to or otherwise considered EPA in the development of this rulemaking. The docket is a dynamic

file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify readily and locate documents so they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated rule, and EPA responses to significant comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review (Clean Air Act, section 307(d)(7)(A)).

B. Office of Management and Budget Reviews

Under Executive Order 12291, EPA is required to judge whether a regulation is a "major rule" and, therefore, subject to the requirements of a regulatory impact analysis. The Agency has determined that this regulation would result in none of the adverse economic effects set forth in section 1 of the Order as grounds for finding a regulation to be a "major rule." The rulemaking does not impose emission measurement requirements beyond those specified in the current regulations, but instead, provides simplification and clarification in the test methods and procedures sections of the regulation that would apply irrespective of this rulemaking. The Agency has, therefore, concluded that this regulation is not a "major rule" under Executive Order 12291.

As required by Executive Order 12291, this Final Rule has been reviewed by the Office of Management and Budget (OMB). Any written OMB comments to EPA and EPA's response to these comments will be available for inspection in the public docket for this rulemaking.

C. Regulatory Flexibility Act Compliance

The Regulatory Flexibility Act (RFA) of 1980 requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The Act specifically requires the completion of an RFA in those instances where small business impacts are possible. Because this rulemaking imposes no adverse economic impacts, an RFA has not been conducted.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this promulgated rule will not have any economic impact on small entities because no changes are being made to testing requirements.

List of Subjects in 40 CFR Part 60

Air pollution, Electric utility steam generating units, Gas turbines, Incinerators, Incorporation by reference, Intergovernmental relations, Phosphate fertilizer, Portland cement plants, Primary copper smelters, Primary lead smelters, Primary zinc smelters, Reporting and recordkeeping requirements, and Wool fiberglass insulation.

Date: February 2, 1989.

Jack Moore,

Acting Administrator.

40 CFR Part 60 is amended as follows:

PART 60—[AMENDED]

1. The authority citation for Part 60 continues to read as follows:

Authority: Sections 101, 111, 114, 116, and 301 of the Clean Air Act, as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601).

§ 60.2 [Amended]

2. Section 60.2 (Subpart A) is amended by revising the definition of "Reference method" to read, " 'Reference method' means any method of sampling and analyzing for an air pollutant as specified in the applicable subpart."

§ 60.8 [Amended]

3. In § 60.8(b), the first sentence is amended by removing the word "on" before the number "(4)", revising the period at the end of the sentence to a comma, and by adding the following phrase, to read as follows:

(b) * * * or (5) approves shorter sampling times and smaller sample volumes when necessitated by process variables or other factors.

4. Section 60.8 is amended by adding the following sentence to the end of paragraph (e)(1) to read as follows:

(e) * * *

(1) * * * This includes (i) constructing the air pollution control system such that volumetric flow rates and pollutant emission rates can be accurately determined by applicable test methods and procedures and (ii) providing a stack or duct free of cyclonic flow during performance tests, as demonstrated by applicable test methods and procedures.

§ 60.45 [Amended]

5. Section 60.45(c)(1) is revised to read as follows:

(c) * * *

(1) Methods 6, 7, and 3, as applicable, shall be used for the performance evaluations of sulfur dioxide and nitrogen oxides continuous monitoring systems. Acceptable alternative methods for Methods 6, 7, and 3 are given in § 60.46(d).

6. In § 60.45(f)(3), the words "paragraph (d)" are revised to read "paragraph (a)".

7. Section 60.46 is revised to read as follows:

§ 60.46 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (d) of this section.

(b) The owner or operator shall determine compliance with the particulate matter, SO_2, and NO_x standards in §§ 60.42, 60.43, and 60.44 as follows:

(1) The emission rate (E) of particulate matter, SO_2, or NO_x shall be computed for each run using the following equation:

$E = CF_d (20.9)/(20.9 - \%O_2)$

E = emission rate of pollutant, ng/J (lb/million Btu).

C = concentration of pollutant, ng/dscm (lb/dscf).

$\%O_2$ = oxygen concentration, percent dry basis.

F_d = factor as determined from Method 19.

(2) Method 5 shall be used to determine the particular matter concentration (C) at affected facilities without wet flue-gas-desulfurization (FGD) systems and Method 5B shall be used to determine the particulate matter concentration (C) after FGD systems.

(i) The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf). The probe and filter holder heating systems in the sampling train may be set to provide a gas temperature no greater than 160±14 °C (320±25 °F).

(ii) The emission rate correction factor, integrated or grab sampling and analysis procedure of Method 3 shall be used to determine the O_2 concentration ($\%O_2$). The O_2 sample shall be obtained simultaneously with, and at the same traverse points as, the particulate sample. If the grab sampling procedure is used, the O_2 concentration for the run shall be the arithmetic mean of all the individual O_2 sample concentrations at each traverse point.

(iii) If the particulate run has more than 12 traverse points, the O_2 traverse points may be reduced to 12 provided that Method 1 is used to locate the 12 O_2 traverse points.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(4) Method 6 shall be used to determine the SO_2 concentration.

(i) The sampling site shall be the same as that selected for the particulate sample. The sampling location in the duct shall be at the centroid of the cross section or at a point no closer to the walls than 1 m (3.28 ft). The sampling time and sample volume for each sample run shall be at least 20 minutes and 0.020 dscm (0.71 dscf). Two samples shall be taken during a 1-hour period, with each sample taken within a 30-minute interval.

(ii) The emission rate correction factor, integrated sampling and analysis procedure of Method 3 shall be used to determine the O_2 concentration ($\%O_2$). The O_2 sample shall be taken simultaneously with, and at the same point as, the SO_2 sample. The SO_2 emission rate shall be computed for each pair of SO_2 and O_2 samples. The SO_2 emission rate (E) for each run shall be the arithmetic mean of the results of the two pairs of samples.

(5) Method 7 shall be used to determine the NO_x concentration.

(i) The sampling site and location shall be the same as for the SO_2 sample. Each run shall consist of four grab samples, with each sample taken at about 15-minute intervals.

(ii) For each NO_x sample, the emission rate correction factor, grab sampling and analysis procedure of Method 3 shall be used to determine the O_2 concentration ($\%O_2$). The sample shall be taken simultaneously with, and at the same point as, the NO_x sample.

(iii) The NO_x emission rate shall be computed for each pair of NO_x and O_2 samples. The NO_x emission rate (E) for each run shall be the arithmetic mean of the results of the four pairs of samples.

(c) When combinations of fossil fuels or fossil fuel and wood residue are fired, the owner or operator (in order to compute the prorated standard as shown in §§ 60.43(b) and 60.44(b)) shall determine the percentage (w, x, y, or z) of the total heat input derived from each type of fuel as follows:

(1) The heat input rate of each fuel shall be determined by multiplying the gross calorific value of each fuel fired by the rate of each fuel burned.

(2) ASTM Methods D 2015–77 (solid fuels), D 240–76 (liquid fuels), or D 1826–77 (gaseous fuels) (incorporated by reference—see § 60.17) shall be used to determine the gross calorific values of the fuels. The method used to determine the calorific value of wood residue must be approved by the Administrator.

(3) Suitable methods shall be used to determine the rate of each fuel burned during each test period, and a material balance over the steam generating system shall be used to confirm the rate.

(d) The owner or operator may use the following as alternatives to the reference methods and procedures in this section or in other sections as specified:

(1) The emission rate (E) of particulate matter, SO_2 and NO_x may be determined by using the F_c factor, provided that the following procedure is used:

(i) The emission rate (E) shall be computed using the following equation:

$$E = C F_c (100/\%CO_2)$$

where:

E = emission rate of pollutant, ng/J (lb/million Btu).

C = concentration of pollutant, ng/dscm (lb/dscf).

$\%CO_2$ = carbon dioxide concentration, percent dry basis.

F_c = factor as determined in appropriate sections of Method 19.

(ii) If and only if the average F_c factor in Method 19 is used to calculate E and either E is from 0.97 to 1.00 of the emission standard or the relative accuracy of a continuous emission monitoring system is from 17 to 20 percent, then three runs of Method 3 shall be used to determine the O_2 and CO_2 concentration according to the procedures in paragraph (b) (2)(ii), (4)(ii), or (5)(ii) of this section. Then if F_o (average of three runs), as calculated from the equation in Method 3, is more than ±3 percent than the average F_o value, as determined from the average values of F_d and F_c in Method 19, i.e., $F_{oa} = 0.209 (F_{da}/F_{ca})$, then the following procedure shall be followed:

(A) When F_o is less than 0.97 F_{oa}, then E shall be increased by that proportion under 0.97 F_{oa}, e.g., if F_o is 0.95 F_{oa}, E shall be increased by 2 percent. This recalculated value shall be used to determine compliance with the emission standard.

(B) When F_o is less than 0.97 F_{oa} and when the average difference ($\bar{d}$) between the continuous monitor minus the reference methods is negative, then E shall be increased by that proportion under 0.97 F_{oa}, e.g., if F_o is 0.95 F_{oa}, E shall be increased by 2 percent. This recalculated value shall be used to determine compliance with the relative accuracy specification.

(C) When F_o is greater than 1.03 F_{oa} and when the average difference $\bar{d}$ is positive, then E shall be decreased by that proportion over 1.03 F_{oa}, e.g., if F_o is 1.05 F_{oa}, E shall be decreased by 2 percent. This recalculated value shall be used to determine compliance with the relative accuracy specification.

(2) For Method 5 or 5B, Method 17 may be used at facilities with or without wet FGD systems if the stack gas temperature at the sampling location does not exceed an average temperature of 160 °C (320 °F). The procedures of sections 2.1 and 2.3 of Method 5B may be used with Method 17 only if it is used after wet FGD systems. Method 17 shall not be used after wet FGD systems if the effluent gas is saturated or laden with water droplets.

(3) Particulate matter and SO_2 may be determined simultaneously with the Method 5 train provided that the following changes are made:

(i) The filter and impinger apparatus in sections 2.1.5 and 2.1.6 of Method 8 is used in place of the condenser (section 2.1.7) of Method 5.

(ii) All applicable procedures in Method 8 for the determination of SO_2 (including moisture) are used:

(4) For Method 6, Method 6C may be used. Method 6A may also be used whenever Methods 6 and 3 data are specified to determine the SO_2 emission rate, under the conditions in paragraph (d)(1) of this section.

(5) For Method 7, Method 7A, 7C, 7D, or 7E may be used. If Method 7C, 7D, or 7E is used, the sampling time for each run shall be at least 1 hour and the integrated sampling approach shall be used to determine the O_2 concentration ($\%O_2$) for the emission rate correction factor.

(6) For Method 3, Method 3A may be used.

§ 60.43a [Amended]

8. Section 60.43a(h)(1) is amended by revising both equations to read as follows:

$$E_s = (340 \times + 520\ y)/100 \text{ and}$$
$$\%P_s = 10$$

9. Section 60.43a(h)(2) is amended by:

a. Revising both equations to read as follows:

$$E_s = (340 \times + 520\ y)/100 \text{ and}$$
$$\%P_s = (10 \times + 30\ y)/100$$

b. Revising the first term in the nomenclature list to read "E_s".

c. Revising the second term in the nomenclature list to read as follows:

$\%P_s$ is the percentage of potential sulfur dioxide emission allowed.

§ 60.44a [Amended]

10. Section 60.44a(a)(1). No_x emission limits table, is amended by:

a. Adding a footnote "2" to the end of the fifth item under "Fuel type"immediately after the word "furnace" to read "furnace[2]".

b. Revising the sixth item under "Fuel type" to read as follows:

Any fuel containing more than 25%, by weight, lignite not subject to the 340 ng/J heat input emission limit[2].

c. Adding a footnote "2" at the end of the table to read as follows:

[2] Any fuel containing less than 25%, by weight, lignite is not prorated but its percentage is added to the percentage of the predominant fuel.

11. Section 60.44a(c) is amended by:

a. Revising the equation to read as follows:

$E_n = [86\ w + 130\ x + 210\ y + 260\ z + 340\ v]/100$

b. Revising the first term in the nomenclature list to read "E_n".

c. Moving the word "and" at the end of the term "y" to the end of the term "z"and adding the definition of the term "v" to the end of the nomenclature list to read as follows:

v is the percentage of total heat input delivered from the combustion of fuels subject to the 340 ng/J heat input standard.

§ 60.46a [Amended]

12. In § 60.46a(d)(3), the paragraph reference "(i)" is revised to read "(h)".

13. In § 60.46a(h), the phrase "sections 6.0 and 7.0 of Reference Method 19 (Appendix A)" is revised to read: "section 7 of Method 19."

14. Section 60.47a is amended by revising paragraphs (f), (h), (i) introductory text, and (i)(1), and (i)(2), and by adding a new paragraph (j) to read as follows:

§ 60.47a Emission monitoring.

* * * * *

(f) The owner or operator shall obtain emission data for at least 18 hours in at least 22 out of 30 successive boiler operating days. If this minimum data requirement cannot be met with a continuous monitoring system, the owner or operator shall supplement emission data with other monitoring systems approved by the Administrator or the reference methods and procedures as described in paragraph (h) of this section.

* * * * *

(h) When it becomes necessary to supplement continuous monitoring system data to meet the minimum data requirements in paragraph (f) of this section, the owner or operator shall use the reference methods and procedures as specified in this paragraph. Acceptable alternative methods and procedures are given in pargraph (j) of this section.

(1) Method 6 shall be used to determine the SO_2 concentration at the same location as the SO_2 monitor. Samples shall be taken at 60-minute intervals. The sampling time and sample volume for each sample shall be at least 20 minutes and 0.020 dscm (0.71 dscf). Each sample represents a 1-hour average.

(2) Method 7 shall be used to determine the NO_x concentration at the same location as the NO_x monitor. Samples shall be taken at 30-minute intervals. The arithmetic average of two consecutive samples represents a 1-hour average.

(3) The emission rate correction factor, integrated bag sampling and analysis procedure of Method 3 shall be used to determine the O_2 or CO_2 concentration at the same location as the O_2 or CO_2 monitor. Samples shall be taken for at least 30 minutes in each hour. Each sample represents a 1-hour average.

(4) The procedures in Method 19 shall be used to compute each 1-hour average concentration in ng/J (1b/million Btu) heat input.

(i) The owner or operator shall use methods and procedures in this paragraph to conduct monitoring system performance evaluations under § 60.13(c) and calibration checks under § 60.13(d). Acceptable alternative methods and procedures are given in paragraph (j) of this section.

(1) Methods 6, 7, and 3, as applicable, shall be used to determine O_2, SO_2, and NO_x concentrations.

(2) SO_2 or NO_x (NO), as applicable, shall be used for preparing the calibration gas mixtures (in N_2, as applicable) under Performance Specification 2 of Appendix B of this part.

* * * * *

(j) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) For Method 6, Method 6A or 6B (whenever Methods 6 and 3 data are used) or 6C may be used. Each Method 6B sample obtained over 24 hours represents 24 1-hour averages. If Method 6A or 6B is used under paragraph (i) of this section, the conditions under § 60.46(d)(1) apply; these conditions do not apply under paragraph (h) of this section.

(2) For Method 7, Method 7A, 7C, 7D, or 7E may be used. If Method 7C, 7D, or 7E is used, the sampling time for each run shall be 1 hour.

(3) For Method 3, Method 3A may be used if the sampling time is 1 hour.

15. Section 60.48a is amended by redesignating paragraph (d) as paragraph (f), by adding a new paragrah (d), and by revising paragraphs (a), (b), (c), and (e) to read as follows:

§ 60.48a Compliance determination test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the methods in Appendix A of this part or the methods and procedures as specified in this section, except as provided in § 60.8(b). Section 60.8(f) does not apply to this section for SO_2 and NO_x. Acceptable alternative methods are given in paragraph (e) of this section.

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.42a as follows:

(1) The dry basis F factor (O_2) procedures in Method 19 shall be used to compute the emission rate of particulate matter.

(2) For the particular matter concentration, Method 5 shall be used at affected facilities without wet FGD systems and Method 5B shall be used after wet FGD systems.

(i) The sampling time and sample volume for each run shall be at least 120 minutes and 1.70 dscm (60 dscf). The probe and filter holder heating system in the sampling train may be set to provide an average gas temperature of no greater than 160±14 °C (320±25 °F).

(ii) For each particulate run, the emission rate correction factor, integrated or grab sampling and analysis procedures of Method 3 shall be used to determine the O_2 concentration. The O_2 sample shall be obtained simultaneously with, and at the same traverse points as, the particulate run. If the particulate run has more than 12 traverse points, the O_2 traverse points may be reduced to 12 provided that Method 1 is used to locate the 12 O_2 traverse points. If the grab sampling procedure is used, the O_2 concentration for the run shall be the arithmetic mean of all the individual O_2 concentrations at each traverse point.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(c) The owner or operator shall determine compliance with the SO_2 standards in § 60.43a as follows:

(1) The percent of potential SO_2 emissions ($\%P_s$) to the atmosphere shall be computed using the following equation:

$$\%P_s = [(100 - \%R_f)\ (100 - \%R_g)]/100$$

where:

$\%P_s$ = percent of potential SO_2 emissions, percent.

$\%R_f$ = percent reduction from fuel pretreatment, percent.

$\%R_g$ = percent reduction by SO_2 control system, percent.

(2) The procedures in Method 19 may be used to determine percent reduction ($\%R_f$) of sulfur by such processes as fuel pretreatment (physical coal cleaning, hydrodesulfurization of fuel oil, etc.), coal pulverizers, and bottom and flyash interactions. This determination is optional.

(3) The procedures in Method 19 shall be used to determine the percent SO_2 reduction ($\%R_g$ of any SO_2 control system. Alternatively, a combination of an "as fired" fuel monitor and emission rates measured after the control system, following the procedures in Method 19, may be used if the percent reduction is calculated using the average emission rate from the SO_2 control device and the average SO_2 input rate from the "as fired" fuel analysis for 30 successive boiler operating days.

(4) The appropriate procedures in Method 19 shall be used to determine the emission rate.

(5) The continuous monitoring system in § 60.47a (b) and (d) shall be used to determine the concentrations of SO_2 and CO_2 or O_2.

(d) The owner or operator shall determine compliance with the NO_x standard in § 60.44a as follows:

(1) The appropriate procedures in Method 19 shall be used to determine the emission rate of NO_x.

(2) The continous monitoring system in § 60.47a (c) and (d) shall be used to determine the concentrations of NO_x and CO_2 or O_2.

(e) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) For Method 5 or 5B, Method 17 may be used at facilities with or without wet FGD systems if the stack temperature at the sampling location does not exceed an average temperature of 160 °C (320 °F). The procedures of §§ 2.1 and 2.3 of Method 5B may be used in Method 17 only if it is used after wet FGD systems. Method 17 shall not be used after wet FGD systems if the effluent is saturated or laden with water droplets.

(2) The F_c factor (CO_2) procedures in Method 19 may be used to compute the emission rate of particulate matter under the stipulations of § 60.46(d)(1). The CO_2 shall be determined in the same manner as the O_2 concentration.

* * * * *

16. Section 60.54 is revised to read as follows:

§ 60.54 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standard in § 60.52 as follows:

(1) The emission rate (c_{12}) of particulate matter, corrected to 12 percent CO_2, shall be computed for each run using the following equation:

$$c_{12} = c_s (12/\%CO_2)$$

where:

c_{12} = concentration of particulate matter, corrected to 12 percent CO_2, g/dscm (gr/dscf).

c_s = concentration of particulate matter, g/dscm (gr/dscf).

$\%CO_2$ = CO_2 concentration, percent dry basis.

(2) Method 5 shall be used to determine the particulate matter concentration (c_s). The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The emission rate correction factor, integrated or grab sampling and analysis procedure of Method 3 shall be used to determine CO_2 concentration ($\%CO_2$).

(i) The CO_2 sample shall be obtained simultaneously with, and at the same traverse points as, the particulate run. If the particulate run has more than 12 traverse points, the CO_2 traverse points may be reduced to 12 if Method 1 is used to locate the 12 CO_2 traverse points. If individual CO_2 samples are taken at each traverse point, the CO_2 concentration ($\%CO_2$) used in the correction equation shall be the arithmetic mean of all the individual CO_2 sample concentrations at each traverse point.

(ii) If sampling is conducted after a wet scrubber, an "adjusted" CO_2 concentration [$(\%CO_2)_{adj}$], which accounts for the effects of CO_2 absorption and dilution air, may be used instead of the CO_2 concentration determined in this paragraph. The adjusted CO_2 concentration shall be determined by either of the procedures in paragraph (c) of this section.

(c) The owner or operator may use either of the following procedures to determine the adjusted CO_2 concentration.

(1) The volumetric flow rates at the inlet and outlet of the wet scrubber and the inlet CO_2 concentration may be used to determine the adjusted CO_2 concentration [$(\%CO_2)_{adj}$] using the following equation:

$$(\%CO_2)_{adj} = (\%CO_2)_{di} (Q_{di}/Q_{do})$$

where:

$(\%CO_2)_{adj}$ = adjusted outlet CO_2 concentration, percent dry basis.

$(\%CO_2)_{di}$ = CO_2 concentration measured before the scrubber, percent dry basis.

Q_{di} = volumetric flow rate of effluent gas before the wet scrubber, dscm/min (dscf/min).

Q_{do} = volumetric flow rate of effluent gas after the wet scrubber, dscm/min (dscf/min).

(i) At the outlet, Method 5 is used to determine the volumetric flow rate (Q_{do}) of the effluent gas.

(ii) At the inlet, Method 2 is used to determine the volumetric flow rate (Q_{di}) of the effluent gas as follows: Two full velocity traverses are conducted, one immediately before and one immediately after each particulate run conducted at the outlet, and the results are averaged.

(iii) At the inlet, the emission rate correction factor, integrated sampling and analysis procedure of Method 3 is used to determine the CO_2 concentration [$(\%CO_2)_{di}$] as follows: At least nine sampling points are selected randomly from the velocity traverse points and are divided randomly into three sets, equal in number of points; the first set of three or more points is used for the first run, the second set for the second run, and the third set for the third run. The CO_2 sample is taken simultaneously with each particulate run being conducted at the outlet, by traversing the three sampling points (or more) and sampling at each point for equal increments of time.

(2) Excess air measurements may be used to determine the adjusted CO_2 concentration [$(\%CO_2)_{adj}$] using the following equation:

$$(\%CO_2)_{adj} = (\%CO_2)_{di} [(100 + \%EA_i)/(100 + \%EA_o)]$$

where:

$(\%CO_2)_{adj}$ = adjusted outlet CO_2 concentration, percent dry basis.

$(\%CO_2)_{di}$ = CO_2 concentration at the inlet of the wet scrubber, percent dry basis.

$\%EA_i$ = excess air at the inlet of the scrubber, percent.

$\%EA_o$ = excess air at the outlet of the scrubber, percent.

(i) A gas sample is collected as in paragraph (c)(1)(iii) of this section and the gas samples at both the inlet and outlet locations are analyzed for CO_2, O_2, and N_2.

(ii) Equation 3-1 of Method 3 is used to compute the percentages of excess air at the inlet and outlet of the wet scrubber.

17. Section 60.64 is revised to read as follows:

§ 60.64 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standard in § 60.62 as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E=(c_s Q_{sd})/(P K)$$

where:
E = emission rate of particulate matter, kg/metric ton (lb/ton) of kiln feed.
c_s = concentration of particulate matter, g/dscm (g/dscf).
Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).
P = total kiln feed (dry basis) rate, metric ton/hr (ton/hr).
K = conversion factor, 1000 g/kg (453.6 g/lb).

(2) Method 5 shall be used to determine the particulate matter concentration (c_s) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30.0 dscf) for the kiln and at least 60 minutes and 1.15 dscm (40.6 dscf) for the clinker cooler.

(3) Suitable methods shall be used to determine the kiln feed rate (P), except fuels, for each run. Material balance over the production system shall be used to confirm the feed rate.

(4) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(18) Section 60.73(a) is revised to read as follows:

§ 60.73 Emission monitoring.

(a) The source owner or operator shall install, calibrate, maintain, and operate a continuous monitoring system for measuring nitrogen oxides (NO_x). The pollutant gas mixtures under Performance Specification 2 and for calibration checks under § 60.13(d) of this part shall be nitrogen dioxide (NO_2). The span value shall be 500 ppm of NO_2. Method 7 shall be used for the performance evaluations under § 60.13(c). Acceptable alternative methods to Method 7 are given in § 60.74(c).

* * * * *

19. Section 60.73(b) is amended by removing the word "short" wherever it occurs in the first and third sentences.

20. Section 60.74 is revised to read as follows:

§ 60.74 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (c) of this section.

(b) The owner or operator shall determine compliance with the NO_x standard in § 60.72 as follows:

(1) The emission rate (E) of NO_x shall be computed for each run using the following equation:

$$E=(C_s Q_{sd})/(P K)$$

where:
E = emission rate of NO_x as NO_2, kg/metric ton (lb/ton) of 100 percent nitric acid.
C_s = concentration of NO_x as NO_2, g/dscm (lb/dscf).
Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).
P = acid production rate, metric ton/hr (ton/hr) or 100 percent nitric acid.
K = conversion factor, 1000 g/kg (1.0 lb/lb).

(2) Method 7 shall be used to determine the NO_x concentration of each grab sample. Method 1 shall be used to select the sampling site, and the sampling point shall be the centroid of the stack or duct or at a point no closer to the walls than 1 m (3.28 ft). Four grab samples shall be taken at approximately 15-minute intervals. The arithmetic mean of the four sample concentrations shall constitute the run value (C_s).

(3) Method 2 shall be used to determine the volumetric flow rate (Q_{sd}) of the effluent gas. The measurement site shall be the same as for the NO_x sample. A velocity traverse shall be made once per run within the hour that the NO_x samples are taken.

(4) The methods of § 60.73(c) shall be used to determine the production rate (P) of 100 percent nitric acid for each run. Material balance over the production system shall be used to confirm the production rate.

(c) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) For Method 7, Method 7A, 7B, 7C, or 7D may be used. If Method 7C or 7D is used, the sampling time shall be at least 1 hour.

(d) The owner or operator shall use the procedure in § 60.73(b) to determine the conversion factor for converting the monitoring data to the units of the standard.

§ 60.84 [Amended]

21. In § 60.84(a), the third sentence is amended by removing the word "Reference" before the words "Methods 8"; and the fourth sentence is amended by adding the word "value" after the word "span".

22. In § 60.84(b), the first sentence and definition of CF in nomenclature list are amended by removing the word "short" before the word "ton" in the two places it occurs.

23. Section 60.84(d) is amended by revising the equation and nomenclature list to read as follows:

(d) * * *

$$E_s=(C_s S)/[0.265-(0.126\ \%O_2)-(A\ \%CO_2)]$$

where:
E_s = emission rate of SO_2, kg/metric ton (lb/ton) of 100 percent of H_2SO_4 produced.
C_s = concentration of SO_2, kg/dscm (lb/dscf).
S = acid production rate factor, 368 dscm/metric ton (11,800 dscf/ton) of 100 percent H_2SO_4 produced.
$\%O_2$ = oxygen concentration, percent dry basis.
A = auxiliary fuel factor,
= 0.00 for no fuel.
= 0.0226 for methane.
= 0.0217 for natural gas.
= 0.0196 for propane.
= 0.0172 for No 2 oil.
= 0.0161 for No 6 oil.
= 0.0148 for coal.
= 0.0126 for coke.
$\%CO_2$ = carbon dioxide concentration, percent dry basis.

* * * * *

24. Section 60.85 is revised to read as follows:

§ 60.85 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (c) of this section.

(b) The owner or operator shall determine compliance with the SO_2 acid mist, and visible emission standards in §§ 60.82 and 60.83 as follows:

(1) The emission rate (E) of acid mist or SO_2 shall be computed for each run using the following equation:

$$E=(CQ_{sd})/(PK)$$

where:
E = emission rate of acid mist or SO_2 kg/metric ton (lb/ton) of 100 percent H_2SO_4 produced.
C = concentration of acid mist or SO_2, g/dscm (lb/dscf).
Q_{sd} = volumetric flow rate of the effluent gas, dscm/hr (dscf/hr).
P = production rate of 100 percent H_2SO_4, metric ton/hr (ton/hr).
K = conversion factor, 1000 g/kg (1.0 lb/lb).

(2) Method 8 shall be used to determine the acid mist and SO_2 concentrations (C's) and the volumetric

flow rate (Q_{sd}) of the effluent gas. The moisture content may be considered to be zero. The sampling time and sample volume for each run shall be at least 60 minutes and 1.15 dscm (40.6 dscf).

(3) Suitable methods shall be used to determine the production rate (P) of 100 percent H_2SO_4 for each run. Material balance over the production system shall be used to confirm the production rate.

(4) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(c) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) If a source processes elemental sulfur or an ore that contains elemental sulfur and uses air to supply oxygen, the following procedure may be used instead of determining the volumetric flow rate and production rate:

(i) The integrated technique of Method 3 is used to determine the O_2 concentration and, if required, CO_2 concentration.

(ii) The SO_2 or acid mist emission rate is calculated as described in § 60.84(d), substituting the acid mist concentration for C_s as appropriate.

25. Section 60.93 is revised to read as follows:

§ 60.93 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.92 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration. The sampling time and sample volume for each run shall be at least 60 minutes and 0.90 dscm (31.8 dscf).

(2) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

26. Section 60.123 is revised to read as follows:

§ 60.123 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.122 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration during representative periods of furnace operation, including charging and tapping. The sampling time and sample volume for each run shall be at least 60 minutes and 0.90 dscm (31.8 dscf).

(2) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

27. Section 60.133 is revised to read as follows:

§ 60.133 Test methods and procedures.

(a) In conducting performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.132 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration during representative periods of charging and refining, but not during pouring of the heat. The sampling time and sample volume for each run shall be at least 120 minutes and 1.80 dscm (63.6 dscf).

(2) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

§ 60.143 [Amended]

28. In § 60.143(b)(5), the reference "§ 60.13(b)(3)" is revised to read "§ 60.13(b)".

29. In § 60.143(c), the references "(b)(1)(A) or (b)(2)(A)" are revised to read "(b)(1)(i) or (b)(2)(i)".

30. Section 60.144 is revised to read as follows:

§ 60.144 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.142 as follows:

(1) The time-measuring instrument of § 60.143 shall be used to document the time and duration of each steel production cycle and each diversion period during each run.

(2) Method 5 shall be used to determine the particulate matter concentration. The sampling time and sample volume for each run shall be at least 60 minutes and 1.50 dscm (53 dscf). Sampling shall be discontinued during periods of diversions.

(i) For affected facilities that commenced construction, modification, or reconstruction on or before January 20, 1983, the sampling for each run shall continue for an integral number of steel production cycles. A cycle shall start at the beginning of either the scrap preheat or the oxygen blow and shall terminate immediately before tapping.

(ii) For affected facilities that commenced construction, modification, or reconstruction after January 20, 1983, the sampling for each run shall continue for an integral number of primary oxygen blows.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity. Observations taken during a diversion period shall not be used in determining compliance with the opacity standard. Opacity observations taken at 15-second intervals immediately before and after a diversion of exhaust gases from the stack may be considered to be consecutive for the purpose of computing an average opacity for a 6-minute period.

(c) To comply with § 60.143(c), the owner or operator shall use the monitoring devices of § 60.143(b) (1) and (2) during the particulate runs to determine the 3-hour averages of the required measurements.

31. Section 60.144a is amended by redesignating paragraphs (d)(1) and (2) as (c) (1) and (2) and by revising paragraphs (a), (b), (c) introductory text, and (d) to read as follows:

§ 60.144a Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.142a as follows:

(1) Start and end times of each steel production cycle during each run shall be recorded (see § 60.145a(c) and (d) for the definitions of start and end times of a cycle).

(2) Method 5 shall be used to determine the particulate matter

concentration. Sampling shall be conducted only during the steel production cycle and for a sufficient number of steel production cycles to obtain a total sample volume of at least 5.67 dscm (200 dscf) for each run.

(3) Method 9 and the procedures of § 60.11 shall be used to determine opacity, except sections 2.4 and 2.5 of Method 9 shall be replaced with the following instructions for recording observations and reducing data:

(i) *Section 2.4.* Opacity observations shall be recorded to the nearest 5 percent at 15-second intervals. During the initial performance test conducted pursuant to § 60.8, observations shall be made and recorded in this manner for a minimum of three steel production cycles. During any subsequent compliance test, observations may be made for any number of steel production cycles, although, where conditions permit, observations will generally be made for a minimum of three steel production cycles.

(ii) *Section 2.5.* Opacity shall be determined as an average of 12 consecutive observations recorded at 15-second intervals. For each steel production cycle, divide the observations recorded into sets of 12 consecutive observations. Sets need not be consecutive in time, and in no case shall two sets overlap. For each set of 12 observations, calculate the average by summing the opacity of 12 consecutive observations and dividing this sum by 12.

(c) In complying with the requirements of § 60.143a(c), the owner or operator shall conduct an initial test as follows:

* * * * *

(d) To comply with § 60.143a (d) or (e), the owner or operator shall use the monitoring device of § 60.143a(a) to determine the exhaust ventilation rates or levels during the particulate matter runs and to determine a 3-hour average.

32. Section 60.154 is revised to read as follows:

§ 60.154 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided for in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter emission standards in § 60.152 as follows:

(1) The emission rate (E) of particulate matter for each run shall be computed using the following equation:

$$E = K(c_s Q_{sd})/S$$

where:

E = emission rate of particulate matter, g/kg (lb/ton) of dry sludge input.

c_s = concentration of particulate matter, g/dscm (g/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

S = charging rate of dry sludge during the run, kg/hr (lb/hr).

K = conversion factor, 1.0 g/g [4.409 $lb^2/(g\text{-}ton)$].

(2) Method 5 shall be used to determine the particulate matter concentration (c_s) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 0.90 dscm (31.8 dscf).

(3) The dry sludge charging rate (S) for each run shall be computed using either of the following equations:

$$S = K_m S_m R_{dm} / \theta$$

$$S = K_v S_v R_{dv} / \theta$$

where:

S = charging rate of dry sludge, kg/hr (lb/hr).

S_m = total mass of sludge charged, kg (lb).

R_{dm} = average mass of dry sludge per unit mass of sludge charged, mg/mg (lb/lb).

θ = duration of run, min.

K_m = conversion factor, 60 min/hr.

S_v = total volume of sludge charged, m^3 (gal).

R_{dv} = average mass of dry sludge per unit volume of sludge charged, mg/liter (lb/ft^3).

K_v = conversion factor, 60×10^{-3} (liter-kg-min)/(m^3-mg-hr) [8.021 (ft^3-min)/(gal-hr)].

(4) The flow measuring device of § 60.153(a)(1) shall be used to determine the total mass (S_m) or volume (S_v) of sludge charged to the incinerator during each run. If the flow measuring device is on a time rate basis, readings shall be taken and recorded at 5-minute intervals during the run and the total charge of sludge shall be computed using the following equations, as applicable:

$$S_m = \sum_{i=1}^{n} Q_{mi}\,\theta_i$$

$$S_v = \sum_{i=1}^{n} Q_{vi}\,\theta_i$$

where:

Q_{mi} = average mass flow rate calculated by averaging the flow rates at the beginning and end of each interval "i", kg/min (lb/min).

Q_{vi} = average volume flow rate calculated by averaging the flow rates at the beginning and end of each interval "i", m^3/min (gal/min).

θ_i = duration of interval "i", min.

(5) Samples of the sludge charged to the incinerator shall be collected in nonporous jars at the beginning of each run and at approximately 1-hour intervals thereafter until the test ends, and "209 F. Method for Solid and Semisolid Samples" (incorporated by reference—see § 60.17) shall be used to determine dry sludge content of each sample (total solids residue), except that:

(i) Evaporating dishes shall be ignited to at least 103 °C rather than the 550 °C specified in step 3(a)(1).

(ii) Determination of volatile residue, step 3(b) may be deleted.

(iii) The quantity of dry sludge per unit sludge charged shall be determined in terms of mg/liter (lb/ft^3) or mg/mg (lb/lb).

(iv) The average dry sludge content shall be the arithmetic average of all the samples taken during the run.

(6) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

§§ 60.165, 60.175, and 60.185 [Amended]

33. Sections 60.165(b)(2)(i), 60.175(a)(2)(i), and 60.185(a)(2)(i) are amended by removing the second and third sentences.

34. In §§ 60.165(b)(2)(ii), 60.175(a)(2)(ii), and 60.185(a)(2)(ii), the words "Field Test for Accuracy (Relative)" are revised to read "Relative Accuracy Test Procedure", and the word "Reference" just before "Method 6" is removed.

35. Section 60.166 is revised to read as follows:

§ 60.166 Test methods and procedures.

(a) In conducting performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter, sulfur dioxide (SO_2) and visible emission standards in §§ 60.162, 60.163, and 60.164 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(2) The continuous monitoring system of § 60.165(b)(2) shall be used to determine the SO_2 concentrations on a dry basis. The sampling time for each run shall be 6 hours, and the average SO_2 concentration shall be computed for the 6-hour period as in § 60.165(c). The monitoring system drift during the run may not exceed 2 percent of the span value.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

36. Section 60.176 is revised to read as follows:

§ 60.176 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter, sulfur dioxide (SO_2), and visible emission standards in §§ 60.172, 60.173, and 60.174 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(2) The continuous monitoring system of § 60.175(a)(2) shall be used to determine the SO_2 concentrations on a dry basis. The sampling time for each run shall be 2 hours, and the average SO_2 concentration for the 2-hour period shall be computed as in § 60.175(b). The monitoring system drift during the run may not exceed 2 percent of the span value.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

37. Section 60.186 is revised to read as follows:

§ 60.186 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter, sulfur dioxide (SO_2), and visible emission standards in §§ 60.182, 60.183, and 60.184 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(2) The continuous monitoring system of § 60.185(a)(2) shall be used to determine the SO_2 concentrations on a dry basis. The sampling time for each run shall be 2 hours, and the average SO_2 concentration for the 2-hour period shall be computed as in § 60.185(b). The monitoring system drift during the run may not exceed 2 percent of the span value.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

§§ 60.194 and 60.195 [Amended]

38. Section 60.195 is amended by redesignating § 60.195(a) as § 60.194(c) and § 60.195(b) as § 60.194(d).

39. Section 60.195 is revised to read as follows:

§ 60.195 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the total fluorides and visible emission standards in §§ 60.192 and 60.193 as follows:

(1) The emission rate (E_p) of total fluorides from potroom groups shall be computed for each run using the following equation:

$$E_p = [(C_s Q_{sd})_1 + (C_s Q_{sd})_2]/(P K)$$

where:

E_p = emission rate of total fluorides from a potroom group, kg/Mg (lb/ton).

C_s = concentration of total fluorides, mg/dscm (mg/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

P = aluminum production rate, Mg/hr (ton/hr).

K = conversion factor, 10^6 mg/kg (453,600 mg/lb).

1 = subscript for primary control system effluent gas.

2 = subscript for secondary control system or roof monitor effluent gas.

(2) The emission rate (E_b) of total fluorides from anode bake plants shall be computed for each run using the following equation:

$$E_b = (C_s Q_{sd})/(P_e K)$$

where:

E_b = emission rate of total fluorides, kg/Mg (lb/ton) of aluminum equivalent.

C_s = concentration of total fluorides, mg/dscm (mg/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

P_e = aluminum equivalent for anode production rate, Mg/hr (ton/hr).

K = conversion factor, 10^6 mg/kg (453,600 mg/lb).

(3) Methods 13A or 13B shall be used for ducts or stacks, and Method 14 for roof monitors not employing stacks or pollutant collection systems, to determine the total fluorides concentration (C_s) and volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 8 hours and 6.80 dscm (240 dscf) for potroom groups and at least 4 hours and 3.40 dscm (120 dscf) for anode bake plants.

(4) The monitoring devices of § 60.194(a) shall be used to determine the daily weight of aluminum and anode produced.

(i) The aluminum production rate (P) shall be determined by dividing 720 hours into the weight of aluminum tapped from the affected facility during a period of 30 days before and including the final run of a performance test.

(ii) The aluminum equivalent production rate (P_e) for anodes shall be determined as 2 times the average weight of anode produced during a representative oven cycle divided by the cycle time. An owner or operator may establish a multiplication factor other than 2 by submitting production records of the amount of aluminum produced and the concurrent weight of anodes consumed by the potrooms.

(5) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

§ 60.203 [Amended]

40. In § 60.203(b), the reference "§ 60.204(d)(2) is revised to read "§ 60.204(b)(3)".

41. Section 60.204 is revised to read as follows:

§ 60.204 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the total fluorides standard in § 60.202 as follows:

(1) The emission rate (E) of total fluorides shall be computed for each run using the following equation:

$$E = \left(\sum_{i=1}^{N} C_{si} Q_{sdi}\right)/(P K)$$

where:

E = emission rate of total fluorides, g/metric ton (lb/ton) of equivalent P_2O_5 feed.

C_{si} = concentration of total fluorides from emission point "i," mg/dscm (mg/dscf).

Q_{sdi} = volumetric flow rate of effluent gas from emission point "i," dscm/hr (dscf/hr).
N = number of emission points associated with the affected facility.
P = equivalent P_2O_5 feed rate, metric ton/hr (ton/hr).
K = conversion factor, 1000 mg/g (453,600 mg/lb).

(2) Method 13A or 13B shall be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The equivalent P_2O_5 feed rate (P) shall be computed for each run using the following equation:

$P = M_p R_p$

where:
M_p = total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).
R_p = P_2O_5 content, decimal fraction.

(i) The accountability system of § 60.203(a) shall be used to determine the mass flow rate (M_p) of the phosphorus-bearing feed.

(ii) The Association of Official Analytical Chemists (AOAC) Method 9 (incorporated by reference—see § 60.17) shall be used to determine the P_2O_5 content (R_p) of the feed.

§ 60.213 [Amended]

42. In § 60.213(b), the reference "§ 60.214(d)(2)" is revised to read "§ 60.214(b)(3)".

43. Section 60.214 is revised to read as follows:

§ 60.214 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the total fluorides standard in § 60.212 as follows:

(1) The emmission rate (E) of total fluorides shall be computed for each run using the following equation:

$$E = \left(\sum_{i=1}^{N} C_{si} Q_{sdi}\right)/(P K)$$

where

E = emission rate of total fluorides, g/metric ton (lb/ton) of equivalent P_2O_5 feed.
C_{si} = concentration of total fluorides from emission point "i," mg/dscm (mg/dscf).
Q_{sdi} = volumetric flow rate of effluent gas from emission point "i," dscm/hr (dscf/hr).
N = number of emission points associated with the affected facility.
P = equivalent P_2O_5 feed rate, metric ton/hr (ton/hr).
K = conversion factor, 1000 mg/g (453,600 mg/lb).

(2) Method 13A or 13B shall be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The equivalent P_2O_5 feed rate (P) shall be computed for each run using the following equation:

$P = M_p R_p$

where:
M_p = total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).
R_p = P_2O_5 content, decimal fraction.

(i) The accountability system of § 60.213(a) shall be used to determine the mass flow rate (M_p) of the phosphorus-bearing feed.

(ii) The Association of Official Analytical Chemists (AOAC) Method 9 (incorporated by reference—see § 60.17) shall be used to determine the P_2O_5 content (R_p) of the feed.

§ 60.223 [Amended]

44. In § 60.223(b), the reference "§ 60.224(d)(2)" is revised to read "§ 60.224(b)(3)".

45. Section 60.224 is revised to read as follows:

§ 60.224 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the total fluorides standard in § 60.222 as follows:

(1) The emission rate (E) of total fluorides shall be computed for each run using the following equation:

$$E = \left(\sum_{i=1}^{N} C_{si} Q_{sdi}\right)/(P K)$$

where:
E = emission rate of total fluorides, g/metric ton (lb/ton) of equivalent P_2O_5 feed.
C_{si} = concentration of total fluorides from emission point "i," mg/dscm (mg/dscf).
Q_{sdi} = volumetric flow rate of effluent gas from emission point "i," dscm/hr (dscf/hr).
N = number of emission points associated with the affected facility.
P = equivalent P_2O_5 feed rate, metric ton/hr (ton/hr).
K = conversion factor, 1000 mg/g (453,600 mg/lb).

(2) Method 13A or 13B shall be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The equivalent P_2O_5 feed rate (P) shall be computed for each run using the following equation:

$P = M_p R_p$

where:
M_p = total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).
R_p = P_2O_5 content, decimal fraction.

(i) The accountability system of § 60.223(a) shall be used to determine the mass flow rate (M_p) of the phosphorus-bearing feed.

(ii) The Association of Official Analytical Chemists (AOAC) Method 9 (incorported by reference—see § 60.17) shall be used to determine the P_2O_5 content (R_p) of the feed.

§ 60.233 [Amended]

46. In § 60.233(b), the reference "§ 60.234(d)(2)" is revised to read "§ 60.234(b)(3)".

47. Section 60.234 is revised to read as follows:

§ 60.234 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the total fluorides standards in § 60.232 as follows:

(1) The emission rate (E) of total fluorides shall be computed for each run using the following equation:

$$E=(\Sigma C_{si} Q_{sdi})/(P K)$$

$$i=1$$

where:

E = emission rate of total fluorides, g/metric ton (lb/ton) of equivalent P_2O_5 feed.

C_{si} = concentration of total fluorides from emission point "i," mg/dscm (mg/dscf).

Q_{sdi} = volumetric flow rate of effluent gas from emission point "i," dscm/hr (dscf/hr).

N = number of emission points in the affected facility.

P = equivalent P_2O_5 feed rate, metric ton/hr (ton/hr).

K = conversion factor, 1000 mg/g (453,600 mg/lb).

(2) Method 13A or 13b shall be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The equivalent P_2O_5 feed rate (P) shall be computed for each run using the following equation:

$$P = M_p R_p$$

where:

M_p total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).

$R_p = P_2O_5$ content, decimal fraction.

(i) The accountability system of § 60.233(a) shall be used to determine the mass flow rate (M_p) of the phosphorus-bearing feed.

(ii) The Association of Official Analytical Chemists (AOAC) Method 9 (incorporated by reference—see § 60.17) shall be used to determine the P_2O_5 content (R_{p2}) of the feed.

§ 60.243 [Amended]

48. In § 60.243(b), the reference "60.244(f)(2)" is revised to read "60.244(c)(3)".

49. Section 60.244 is revised to read as follows:

§ 60.244 Test methods and procedures.

(a) The owner or operator shall conduct performance tests required in § 60.8 only when the following quantities of product are being cured or stored in the facility.

(1) Total granular triple superphosphate is at least 10 percent of the building capacity and

(2) Fresh granular triple superphosphate is at least 20 percent of the total amount of triple superphosphate or,

(3) If the provision in paragraph (a)(2) of this section exceeds production capabilities for fresh granular triple superphosphate, fresh granular triple superphosphate is equal to at least 5 days maximum production.

(b) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(c) The owner or operator shall determine compliance with the total fluorides standard in § 60.242 as follows:

(1) The emission rate (E) of total fluorides shall be computed for each run using the following equation:

$$E=(\Sigma C_{si} Q_{sdi})/(P K)$$

$$i=1$$

where:

E = emission rate of total fluorides, g/hr/metric ton (lb/hr/ton) of equivalent P_2O_5 stored.

C_{si} = concentration of total fluorides from emission point "i," mg/dscm (mg/dscf).

Q_{sdi} = volumetric flow rate of effluent gas from emission point "i," dscm/hr (dscf/hr).

N = number of emission points in the affected facility.

P = equivalent P_2O_5 stored, metric tons (tons).

K = conversion factor, 1000 mg/g (453,600 mg/lb).

(2) Method 13A or 13B shall be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The equivalent P_2O_5 feed rate (P) shall be computed for each run using the following equation:

$$P = M_p R_p$$

where:

M_p = amount of product in storage, metric ton (ton).

$R_p = P_2O_5$ content of product in storage, weight fraction.

(i) The accountability system of § 60.243(a) shall be used to determine the amount of product (M_p) in storage.

(ii) The Association of Official Analytical Chemists (AOAC) Method 9 (incorporated by reference—see § 60.17) shall be used to determine the P_2O_5 content (R_p) of the product in storage.

§ 60.253 [Amended]

50. In § 60.253(b), the last line is amended by revising the reference "§ 60.13(b)(3)" to read "§ 60.13(b)".

51. Section 60.254 is revised to read as follows:

§ 60.254 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particular matter standards in § 60.252 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf). Sampling shall begin no less than 30 minutes after startup and shall terminate before shutdown procedures begin.

(2) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

52. Section 60.266 is revised to read as follows:

§ 60.266 Test methods and procedures.

(a) During any performance test required in § 60.8, the owner or operator shall not allow gaseous diluents to be added to the effluent gas stream after the fabric in an open pressurized fabric filter collector unless the total gas volume flow from the collector is accurately determined and considered in the determination of emissions.

(b) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(c) The owner or operator shall determine compliance with the particulate matter standards in § 60.262 as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E=(\Sigma C_{si} Q_{sdi})/(P K)$$

$$i=1$$

where:

E = emission rate of particulate matter, kg/MW-hr (1b/MW-hr).
n = total number of exhaust streams at which emissions is quantified.
c_{si} = concentration of particulate matter from exhaust stream "i", g/dscm (g/dscf).
Q_{sdi} = volumetric flow rate of effluent gas from exhaust stream "i", dscm/hr (dscf/hr).
P = average furnace power input, MW.
K = conversion factor, 1000 g/kg (453.6 g/lb).

(2) Method 5 shall be used to determine the particulate matter concentration (c_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas, except that the heating systems specified in sections 2.1.2 and 2.1.6 are not to be used when the carbon monoxide content of the gas stream exceeds 10 percent by volume, dry basis. If a flare is used to comply with § 60.263, the sampling site shall be upstream of the flare. The sampling time shall include an integral number of furnace cycles.

(i) When sampling emissions from open electric submerged arc furnaces with wet scrubber control devices, sealed electric submerged arc furnaces, or semienclosed electric arc furnaces, the sampling time and sample volume for each run shall be at least 60 minutes and 1.80 dscm (63.6 dscf).

(ii) When sampling emissions from other types of installations, the sampling time and sample volume for each run shall be at least 200 minutes and 5.70 dscm (200 dscf).

(3) The measurement device of § 60.265(b) shall be used to determine the average furnace power input (P) during each run.

(4) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(5) The emission rate correction factor, integrated sampling procedure of Method 3 shall be used to determine the CO concentration. The sample shall be taken simultaneously with each particulate matter sample.

(d) During the particulate matter run, the maximum open hood area (in hoods with segmented or otherwise moveable sides) under which the process is expected to be operated and remain in compliance with all standards shall be recorded. Any future operation of the hooding system with open areas in excess of the maximum is not permitted.

(e) To comply with § 60.265 (d) or (f), the owner or operator shall use the monitoring devices in § 60.265 (c) or (e) to make the required measurements as determined during the performance test.

§ 60.273 [Amended]

53. Section 60.273(c) is revised to read as follows:

(c) A continuous monitoring system is not required on any modular, multiple-stack, negative-pressure or positive-pressure fabric filter if observations of the opacity of the visible emissions from the control device are performed by a certified visible emission observer as follows: Visible emission observations shall be conducted at least once per day when the furnace is operating in the melting and refining period. These observations shall be taken in accordance with Method 9, and, for at least three 6-minute periods, the opacity shall be recorded for any point(s) where visible emissions are observed. Where it is possible to determine that a number of visible emission sites relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In this case, Method 9 observations must be made for the site of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272(a) of this subpart.

54. Section 60.275 is amended by redesignating paragraph (c) as § 60.276(c), by revising paragraphs (a), (b), (d), (e), and (f), and by adding a new paragraph (c) to read as follows:

§ 60.275 Test methods and procedures.

(a) During performance tests required in § 60.8, the owner or operator shall not add gaseous diluent to the effluent gas after the fabric in any pressurized fabric collector, unless the amount of dilution is separately determined and considered in the determination of emissions.

(d) When emissions from any EAF(s) are combined with emissions from facilities not subject to the provisions of this subpart but controlled by a common capture system and control device, the owner or operator shall use either or both of the following procedures during a performance test (see also § 60.276(b)):

(1) Determine compliance using the combined emissions.

(2) Use a method that is acceptable to the Administrator and that compensates for the emissions from the facilities not subject to the provisions of this subpart.

(c) When emissions from any EAF(s) are combined with emissions from facilities not subject to the provisions of this subpart, the owner or operator shall use either or both of the following procedures to demonstrate compliance with § 60.272(a)(3):

(1) Determine compliance using the combined emissions.

(2) Shut down operation of facilities not subject to the provisions of this subpart during the performance test.

(d) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(e) The owner or operator shall determine compliance with the particulate matter standards in § 60.272 as follows:

(1) Method 5 shall be used for negative-pressure fabric filters and other types of control devices and Method 5D shall be used for positive-pressure fabric filters to determine the particular matter concentration and, if applicable, the volumetric flow rate of the effluent gas. The sampling time and sample volume for each run shall be at least 4 hours and 4.5 dscm (160 dscf) and, when a single EAF is sampled, the sampling time shall include an integral number of heats.

(2) When more then one control device serves the EAF(s) being tested, the concentration of particulate matter shall be determined using the following equation:

$$C_{st} = [\sum_{i=1}^{n} C_{si} Q_{sdi}] / \sum_{i=1}^{n} Q_{sdi}$$

where:
C_{st} = average concentration of particulate matter, mg/dscm (gr/dscf).
C_{si} = concentration of particulate matter from control device "i", mg/dscm (gr/dscf).
n = total number of control devices tested.
Q_{sdi} = volumetric flow rate of stack gas from control device "i", dscm/hr (dscf/hr).

(3) Method 9 and the procedures of § 60.11 shall be used to determine opacity.

(4) To demonstrate compliance with § 60.272(a) (1), (2), and (3), the test runs shall be conducted concurrently, unless inclement weather interferes.

(f) To comply with § 60.274 (c), (f), (g), and (i), the owner or operator shall obtain the information in these paragraphs during the particulate matter runs.

* * * * *

§ 60.276 [Amended]

55. In § 60.276(b), the reference "§ 60.275(g)(2) or (g)(3)" is revised to read "§ 60.275(b)(2) or a combination of (b)(1) and (b)(2)".

§ 60.273a [Amended]

56. Section 60.273a(c) is revised to read as follows:

(c) A continuous monitoring system for the measurement of opacity is not required on modular, multiple-stack, negative-pressure or positive-pressure fabric filters if observations of the opacity of the visible emissions from the

control device are performed by a certified visible emission observer as follows: Visible emission observations are conducted at least once per day when the furnace is operating in the melting and refining period. These observations shall be taken in accordance with Method 9, and, for at least three 6-minute periods, the opacity shall be recorded for any point(s) where visible emissions are observed. Where it is possible to determine that a number of visible emission sites relate to only one incident of the visible emissions, only one set of three 6-minute observations will be required. In this case, Method 9 observations must be made for the site of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272a(a) of this subpart.

57. Section 60.275a is amended by redesignating paragraph (d) as § 60.276a(f), by revising paragraphs (a), (b), (c), (e), and (f), and by adding new paragraph (d) to read as follows:

§ 60.275a Test methods and procedures.

(a) During performance tests required in § 60.8, the owner or operator shall not add gaseous diluents to the effluent gas stream after the fabric in any pressurized fabric filter collector, unless the amount of dilution is separately determined and considered in the determination of emissions.

(b) When emissions from any EAF(s) or AOD vessel(s) are combined with emissions from facilities not subject to the provisions of this subpart but controlled by a common capture system and control device, the owner or operator shall use either or both of the following procedures during a performance test (see also § 60.276a(e)):

(1) Determine compliance using the combined emissions.

(2) Use a method that is acceptable to the Administrator and that compensates for the emissions from the facilities not subject to the provisions of this subpart.

(c) When emission from any EAF(s) or AOD vessel(s) are combined with emissions from facilities not subject to the provisions of this subpart, the owner or operator shall demonstrate compliance with § 60.272(a)(3) based on emissions from only the affected facility(ies).

(d) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(e) The owner or operator shall determine compliance with the particulate matter standards in § 60.272a as follows:

(1) Method 5 shall be used for negative-pressure fabric filters and other types of control devices and Method 5D shall be used for positive-pressure fabric filters to determine the particulate matter concentration and volumetric flow rate of the effluent gas. The sampling time and sample volume for each run shall be at least 4 hours and 4.50 dscm (160 dscf) and, when a single EAF or AOD vessel is sampled, the sampling time shall include an integral number of heats.

(2) When more than one control device serves the EAF(s) being tested, the concentration of particulate matter shall be determined using the following equation:

$$C_{st} = [\Sigma_{i=1}^{n} C_{si} Q_{sdi}] / \Sigma_{i=1}^{n} Q_{sdi}$$

where:

C_{st} = average concentration of particulate matter, mg/dscm (gr/dscf).

C_{si} = concentration of particulate matter from control device "i", mg/dscm (gr/dscf).

n = total number of control devices tested.

Q_{sdi} = volumetric flow rate of stack gas from control device "i", dscm/hr (dscf/hr).

(3) Method 9 and the procedures of § 60.11 shall be used to determine opacity.

(4) To demonstrate compliance with § 60.272a(a) (1), (2), and (3), the test runs shall be conducted concurrently, unless inclement weather interferes.

(f) To comply with § 60.274a (c), (f), (g), and (h), the owner or operator shall obtain the information required in these paragraphs during the particulate matter runs.

* * * * *

§ 60.276a [Amended]

58. In 60.276a(e), the reference "§ 60.275a(h)(2) or (h)(3)" is revised to read "§ 60.275(b)(2) or a combination of (b)(1) and (b)(2)".

59. Section 60.285 is revised to read as follows:

§ 60.285 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures in this section, except as provided in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (f) of this section.

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.282(a) (1) and (3) as follows:

(1) Method 5 shall be used to determine the particulate matter concentration. The sampling time and sample volume for each run shall be at least 60 minutes and 0.90 dscm (31.8 dscf). Water shall be used as the cleanup solvent instead of acetone in the sample recovery procedure. The particulate concentration shall be corrected to the appropriate oxygen concentration according to § 60.284(c)(3).

(2) The emission rate correction factor, integrated sampling and analysis procedure of Method 3 shall be used to determine the oxygen concentration. The gas sample shall be taken at the same time and at the same traverse points as the particulate sample.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(c) The owner or operator shall determine compliance with the particular matter standard in § 60.282(a)(2) as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E = c_s Q_{sd} / BLS$$

where:

E = emission rate of particulate matter, g/kg (lb/ton) of BLS.

C_s = concentration of particulate matter, g/dsm (lb/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

BLS = black liquor solids (dry weight) feed rate, kg/hr (ton/hr).

(2) Method 5 shall be used to determine the particulate matter concentration (C_s) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume shall be at least 60 minutes and 0.90 dscm (31.8 dscf). Water shall be used instead of acetone in the sample recovery.

(3) Process data shall be used to determine the black liquor solids (BLS) feed rate on a dry weight basis.

(d) The owner or operator shall determine compliance with the TRS standards in § 60.283, except § 60.283(a)(1)(vi) and (4), as follows:

(1) Method 16 shall be used to determine the TRS concentration. The TRS concentration shall be corrected to the appropriate oxygen concentration using the procedure in § 60.284(c)(3). The

sampling time shall be at least 3 hours, but no longer than 6 hours.

(2) The emission rate correction factor, integrated sampling and analysis procedure of Method 3 shall be used to determine the oxygen concentration. The sample shall be taken over the same time period as the TRS samples.

(3) When determining whether a furnace is a straight kraft recovery furnace or a cross recovery furnace, TAPPI Method T.624 (incorporated by reference—see § 60.17) shall be used to determine sodium sulfide, sodium hydroxide, and sodium carbonate. These determinations shall be made 3 times daily from the green liquor, and the daily average values shall be converted to sodium oxide (Nac_20) and substituted into the following equation to determine the green liquor sulfidity:

$$GLS = 100\ CNa_2S/(C_{NA^2S} + C_{NaOH} + C_{Na^2CO^3})$$

Where:

GLS = green liquor sulfidity, percent.

C_{Na2S} = concentration of Na_2S as Na_2O, mg/liter (gr/gal).

C_{NaOH} = concentration of NaOH as Na_2O, mg/liter (gr/gal).

C_{Na2CO3} = concentration of Na_2CO_3 as Na_2O, mg/liter (gr/gal).

(e) The owner or operator shall determine compliance with the TRS standards in § 60.283(a)(1)(vi) and (4) as follows:

(1) The emission rate (E) of TRS shall be computed for each run using the following equation:

$$E = C_{TRS}\ F\ Q_{sd}/P$$

where:

E = emission rate of TRS, g/kg (lb/ton) of BLS or ADP.

C_{TRS} = average combined concentration of TRS, ppm.

F = conversion factor, 0.001417 g H_2S/m^3 ppm (0.0844×10^{-6} lb H_2S/ft^3 ppm).

Q_{sd} = volumetric flow rate of stack gas, dscm/hr (dscf/hr).

P = black liquor solids feed or pulp production rate, kg/hr (ton/hr).

(2) Method 16 shall be used to determine the TRS concentration (C_{TRS}).

(3) Method 2 shall be used to determine the volumetric flow rate (Q_{sd}) of the effluent gas.

(4) Process data shall be used to determine the black liquor feed rate or the pulp production rate (P).

(f) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) For Method 5, Method 17 may be used if a constant value of 0.009 g/dscm (0.004 gr/dscf) is added to the results of Method 17 and the stack temperature is no greater than 205 °C (400 °F).

(2) For Method 16, Method 16A or 16B may be used if the sampling time is 60 minutes.

§ 60.292 [Amended]

60. In § 60.292(a)(2), the definition of "Y" is amended by revising the words "Decimal percent" to read "Decimal fraction" and revising the reference "§ 60.296(f)" to read "§ 60.296(b)".

61. Section 60.296 is revised to read as follows:

§ 60.296 Test methods and procedures.

(a) If a glass melting furnace with modified processes is changed to one without modified processes or if a glass melting furnace without modified processes is changed to one with modified processes, the owner or operator shall notify the Administrator at least 60 days before the change is scheduled to occur.

(b) When gaseous and liquid fuels are fired simultaneously in a glass melting furnace, the owner or operator shall determine the applicable standard under § 60.292(a)(2) as follows:

(1) The ratio (Y) of liquid fuel heating value to total (gaseous and liquid) fuel heating value fired in the glass melting furnaces shall be computed for each run using the following equation:

$$Y = (H_l\ L)/H_l\ L + H_g\ G)$$

where:

Y = decimal fraction of liquid fuel heating value to total fuel heating value.

H_l = gross calorific value of liquid fuel, J/kg.

H_g = gross calorific value of gaseous fuel, J/kg.

L = liquid flow rate, kg/hr.

G = gaseous flow rate, kg/hr.

(2) Suitable methods shall be used to determine the rates (L and G) of fuels burned during each test period and a material balance over the glass melting furnace shall be used to confirm the rates.

(3) American Society of Testing and Materials (ASTM) Method D 240–76 (liquid fuels) and D 1826–77 (gaseous fuels) (incorporated by reference—see § 60.17), as applicable, shall be used to determine the gross calorific values.

(c) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(d) The owner or operator shall determine compliance with the particulate matter standards in §§ 60.292 and 60.293 as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E = (c_s\ W_{sd} - A)/P$$

where:

E = emission rate of particulate matter, g/kg.

c_s = concentration of particulate matter, g/dsm.

Q_{sd} = volumetric flow rate, dscm/hr.

A = zero production rate correction
= 227 g/hr for container glass, pressed and blown (soda-lime and lead) glass, and pressed and blown (other than borosilicate, soda-lime, and lead) glass.
= 454 g/hr for pressed and blown (borosilicate) glass, wool fiberglass, and flat glass.

P = glass production rate, kg/hr.

(2) Method 5 shall be used to determine the particulate matter concentration (c_s) and volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 0.90 dscm (31.8 dscf). The probe and filter holder heating system may be set to provide a gas temperature no greater than 177±14 °C (350±25 °F), except under the conditions specified in § 60.293(e).

(3) Direct measurement or material balance using good engineering practice shall be used to determine the amount of glass pulled during the performance test. The rate of glass produced is defined as the weight of glass pulled from the affected facility during the performance test divided by the number of hours taken to perform the performance test.

(4) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

62. Section 60.303 is revised to read as follows:

§ 60.303 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (c) of this section.

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.302 as follows:

(1) Method 5 shall be used to determine the particulate matter concentration and the volumetric flow rate of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 1.70 dscm (60 dscf). The probe and filter holder shall be operated without heaters.

(2) Method 2 shall be used to determine the ventilation volumetric flow rate.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(c) The owner or operator may use the following as alternatives to the

reference methods and procedures specified in this section:

(1) For Method 5, Method 17 may be used.

63. Section 60.335 is revised to read as follows:

§ 60.335 Test methods and procedures.

(a) To compute the nitrogen oxides emissions, the owner or operator shall use analytical methods and procedures that are accurate to within 5 percent and are approved by the Administrator to determine the nitrogen content of the fuel being fired.

(b) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided for in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (f) of this section.

(c) The owner or operator shall determine compliance with the nitrogen oxides and sulfur dioxide standards in §§ 60.332 and 60.333(a) as follows:

(1) The nitrogen oxides emission rate (NO_x) shall be computed for each run using the following equation:

$$NO_x = (NO_{xo})\,(P_r/P_o)^{0.5} e^{19(H_o - 0.00633)}\,(288°K/T_a)^{1.53}$$

where:

NO_x = emission rate of NO_x at 15 percent O_2 and ISO standard ambient conditions, volume percent.

NO_{xo} = observed NO_x concentration, ppm by volume.

P_r = reference combustor inlet absolute pressure at 101.3 kilopascals ambient pressure, mm Hg.

P_o = observed combustor inlet absolute pressure at test, mm Hg.

H_o = observed humidity of ambient air, g H_2O/g air.

e = transcendental constant, 2.718.

T_a = ambient temperature, °K.

(2) The monitoring device of § 60.334(a) shall be used to determine the fuel consumption and the water-to-fuel ratio necessary to comply with § 60.332 at 30, 50, 75, and 100 percent of peak load or at four points in the normal operating range of the gas turbine, including the minimum point in the range and peak load. All loads shall be corrected to ISO conditions using the appropriate equations supplied by the manufacturer.

(3) Method 20 shall be used to determine the nitrogen oxides, sulfur dioxide, and oxygen concentrations. The span values shall be 300 ppm of nitrogen oxide and 21 percent oxygen. The NO_x emissions shall be determined at each of the load conditions specified in paragraph (c)(2) of this section.

(d) The owner or operator shall determine compliance with the sulfur content standard in § 60.333(b) as follows: ASTM D 2880–71 shall be used to determine the sulfur content of liquid fuels and ASTM D 1072–80, D 3031–81, D 4084–82, or D 3246–81 shall be used for the sulfur content of gaseous fuels (incorporated by reference—see § 60.17). The applicable ranges of some ASTM methods mentioned above are not adequate to measure the levels of sulfur in some fuel gases. Dilution of samples before analysis (with verification of the dilution ratio) may be used, subject to the approval of the Administrator.

(e) To meet the requirements of § 60.334(b), the owner or operator shall use the methods specified in paragraphs (a) and (d) of this section to determine the nitrogen and sulfur contents of the fuel being burned. The analysis may be performed by the owner or operator, a service contractor retained by the owner or operator, the fuel vendor, or any other qualified agency.

(f) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) Instead of using the equation in paragraph (b)(1) of this section, manufacturers may develop ambient condition correction factors to adjust the nitrogen oxides emission level measured by the performance test as provided in § 60.8 to ISO standard day conditions. These factors are developed for each gas turbine model they manufacture in terms of combustion inlet pressure, ambient air pressure, ambient air humidity, and ambient air temperature. They shall be substantiated with data and must be approved for use by the Administrator before the initial performance test required by § 60.8. Notices of approval of custom ambient condition correction factors will be published in the Federal Register.

§ 60.343 [Amended]

64. In § 60.343(e), the last sentence is revised to read as follows: "If visible emission observations are made according to paragraph (b) of this section, reports of excess emissions shall be submitted semiannually."

65. Section 60.344 is revised to read as follows:

§ 60.344 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.342(a) as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E = (c_s\, Q_{sd})/PK$$

where:

E = emission rate of particulate matter, kg/Mg (1b/ton) of stone feed.

c_s = concentration of particulate matter, g/dscm (g/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

P = stone feed rate, Mg/hr (ton/hr).

K = conversion factor, 1000 g/kg (453.6 g/lb).

(2) Method 5 shall be used at negative-pressure fabric filters and other types of control devices and Method 5D shall be used as positive-pressure fabric filters to determine the particulate matter concentration (c_s) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 0.90 dscm (31.8 dscf).

(3) The monitoring device of § 60.343(d) shall be used to determine the stone feed rate (P) for each run.

(4) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(c) During the particulate matter run, the owner or operator shall use the monitoring devices in § 60.343(c) (1) and (2) to determine the average pressure loss of the gas stream through the scrubber and the average scrubbing liquid supply pressure.

66. Section 60.374 is revised to read as follows:

§ 60.374 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the lead standards in § 60.372, except § 60.372(a)(4), as follows:

(1) Method 12 shall be used to determine the lead concentration and, if applicable, the volumetric flow rate (Q_{sdn}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(2) When different operations in a three-process operation facility are ducted to separate control devices, the lead emission concentration (C) from the facility shall be determined as follows:

$$C = \left[\sum_{a=1}^{N} (C_a Q_{sda})\right] / \sum_{a=1}^{N} Q_{sda}$$

where:
C = concentration of lead emissions for the entire facility, mg/dscm (gr/dscf).
C_a = concentration of lead emissions from facility "a", mg/dscm (gr/dscf).
Q_{sda} = volumetric flow rate of effluent gas from facility "a", dscm/hr (dscf/hr).
N = total number of control devices to which separate operations in the facility are ducted.

(3) Method 9 and the procedures in § 60.11 shall be used to determine opacity. The opacity numbers shall be rounded off to the nearest whole percentage.

(c) The owner or operator shall determine compliance with the lead standard in § 60.372(a)(4) as follows:

(1) The emission rate (E) from lead oxide manufacturing facility shall be computed for each run using the following equation:

$$E = \left[\sum_{i=1}^{M} C_{Pbi} Q_{sdi}\right] / (P\,K)$$

where:
E = emission rate of lead, mg/kg (lb/ton) of lead charged.
C_{Pbi} = concentration of lead from emission point "i," mg/dscm.
Q_{sdi} = volumetric flow rate of effluent gas from emission point "i," dscm/hr (sdcf/hr).
M = number of emission points in the affected facility.
P = lead feed rate to the facility, kg/hr (ton/hr).
K = conversion factor, 1.0 mg/mg (453,600 mg/lb).

(2) Method 12 shall be used to determine the lead concentration (C_{Pb}) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The average lead feed rate (P) shall be determined for each run using the following equation:

$$P = N\,W/\Theta$$

where:
N = number of lead pigs (ingots) charged.
W = average mass of a pig, kg (ton).
Θ = duration of run, hr.

§ 60.385 [Amended]

67. In § 60.385(c), the words "those measurements recorded" are revised to read "the average obtained".

68. Section 60.386 is revised to read as follows:

§ 60.386 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine complance with the particulate matter standards § 60.382 as follows:

(1) Method 5 or 17 shall be used to determine the particulate matter concentration. The sample volume for each run shall be at least 1.70 dscm (60 dscf). The sampling probe and filter holder of Method 5 may be operated without heaters if the gas stream being sampled is at ambient temperature. For gas streams above ambient temperature, the Method 5 sampling train shall be operated with a probe and filter temperature slightly above the effluent temperature (up to a maximum filter temperature of 121°C (250°F)) in order to prevent water condensation on the filter.

(2) Method 9 and the procedures in § 60.11 shall be used to determine opacity from stack emissions and process fugitive emissions. The observer shall read opacity only when emissions are clearly identified as emanating solely from the affected facility being observed.

(c) To comply with § 60.385(c), the owner or operator shall use the monitoring devices in § 60.3284(a) and (b) to determine the pressure loss of the gas stream through the scrubber and scrubbing liquid flow rate at any time during each particulate matter run, and the average of the three determinations shall be computed.

69. Section 60.404 is revised to read as follows:

§ 60.404 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided for in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.402 as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E = (c_s\,Q_{sd})/(P\,K)$$

where:
E = emission rate of particulate matter, kb/Mg (lb/ton) of phosphate rock feed.
c_s = concentration of particulate matter, g/dscm (g/dscf).
Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).
P = phosphate rock feed rate, Mg/hr (ton/hr).
K = conversion factor, 1000 g/kg (453.6 g/lb).

(2) Method 5 shall be used to determine the particulate matter concentration (c_s) and volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf).

(3) The device of § 60.403(d) shall be used to determine the phosphate rock feed rate (P) for each run.

(4) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(c) To comply with § 60.403(f), if applicable, the owner or operator shall use the monitoring devices in § 60.403(c) (1) and (2) to determine the average pressure loss of the gas stream through the scrubber and the average scrubbing supply pressure during the particulate matter runs.

70. Section 60.424 is revised to read as follows:

§ 60.424 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.422 as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E = (c_s Q_{sd})/(PK)$$

where:

E = emission rate of particulate matter, kg/Mg (lb/ton) of ammonium sulfate produced.

c_s = concentration of particulate matter, g/dscm (g/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

P = production rate of ammonium sulfate, Mg/hr (ton/hr).

K = conversion factor, 1000 g/kg (453.6 g/lb).

(2) Method 5 shall be used to determine the particulate matter concentration (c_s) and volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run shall be at least 60 minutes and 1.50 dscm (53 dscf).

(3) Direct measurement using product weigh scales or computed from material balance shall be used to determine the rate (P) of the ammonium sulfate production. If production rate is determined by material balance, the following equations shall be used:

(i) For synthetic and coke oven by-product ammonium sulfate plants:

$$P = ABCK'$$

where:

A = sulfuric aid flow rate to the reactor/crystallizer averaged over the time period taken to conduct the run, liter/min.

B = acid density (a function of acid strength and temperature), g/cc.

C = acid strength, decimal fraction.

K' = conversion factor, 0.0808 (Mg-min-cc)/(g-hr-liter) [0.0891 (ton-min-cc)/(g-hr-liter)].

(ii) For caprolactam by-product ammonium sulfate plants:

$$P = DEFK''$$

where:

D = total combined feed stream flow rate to the ammonium crystallizer before the point where any recycle streams enter the stream averaged over the time period taken to conduct the test run, liter/min.

E = density of the process stream solution, g/liter.

F = percent mass of ammonium sulfate in the process solution, decimal fraction.

K'' = conversion factor, 6.0×10^{-5} (Mg-min)/(g-hr) [6.614×10^{-5} (ton-min)/(g-hr)].

(3) Method 9 and the procedures in § 60.11 shall be used to determine the opacity.

71. Section 60.474 is revised to read as follows:

§ 60.474 Test methods and procedures.

(a) For saturators, the owner or operator shall conduct performance tests required in § 60.8 as follows:

(1) If the final product is shingle or mineral-surfaced roll roofing, the tests shall be conducted while 106.6-kg (235-lb) shingle is being produced.

(2) If the final product is saturated felt or smooth-surfaced roll roofing, the tests shall be conducted while 6.8-kg (15-lb) felt is being produced.

(3) If the final product is fiberglass shingle, the test shall be conducted while a nominal 100-kg (220-lb) shingle is being produced.

(b) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(c) The owner or operator shall determine compliance with the particulate matter standards in § 60.472 as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$$E = (c_s Q_{sd})/(PK)$$

where:

E = emission rate of particulate matter, kg/Mg.

c_s = concentration of particulate matter, g/dscm (g/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

P = asphalt roofing production rate or asphalt charging rate, Mg/hr (ton/hr).

K = conversion factor, 1000 g/kg [907.2/(g-Mg)/(kg-ton)].

(2) Method 5A shall be used to determine the particulate matter concentration (c_s) and volumetric flow rate (Q_{sd}) of the effluent gas. For a saturator, the sampling time and sample volume for each run shall be at least 120 minutes and 3.00 dscm (106 dscf), and for the blowing still, at least 90 minutes or the duration of the coating blow or non-coating blow, whichever is greater, and 2.25 dscm (79.4 dscf).

(3) For the saturator, the asphalt roofing production rate (P) for each run shall be determined as follows: The amount of asphalt roofing produced on the shingle or saturated felt process lines shall be obtained by direct measurement. The asphalt roofing production rate is the amount produced divided by the time taken for the run.

(4) For the blowing still, the asphalt charging rate (P) shall be computed for each run using the following equation:

$$P = (Vd)/(K'\theta)$$

where:

P = asphalt charging rate to blowing still, Mg/hr (ton/hr).

V = volume of asphalt charged, m^3 (ft^3).

d = density of asphalt, kg/m^3 (llb/ft^3).

K' = conversion factor, 1000 kg/Mg (200 lb/ton).

θ = duration of test run, hr.

(i) The volume (V) of asphalt charged shall be measured by any means accurate to within 10 percent.

(ii) The density (d) of the asphalt shall be computed using the following equation:

$$d = K''(1056.1 - 0.6176\ °C)$$

where:

°C = temperature at the start of the blow, °C.

K'' = 1.0 [0.06243 (lb − m^3)/(ft^3 − kg)].

(5) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(d) The Administrator will determine compliance with the standards in § 60.472(a)(3) by using Method 22, modified so that readings are recorded every 15 seconds for a period of consecutive observations during representative conditions (in accordance with § 60.8(c)) totaling 60 minutes. A performance test shall consist of one run.

(e) The owner or operator shall use the monitoring device in § 60.473 (a) or (b) to monitor and record continuously the temperature during the particulate matter run and shall report the results to the Administrator with the performance test results.

(f) If at a later date the owner or operator believes the emission limits in § 60.472 (a) and (b) are being met even though the temperature measured in accordance with § 60.473 (a) and (b) is exceeding that measured during the performance test, he may submit a written request to the Administrator to repeat the performance test and procedure outlined in paragraph (c) of this section.

(g) If fuel oil is to be used to fire an afterburner used to control emissions from a blowing still, the owner or operator may petition the Administrator in accordance with § 60.11(e) of the General Provisions to establish an opacity standard for the blowing still that will be the opacity standard when fuel oil is used to fire the afterburner. To obtain this opacity standard, the owner or operator must request the Administrator to determine opacity during an initial, or subsequent, performance test when fuel oil is used to fire the afterburner. Upon receipt of the results of the performance test, the Administrator will make a finding concerning compliance with the mass standard for the blowing still. If the Administrator finds that the facility was

in compliance with the mass standard during the performance test but failed to meet the zero opacity standard, the Administrator will establish and promulgate in the **Federal Register** an opacity standard for the blowing still that will be the opacity standard when fuel oil is used to fire the afterburner. When the afterburner is fired with natural gas, the zero percent opacity remains the applicable opacity standard.

72. Section 60.485 is revised to read as follows:

§ 60.485 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall determine compliance with the standards in §§ 60.482, 60.483, and 60.484 as follows:

(1) Method 21 shall be used to determine the presence of leaking sources. The instrument shall be calibrated before use each day of its use by the procedures specified in Method 21. The following calibration gases shall be used:

(i) Zero air (less than 10 ppm of hydrocarbon in air); and

(ii) A mixture of methane or n-hexane and air at a concentration of about, but less than, 10,000 ppm methane or n-hexane.

(c) The owner or operator shall determine compliance with the no detectable emission standards in §§ 60.482–2(e), 60.482–3(i), 60.482–4, 60.482–7(f), and 60.482–10(e) as follows:

(1) The requirements of paragraph (b) shall apply.

(2) Method 21 shall be used to determine the background level. All potential leak interfaces shall be traversed as close to the interface as possible. The arithmetic difference between the maximum concentration indicates by the instrument and the background level is compared with 500 ppm for determining compliance.

(d) The owner or operator shall test each piece of equipment unless he demonstrates that a process unit is not in VOC series, i.e., that the VOC content would never be reasonably expected to exceed 10 percent by weight. For purposes of this demonstration, the following methods and procedures shall be used:

(1) Procedures that conform to the general methods in ASTM E–260, E–168, E–169 (incorporated by reference—see § 60.17) shall be used to determine the percent VOC content in the process fluid that is contained in or contacts a piece of equipment.

(2) Organic compounds that are considered by the Administrator to have negligible photochemical reactivity may be excluded from the total quantity of organic compounds in determining the VOC content of the process fluid.

(3) Engineering judgment may be used to estimate the VOC content, if a piece of equipment had not been shown previously to be in service. If the Administrator disagrees with the judgment, paragraphs (d) (1) and (2) of this section shall be used to resolve the disagreement.

(e) The owner or operator shall demonstrate that an equipment is in light liquid service by showing that all the following conditions apply:

(1) The vapor pressure of one or more of the components is greater than 0.3 kPa at 20 °C. Standard reference texts or ASTM D–2879 (incorporated by reference—see § 60.17) shall be used to determine the vapor pressures.

(2) The total concentration of the pure components having a vapor pressure greater than 0.3 kPa at 20 °C is equal to or greater than 20 percent by weight.

(3) The fluid is a liquid at operating conditions.

(f) Samples used in conjunction with paragraphs (d), (e), and (g) shall be representative of the process fluid that is contained in or contacts the equipment or the gas being combusted in the flare.

(g) The owner or operator shall determine compliance with the standards of flares as follows:

(1) Method 22 shall be used to determine visible emissions.

(2) A thermocouple or any other equivalent device shall be used to monitor the presence of a pilot flame in the flare.

(3) The maximum permitted velocity (V_{max}) for air-assisted flares shall be computed using the following equation:

$$V_{max} = 8.706 + 0.7084\ H_T$$

where:

V_{max} = maximum permitted velocity, m/sec.

H_T = net heating value of the gas being combusted, MJ/scm.

(4) The net heating value (H_T) of the gas being combusted in a flare shall be computed as follows:

$$H_T = K \sum_{i=1}^{n} C_i H_i$$

where:

K = conversion constant, 1.740×10^{-7} [(g-mole)(MJ)]/[(ppm)(scm)(kcal).

C_i = concentration of sample component "i", ppm.

H_i = net heat of combustion of sample component "i" at 25 °C and 760 mm Hg, kcal/g-mole.

(5) Method 18 and ASTM D 2504–67 (incorporated by reference—see § 60.17) shall be used to determine the concentration of sample component "i."

(6) ASTM D 2382–76 (incorporated by reference—see § 60.17) shall be used to determine the net heat of combustion of component "i" if published values are not available or cannot be calculated.

(7) Method 2, 2A, 2C, or 2D, as appropriate, shall be used to determine the actual exit velocity of a flare. If needed, the unobstructed (free) cross-sectional area of the flare tip shall be used.

§ 60.502 [Amended]

73. In § 60.502(h), the reference "§ 60.503(b)" is revised to read "§ 60.503(d)".

74. Section 60.503 is revised to read as follows:

§ 60.503 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b). The three-run requirement of § 60.8(f) does not apply to this subpart.

(b) Immediately before the performance test required to determine compliance with § 60.502 (b), (c), and (h), the owner or operator shall use Method 21 to monitor for leakage of vapor all potential sources in the terminal's vapor collection system equipment while a gasoline tank truck is being loaded. The owner or operator shall repair all leaks with readings of 10,000 ppm (as methane) or greater before conducting the performance test.

(c) The owner or operator shall determine compliance with the standards in § 60.502 (b) and (c) as follows:

(1) The performance test shall be 6 hours long during which at least 300,000 liters of gasoline is loaded. If this is not possible, the test may be continued the same day until 300,000 liters of gasoline is loaded or the test may be resumed the next day with another complete 6-hour period. In the latter case, the 300,000-liter criterion need not be met. However, as much as possible, testing should be conducted during the 6-hour period in

which the highest throughput normally occurs.

(2) If the vapor processing system is intermittent in operation, the performance test shall begin at a reference vapor holder level and shall end at the same reference point. The test shall include at least two startups and shutdowns of the vapor processor. If this does not occur under automatically controlled operations, the system shall be manually controlled.

(3) The emission rate (E) of total organic compounds shall be computed using the following equation:

$$E = K\Sigma_{i=1}^{n} (V_{esi} C_{ei}) / (L\ 10^6)$$

where:

E = emission rate of total organic compounds, mg/liter of gasoline loaded.
V_{esi} = volume of air-vapor mixture exhausted at each interval "i", scm.
C_{ei} = concentration of total organic compounds at each interval "i", ppm.
L = total volume of gasoline loaded, liters.
n = number of testing intervals.
i = emission testing interval of 5 minutes.
K = density of calibration gas, 1.83×10^6 for propane and 2.41×10^6 for butane, mg/scm.

(4) The performance test shall be conducted in intervals of 5 minutes. For each interval "i", readings from each measurement shall be recorded, and the volume exhausted (V_{esi}) and the corresponding average total organic compounds concentration (C_{ei}) shall be determined. The sampling system response time shall be considered in determining the average total organic compounds concentration corresponding to the volume exhausted.

(5) The following methods shall be used to determine the volume (V_{esi}) air-vapor mixture exhausted at each interval:

(i) Method 2B shall be used for combustion vapor processing systems.

(ii) Method 2A shall be used for all other vapor processing systems.

(6) Method 25A or 25B shall be used for determining the total organic compounds concentration (C_{ei}) at each interval. The calibration gas shall be either propane or butane. The owner or operator may exclude the methane and ethane content in the exhaust vent by any method (e.g., Method 18) approved by the Administrator.

(7) To determine the volume (L) of gasoline dispensed during the performance test period at all loading racks whose vapor emissions are controlled by the processing system being tested, terminal records or readings from gasoline dispensing meters at each loading rack shall be used.

(d) The owner or operator shall determine compliance with the standard in § 60.502(h) as follows:

(1) A pressure measurement device (liquid manometer, magnehelic gauge, or equivalent instrument), capable of measuring up to 500 mm of water gauge pressure with ±2.5 mm of water precision, shall be calibrated and installed on the terminal's vapor collection system at a pressure tap located as close as possible to the connection with the gasoline tank truck.

(2) During the performance test, the pressure shall be recorded every 5 minutes while a gasoline truck is being loaded; the highest instantaneous pressure that occurs during each loading shall also be recorded. Every loading position must be tested at least once during the performance test.

§ 60.643 [Amended]

75. Section 60.643(b) is revised as follows:

(b) The emission reduction efficiency (R) achieved by the sulfur reduction technology shall be determined using the procedures in § 60.644(c)(1).

§ 60.645 [Removed and Reserved]

76. Section 60.645 is removed and reserved, and § 60.644 is revised to read as follows:

§ 60.644 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in paragraph § 60.8(b).

(b) During a performance test required by § 60.8, the owner or operator shall determine the minimum required reduction efficiencies (Z) of SO_2 emissions as required in § 60.642 (a) and (b) as follows:

(1) The average sulfur feed rate (X) shall be computed as follows:

$$X = K\ Q_a\ Y$$

where:

X = average sulfur feed rate, long ton/day.
Q_a = average volumetric flow rate of acid gas from sweetening unit, dscf/day.
Y = average H_2S concentration in acid gas feed from sweetening unit, percent by volume.

K = (32 lb S/lb-mole)/[(100%)(385.36 dscf/lb-mole)(2240 lb/long ton)]
$= 3.707 \times 10^{-7}$

(2) The continuous readings from the process flowmeter shall be used to determine the average volumetric flow rate (Q_a) in dscf/day of the acid gas from the sweetening unit for each run.

(3) The Tutwiler procedure in § 60.648 or a chromatographic procedure following ASTM E–260 (incorporated by reference—see § 60.17) shall be used to determine the H_2S concentration in the acid gas feed from the sweetening unit. At least one sample per hour (at equally spaced intervals) shall be taken during each 4-hour run. The arithmetic mean of all samples shall be the average H_2S concentration (Y) on a dry basis for the run. By multiplying the result from the Tutwiler procedure by 1.62×10^{-3}, the units gr/100 scf are converted to volume percent.

(4) Using the information from paragraphs (b) (1) and (3), Tables 1 and 2 shall be used to determine the required initial (Z_i) and continuous (Z_c) reduction efficiencies of SO_2 emissions.

(c) The owner or operator shall determine compliance with the SO_2 standards in § 60.642 (a) or (b) as follows:

(1) The emission reduction efficiency (R) achieved by the sulfur recovery technology shall be computed for each run using the following equation:

$$R = (100\ S)/(S+E)$$

(2) The level indicators or manual soundings shall be used to measure the liquid sulfur accumulation rate in the product storage tanks. Readings taken at the beginning and end of each run, the tank geometry, sulfur density at the storage temperature, and sample duration shall be used to determine the sulfur production rate (S) in kg/hr for each run.

(3) The emission rate (E) of sulfur shall be computed for each run as follows:

$$E = C_e\ Q_{sd}/K$$

where:

C_e = concentration of sulfur equivalent (SO_2 + TRS), g/dscm.
Q_{sd} = volumetric flow rate of effluent gas, dscm/hr.
K = conversion factor, 1000 g/kg.

(4) The concentration (C_e) of sulfur equivalent shall be the sum of the SO_2 and TRS concentrations, after being converted to sulfur equivalents. For each run and each of the test methods specified in this paragraph (c) of this section, the sampling time shall be at least 4 hours. Method 1 shall be used to select the sampling site. The sampling point in the duct shall be at the centroid

of the cross-section if the area is less than 5 m^2 (54 ft^2) or at a point no closer to the walls than 1 m (39 in.) if the cross-sectional area is 5 m^2 or more, and the centroid is more than 1 m (39 in.) from the wall.

(i) Method 6 shall be used to determine the SO_2 concentration. Eight samples of 20 minutes each shall be taken at 30-minute intervals. The arithmetic average in mg/dscm shall be the concentration for the run. The concentration in mg/dscm shall be multiplied by 0.5 to convert the results to sulfur equivalent.

(ii) Method 15 shall be used to determine the TRS concentration from reduction-type devices or where the oxygen content of the effluent gas is less than 1.0 percent by volume. The sampling rate shall be at least 3 liters/min (0.1 ft^3/min) to insure minimum residence time in the sample line. Sixteen samples shall be taken at 15-minute intervals. The arithmetic average of all the samples shall be the concentration for the run. The concentration in ppm TRS as H_2S shall be multiplied by 1.352×10^{-6} to convert the results to sulfur equivalent.

(iii) Method 16A shall be used to determine the TRS concentration from oxidation-type devices or where the oxygen content of the effluent gas is greater than 1.0 percent by volume. Eight samples of 20 minutes each shall be taken at 30-minute intervals. The arithmetic average shall be the concentration for the run. The concentration in ppm TRS as H_2S shall be multiplied by 1.352×10^{-6} to convert the results to sulfur equivalent.

(iv) Method 2 shall be used to determine the volumetric flow rate of the effluent gas. A velocity traverse shall be conducted at the beginning and end of each run. The arithmetic average of the two measurements shall be used to calculate the volumetric flow rate (Q_{sd}) for the run. For the determination of the effluent gas molecular weight, a single integrated sample over the 4-hour period may be taken and analyzed or grab samples at 1-hour intervals may be taken, analyzed, and averaged. For the moisture content, two samples of at least 0.10 dscm (0.35 dscf) and 10 minutes shall be taken at the beginning of the 4-hour run and near the end of the time period. The arithmetic average of the two runs shall be the moisture content for the run.

(d) To comply with § 60.646(d), the owner or operator shall obtain the information required by using the monitoring devices in paragraph (b) of (c) of this section.

§ 60.646 [Amended]

77. In § 60.646(a)(2), the reference "§ 60.645(a)(8)" is revised to read "§ 60.644(b)(1)".

78. In § 60.646(a)(4), the reference "§ 60.644(a)(4)" is revised to read "§ 60.644(b)(3)".

79. In § 60.646(d), the reference "§ 60.643(b)" is revised to read "§ 60.644(c)(1)".

80. Section 60.675 is revised to read as follows:

§ 60.675 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (e) of this section.

(b) The owner or operator shall determine compliance with the particulate matter standards in § 60.272(a) as follows:

(1) Method 5 or Method 17 shall be used to determine the particulate matter concentration. The sample volume shall be at least 1.70 dscm (60 dscf). For Method 5, if the gas stream being sampled is at ambient temperature, the sampling probe and filter may be operated without heaters. If the gas stream is above ambient temperature, the sampling probe and filter may be operated at a temperature high enough, but no higher than 121 °C (250 °F), to prevent water condensation on the filter.

(2) Method 9 and the procedures in § 60.11 shall be used to determine opacity.

(c) In determining compliance with the particulate matter standards in § 60.672 (b) and (c), the owner or operator shall use Method 9 and the procedures in § 60.11, with the following additions:

(1) The minimum distance between the observer and the emission source shall be 4.57 meters (15 feet).

(2) The observer shall, when possible, select a position that minimizes interference from other fugitive emission sources (e.g., road dust). The required observer position relative to the sun (Method 9, Section 2.1) must be followed.

(3) For affected facilities using wet dust suppression for particulate matter control, a visible mist is sometimes generated by the spray. The water mist must not be confused with particulate matter emissions and is not to be considered a visible emission. When a water mist of this nature is present, the observation of emissions is to be made at a point in the plume where the mist is no longer visible.

(d) In determining compliance with § 60.672(e), the owner or operator shall use Method 22 to determine fugitive emissions. The performance test shall be conducted while all affected facilities inside the building are operating. The performance test for each building shall be at least 75 minutes in duration, with each side of the building and the roof being observed for at least 15 minutes.

(e) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) For the method and procedure of paragraph (c) of this section, if emissions from two or more facilities continuously interfere so that the opacity of fugitive emissions from an individual affected facility cannot be read, either of the following procedures may be used:

(i) Use for the combined emission stream the highest fugitive opacity standard applicable to any of the individual affected facilities contributing to the emissions stream.

(ii) Separate the emissions so that the opacity of emissions from each affected facility can be read.

(f) To comply with § 60.676(d), the owner or operator shall record the measurements as required § 60.676(c) using the monitoring devices in § 60.674 (a) and (b) during each particulate matter run and shall determine the averages.

§ 60.676 [Amended]

81. In § 60.676(d), the words "those measurements recorded" are revised to read "the averaged determined".

82. Section 60.685 is revised to read as follows:

§ 60.685 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in Appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) The owner or operator shall conduct performance tests while the product with the highest loss on ignition (LOI) expected to be produced by the affected facility is being manufactured.

(c) The owner or operator shall determine compliance with the particulate matter standard in § 60.682 as follows:

(1) The emission rate (E) of particulate matter shall be computed for each run using the following equation:

$E = (C_t\ Q_{sd})/(P_{avg}\ K)$

where:

E = emission rate of particulate matter, kg/Mg (lb/ton).

C_t = concentration of particulate matter, g/dscm (g/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

P_{avg} = average glass pull rate, Mg/hr (ton/hr).

K = conversion factor, 1000 g/kg (453.6 g/lb).

(2) Method 5E shall be used to determine the particulate matter concentration (C_t) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume shall be at least 120 minutes and 2.55 dscm (90 dscf).

(3) The average glass pull rate (P_{avg}) for the manufacturing line shall be the arithmetic average of three glass pull rate (P_i) determinations taken at intervals of at least 30 minutes during each run.

The individual glass pull rates (P_i) shall be computed using the following equation:

$P_i = K'\ L_s\ W_m\ M\ [1.0 - (LOI/100)]$

where:

P_i = glass pull rate at interval "i", Mg/hr (ton/hr).

L_s = line speed, m/min (ft/min).

W_m = trimmed mat width, m (ft).

M = mat gram weight, g/m^2 (lb/ft^2).

LOI = loss on ignition, weight percent.

K' = conversion factor, 6×10^{-5} (min-Mg)/(hr-g) [3×10^{-2} (min-ton)/(hr-lb)].

(i) ASTM Standard Test Method D2584–68 (Reapproved 1979) (incorporated by reference—see § 60.17), shall be used to determine the LOI for each run.

(ii) Line speed (L_s), trimmed mat width (W_m), and mat gram weight (M) shall be determined for each run from the process information or from direct measurements.

(d) To comply with § 60.684(d), the owner or operator shall record measurements as required in § 60.684 (a) and (b) using the monitoring devices in § 60.683 (a) and (b) during the particulate matter runs.

[FR Doc. 89–3064 Filed 2–13–89; 8:45 am]

BILLING CODE 6560–50–M

Proposed Rules

Federal Register
Vol. 54, No. 29
Tuesday, February 14, 1989

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 58

[DA-89-006]

Grading and Inspection, General Specifications for Approved Plants and Standards for Grades of Dairy Products; Proposed Increase in Fees and Other Administrative Changes

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service proposes to increase the fees charged for services provided under the dairy inspection and grading program. The program is a voluntary, user-fee program conducted under the authority of the Agricultural Marketing Act of 1946, as amended.

This action would increase the hourly rate for all services and eliminate the separate hourly rate for "continuous" nonresident services. The major proposed fees are $32.00 per hour for resident services and $36.00 per hour for nonresident services.

The fee changes are needed to offset an increase in operating expenses, including a 4.1 percent increase in Federal salaries, a 28.3 percent increase in the Agency's Federal Employees Health Benefits Program contributions, and a 10 percent increase in travel costs (mileage and per diem). An increase is also needed to offset declining revenues resulting from a major reduction in grading activities for Government purchases of surplus dairy products.

DATE: Comments must be received on or before March 16, 1989.

ADDRESS: Comments should be sent to: Office of the Director, USDA/AMS/Dairy Division, Room 2968-S, P.O. Box 96456, Washington, DC 20090-6465.

FOR FURTHER INFORMATION CONTACT: Lynn G. Boerger, USDA/AMS/Dairy Division, Dairy Grading Section, Room 2750-S., P.O. Box 96456, Washington, DC 20090-6456, (202) 382-9381.

SUPPLEMENTARY INFORMATION: This proposed rule has been reviewed under USDA guidelines implementing Executive Order 12291 and Departmental Regulation 1512-1 and has been classified a "non-major" rule under the criteria contained therein.

The proposed rule also has been reviewed in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Administrator, Agricultural Marketing Service, has determined that if promulgated it would not have a significant economic impact on a substantial number of small entities. The proposed changes will not significantly affect the cost per unit for grading and inspection services. The Agricultural Marketing Service estimates that overall this rule will yield an additional $400,000 during fiscal year 1989. The Agency does not believe the increases will affect competition. Furthermore, the dairy grading program is a voluntary program.

The Agricultural Marketing Act of 1946, as amended, authorizes the Secretary of Agriculture to provide Federal dairy grading and inspection services that facilitate marketing and help consumers obtain the quality of dairy products they desire. The Act provides that reasonable fees be collected from the users of the services to cover as nearly as practicable the cost of maintaining the program.

Although the hourly fee rates under the program were increased on June 19, 1988, the changes were based on workload levels experienced during FY 1987 and did not take into account the significant and unforeseen drop in workload during the last half of 1988. Also, the changes did not include the recent increase in operating costs caused by the recent 4.1 percent increase in Federal employee salaries, the 28.3 percent increase in the Agency's contribution to the Federal Employee Health Benefits Program, and a travel cost increase of 10 percent. Because of inadequate grading revenues during FY 1988, the operating reserve of over $2 million was depleted. In fact, drastic program adjustments to reduce costs were taken to prevent the program from realizing a negative reserve balance of approximately $600,000 in FY 1988. During FY 1989, further decreases in workload are expected for the nonresident program as a result of a projected additional 40 percent reduction in purchases of surplus products under the dairy price support program.

Since the last fee increase, a major restructuring of the grading and inspection program was initiated to bring staffing and operational activities in line with the reduced workload. The adjustments included a 39 percent reduction in staff, closure of one of four regional offices, reductions in travel, deferred computer purchases, and a reduction in management overhead costs.

In spite of these extensive cost-cutting measures, the higher costs for salaries, health benefits, and travel and the continuing decline in revenues because of a lower workload are causing the program further financial problems. Without the proposed fee increases a negative reserve balance of over $400,000 is projected by the end of FY 1989. Without fee increases, revenues and costs for FY 1989 are projected to be $6 million and $6.4 million respectively. The fee increases would reverse this situation and would lead to the desired 4-month operating reserve of $2.3 million by the end of FY 1991. With the proposed fee increases both revenues and costs for FY 1989 are estimated to be $6.4 million.

This document proposes the following changes in the regulations implementing the dairy inspection and grading program:

1. Increase the hourly fees for resident services from $24.00 to $32.00 and increase the fees for nonresident services from $33.00 to $36.00.

The resident hourly rate is charged to those who are using grading and inspection services performed by an inspector or grader assigned to a plant on a continuous year-round, resident basis. The nonresident hourly rate is charged to users who request an inspector or grader for particular dates and amounts of time to perform specific grading or inspection activities. These users of nonresident services are charged for the amount of time required to perform the task and undertake related travel, plus travel costs.

2. Eliminate the fee for continuous nonresident service.

The continuous nonresident rate, which is higher than the nonresident rate, applies to users who have

contracts with the Agricultural Stabilization and Conservation Service and who request service in 40-hour week increments. This rate was intended to include not only the cost for inplant inspection and grading services but the related travel costs as well. This rate is being discontinued because the Agency cannot accurately establish a rate for all users since the Agency has no control over where the contracts are awarded and thus cannot project under the current workload and staffing level the average travel costs that must be built into the fee rate. Under the change, the user would be charged the nonresident rate plus travel costs. This change will enable the agency to recover the cost of providing service by making charges for travel only when the cost is incurred and charging only those users who required the travel.

3. Increase the fees for laboratory services.

Effective January 15, 1989, the Agency's Commodity Scientific Support Division (CSSD) assumed administrative control of all dairy laboratory services supporting the grading program except those performed in conjunction with the resident services. The resident services laboratory functions will receive oversight and audit of their technical procedures by CSSD. The Dairy Division will continue to bill applicants for laboratory services.

To reflect the additional costs of providing laboratory services that stem from increased salaries and other related employee costs, the hourly rate for laboratory services is being increased from $24.00 to $28.00. The charges for specifically listed tests are being increased to reflect the change in the hourly rate. Tests that are no longer performed by the laboratory are being deleted from the list of charges.

4. Miscellaneous nonsubstantive changes are proposed for clarity in several of the provisions. These changes include the deletion of the definition of "Continuous nonresident service."

Timing of Proposed Fee Increases

It is contemplated that the proposed fees will be implemented on an expedited basis. The seriousness of the revenue shortfall warrants putting the higher fees into effect as quickly as possible. Accordingly, it is anticipated that the fee increases, if adopted, would become effective upon publication or very soon after publication of the final rule in the **Federal Register** and that postponing the effective date of the final rule until 30 days after publication in the **Federal Register** would not occur. An approximate effective date would be April 9, 1989.

All written submissions made pursuant to this notice will be available for public inspection at the Dairy Division, Agricultural Marketing Service, USDA, Washington, DC, during regular business hours.

List of Subjects in 7 CFR Part 58

Food grades and standards, Dairy products.

For the reasons set forth in the preamble, it is proposed that 7 CFR Part 58, Subpart A, be amended as follows:

PART 58—[AMENDED]

Subpart A—Regulations Governing the Inspection and Grading Services of Manufactured or Processed Dairy Products

1. The authority citation for Part 58 continues to read as follows:

Authority: Secs. 202–208, 60 Stat. 1087, as amended; 7 U.S.C. 1621–1627, unless otherwise noted.

§ 58.1 [Amended]

2. Section 58.1 is amended to remove the definition of the term "Continuous nonresident service."

3. Section 58.41 is revised to read as follows:

§ 58.41 Fees for additional copies of certificates.

Additional copies of any inspection or grading certificates (including takeoff certificates), other than those provided for in § 58.20 may be supplied to any interested party upon payment of a fee based on time required to prepare such copies at the hourly rate specified in § 58.43.

4. Section 58.43 is revised to read as follows:

§ 58.43 Fees for inspection, grading, and sampling.

Except as otherwise provided in this section and §§ 58.38 through 58.46, charges shall be made for inspection, grading, and sampling service at the hourly rate of $36.00 for service performed between 6 a.m. and 6 p.m., and $39.60 for service performed between 6 p.m. and 6 a.m., for the time required to perform the service calculated to the nearest 15-minute period, including the time required for preparation of certificates and reports and the travel time of the inspector or grader in connection with the performance of the service. A minimum charge of one-half hour shall be made for service pursuant to each request or certificate issued.

5. Section 58.44 is revised to read as follows:

§ 58.44 Fees for laboratory analysis.

Except as otherwise provided in this section, charges shall be made for laboratory analysis at the hourly rate of $28.00 for the time required to perform the service. A minimum charge of one-half hour shall be made for service pursuant to each request or certificate issued. The following minimum rates per test, which are based on the average time required to perform the test specified, shall apply unless the actual time required to perform the test is greater than the minimum set forth:

(a) Dry milk and related products:	
Total fat (ether extraction)	$5.07
Moisture	3.91
Titratable acidity	1.92
Solubility index	2.63
Scorched particles	2.63
Bacterial plate count	5.07
Bacterial direct microscopic count	7.58
Whey protein nitrogen	12.77
Vitamin A	25.32
Alkalinity of ash	28.00
Dispersibility	12.77
Coliform (solid media)	5.07
Salmonella	28.00
Phosphatase	28.00
Oxygen	15.17
Density	1.92
Antibiotic	9.39
(b) Condensed milk and related products:	
Fat (fat extraction)	7.58
Total solids	5.07
Sugar (sucrose)	28.00
Net weight (per can)	3.09
(c) Cheese and related products:	
Moisture	5.07
Moisture in duplicate	7.58
Total fat (ether extraction)	8.93
Moisture and fat (dry basis) complete	14.00
Meltability (Process cheese)	5.07
(d) Butter and related products:	
Moisture	5.07
Fat	10.09
Salt	5.07
Complete Kohman analysis	15.17
Fat and moisture (same sample)	12.77
Peroxide value	28.00
Free fatty acid	12.77
Yeast and mold	6.42
Proteolytic count	6.42
(e) Meat and related products: Fat (hamburger)	13.13

6. Section 58.45 is revised to read as follows:

§ 58.45 Fees for continuous resident service.

Irrespective of the fees and charges provided in §§ 58.39 and 58.43, charges for the inspector(s) and grader(s) assigned to a continuous resident program shall be made at the rate of $32.00 per hour for services performed

during the assigned tour of duty. Charges for service performed in excess of the assigned tour of duty shall be made at a rate of 1½ times the rate stated in this section.

§ 58.47 [Removed]

7. Section 58.47 is removed.

Signed at Washington, DC on February 10, 1989.

J. Patrick Boyle,

Administrator, Agricultural Marketing Service.

[FR Doc. 89-3563 Filed 2-13-89; 8:45 am]

BILLING CODE 3410-02-M

Food Safety and Inspection Service

9 CFR Parts 307 and 310

[Docket No. 83-008R]

Streamlined Inspection System; Cattle and Staffing Standards

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: On November 30, 1988, the Food Safety and Inspection Service (FSIS) published a proposed rule to amend the Federal meat inspection regulations to establish a new system of post-mortem inspection for cattle. This method would be known as the "Streamlined Inspection System-Cattle" (SIS-Cattle) when the system is operated without a slaughter partial quality control (PQC) program or as the "Streamlined Inspection System/Partial Quality Control-Cattle" (SIS/PQC-Cattle) when the system is operated in conjunction with a slaughter PQC program.

The comment period closed on January 30, 1989. FSIS has received requests to reopen the comment period so that additional information may be provided to FSIS. FSIS is granting these requests and reopening the comment period for an additional 90 days.

DATE: Comments must be received on or before May 15, 1989.

ADDRESS: Written comment to: Policy Office, ATTN: Linda Carey, FSIS Hearing Clerk, Room 3171 South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Dr. Jill Hollingsworth, Director, Slaughter Inspection Standards and Procedures Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-3219.

SUPPLEMENTARY INFORMATION: On November 30, 1988, FSIS published a proposed rule (53 FR 48262) to amend the Federal meat inspection regulations to establish a new system of post-mortem inspection for cattle. This method would be known as the "Streamlined Inspection System-Cattle" (SIS-Cattle) when the system is operated without a slaughter partial quality control (PQC) program or as the "Streamlined Inspection System/Partial Quality Control-Cattle" (SIS/PQC-Cattle) when the system is operated in conjunction with a slaughter PQC program. An approved slaughter PQC program would be required for establishments operating at slaughter rates greater than 275 head per hour. The PQC program would be optional for establishments that operate at slaughter rates of 275 head per hour or less. This SIS inspection system would be implemented in all establishments that slaughter cattle (steers and heifers only) and have an on-line staffing requirement of three inspectors or more.

SIS-Cattle would incorporate modifications of the present cattle post-mortem inspection procedure and combine viscera and carcass inspection stations so that inspection is completed at the viscera table. The proposed rule would also establish Finished Product Standards (FPS) for carcasses, heads and tongues and standards for other edible byproducts. The FPS program uses the cumulative sum (CUSUM) which is a statistical concept used by the establishment and monitored by the inspector. Compliance is determined based on sample results collected over a period of time. These standards would be used to evaluate the wholesomeness and acceptability of products.

This proposed rule would also establish staffing standards for the inspection of steers and heifers based on work measurement data and faculity requirements.

All establishments under the SIS system would be responsible for proper head, tongue, viscera, and carcass presentation. The operation of a PQC program for the presentation standards would be an option for SIS-Cattle establishments. Establishments operating under SIS/PQC-Cattle would include presentation standards in their PQC program.

The SIS-Cattle system would also require establishment employees to palpate and present the tongue, incise the cheek muscles, and open the heart for inspection personnel.

Additionally, the establishment would be responsible for the removal from carcasses of defects that are the result of the handling, slaughtering, or dressing operations and the removal of designated trimmable defects as listed in the beef carcass finished product standards program.

This system would provide an increase in slaughter method and personnel efficiency, as well as provide an increase in product yield, while still providing consumers with wholesome and otherwise unadulterated products. These gains have been demonstrated and documented in four pilot cattle establishments.

FSIS has received requests to reopen the comment period so that additional information can be gathered and submitted to FSIS. FSIS is interested in receiving additional information and is, therefore, reopening the comment period for an additional 90 days.

Done at Washington, DC on February 9, 1989.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 89-3448 Filed 2-13-89; 8:45 am]

BILLING CODE 3410-DM-M

FEDERAL ELECTION COMMISSION

11 CFR Parts 110, 113, 114 and 116

[Notice 1989-3]

Debts Owed by Candidates and Political Committees

AGENCY: Federal Election Commission.

ACTION: Additional public hearing date.

SUMMARY: On December 6, 1988, the Commission published proposed rules on debts owed by candidates and political committees. *See* 53 FR 49193. That notice announced that a public hearing would be held on February 15, 1989 at 10:00 a.m. The Commission has decided to schedule an additional date, February 16, 1989 for further testimony on the issues presented in the rulemaking.

DATES: The Commission will hold a hearing on February 15, 1989 at 10:00 a.m. and on February 16, 1989 at 2:00 p.m.

ADDRESSES: The hearing will be held at the Federal Election Commission, Ninth Floor Hearing Room, 999 E Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463, (202) 376-5690 or (800) 424-9530.

Dated: February 8, 1989.

Danny L. McDonald,

Chairman, Federal Election Commission.

[FR Doc. 89-3425 Filed 2-13-89; 8:45 am]

BILLING CODE 6715-01-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Parts 545, 546, 561, 563, 563b, 563c, 570, and 571

[No. 89-104]

Conforming and Technical Amendments To the Classification Of Assets System

Date: February 2, 1989.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as the operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC"), is proposing to amend tis regulations by removing references to scheduled items and specified assets to ensure its regulations conform with the classification of assets system mandated by the Competitive Equality Banking Act of 1987 ("CEBA").

DATE: Comments must be received on or before March 16, 1989.

ADDRESS: Please send comment letters to the Director Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552. Comment letters will be available for inspection at 801 17th Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Jeffrey R. Williams, Attorney-Adviser, (202) 377-6559, Regulations and Legislation Divison, Office of General Counsel, 1700 G Street NW., Washington, DC 20552; or Francis E. Raue, Policy Analyst, (202) 331-4586, Office of Regulatory Activities, Federal Home Loan Bank System, 801 17th Street NW., Washington, DC 20006; for technical amendments to §§ 545.112, 563.17-2 and 571.1a, W. Barefoot Bankhead, Professional Accounting Fellow, (202) 331-4585.

SUPPLEMENTARY INFORMATION: Section 403(b) of the National Housing Act ("NHA") authorizes the Board, as operating head of the FSLIC, to examine and evaluate the assets of institutions the accounts of which are insured by the FSLIC ("insured institutions") and their affiliates, to require reporting, and to prescribe the treatment of such assets for regulatory evaluation purposes. 12 U.S.C. 1726(b); *see also* 12 U.S.C. 1730(m); 12 CFR 563.17-1.

On August 10, 1987, CEBA was signed into law. Pub. L. No. 100-86, 101 Stat. 552. Section 402 of CEBA required the Board to establish an asset classification scheme consistent with the classification practices of the Federal banking agencies. In particular, section 407 of CEBA instructed the Board to remove the scheduled items system.

Pursuant to this Congressional mandate, the Board proposed for public comment a rule amending the classification of assets system that, among other things, removed the scheduled items provision of the Board's regulations, 12 CFR 561.15 (1987). 52 FR 39087 (October 20, 1987). After considering all comments received, the Board adopted a final rule on December 21, 1987 that removed the § 561.15 scheduled items regulation, and established a classification of assets system consistent with the asset classification practices of the Federal banking agencies. 53 FR 338 (January 6, 1988) ("final rule"). Under this final rule, assets that would have been deemed schedule items under the old classification scheme became subject to the classification system established by § 561.16(c). *See* 12 CFR 561.16(c) (1988); 53 FR 338, 341. In promulgating the final rule, the Board reiterated its desire that required capital levels reflect asset quality and emphasized the final rule's consistency with the Board's broader and more comprehensive attempts to revise and promulgate capital-related regulations and generally raise the industry's capital levels. 53 FR 338, 344. *See also* 12 CFR 563.14(b)(7) (1988) (Higher levels of capital may be appropriate under the individual minimum capital requirement for an insured institution "with a portfolio reflecting weak credit quality or a significant likelihood of financial loss, or that has loans in nonperforming status or on which borrowers fail to comply with payment terms.")

In addition to § 561.15, eighteen regulations contain the term "scheduled items" or refer to § 561.15. These regulations were not removed or revised by the final rule and continue to contain the term "scheduled items" or refer to former § 561.15. The Board proposed to remove references to scheduled items and to revise these provisions to ensure they are consistent with both the new asset classification scheme and the Board's expressed belief that the overall capital strength of insured institutions is an effective and reliable means of evaluating the health of insured institutions and their affiliates.

Before the adoption of the final rule, the Board used a measure of an insured institution's ratio of schedule items to specified assets to determine whether to approve such institution's application to engage in certain activities. Since the Board removed the scheduled items system, the continued use of a measure including scheduled items and "specified assets" is problematic. The Board no longer uses an institution's "specified assets" in determining whether a thrift may engage in certain activities. Therefore, the Board proposes to remove § 561.17 and to revise those regulations that refer to a specifed assets ratio, consistent with CEBA and the final rule.

Accordingly, the Board proposes to amend existing regulations that require a prescribed ratio of scheduled items to specified assets as a litmus test for authority of insured institutions to engage in expanded activities. The Board proposes to replace that measurement with a requirement that insured institutions demonstrate compliance with the minimum capital requirements of § 563.13 and with the individual minimum capital requirements of §§ 563.14 and 563.14-1. The inclusion of compliance with minimum capital requirements provides supervisory personnel with the flexibility to restrict an institution's activities on the basis of overall capital strength, as determined on a case-by-case basis, rather than on the scheduled items formula that only measured problem assets. The Board's objective to provide supervisory personnel with increased flexibility is consistent with the stated goal of the final rule of "fostering the exercise of greater flexibility and discretion by examiners and supervisory personnel in classifying assets and in establishing valuation allowances." 53 FR 338, 340.

An exception to the proposal's removal of references to scheduled items is the use of that term (and the use of the term "scheduled item factor") contained in § 563.13(b)(4)(i)(F). 12 CFR 563.13(b)(4)(i)(F) (1988). The scheduled item factor is used to calculate the contingency component of an institution's regulatory capital requirement. *Id.* In the final rule, the Board adopted the use of the scheduled item factor as an interim, transitional measure to lessen the harmful effects that would result from the deletion of scheduled items from the contingency component. As discussed in the final rule, this deletion, coupled with other revisions to the asset classification regulation, would have significantly altered both the minimum regulatory

capital requirements and the capital levels of many insured institutions. 53 FR 338, 345. In light of the considerable amount of industry capital that institutions maintained due to scheduled items, the Board decided in the final rule to require institutions to include a factor of their reported scheduled items as of September 30, 1987, in calculating their minimum regulatory capital requirement under § 563.13. The contingency component *will continue* to include the scheduled item factor as an interim device until the Board completes its review, analysis, and consideration of appropriate revisions of the minimum regulatory capital regulation. *See* 53 FR 338, 345.

The Board is also proposing technical amendments to existing §§ 563.17–2 and 571.1a in an effort to ensure that this regulatory provision and Statement of Policy are consistent with the asset classification system outlined in the final rule. These amendments merely reflect the Board's conclusions, as stated in the final rule and the Supplementary Information accompanying the final rule, that a properly conducted appraisal may be an important factor in an examiner's evaluation of an asset, but that the risk of nonpayment is dependent upon several factors, as discussed in this Supplementary Information. *See* 53 FR 349, 350 (January 6, 1988). These amendments clarify existing language, overlooked in the drafting of the final rule, that incorrectly suggests that an appraisal is required in the evaluation of real estate or real estate collateral for the purpose of establishing valuation allowances. (Consistent with the final rule, § 563.17–2(a) will continue to require that an appraisal be conducted with respect to real estate owned at the earlier of foreclosure or in-substance foreclosure.) These amendments to § 563.17–2(b) provide that the availability of private mortgage insurance compensation may be a re-evaluation factor rather than a classification of assets factor as currently provided by § 571.1a.

Finally, the Board is also proposing a technical amendment to § 545.112 to ensure that this section is consistent with the asset classification system outlined in the final rule. Specifically, this section's discussion of real estate owned ("REO") and uncollected interest is being amended to ensure that a Federal association carries REO at fair market value, which may include uncollected interest to the extent such interest is supported by the fair market value of the property. As stated in the Supplementary Information accompanying the final rule, "[t]he fair market value of the REO at the date of acquisition * * * becomes the carrying value of the property on the books of the institution, * * * [and] the institution or the examiner must recognize additional losses if, subsequent to the date of acquisition, the NRV is less than the fair market value at acquisition." *See* 53 FR 338, 343. The Board solicits particular comment on this amendment, including views addressing whether it may be more appropriate simply to remove § 545.112 entirely.

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Board is providing the following regulatory flexibility analysis:

1. *Reasons, objectives, and legal basis underlying the proposed rule.* These elements are incorporated above in the **"SUPPLEMENTARY INFORMATION"** section.

2. *Small entities to which the proposed rule would apply.* The proposed rule would apply to all insured institutions without regard to size.

3. *Impact of the proposed rule on small entities.* The proposed rule would not have a disproportionate impact on small insured institutions.

4. *Overlapping or conflicting federal rules.* There are no known federal rules that duplicate, overlap, or conflict with this proposal.

5. *Alternatives to the proposed rule.* The Board has not found any alternatives to date that would be less burdensome and adequately address its concerns.

List of Subjects

12 CFR Part 545

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings and loan associations.

12 CFR Parts 546 and 561

Savings and loan associations.

12 CFR Part 563

Bank deposit insurance, Currency, Investments, Reporting and recordkeeping requirements, Savings and loan associations.

12 CFR Part 563b

Reporting and recordkeeping requirements, Savings and loan associations, Securities.

12 CFR Part 563c

Accounting, Reporting and recordkeeping requirements, Savings and loan associations, Securities.

12 CFR Part 570

Bank deposit insurance, Savings and loan associations.

12 CFR Part 571

Accounting, Bank deposit insurance, Savings and loan associations.

Accordingly, the Federal Home Loan Bank Board hereby proposes to amend Parts 545 and 546, Subchapter C, and Parts 561, 563, 563c, 570, and 571, Subchapter D, Chapter V, Title 12, Code of Federal Regulations, as set forth below.

SUBCHAPTER C—FEDERAL SAVINGS AND LOAN SYSTEM

PART 545—OPERATIONS

1. The authority citation for Part 545 continues to read as follows:

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 66 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402–403, 407, 48 Stat. 1256–1257, 1260, as amended (12 U.S.C. 1725–1726, and 1730); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

§ 545.45 [Amended]

2. Paragraph (e)(2) of § 545.45 is removed.

3. Amend § 545.73 by revising paragraph (a) to read as follows:

§ 545.73 Inter-American Savings and Loan Bank.

* * * * *

(a) The association's regulatory capital meets the requirements of § 563.13 of this chapter, including any individual minimum capital requirement established under § 563.14 of this chapter or by a capital directive issued pursuant to § 563.14–1 of this chapter, and all losses have been offset by specific loss allowances to the extent required by § 563.17–2 of this chapter.

* * * * * *

4. Amend § 545.74 by removing paragraph (a)(4); by redesignating existing paragraph (a)(5) as paragraph (a)(4); by revising paragraph (d)(2) to read as follows; and by removing paragraph (d)(4):

§ 545.74 Service corporations.

* * * * *

(d) *Amount of investment.* * * *

(2) In addition to amounts that it may invest under paragraph (d)(1) of this section, an association that meets the minimum regulatory capital requirements of § 563.13 of this chapter, including any individual minimum capital requirements established under § 563.14 of this chapter or by a capital directive issued under the authority of

§ 563.14–1 of this chapter, may lend additional amounts as follows:

* * * * *

5. Revise § 545.112 to read as follows:

§ 545.112 Real estate owned.

A federal association may not carry real estate on its books for a sum in excess of the total amount invested by the association on account of such real estate, including advances, costs, improvements, and uncollected interest to the extent such carrying value is supported by the fair market value of the property at the date of the earlier of foreclosure or in-substance foreclosure.

PART 546—MERGER, DISSOLUTION, REORGANIZATION, AND CONVERSION

6. The authority citation for Part 546 continues to read as follows:

Authority: Secs. 2, 5, 48 Stat. 128, 132, as amended (12 U.S.C. 1462, 1464); secs. 401–403, 405–407, 48 Stat. 1255–1257, 1259–1260, as amended (12 U.S.C. 1724–1726, 1728–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

7. Amend § 546.2 by revising the last two sentences of paragraph (h)(1)(xii) to read as follows:

§ 546.2 Procedure; effective date.

* * * * *

(h)(1) * * *

(xii) * * * For purposes of this provision, in calculating whether the regulatory capital of the resulting association will at least equal the amount required under § 563.13 of this chapter, the Principal Supervisory Agent may exclude the scheduled item factor that will be acquired in the merger and the amount of either the regulatory capital deficiency or the liabilities of the acquired association at the date of the merger;

* * * * *

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 561—DEFINITIONS

8. The authority citation for Part 561 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 1, 48 Stat. 128, as amended (12 U.S.C. 1461 *et seq.*); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

§ 561.17 [Removed and Reserved]

9. Section 561.17 is removed and reserved.

PART 563—OPERATIONS

10. The authority citation for Part 563 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); sec. 1204, 101 Stat. 662 (12 U.S.C. 3806); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

§ 563.7–5 [Amended]

11. Amend § 563.7–5 by removing paragraph (b)(2)(ii); and by redesignating paragraphs (b)(2)(iii) and (b)(2)(iv) as paragraphs (b)(2)(ii) and (b)(2)(iii), respectively.

12. Amend § 563.8 by revising the introductory text of paragraph (e)(1) to read as follows:

§ 563.8 Borrowing limitations.

* * * * *

(e) *Filing requirements for outside borrowings with maturities in excess of one year.* (1) Unless the insured institution meets the regulatory capital requirement of § 563.13 of this chapter or any applicable individual minimum capital requirement of § 563.14 of this chapter or capital directive issued pursuant to § 563.14–1 of this chapter, it shall, at least ten business days prior to issuance, file with the Supervisory Agent a notice of intent to issue securities evidencing such borrowings. Such notice shall contain a summary of the terms of the security, including:

* * * * *

§ 563.8–1 [Amended]

13. Amend § 563.8–1 by removing paragraph (b)(2)(ii); and by redesignating paragraphs (b)(2)(iii), (iv) and (v) as paragraphs (b)(2)(ii), (iii) and (iv), respectively.

14. Amend § 563.8–4 by revising the second sentence of paragraph (b)(7) to read as follows:

§ 563.8–4 Transfer and repurchase of government securities.

* * * * *

(b) * * *

(7) *Eligibility requirements.* * * * *An institution which does not have regulatory capital equal to the sum of one percent of all liabilities (i.e.*, total assets minus regulatory capital) of the institution, plus an amount equal to 20 percent of the institution's assets classified under § 561.16c of this chapter, shall not issue or renew repurchase agreements under paragraph (b) of this section unless it meets the following additional requirements.

* * * * *

15. Amend § 563.9–7 by revising paragraph (b) to read as follows:

§ 563.9–7 Loans in excess of 90 percent of value.

* * * * *

(b) This section does not apply to loans to facilitate the sale of real estate owned as a result of foreclosure, or acquired by deed in lieu of foreclosure, or where a contract purchaser has defaulted and the contract canceled, nor to investments in Farmers Home Administration Rural Housing Program guaranteed loans complying with § 545.38 of this chapter.

16. Amend § 563.9–8 by revising paragraph (g)(3)(ii)(A)(*1*)(*iii*) to read as follows:

§ 563.9–8 Regulation of equity risk investment in equity securities, real estate, service corporations, operating subsidiaries, certain land loans, and nonresidential construction loans.

* * * * *

(g) *Exceptions.* * * *

(3) * * *

(ii) * * *

(A) * * *

(*1*) * * *

(*iii*) The level of assets classified under § 561.16c of this chapter.

* * * * *

17. Amend § 563.17–2 by revising paragraphs (a), (b), and (d) to read as follows:

§ 563.17–2 Re-evaluation of assets; adjustment of book value; adjustment charges.

(a) *Real estate owned.* An insured institution shall appraise each parcel of real estate owned at the earlier of in substance foreclosure or at the time of the institution's acquisition of such property, and at such times thereafter as dictated by prudent management policy. The Principal Supervisory Agent or his designee may require subsequent appraisals if, in his discretion, such subsequent appraisal is necessary under the particular circumstances. The foregoing requirement shall not apply to any parcel of real estate that is sold and reacquired less than 12 months subsequent to the most recent appraisal made pursuant to this paragraph. A dated, signed copy of each report of appraisal made pursuant to any provisions of this paragraph shall be

retained in the institution's records. Re-evaluation of parcels of real estate that are similar in all essential respects may be based on an appraisal of one or more of such parcels. When an appraisal is required under this provision, it shall conform with § 563.17–1a of this part.

(b) *Re-evaluation of loans and other assets.* In connection with each examination of an insured institution or service corporation, the Board's examiner shall make such re-evaluation of such institution's or service corporation's assets (exclusive of insured or guaranteed loans) as deemed advisable or necessary. Any such re-evaluation of real estate or real estate collateral shall be based on net realizable value. If real estate collateral has been in substance foreclosed, the re-evaluation shall be based on fair value. The re-evaluation should take into consideration the availability of compensation by private mortgage insurance when the probability of full insurance payment is substantial.

* * * * *

(d) *Adjustment charges.* Adjustment of the book value of an asset by an insured institution or service corporation pursuant to any provision of this section shall be made by a charge against such institution's or service corporation's previously established allowances, if any, and then against earnings for the period in which such charge is made. Any recovery of any portion of any amount previously charged against allowances established for the sole purpose of absorbing losses shall be credited to such allowances; such credit shall be in addition to all other required credits to such allowances. Any recovery of any portion of any amount previously charged against earnings shall be credited to earnings for the period in which such recovery is affected. For the purposes of this paragraph (d), any charge against a specific allowance established pursuant to any provision of this section shall be deemed to be a recovery on an asset, the book value of which was previously adjusted unless such charge is made for the purpose of concurrently writing down the book value of such asset.

18. Amend § 563.22 by changing the semicolon at the end of paragraph (e)(1)(xii) to a period and adding a new sentence to read as follows:

§ 563.22 Merger, consolidation, purchase or sale of assets, or assumption of liabilities.

* * * * *

(e) * * *

(1) * * *

(xii) * * * For purposes of this provision, in calculating whether the regulatory capital of the resulting association will at least equal the amount required under § 563.13 of this part, the Principal Supervisory Agent may exclude the scheduled item factor which will be acquired in the merger and the amount of either the regulatory capital deficiency or the liabilities, including averaged liabilities, of the acquired association at the date of the merger;

* * * * *

PART 563b—CONVERSIONS FROM MUTUAL TO STOCK FORM

19. The authority citation for Part 563b continues to read as follows:

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); secs. 2, 5, 48 Stat. 128, 132, as amended (12 U.S.C. 1462, 1464); secs. 401–403, 405–407, 48 Stat. 1255–1257, 1259–1260, as amended (12 U.S.C. 1724–1726, 1273–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); secs. 3, 12–14, 23, 48 Stat. 882, 894–895, 901, as amended (15 U.S.C. 78c, 1–n, w); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

20. Amend § 563b.101 by adding a new sentence at the end of Item 7(c)(1)(C)(v) and revising Item 7(d)(7) to read as follows:

§ 563b.101 Form PS—Proxy Statement.

* * * * *

(7) * * *

(c) * * *

(1) * * *

(C) *Results of operations.* * * *

(v) * * * This would include real estate development, significant amounts of commercial real estate as loan collateral, and any other significant risk factors inherent in the applicant's lending or investment portfolios, including significant increases in amounts of nonaccural, past due, restructured, and potential problem loans (*see* Securities Exchange Commission's Securities Act Industry Guide 3, section III C).

* * * * *

(d) * * *

(7) Describe briefly the risk elements within the loan and investment portfolios including the applicant's customary procedures regarding delinquent loans. As of the end of each of the periods covered by the statements of operation required by Item 14(b)(1) and as of the date of the latest statement of financial condition required by Item 14(a), set forth in tabular form the amounts and categories of nonaccrual, past due, restructured, and potential problem loans (*see* Securities Exchange Commission's Securities Act Industry Guide 3, section III C) and the ratio of such loans to total assets. Where the amount of real estate that has been in substance foreclosed, acquired by foreclosure, or by deed in lieu thereof is significant, include a brief description of the major properties and a statement as to the applicant's probable loss, if any, upon disposition of such properties.

* * * * *

PART 563c—ACCOUNTING REQUIREMENTS

21. The authority citation of Part 563c continues to read as follows:

Authority: Sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402–403, 407, 48 Stat. 1256–1257, 1260, as amended (12 U.S.C. 1725–1726, 1730); secs. 3(b), 12–14, 23, 48 Stat. 882, 892, 894–895, 901, as amended (15 U.S.C. 78c(b), m, n, w); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–48 Comp., p. 1071.

22. Amend § 563c.14 by revising the first sentence of paragraph (a) to read as follows:

§ 563c.14 Accounting for gains and losses on the sale or other disposition of mortgage loans, redeemable ground-rent leases, and certain securities; matching the amortization of discounts and losses.

(a) *General.* An insured institution, by resolution of its board of directors, may elect to defer and amortize all gains and losses net of related income taxes computed in accordance with generally accepted accounting principles, on any sale or other disposition, occurring in the fiscal year that the action to defer and amortize is taken, of mortgage loans, redeemable ground-rent leases, mortgage-related securities (as defined in § 563.17(a)(4) of this subchapter), preferred stock that at the time of issuance provides for redemption on a fixed date in a fixed dollar amount or for redemption pursuant to a fixed schedule of periodic payments and has a remaining term to maturity of at least five years, and debt securities that do not quality as liquid asssets under § 523.10(g) (except those qualifying under § 523.10(g)(11)) of this chapter because of their maturities or that have remaining terms to maturity of at least five years. * * *

23. Amend § 563c.102 by revising Item I (7)(j)(ii) to read as follows:

§ 563c.102 Financial statement presentation.

* * * * *

Item I * * *

(7) * * *

(j) * * *

(ii) If a significant portion of the aggregate amount of loans outstanding at the end of the fiscal year disclosed pursuant to subparagraph (i)(A) of this paragraph (j) above relates to nonaccrual, past due, restructured and potential problem loans (*see* Securities Exchange Commission's Securities Act Industry Guide 3, section III C), so state and disclose the aggregate amount of such loans with such other information necessary

to an understanding of the effects of the transactions on the statements.

* * * * *

PART 570—BOARD RULINGS

24. The authority citation for Part 570 continues to read as follows:

Authority: Secs. 552, 559, 80 Stat. 383, 388, as amended (5 U.S.C. 552, 559); sec. 11, 47 Stat. 733, as amended (12 U.S.C. 1431(e)(2)(c)); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–403, 405, 407, 48 Stat. 1255–1257, 1259–1260, as amended (12 U.S.C. 1724–1726, 1728, 1730); sec. 414, as added by sec. 522, 94 Stat. 165, as amended (12 U.S.C. 1730g); Reorg. Plan No. 3 of 1947, 3 CFR, 1943–48 Comp., p. 1071.

§ 570.8 [Removed and Reserved]

25. Section 570.8 is removed and reserved.

PART 571—STATEMENTS OF POLICY

26. The authority citation for Part 571 continues to read as follows:

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402, 403, 406, 407, 48 Stat. 1256, 1257, 1259, 1260, as amended (12 U.S.C. 1725, 1726, 1729, 1730); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–48 Comp., p. 1071.

27. Amend § 571.1 by revising paragraph (d) to read as follows:

§ 571.1 Appraisal of real estate securing assets of insured institutions.

* * * * *

(d) *Authority to obtain appraisals, after consultation.* When the trend of the ratio of assets classified under § 561.16c of this chapter to total assets is such that it raises a serious question as to financial condition, when the trend of the ratio of scheduled items to total assets is such that it raises serious question as to financial condition, when it is apparent that assets secured by real property are worth substantially less than the book value thereof, or when there are other indications of the need to evaluate appraisal practices and policies, the Chief Examiner, after consultation with the Supervisory Agent, is authorized to obtain, as a part of and in connection with an examination, appraisals of the real estate securing the insured institution's loans and contracts.

* * * * *

28. Amend § 571.1a by revising the introductory text preceding paragraph (a) to read as follows:

§ 571.1a Classification of certain assets.

This statement of policy provides guidance in the classification of assets pursuant to § 561.16c of this subchapter. Assets subject to this classification requirement may fall within more than one category, and a portion of an asset may remain unclassified.

* * * * *

29. Amend § 571.13 by revising paragraph (a)(3) to read as follows:

§ 571.13 Participation interests in pools of loans.

(a) * * *

(3) The originator/servicer has agreed to provide each insured institution investing in the pool a monthly report of loan delinquencies separately indicating the number and aggregate principal amount of loans delinquent one month and two or more months, the book value of any collateral acquired by the pool through foreclosure, deed in lieu of foreclosure or other exercise of its security interest in the collateral, and the aggregate dollar amount or loans made by the pool, if any, on the security of the collateral if such loans are as described in § 561.15(d) of this subchapter and the aggregate dollar amount or loans made by the pool, if any, on the security of the acquired collateral if such loans have remaining expiration periods in excess of maximum regulatory limitations, or 30 years, or have unpaid principal balances in excess of maximum regulatory limitations, or 90 percent of the security value.

* * * * *

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89–3253 Filed 2–13–89; 8:45 am]

BILLING CODE 6720–01–M

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12 CFR Part 584

[No. 89–132]

Extension of Time Period for Board Action on Outstanding Proposal

Date: February 7, 1989.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule; extension of time period for Board action.

SUMMARY: Pursuant to its regulatory review procedures, *see* Board Res. No. 88–269, 53 FR 13156 (April 21, 1988), the Federal Home Loan Bank Board ("Board") hereby gives notice that it is extending the time period for possible Board action on the following outstanding proposed regulation as outlined in **SUPPLEMENTARY INFORMATION.** The Board is taking this action in order to allow adequate time for consideration of a number of complex issues raised by this proposal. It is not soliciting additional comments on this proposal.

DATE: The time period for Board consideration is extended until August 8, 1989.

FOR FURTHER INFORMATION CONTACT: Mary Hoyle, Regulatory Paralegal, (202) 377–7135, Regulations and Legislation Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552 or the appropriate contact persons listed in the referenced **Federal Register** document.

SUPPLEMENTARY INFORMATION: Although the comment period on the following proposal has been closed for more than six months, the Board still has the proposal under active consideration for possible further action. The Board is hereby extending the time for possible final Board action on this proposal to the date indicated below:

August 8, 1989

Transactions with Affiliates, adopted by the Board on June 2, 1988; 53 FR 21838 (June 10, 1988).

The Board notes that this action does not constitute a representation that the Board will take final action with respect to this proposal, only that it may do so within this extension of time. Moreover, this action carries no implication whatsoever with respect to the Board's view of the merits of the proposal.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89–3461 Filed 2–13–89; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88–NM–205–AD]

Airworthiness Directives; Boeing Models 727–100C and 727C Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to Boeing Models 727–100C and 727C series airplanes, which would require inspection of the main cargo door lower sill latch support fittings for cracks, and

replacement of the fittings, if necessary. This proposal is prompted by reports of cracks in latch support fittings. Cracking in multiple fittings, if allowed to grow, could result in rapid decompression during flight and in-flight loss of the main cargo door.

DATES: Comments must be received no later than April 19, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-205-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Ms. Kathi N. Ishimaru, Airframe, Branch, ANM-120S; telephone (206) 431-1525. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such writtten data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-205-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

Outward movement of a fully closed main cargo door is prevented by the engagement of eight doorway lower sill latch pin fittings with door-mounted rotary latches. Structural support for each latch pin fitting is provided by a latch support fitting. The latch support fitting attaches to the fuselage structure in the door sill area.

The FAA has received a report of cracked latch support fittings found on three Model 727-100C and 727C series airplanes. The cause of the cracking is attributed to stress corrosion in the 7079-T6 material of which the fittings are made. Undetected cracking could result in the latch pin fitting separating from the latch support fitting. Separation of multiple fittings could result in rapid decompression during flight and in-flight loss of the main cargo door.

The FAA has reviewed and approve Boeing Alert Service Bulletin 727-53A0177, Revision 1, dated August 27, 1987, which describes procedures for inspection for cracked fittings, and replacement of the fittings with ones made of 7075-T73 material, which are more resistant to stress corrosion cracking.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require inspection of the latch support fittings, and replacement, if necessary, in accordance with the service bulletin previously mentioned.

There are approximately 129 Model 727-100C and 727C (cargo) series airplanes of the affected design in the worldwide fleet. It is estimated that 83 airplanes of U.S. registry would be affected by this AD, that it would take approximately 28 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD On U.S. operators is estimated to be $92,960.

The regulations proposed herein would 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, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 727-100C and 727C airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

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

PART 39—[AMENDED]

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

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

2. By adding the following new airworthiness directive:

Boeing.—Applies to Models 727-100C and 727C (cargo) series airplanes, as listed in Boeing Alert Service Bulletin 727-53A0177, Revision 1, dated August 27, 1987, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent in-flight loss of the main cargo door, accomplish the following:

A. Prior to the accumulation of 25,000 flight cyles or within the next 3,000 flight cycles after the effective date of this AD, whichever occurs later, conduct a close visual or an eddy current inspection of the eight main cargo door latch suport fittings, in accordance with Figure 1 of the Boeing Alert Service Bulletin 727-53A0177, Revision 1, dated August 27, 1987.

B. If a cracked latch support fitting is found, prior to further flight, replace the fiitting with a fitting made of 7075-T73 material, in accordance with figure 2 or 3 of Boeing Alert Service Bulletin 727-53A0177, Revision 1, dated August 27, 1987.

C. Repeat the inspection required in paragraph A., above, at intervals not to exceed 3,000 flight cycles.

D. Replacement of a latch support fitting with the 7075-T73 fitting specified in Figure 2 or 3 of Boeing Alert Service Bulletin 727-53A0177, Revision 1, dated August 27, 1987, constitutes terminating action for the repetitive inspections required for that fitting.

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

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

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington, 98124.

These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on February 6, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-3367 Filed 2-13-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-216-AD]

Airworthiness Directives; Boeing Model 737-300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to Boeing Model 737-300 series airplanes equipped with CFM International CFM56-3 and -3B engines, that would require the deletion of the paragraph from the FAA-approved Airplane Flight Manual (AFM) which permits operations over a route that contains a point farther than one hour flying time at the normal one-engine inoperative cruise speed (in still air) from an adequate airport in deviation from § 121.161 of the Federal Aviation Regulations (FAR), referred to as "extended range," "EROP," or "ETOP" operations. This proposal is prompted by reports that partial and total loss of thrust has occurred during operations in moderate to heavy precipitation. Total loss of thrust could prevent the continued safe flight and landing of the airplane.

DATES: Comments must be received no later than March 13, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-216-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Simonson, Propulsion Branch, ANM-140S; telephone (206) 431-1965. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-216-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

The FAA has recently issued several airworthiness directives in response to dual engine flameout incidents involving Boeing Model 737-300 airplanes. The requirements of those AD's have included the addition of a cautionary note, in the AFM, against airplane operation within 5 miles of thunderstorm activity, and a limitation that requires at least 45% N_1 be maintained when operating in or near moderate to heavy rain, hail, or sleet. Although it has been determined that those requirements are acceptable for assuring adequate safety for the existing Model 737-300 fleet, those actions have been accomplished with the knowledge that the majority of the affected airplanes operate in an environment which allows for avoiding severe weather by diverting to suitable alternate airports (as defined in Advisory Circular 120.42A).

In the context of extended range operations, however, it is substantially more likely that there would be only one adequate airport available in the event of an engine-out diversion. In that event, if thunderstorm activity existed at that location, exposure to that activity would be unavoidable, and the risk of loss of the second engine would be unacceptably high.

Since this condition is likely to exist or develop on other airplanes of this same type design, a revision to the Model 737-300 AFM is proposed which would delete any reference to the approvability of that airplane for extended range operation.

There is, at present, an engine modification under development that addresses this operational deficiency of the CFM56-3 series engines. The FAA has been advised by the engine manufacturer that these improved engines are expected to be available in mid to late 1989. Upon completion of the evaluation of this modification, the extended range Configuration, Maintenance, and Procedures (CMP) Document for the Model 737-300 airplane would be reassessed by the FAA.

There are approximately 600 Model 737-300 series airplanes in the worldwide fleet, some of which have authorization for extended range operation. There are approximately 257 Model 737-300 series airplanes on the U.S. register; however, no U.S. operator currently has authorization for extended range operations. There would be no cost impact of this AD on those aircraft which have no reference to extended range operations in their AFM. However, for those aircraft with AFM

authorization for extended range operation, approximately 1 manhour would be necessary to accomplish the actions required by this AD, and the average labor cost would be $40 per manhour. Based on these figures, the cost impact of the AD on an affected operator is estimated to be $40 per airplane.

The regulations proposed herein would 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, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 737–300 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft

The Proposed Amendment

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

PART 39—[AMENDED]

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

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

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing.—Applies to all Model 737–300 series airplanes, certificated in any category. Compliance required within 30 days of the effective date of this AD, unless previously accomplished.

To prevent the risk of total engine thrust loss due to unavoidable severe weather penetration during a single engine diversion on an extended range flight, accomplish the following:

A. Delete, from the FAA-approved Airplane Flight Manual (AFM), any reference to approval or suitability of the Model 737–300 airplane for use in extended range operation. This may be accomplished by deleting the existing AFM statement containing the Extended Range Operations suitability and adding a copy of this AD to the AFM. If the existing AFM does not contain such a statement, no action is necessary.

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

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

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

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on February 3, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–3366 Filed 2–13–89; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 39

[Docket No. 88–NM–201–AD]

Airworthiness Directives; Boeing Model 767 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to certain Boeing Model 767 series airplanes equipped with Pratt and Whitney JT9D series engines or General Electric CF6–80A series engines, which would require modifications to the electromagnetic protection shielding of the wires to the respective engine electronic engine controls (EEC). This proposal is prompted by a review of the wiring installation between the engine fan case and the strut, which has shown that not all engine and EEC wires requiring electromagnetic protection shielding have been shielded. This condition, if not corrected, could lead to an electrical transient from a lightning strike to one engine, which could cause damage or malfunction to the unstruck engine's EEC; this may affect the thrust of the unstruck engine, as well as that of the struck engine. A lightning strike during takeoff, causing EEC shutdown on both engines, could result in a thrust loss greater than the loss of one engine.

DATES: Comments must be received no later than April 19, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–103, Attention: Airworthiness Rules Docket No. 88–NM–201–AD, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Bernie Gonzalez, Propulsion Branch, ANM–140S; telephone (206) 431–1964. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available,

both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-201-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

In a review of the wiring installation between the engine fan case and the strut on Boeing Model 767 airplanes equipped with Pratt and Whitney JT9D series engines and General Electric CF6-80A series engines, the FAA determined that not all engine electrical and electronic engine control wires requiring lightning protection were properly shielded. A lightning strike to one engine may result in an electrical transient, which may cause damage or malfunction to the unstruck engine as well as the struck engine. A lightning strike during takeoff, causing EEC shutdown on both engines, could result in a thrust loss greater than the loss of one engine.

The FAA has reviewed and approved Boeing Service Bulletin 767-71-0041, dated September 22, 1988, which provides instructions for modifications to certain electrical wiring to provide electromagnetic shielding for the electronic engine control.

Since this condition is likely to exist on other airplanes of this same type design, an AD is proposed which would require modification of certain engine control wiring in accordance with the service bulletin previously mentioned.

There are approximately 188 Model 767 series airplanes of the affected design in the worldwide fleet. It is estimated that 93 airplanes of U.S. registry would be affected by this AD, that it would take approximately 35⅛ manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The average parts cost per airplane would be $7,554. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $833,185.

The regulations proposed herein would 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, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model 767 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft

The Proposed Amendment

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

PART 39—[AMENDED]

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

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

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing.—Applies to Model 767 series airplanes, equipped with Pratt and Whitney JT9D series engines or General Electric CF6-80A series engines, specified in Boeing Service Bulletin 767-71-0041 dated September 22, 1988, certificated in any category. Compliance required within one year after the effective date of this AD, unless previously accomplished.

To minimize the potential for total loss in both engines due to a lightning strike, accomplish the following:

A. Modify the engine electrical and electronic engine control wiring in accordance with Boeing Service Bulletin 767-71-0041, dated September 22, 1988.

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

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

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on February 6, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-3368 Filed 2-13-89; 8:45 am]

BILLING CODE 4910-13-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-26529; File No. S7-3-89]

Suitability Requirements for Transactions in Certain Securities

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Securities and Exchange Commission is publishing for comment proposed Rule 15c2-6, which would require written customer agreement to, and a documented suitability determination for, certain recommended transactions in equity securities that are not registered on a national securities exchange or authorized for inclusion in the NASDAQ system, and whose issuers do not meet certain minimum financial standards. The Commission is taking these actions in response to the widespread incidence of misconduct by some broker-dealers in connection with transactions in such securities.

DATE: Comments should be received on or before April 17, 1989.

ADDRESS: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and

Exchange Commission, 450 Fifth Street, NW., Mail Stop 6–9, Washington, DC 20549. Comment letters should refer to File No. S7–3–89. All comment letters received will be made available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Robert L.D. Colby, Chief Counsel, (202) 272–2844; or Daniel M. Gray, Attorney, (202) 272–2848, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 5–1, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Securities and Exchange Commission ("Commission") is proposing for comment Rule 15c2–6 under the Securities Exchange Act of 1934 ("Exchange Act").[1] The rule is designed to prevent fraudulent, deceptive, or manipulative acts or practices in connection with certain recommended transactions in equity securities ("Designated Securities") that are not registered on a national securities exchange or authorized for quotation in the National Association of Securities Dealers' Automated Quotation ("NASDAQ") system, and whose issuers do not meet minimum net income, capital and surplus, or asset standards. These securities are quoted primarily in daily listings of dealers published by the National Quotation Bureau ("pink sheets"),[2] and often are traded at less than one dollar per share.

Proposed Rule 15c2–6 would provide that a broker-dealer who recommends to a person the purchase of a Designated Security may not sell that security to such person unless (1) the person was a regular customer or an accredited investor, (2) the broker/dealer's transactions in the security did not exceed an aggregate volume of $5000 or 10,000 shares during any period of five consecutive business days that ended within the preceding 90 days, or (3) prior to the sale, the broker-dealer had received written agreement to the sale from such person and had approved the person's account for transactions in Designated Securities. In approving an account, the broker-dealer would be required to obtain information concerning the customer's objectives and financial situation reasonably determine that transactions in Designated Securities were suitable for the customer, and maintain in its files a written statement setting forth the basis for such determination.

The Commission's decision to propose Rule 15c2–6 at this time reflects the Commission's growing concern with the widespread incidence of broker-dealer fraud and other misconduct in the market for small pink sheet stocks.[3] In recent years, the Commission has initiated a number of injunctive and administrative proceedings against individual broker-dealers involved in a wide array of misconduct in connection with transactions in pink sheet stocks.[4] Despite the expenditure of considerable Commission resources in investigating and prosecuting these illegal activities, the Commission's ongoing broker-dealer examination program indicates that broker-dealer misconduct in connection with transactions in pink sheet stocks has continued. Therefore, the Commission believes that additional regulatory action is necessary to deal more effectively with the problem.

The Commission is proposing Rule 15c2–6 in particular to address the indiscriminate use by some broker-dealers of high pressure telephone sales campaigns to sell pink sheet stocks issued by small, little known companies to unsophisticated investors. Many of these stocks are speculative securities that require purchasers to possess a significant degree of expertise, as well as access to information, before an informed investment decision can be made. The issuers of these securities are rarely followed by professional securities analysts or covered by the financial press. In addition, these small pink sheet issuers often are not subject to Exchange Act periodic reporting requirements, and therefore may not be making publicly available on a regular basis complete information about their operations and financial condition. As a result, investors may have few reliable sources of information on these companies. Moreover, many of these issuers often have few assets and limited operating histories, but nevertheless intend to expand rapidly.[5] Such issuers necessarily have a high risk of failure and corresponding loss of investment for their shareholders. A decision to invest in pink sheet stocks therefore requires diligent investigation and careful analysis of the issuer and its management to determine whether it is a viable operating entity with realizable potential for growth.

The sales practices of some broker-dealers active in this area, however, apparently are designed to preclude careful analysis by investors of the fundamental investment merits of small pink sheet companies. A common means or solicitation is the "cold call"—a telephone call to a person whose name has been drawn from the telephone directory or a membership list, or who has responded to advertisements promoting purchases of small growth companies. Although broker-dealers making cold calls at times may provide prospective buyers with sufficient information and time to make an informed investment decision, more frequently cold calls regarding the stocks of small pink sheet issuers provide investors with little information on the company and little time for reflection before deciding whether to buy.

High pressure cold calls are the predominant means to locate customers used by "boiler room" operations active in the pink sheet market in recent years. These operations involve a concerted, high-intensity effort to sell over the telephone large quantities of little known, speculative stocks to any and all buyers. Salespersons are expected to make hundreds of cold calls per day, and are trained in high-pressure sales tactics frequently invovling use of prepared scripts designed to elicit an immediate buy decision from the person called. These tacts usually focus on pink sheet stocks, often where the broker-dealer is the sole or dominant market

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[1] 15 U.S.C. 78a-78jj.

[2] The NASD currently is developing an electronic system for displaying bid and offer quotations in pink sheet securities. *See* Securities Exchange Act Release No. 25949 (July 28, 1988), 53 FR 29096.

[3] *See* SEC News Release, Remarks of David S. Ruder, Chairman, U.S. Securities and Exchange Commission, Before the Twenty-First Annual Rocky Mountain-State-Federal-Provincial Securities Conference, Denver, Colorado (October 21, 1988). *See also* SEC Information for Investors, *Beware of Penny Stock Fraud!* (November 1988).

[4] In 1988, the Commission initiated more than 25 enforcement actions involving fraud or abuse in this market, and since 1986, the Denver Regional Office of the Commission alone has initiated more than thirty cases involving pink sheet stock abuses. *See, e.g., SEC v. Hughes Capital Corp.*, SEC Litigation Release No. 11939, 42 SEC Doc. 742 (December 13, 1988); *SEC v. Goldcor, Inc.*, SEC Litigation Release No. 11847, 41 SEC Doc. 1176 (August 24, 1988); *SEC v. Zetex, Ltd.*, SEC Litigation Release No. 11784, 41 SEC Doc. 559 (July 6, 1988); *In re CDA Securities, Inc.* Securities Exchange Act Release No. 26142, 41 SEC Doc. 1676 (September 30, 1988); *In re Bradley E. Bohling*, Securities Exchange Act Release No. 25346, 40 SEC Doc. 296 (February 11, 1988). In addition, the Commission suspended over-the-counter trading in the securities of well over 100 companies in 1988. *See, e.g.*, Securities Exchange Act Release No. 25813, 41 SEC Doc. 311 (June 21, 1988); Securities Exchange Act Release No. 25550, 40 SEC Doc. 1085 (April 5, 1988).

[5] An extreme example of this type of company is found in blank check offerings—an initial public offering of a company with no operating history, practically no assets, and formed solely for the purpose of raising capital to take advantage of unspecified business opportunities. A recent study by the Commission's Office of Economic Analysis found that 435 blank check offerings were registered with the Commission in 1985 and 1986.

maker and little information is available about the issuer.

Because these cold call sales campaigns normally are directed at individuals drawn from a telephone directory or list of names, inevitably many of the persons contacted will have little investment experience and limited financial resources. These individuals may be particularly vulnerable to high pressure sales tactics from salespersons willing to disregard the unsuitability of the recommended security for the purchaser. The potential for mistreatment of investors in cold calls is magnified when the securities being sold are not traded through organized markets and are issued by little known companies, where the risk of loss and the importance of the investment analysis require a careful and unhurried investment decision.

For these reasons, the Commission believes that a serious potential for fraud against investors exists in the unbridled sale of the securities of small pink sheet issuers through the use of cold calls. The Commission is proposing Rule 15c2–6 to help address these problems.

II. Previous Commission Action

High pressure sales campaigns are not a new phenomenon in the securities industry. These campaigns were a particular problem in the 1950's when a large number of boiler room operations sprang up around the country to take advantage of the many inexperienced investors who were entering the securities markets at that time.[6] The Commission responded with a vigorous enforcement campaign against these operations that included criminal prosecutions, as well as civil injunctions and administrative proceedings.[7] From 1960 to mid-1962 the Commission revoked the registration of over thirty broker-dealers who were engaged in fraud in telephone solicitations of unsophisticated investors regarding speculative securities.[8] The Commission's enforcement efforts were hindered, however, by the difficulty of establishing evidence of misrepresenations in telephone solicitations. To do so, the Commission was required not only to ascertain what was communicated, which was difficult to do when the purchasers reached by telephone were scattered around the country, but also to "tie back those representations made by voice over the long-distance telephone to the boiler room, and to assemble some evidence concerning the issuer in order to make a showing as to the false or misleading character of the representations."[9]

In an attempt to deal more effectively with the problem, the Commission originally proposed a version of Rule 15c2–6 in 1962.[10] The rule would have made it unlawful for a broker-dealer to offer or sell an equity security at a price of less than ten dollars per share by telephone to any person other than a broker-dealer, institutional investor, or regular customer, unless the broker-dealer established that one of several exemptions in the rule was available.[11] The rule also would have required broker-dealers to maintain extensive records of their telephone solicitations. Thus, Rule 15c2–6 as originally proposed in effect would have prohibited cold-calling entirely with respect to a wide range of securities.[12]

In 1963, the problem of improper broker-dealer sales practices was referred to Congress as part of the Special Study of the Securities Markets ("Special Study"),[13] and proposed Rule 15c2–6 ultimately was never adopted.[14] In discussing ways to prevent abusive sales practices, the Special Study recommended that the Commission and the self regulatory organizations ("SROs") give greater emphasis to the concept of suitability of particular securities for particular customers. It specifically suggested the adoption of statements of policy covering guidelines as to categories or amounts of securities deemed clearly unsuitable in specified circumstances, and practices deemed incompatible with standards of suitability, such as indiscriminate recommending or selling of specific securities to persons other than known customers.[15]

The SROs have had general suitability rules for many years. For instance, New York Stock Exchange Rule 405 requires its members to use due diligence to learn the essential facts relative to every customer.[16] This rule has been interpreted as requiring an evaluation of the financial condition and investment objectives of the customer and the suitability of particular transactions.[17] The National Association of Securities Dealers, Inc. ("NASD"), of which all broker-dealers who effect transactions in pink sheet stocks must be members, has long recognized that suitability is an important part of its members' general obligation to deal fairly with the public. One of its Rules of Fair Practice provides that:

> In recommending to a customer the purchase, sale, or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.[18]

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[6] A Commission decision in 1960 described the sales practices of these operations in terms that continue to be applicable to the operations of some broker-dealers today: It is apparent that registrant engaged in an intensive campaign of selling North Carolina stock in volume by the use of whatever representations it thought would produce the greatest number of sales in the shortest time. Its wholesale solicitation of distant customers by telephone was by its very nature not conductive [sic] to an unhurried and careful presentation and disclosure of the facts and investment factors applicable to the security recommended and to a determination of its suitability for purchase by the customer in light of his particular financial situation and investment objectives. Rather, the sales method was of a type customarily used to place a customer in a position where he is asked to make a hasty decision to buy securities of a speculative nature on the basis of oral and undocumented representations promising quick profits by an unseen and unknown person skilled in high-pressure selling techniques and inacessible to complaints. This type of treatment of customers is neither fair nor in accordance with the standards of the profession. *Best Securities, Inc.*, 39 S.E.C. 931, 933–34 (1960).

[7] 25 S.E.C. Annual Report 2–4 (1959).

[8] Securities Exchange Act Release No. 6885 (August 16, 1962), at 2 n.2.

[9] Loomis, *Enforcement Problems Under the Federal Securities Laws*, 14 Bus. Law. 665, 673 (1959). *See also Mac Robbins & Co., Inc.*, 41 S.E.C. 116, 119–20 (1962), *aff'd sub nom. Berko v. SEC*, 316, F.2d 137 (2d Cir. 1963).

[10] *See* Release No. 6885, *supra* note 8.

[11] The proposed rule would have exempted (1) securities issued by companies that had net income in their last preceding fiscal year, and who made current financial information publicly available, (2) isolated transactions not part of any concentrated sales efforts by the broker-dealer, (3) transactions not solicited by the broker-dealer, and (4) registered securities that were sold during a distribution by means of a prospectus. *Id.* at 3–4.

[12] The United Kingdom's approach to regulating cold calls is similar to the originally proposed version of Rule 15c2–6. The unsolicited calls section of the Financial Services Act of 1986 provides that no person in the course of, or as a consequence of, an unsolicited call shall enter into, or attempt to enter into, an investment agreement with the person to whom the call is made. Financial Services Act, 1986, ch. 60, section 56. Investment agreements entered into in violation of the Financial Services Act's prohibition do not constitute an offense, but are voidable, subject to certain exceptions, by the person called. The regulations of the Securities and Investments Board contain several exceptions to the general prohibition of unsolicited calls. The exceptions include calls made to securities professionals, institutional investors, and regular customers. *See* The Financial Services (Unsolicited Calls) Regulation 1987, section 4.

[13] Report of Special Study of Securities Markets of the SEC (1963), *reprinted in* H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963).

[14] *See* Securities Exchange Act Release No. 7517 (January 22, 1965) (withdrawing proposed Rule 15c2–6).

[15] Special Study, *supra* note 13, pt. 1 at 329.

[16] NYSE Rule 405(1), *NYSE Guide* (CCH) ¶2405.

[17] *See, e.g.*, Securities Exchange Act Release No. 14143, 13 S.E.C. Doc. 639, 641 (November 7, 1977); Special Study, *supra* note 13, pt. 1 at 316.

[18] NASD Rules of Fair Practice, Art. III, section 2. *NASD Manual* (CCH) ¶2152. *See also* NASD Notice to Members No. 88–91 (November 1988), in which the NASD proposed to amend its books and records

Continued

A broker-dealer who makes unsuitable recommendations also can be liable to its customers under the antifraud provisions of the Federal securities laws.[19]

In response to the recommendations of the Special Study, the NASD adopted in 1964 an interpretation of its suitability rule dealing with recommendations of speculative, low-priced securities. It stated that the following practice clearly would violate a broker-dealer's responsibility for fair dealing:

> Recommending speculative low-priced securities without knowledge of or attempt to obtain information concerning the customers' other securities holdings, their financial situation and other necessary data. The principle here is that this practice, by its very nature, involves a high probability that the recommendation will not be suitable for at least some of the persons solicited. This has particular application to high pressure telephonic sales campaigns.[20]

Unfortunately, the sales practices of many broker-dealers active in the market for pink sheet stocks do not appear to be effectively controlled by this interpretation of the NASD's general suitability rule. The Commission believes that the NASD rule and interpretation should be supplemented by a Commission rule designed to establish specific obligations of broker-dealers in transactions especially susceptible to fraudulent broker-dealer sales practices, and clearer standards regarding the suitability determination required of broker-dealers in this market.[21]

rule to require a member, prior to making a recommendation pursuant to its suitability rule, to make reasonable efforts to obtain information concerning a customer's financial background, tax status, and investment objectives, and such other information used or considered to be reasonable and necessary by the member. Unlike currently proposed Rule 15c2–6, the proposed amendment would not require a written customer statement setting forth such information, nor would it require the member to maintain a written statement setting forth the basis on which the member makes its suitability determination.

[19] *See Clark v. John Lamula Investors, Inc.*, 583 F.2d 594, 600 (2d Cir. 1978); *Cruse v. Equitable Securities of New York, Inc.*, 678 F. Supp. 1023, 1031–32 (S.D.N.Y. 1987); *Clark v. Kidder, Peabody & Co.*, 636 F. Supp. 195, 198 (S.D.N.Y. 1986); *Levin v. Shearson Lehman/American Express Inc.*, [1984–85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,080 at 91407 (S.D.N.Y. 1985).

[20] NASD, Special Report to Members (October 9, 1964), *reprinted in* NASD Rules of Fair Practice, Art. III, section 2, Policy of the Board of Governors re Fair Dealing With Customers, *NASD Manual* (CCH) ¶2152 at 2051–52.

[21] The Commission and the SROs have adopted rules on several occasions containing specially tailored suitability requirements applicable to types of securities transactions that presented problems that were not effectively addressed by general suitability requirements. These rules have addressed certain types of credit transactions, 17 CFR 240.15c2–5; self-underwritings by broker-dealers, NASD Schedules to the By-Laws, Schedule E, section 11, *NASD Manual* (CCH) ¶1755; direct participation programs, NASD Rules of Fair Practice, Appendix F, section 3, *NASD Manual* (CCH) ¶2192; and options, NYSE Rule 723, *NYSE Guide* (CCH) ¶2723; NASD Rules of Fair Practice, Appendix E, sections 16 and 19, *NASD Manual* (CCH) ¶2184. *See also* Securities Exchange Act Release No. 9671 (July 26, 1972), at 14–16 (Commission requested SROs to develop suitability standards for initial public offerings that became "hot issues").

[22] 17 CFR 230.501(a).

[23] 15 U.S.C. 77a–77aa.

III. Description of Rule

Proposed Rule 15c2–6 is designed to prevent fraud by addressing two of the most objectionable aspects of cold call oriented operations: High pressure sales tactics and indiscriminate recommendations of highly speculative securities. Paragraph (b)(3)(i) of the rule would require that the broker-dealer obtain written agreement from the customer to each purchase of a Designated Security covered by the rule. This requirement is intended to provide the customer an opportunity to evaluate the purchase without the necessity for an immediate final decision that is characteristic of high pressure telephone sales tactics. Paragraph (b)(3)(ii) would impose specific procedures that a broker-dealer must follow in making its suitability determination regarding Designated Securities. These procedures are intended to increase the likelihood that the broker-dealer actually will make this determination and to facilitate subsequent review of the determination by regulatory authorities. The rule imposes specific requirements for the transactions it covers, but the rule would be narrowly drawn to cover only those securities that are of the type providing the greatest opportunity for fraudulent high pressure sales activity.

A. Scope of Rule

The scope of the rule would be limited in four ways. The rule would apply only to (1) purchases of Designated Securities (2) by persons who are neither accredited investors, as defined by Regulation D [22] under the Securities Act of 1933 ("Securities Act"),[23] nor regular customers of the broker-dealer, (3) that the broker-dealer recommended, (4) if the broker-dealer's transactions in the recommended security exceed certain minimum levels.

1. Purchases of Designated Securities

A Designated Security is defined in the rule as any equity security other than a security that is registered on a national securities exchange or authorized for quotation in the NASDAQ system, that is issued by an investment company registered under the Investment Company Act of 1940,[24] or whose issuer meets at least one of the following financial standards: (1) Annual net income in excess of $300,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years;[25] (2) capital and surplus in excess of $8,000,000 at the end of the most recently completed fiscal year; or (3) total assets in excess of $10,000,000 at the end of the most recently completed fiscal year. The rule would require satisfaction of these financial standards to be demonstrated by financial statements that the broker-dealer has reviewed and has no reasonable basis to believe are not true and complete, and, for U.S. issuers, that are certified by an independent public accountant.[26]

The rule therefore would not apply to securities transactions that are subject to the protections of trading in a market that has real time quotation reporting and extensive surveillance systems in place,[27] nor would it apply to securities

[24] 15 U.S.C. 80a–1—80a–52.

[25] For issuers who have not yet completed an entire fiscal year, the financial standards could be met as of the date of the issuer's most recent financial statements meeting the requirements of paragraph (a)(2)(ii) of the rule.

The net income and the capital and surplus standards are derived from the former requirements for designation as a NASDAQ National Market System ("NMS") security. The NMS net income requirement recently was raised to $400,000, and the capital and surplus requirement was raised to $12,000,000 in tangible net assets. *See* Securities Exchange Act Release No. 26433 (January 9, 1989). The financial standards of proposed Rule 15c2–6 are higher than the minimum requirements for authorization as a NASDAQ security. The market for pink sheet stocks, however, lacks the ready market information provided by NASDAQ and the accompanying automated surveillance systems, and the Commission believes the protections of the rule should apply to the securities of somewhat larger pink sheet issuers.

[26] Many securities quoted in the pink sheets are issued by substantial foreign companies whose financial statements are prepared and audited in accordance with the requirements of their home jurisdiction. The rule would allow foreign financial statements to be used to show that the issuer exceeds the net income, capital and surplus, or assets standards if such financial statements were (1) filed with the Commission, (2) furnished to the Commission pursuant to Rule 12g3–2(b) under the Exchange Act, 17 CFR 240.12g3–2(b), or (3) prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

[27] The NASD has recently adopted Schedule H to its By-Laws which requires members to report to the NASD the highest price at which the member sold and the lowest price at which it purchased a non-NASDAQ security, and the total volume of purchases and sales executed by it, on any day that its principal transactions in that security exceeded an aggregate daily volume of sales or purchases of either 50,000 shares or $10,000. This information is

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issued by companies that have financial strengths likely to reduce the speculative risks to their shareholders. Instead, the rule would apply to transactions in which the investor is assuming the risks of purchasing a security issued by a smaller company without a history of profitability, and traded by few market makers in a market characterized by little market information.

The Commission wishes to emphasize that the target of its proposal is sales practice abuse and manipulation, not small issues or speculative investment decisions *per se*. It is, however, in securities of the type described here as "Designated Securities" that we have found a disproportionate number of such abuses to occur, and it is for this reason that we propose application of a prophylactic rule for recommended sales of such securities.

The Commission requests comment on whether the definition of a Designated Security is appropriately tailored to include those securities that present the problems to which the rule is addressed without unnecessarily including securities that are not generally the vehicles used for fraudulent high pressure sales activity. In particular, should the rule apply to all securities whose issuers do not meet the minimum financial standards, regardless of the market in which they are traded? Should the minimum financial standards be raised or lowered, or should they be eliminated altogether so that the rule would apply to all pink sheet stocks? Should the definition be expanded beyond equity securities to include debt securities? In particular, do the abusive sales practices to which the rule is addressed occur in connection with transactions in debt securities?

The Commission also requests comment on the requirement that the financial statements of U.S. issuers be certified by an independent public accountant. In particular, the Commission seeks the views of commentators concerning the effect of this certified financial statement requirement on small issuers whose securities are traded over-the-counter, including whether the market for these issuers' securities or their ability to raise capital effectively will be affected by the requirement that domestic issuers have certified financial statements to qualify for exclusion from the rule. In this connection, comment is requested on other alternative standards that would provide a reliable basis for determining whether an issuer's financial condition satisfies the criteria for exclusion from the rule. Finally, the Commission requests comment in general on the burdens imposed on broker-dealers by the rule, and whether these burdens are appropriate given the nature of the problems to which the rule is addressed.

2. Type of Customer

The rule would not apply to purchases by accredited investors or by regular customers of the broker-dealer. The definition of accredited investor is the same as the definition in Regulation D [28] under the Securities Act. This definition excludes from the scope of the rule purchases by institutional investors, persons associated with the issuer, and other natural persons who have financial qualifications suggesting that they are less in need of the special suitability protections of the rule.

A regular customer is defined in the rule as any person for whom the broker-dealer, or a clearing broker on behalf of such broker-dealer, maintains a margin account or a cash account as provided for in Regulation T [29] of the Federal Reserve Board, and who has purchased in either or both such accounts the securities of three or more different issuers on three separate occasions within the preceding two years. This definition excludes from the scope of the rule persons with whom the broker-dealer previously has established a business relationship, and for whom the broker-dealer has executed a base level number of trades. These persons presumably are acquainted with the nature and business conduct of the broker-dealer. The rule primarily is directed at cold calling situations where the broker-dealer is recommending purchases to persons who have little familiarity with the broker-dealer and its business practices.

3. Broker-Dealer Recommendations

As proposed, the rule would apply only to purchases of Designated Securities recommended by a broker-dealer. The rule's requirements would not apply to situations where a broker-dealer functions solely as an order taker and executes transactions for persons who on their own initiative decide to purchase a Designated Security absent a recommendation from the broker-dealer. The rule would apply, however, to situations where the broker-dealer recommends to an investor the purchase a specific Designated Security, whether through direct telephone communication with the customer or through sending promotional material to the customer through the mail.[30] The rule would not apply to general advertisements not involving a direct recommendation to the individual.

The proposed rule would apply to recommended purchases of all Designated Securities, including purchases that were part of an offering for which a registration statement had been filed under the Securities Act or an offering pursuant to Regulation A [31] under the Securities Act. With respect to registered offerings by issuers who previously have not been Exchange Act reporting companies, Rule 15c2–8(b) [32] under the Exchange Act requires broker-dealers to deliver a preliminary prospectus to purchasers at least 48 hours prior to the mailing of the confirmation. Regulation A imposes a similar delivery requirement for offering circulars.[33] Paragraph (b)(3)(i) of the proposed Rule 15c2–6 is intended to provide purchasers with an unpressured opportunity to evaluate the merits of their investment decision, and the prospectus delivery requirement of Rule 15c2–8(b) and the offering circular delivery requirement of Regulation A also address this concern. Notwithstanding these protections, the Commission preliminarily believes that concerns over abusive high pressure sales tactics are also applicable to the initial offering of Designated Securities. The Commission requests comment, however, on whether Rule 15c2–6 should exempt from the requirements of paragraph (b)(3)(i) those transactions to which the delivery requirements of Rule 15c2–8(b) or Regulation A apply.[34] In particular, the Commission seeks comment on the extent to which such an exemption would reduce the burden of the rule on the capital-raising of small issuers without significantly reducing the protections provided by the rule.

required to be reported through an electronic price and volume reporting system operated by the NASD for pink sheet securities. NASD Schedules to the By-Laws, Schedule H, section 2 (CCH) *NASD Manual* ¶¶ 1932–33. While Schedule H represents a beneficial step in improving surveillance of the pink sheet market, it will not provide the protections of real-time NASDAQ quotations, nor are issuers whose stocks are encompassed in the NASD's new system subject to the reporting standards applicable to NASDAQ issuers.

[28] 17 CFR 230.501(a).

[29] 12 CFR 220.4; 12 CFR 220.8.

[30] The proposed rule would not prohibit "introductory" or other cold calls *per se*. Rather, the rule focuses on transactions that result from such contacts.

[31] 17 CFR 230.251—230.262.

[32] 17 CFR 240.15c2–8(b).

[33] 17 CFR 230.256(a)(2).

[34] The provisions of paragraph (b)(3)(ii) of proposed Rule 15c2–6 would continue to apply to transactions in Designated Securities exempted from paragraph (b)(3)(i) of the rule.

4. Volume of Broker-Dealer Transactions

The rule would not apply to broker-dealers whose principal and agency transactions in a Designated Security have not exceeded an aggregate volume of $5000 or 10,000 shares during any period of five consecutive business days that ended within the preceding 90 days. The rule is directed primarily at broker-dealers engaging in concentrated selling efforts for a particular security, and whose transactions generally will far exceed the limits in the rule. Broker-dealers who are not engaging in concentrated selling efforts may be less likely to engage in the abusive selling practices to which the rule is addressed. Moreover, the benefits of imposing the rule's requirements on broker-dealers who are executing only minimal transactions in a security may not exceed the costs of compliance. Consequently, such broker-dealers are excluded from the requirements of the rule.[35]

The exclusion is structured so that a broker-dealer would not be covered by the rule until its transactions in a Designated Security during the immediately preceding five business days exceeded the rule's limits.[36] Beginning with the time the broker-dealer's transactions exceeded the rule's limits, the rule would apply to the broker-dealer's transactions in that security and would continue to apply for at least 90 days. If the broker-dealer's transactions subsequently exceeded the rule's limits, a new 90-day period would be initiated.

The Commission requests comment on the proposed volume standards. In particular, the Commission requests comment on whether the levels of these standards are appropriately drawn to achieve the purposes of the rule without impeding capital formation by small issuers or imposing unnecessary costs on broker-dealers. Comment is requested on whether higher volume levels should be used in the rule to focus its provisions on situations where abusive selling practices are most prevalent while avoiding situations where these abusive sales practices are uncommon.

The Commission also requests comment on whether the rule should exempt sales of Designated Securities by broker-dealers with ten or fewer associated persons as long as the broker-dealer's transactions in any Designated Security do not exceed $50,000 during any period of five consecutive business days that ended within the preceding 90 days. Comment is solicited on whether this exemption would be appropriate in view of the sales practice abuses to which the rule is addressed, and, if so, whether the number of associated persons should be higher or lower. Comment also is solicited on whether the $50,000 level is an appropriate level, or whether it should be raised or lowered.

B. Written Customer Agreement to Purchase

Paragraph (b)(3)(i) of the rule would make it unlawful for a broker-dealer to sell a Designated Security in a transaction covered by the rule unless the broker-dealer had received from the purchaser written agreement to each sale setting forth the identity and number of shares or units of the Designated Security to be purchased. To ensure that the customer is aware of this written agreement requirement, paragraph (c)(1)(ii) of the rule requires that the broker-dealer, as part of the procedures for approving an account for transactions in Designated Securities, provide to the customer a statement of the written agreement requirement, and that the customer acknowledge the statement and return it to the broker-dealer. Consequently, the broker-dealer must explain clearly to the customer that the customer will not be obligated to make any purchase until the broker-dealer receives the customer's written agreement to the purchase. This requirement is intended to provide the purchaser with an opportunity to evaluate the transaction outside of a pressured telephone conversation with the salesperson. Any unconditional oral agreement to sell, as well as any attempt by the broker-dealer to hold the customer to such an agreement, would constitute a violation of the rule.

Because of the purpose of paragraph (b)(3)(i) is to provide the customer with an opportunity for unpressured consideration of a specific purchase, a blanket pre-authorization of purchases obtained from the customer would not satisfy the requirements of the rule. The requirement that each particular purchase be agreed to in writing necessarily means that the essential terms of the purchase must be reflected in the customer's written agreement. These terms would include at a minimum the name and quantity of the security to be purchased. Because the written agreement may, in some cases, be mailed to the customer, the rule would not require price to be specified. Instead, the broker-dealer and the customer could agree orally to the price after the broker-dealer had received the customer's agreement.[37] Any other modification of the terms contained in the written agreement would require a new written agreement.

C. Approval of Customer Accounts

Paragraph (b)(3)(ii) of the rule would require that a broker-dealer approve a person's account for transactions in Designated Securities before selling to such person. This provision is intended to document the broker-dealer's satisfaction of its suitability obligations, thereby increasing the likelihood that an appropriate suitability determination will be made, as well as facilitating review of such determination at a later date by regulatory authorities. Under paragraph (c) of the rule, approving an account is a three-step process. The broker-dealer must obtain information about the customer, make a suitability determination, and document such determination in its files.

1. Customer Information

Paragraph (c)(1) of the rule would require the broker-dealer to obtain from the customer a manually executed and dated statement containing information concerning the customer's financial situation, investment experience and knowledge, and investment objectives. The requirement that a statement be manually executed and dated by the customer is designed to help ensure that the information about the customer is accurate and that it is obtained prior to any sales to the customer. Because most investors will not divulge personal financial information without reflection, this requirement also may have the effect of encouraging prospective buyers to consider their actions carefully before committing to trades with an unfamiliar broker-dealer in obscure, pink sheet stocks.

The rule specifies items of information that the broker-dealer must obtain from the customer,[38] including investment

[35] Of course, other broker-dealer sales practice standards, including in particular existing suitability requirements, would continue to apply to all recommended transactions in Designated Securities.

[36] Broker-dealers depending on the exception would be required to carefully monitor transactions in Designated Securities to ensure that the rule's requirements were complied with for each transaction after the volume limits were exceeded.

[37] The proposed rule would not preclude a written agreement from including the price agreed upon by the broker-dealer and the customer. If, however, the market price of the security at the time the broker-dealer receives the written agreement is not reasonably related to the price specified therein, the broker-dealer's "best execution" obligations would preclude the broker-dealer from executing the transaction at that price. *See* NASD Rules of Fair Practice, Art. III, sections 1 & 4, Interpretation of the Board of Governors re NASD Mark-Up Policy, *NASD Manual*, (CCH) ¶2154 at 2056.

[38] The information required by the rule is comparable to the information that broker-dealers

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objectives, income, net worth, and the size, frequency, and types of prior investments. While the broker-dealer cannot force the customer to provide this information, the customer's failure to do so means that the broker-dealer will be unable to approve the account as required by the rule.[39] Consequently, any sale made without the information specified in the rule would constitute a violation of the rule.

2. Suitability Determination

In order to approve an account for purchases of Designated Securities,[40] paragraph (c)(2) of the rule would require the broker-dealer reasonably to determine, based on the information required by paragraph (c)(1)(i) any any other information known by the broker-dealer: (1) That transactions in Designated Securities are suitable for the customer, and (2) that the customer has sufficient knowledge and experience in financial matters so that the customer reasonably may be expected to be capable of evaluating the risks of transactions in Designated Securities. In determining whether transactions in Designated Securities are suitable for a customer, a broker-dealer should consider whether, in light of the customer's financial circumstances, purchases of speculative and high risk securities are consistent with the customer's financial needs and objectives.[41] In particular, the broker-dealer should consider the extent and nature of the customer's other investments, and whether the customer would be financially able to bear a loss of its investment in Designated Securities.

The rule also requires the broker-dealer to determine whether the customer reasonably can be expected to be capable of evaluating the risks of transactions in Designated Securities. The customer's ability to evaluate the risks of a transaction is an integral part of any suitability determination. The Commission previously has expressed its view that broker-dealers should not recommend complex and high risk securities transactions to investors who do not understand them.[42] The Commission believes that the special problems to which the rule is addressed require a specific investigation of the customer's capability to evaluate the risks of transactions in Designated Securities.[43]

The rule only applies to persons who have not purchased the securities of three different issuers on three separate occasions within the preceding two years in their account with the broker-dealer. Because of the complexity of the investment decision and risks involved in purchases of Designated Securities, persons with minimal investment experience are unlikely to have the experience with which to evaluate such transactions properly. The rule's requirement that the broker-dealer evaluate and document such capability is intended to deter broker-dealers from inappropriately inducing inexperienced customers to purchase Designated Securities that are unsuitable for their investment needs and experience.

3. Documentation of Suitability Determination

Paragraph (c)(3) of the rule would require a broker-dealer to retain in its files a written statement setting forth the basis on which the broker-dealer made its suitability determination. This requirement imposes a formal procedure for evidencing suitability determinations, with a view to encouraging broker-dealers to comply with the requirement to make an explicit suitability determination, and facilitating a subsequent review of the broker-dealer's actions by the Commission and the SROs. The rule also would require the broker-dealer to provide a copy of the statement setting forth the basis of its suitability determination to the purchaser together with the written notification required by Rule 10b–10 [44] under the Exchange Act so that the purchaser may review the determination for accuracy. The written statements required by paragraphs (c)(1) and (c)(3), as well as the written customer agreement to trades required by paragraph (b)(3)(i), must be preserved in accordance with the provisions of Rule 17a–4 under the Exchange Act.[45]

D. Exemptions

Paragraph (d) of the rule would empower the Commission to exempt conditionally or unconditionally from the provisions of the rule any transaction or class of transactions that, upon prior written request or upon its own motion, the Commission determines are not encompassed within the purposes of the rule.

IV. Requests for Comments

The Commission solicits comments on the design of Rule 15c2–6, and whether it is likely to address the concerns identified previously without imposing undue burdens on broker-dealers and the issuer community. In light of the important longstanding role of small businesses in the nation's economy, the Commission in particular seeks the views of commentators on the impact of the rule on the capital raising requirements of small businesses. The Commission invites comment on whether the rule's requirements will, in practice, limit the ability of small over-the-counter issuers to attract new investors, impede the offering of new securities, or reduce liquidity in the market for small issuers' securities. Finally, comment is sought on whether the rule will have the intended effect of providing greater protections for investors in these securities, thus increasing investor confidence and, potentially, investor involvement in these markets.

V. Effects on Competition and Regulatory Flexibility Act Considerations

Section 23(a) of the Exchange Act [46] requires that the Commission, in adopting rules under the Exchange Act, consider the anticompetitive effects of such rules, if any, and balance any anticompetitive impact against the

must obtain in approving accounts for options transactions. *See* NYSE Rule 721, Supplementary Material, *NYSE Guide* (CCH) ¶2721 at 4554–55; NASD Rules of Fair Practice, Appendix E, section 16, Interpretation of the Board of Governors, *NASD Manual* (CCH) ¶2184 at 2152–53.

[39] *Cf. Eugene J. Erdos*, Securities Exchange Act Release No. 20376, 29 S.E.C. Doc. 226, 230 (November 16, 1983), *aff'd sub nom. Erdos v. SEC*, 742 F.2d 507 (9th Cir. 1984) (customer's refusal to provide financial information did not excuse salesperson's unsuitable recommendations).

[40] The rule's requirement that a broker-dealer make a special suitability determination in approving a customer's account for transactions in Designated Securities is in addition to, and in no way replaces, a broker-dealer's general obligation under SRO rules to make a suitability determination for all recommended transactions. Thus, a broker-dealer would remain obligated to make a suitability determination for each recommended purchase of a Designated Security by a customer even after such customer's account had been approved for transactions in Designated Securities, as well as for recommended purchases by customers that are not covered by the proposed rule, such as accredited investors and regular customers.

[41] Paragraph (c)(1)(i)(C) of the rule would require the broker-dealer to obtain information concerning the customer's investment objectives, such as safety of principal, income, growth, or speculation.

[42] *See Erdos, supra* note 39; Report of the Special Study of the Options Markets to the SEC, H.R. Comm. Print IFC3, 96th Cong., 1st Sess., at 47–50 (1978). *See also* NYSE Rule 723, *NYSE Guide* (CCH) ¶2723; NASD Rules of Fair Practice, Appendix E, section 19, *NASD Manual* (CCH) ¶2184.

[43] The Commission solicits comment on whether the rule should be provided that the customer's capability of evaluating the risks of transactions in Designated Securities is established when the customer consults with a personal adviser who is capable of evaluating such risks.

[44] 17 CFR 240.10b–10.

[45] 17 CFR 240.17a–4(b) and (c).

[46] 15 U.S.C. 78w(a)(2).

regulatory benefits gained in terms of furthering the purposes of the Exchange Act. The Commission is preliminarily of the view that proposed Rule 15c2–6 would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission requests comment, however, on any competitive burdens that might result from adoption of the rule.

In addition, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA"), pursuant to the requirements of the Regulatory Flexibility Act,[47] regarding the proposed rule. The IRFA indicates the proposed Rule 15c2–6 could impose some additional costs on small broker-dealers and small issuers. The Commission believes, however, that the rule minimizes these costs to the greatest extent possible while still fulfilling its purpose under the Exchange Act to prevent fraud. A copy of the IRFA may be obtained from Daniel M. Gray, Attorney, Office of Legal Policy, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 5–1, Washington, DC 20549, (202) 272–2848.

List of Subjects in 17 CFR Part 240

Securities.

VI. Statutory Basis and Text of Amendments

The Commission proposes to adopt § 240.15c2–6 in Chapter II of Title 17 of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 is amended by adding the following citation:

Authority: Sec. 23, 48 Stat. 901, as amended; 15 U.S.C. 78w. * * * § 240.15c2–6 also issued under 78c, 78j, and 78o.

2. By adding § 240.15c2–6 as follows:

§ 240.15c2–6 Suitability requirements for transactions in certain securities.

(a) For the purposes of this section—

(1) The term "accredited investor" shall have the same meaning as in 17 CFR 230.501(a).

(2) The term "designated security" shall mean any equity security other than a security that is registered on a national securities exchange or authorized for quotation in the National Association of Securities Dealers' Automated Quotation system, that is issued by an investment company registered under the Investment Company Act of 1940, or whose issuer meets at least one of the financial standards set forth in paragraph (a)(2)(i) of this section, as demonstrated by financial statements that meet the requirements set forth in paragraph (a)(2)(ii) of this section.

(i) Issuer financial standards:

(A) Annual net income in excess of $300,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years;

(B) Capital and surplus in excess of $8,000,000 at the end of the most recently completed fiscal year; or

(C) Total assets in excess of $10,000,000 at the end of the most recently completed fiscal year.

(ii) Issuer financial statements must be reviewed by the broker or dealer, and the broker or dealer must have no reasonable basis to believe they are not true and complete, and

(A) In the event the issuer is a foreign private issuer, the financial statements must be filed with the Commission; furnished to the Commission pursuant to 17 CFR 240.12g3–2(b); or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction; or

(B) In the event the issuer is other than a foreign private issuer, the financial statements must be certified by an independent public accountant.

(3) The term "regular customer" shall mean any person for whom the broker or dealer, or a clearing broker on behalf of such broker or dealer, maintains a margin account as provided for in 12 CFR 220.4 or a cash account as provided for in 12 CFR 220.8, and who has purchased in either or both such accounts the securities of three or more different issuers on three separate occasions within the preceding two years.

(b) As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for a broker or dealer to recommend to a person the purchase of a designated security, and subsequently to sell that designated security to such person unless:

(1) Such person is a regular customer or an accredited investor;

(2) The broker or dealer's principal and agency transactions in the designated security have not exceeded an aggregate volume of $5000 or 10,000 shares during any period of five consecutive business days that ended within the preceding 90 days; or

(3) Prior to the sale:

(i) The broker or dealer has received from such person a written agreement to each such sale setting forth the identity and number of shares or units of the designated security to be purchased; and

(ii) The broker or dealer has approved such person's account for transactions in designated securities in accordance with the procedures set forth in paragraph (c) of this section.

(c) In order to approve an account for the purchase of designated securities, the broker or dealer must:

(1) Obtain a statement, manually executed and dated by such person, which contains:

(i) Information concerning the person's:

(A) Financial situation, including age, marital status, number of dependents, employment status, estimated annual income and the sources of that income, estimated net worth (exclusive of family residence), and estimated liquid net worth (cash, securities, other);

(B) Investment experience and knowledge, including the number of years of experience, and the size, frequency, and types of transactions in stocks, bonds, options, commodities, and other investments; and

(C) Investment objectives, such as safety of principal, income, growth, or speculation;

(ii) A statement by the broker or dealer, acknowledged by the person's signature, that it is unlawful for the broker or dealer to sell a designated security to the person in a transaction covered by this section unless the broker or dealer has received, prior to the sale, a written agreement to the sale from the person.

(2) Reasonably determine, based on the information required by paragraph (c)(1)(i) of this section and any other information known by the broker-dealer, that transactions in designated securities are suitable for the person, and that the person has sufficient knowledge and experience in financial matters that the person reasonably may be expected to be capable of evaluating the risks of transactions in designated securities; and

(3) Retain in its files a written statement setting forth the basis on which the broker or dealer made such determination, and provide a copy of such statement to the person together with the written notification required by 17 CFR 240.10b–10.

(d) The provisions of this section shall not apply to any transaction or

[47] 5 U.S.C. 603.

transactions that, upon prior written request or upon its own motion, the Commission conditionally or unconditionally exempts as not encompassed within the purposes of this section.

By the Commission.

Dated: February 8, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-3402 Filed 2-13-89; 8:45 am]

BILLING CODE 8010-01-M

17 CFR Parts 250 and 259

[Release No. 35-24815; File No. S7-2-89]

Non-Utility Diversification by Intrastate Public-Utility Holding Companies

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule, rule amendment and form amendment.

SUMMARY: The Commission is publishing for comment a rule that would specify certain circumstances in which non-utility diversification by an intrastate public-utility holding company would not be deemed detrimental to the public interest or the interest of investors or consumers. By creating a safe harbor, the proposed rule is intended to provide intrastate public-utility holding companies with greater certainty in determining the circumstances under which, because of diversified activities, exemption orders would be entered or, having been granted, continued. The Commission is also publishing for comment a rule amendment and a related form amendment to provide that a claim of exemption pursuant to rule by an intrastate public-utility holding company, in order to be effective, would require such holding company to meet one of the safe harbor provisions of the new rule.

DATE: Comments must be received on or before May 15, 1989.

ADDRESS: Send comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. (Reference to File No. S7-2-89). All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: William C. Weeden, Assistant Director (202) 272-7683 or Sidney L. Cimmet, Senior Special Counsel (202) 272-7340, Office of Public Utility Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is asking for public comment on:

(1) Proposed rule 17 under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) ("Act"). The proposed rule would provide that after three years from its adoption, in determining whether to grant, modify, or revoke any order of exemption under section 3(a)(1) (15 U.S.C. 79c(a)(1)) of the Act, the Commission shall not deem interests of any intrastate public-utility holding company in non-utility businesses to be detrimental to the public interest or the interest of investors or consumers within the meaning of the "unless and except" clause of section 3(a) (15 U.S.C. 79c(a)) of the Act [1] if either (a)(i) the interests in businesses which are not functionally related ("unrelated") to the operations of public-utility affiliates of the holding company are of limited size, as specified in the rule, to assure that the public-utility business remains the primary business of the holding-company system and that the extent of the risks to utility operations from possible financial reversals of unrelated activities and the possible effect of those activities on the filling of capital needs for utility purposes are limited; and (ii) certain other conditions are satisfied which are intended to insulate the utility business to the extent possible from legal liabilities stemming from non-utility operations and to prevent the diversion of utility resources for non-utility purposes; or (b)(i) the state has enacted a statute governing the formation and/or operations of intrastate public-utility holding companies and their affiliates; (ii) the state has considered, or authorized the appropriate state commission to consider, the issue of diversification of intrastate public-utility holding companies into non-utility businesses in light of the public policy goals of the Act, and the state and/or state commission has written policies with regard to such diversification; and (iii) the holding company is in compliance with any state statute and any state commission rules, regulations and orders pertaining to diversification activities. Holding companies exempt under section 3(a)(1) of the Act by order of the Commission when rule 17 and the related proposals become effective would have a one-time, and then an annual, filing requirement of certain information required of companies claiming exemption under rule 2(a)(1) of the Act.

(2) An amendment of rule 2 under the Act that would provide that after three years from its adoption, any intrastate public-utility holding company, and every subsidiary company thereof as such, upon the filing of an exemption statement on form U-3A-2 under the Act initially and as required each year thereafter, shall be exempt from all the provisions of the Act and the rules thereunder, except section 9(a)(2) (15 U.S.C. 79i(a)(2)) of the Act, if, in addition to satisfying present paragraph (a)(1) of rule 2, such holding company meets one of the safe harbor provisions of rule 17. A special, one-time filing of form U-3A-2 will be required following the effective date of amended rule 2 for entities which can claim exempt status under rule 2(a)(1) on such effective date.

(3) An amendment of form U-3A-2 to require intrastate holding companies claiming exemption under rule 2 to furnish information supporting the company's ability to rely on one of the safe harbor provisions of rule 17.

Background

1. Purpose of the Section 3(a)(1) Exemption

In adopting the Act, Congress determined to exempt from any provision or provisions of the Act a public-utility holding company that although engaged in interstate commerce, has an essentially intrastate

[1] Section 3(a)(1), in essence, provides that the Commission, by rules and regulations, or by order upon application, shall exempt any predominantly intrastate holding company (and its subsidiaries) from any provision or provisions of the Act "*unless and except* insofar as *it finds the exemption detrimental to the public interest or the interest of investors or consumers.*" 15 U.S.C. 79c(a)(1) (emphasis added). Holding companies not exempted by section 3(a)(1) are not the subject of this proposed rulemaking because their diversification activities, if any, are already subject to appropriate review, or because diversification is not relevant to their operations. Section 3(a)(2) exempts a holding company that is predominantly a public-utility company. Such a company's diversified activities, whether conducted directly as a division of the holding company, or through a subsidiary, make it possible for state regulatory authorities to monitor and delimit such activities in the context of ratemaking or the approval of security issuances. Section 3(a)(3) exempts a holding company that is primarily engaged in an industrial or other non-utility business where the utility subsidiary is functionally related to the (primary) non-utility business. Section 3(a)(4) exempts a holding company that is temporarily a holding company by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted, or in connection with a bona fide arrangement for the underwriting or distribution of securities. Section 3(a)(5) affords an exemption only when the utility operations conducted by a holding company are such that the holding company's utility interests are essentially foreign and include at most a small or minor domestic utility.

character.[2] Congress' decision is consistent with indications in the Act's legislative history that a major purpose of the Act was to create a system to control public-utility holding companies that escaped effective state regulation because of their interstate activities.[3] While Congress' purpose in adopting the section 3(a)(1) exemption is not entirely explicit, it appears that Congress believed that a company that is "predominantly intrastate" could be effectively controlled by the state in which it is primarily located.[4] This assessment is supported by the Senate and House Reports, which state that a predominantly intrastate company is "essentially not the kind of public-utility holding compan[y] at which the purposes of the legislation are directed * * *."[5]

2. Operation of Sections 3(a)(1) and 3(c)

Section 3(a)(1) of the Act provides that the Commission "shall" grant an exemption from "any provision or provisions" of the Act and the rules thereunder to a predominantly intrastate holding company and its subsidiaries "unless and except" the Commission finds the exemption "detrimental to the public interest or the interest of investors or consumers" (hereinafter referred to as "protected interests").[6] The terms "provision or provisions" allow for a partial exemption; that is, the Commission can condition or qualify an exemption, or limit an exemption to particular provisions of the Act.[7]

The Commission also has the power to revoke a company's exemption[8] and has exercised that power in two cases. In each case, it found both changed circumstances (as set forth in section 3(c)) and detriment to protected interests (as set forth in section 3(a)).[9]

3. Relationship of Detriment to Diversification

To determine the meaning of "detrimental" in the context of the "unless and except" clause of section 3(a), and the extent to which "diversification" is to be considered in the analysis, it is necessary to consider the language of the statute and its purpose, as well as the Act's legislative history.

A. Section 1: Abuses Sought To Be Eliminated by the Act

Non-utility diversification and investment in speculative ventures by public utility holding companies was of concern to Congress in the passage of the Act. To eliminate the abuses identified in section 1(b)(4)[10] and other abuses and to further the Act's policies, Congress adopted section 11(b) (15 U.S.C. 79k(b)) which by its terms applies only to registered holding companies.[11]

Congress did not make strict compliance with section 11(b)(1) a prerequisite to obtaining an intrastate exemption under section 3(a)(1).[12] Thus, it appears that Congress did not intend that diversification *per se* should make an exemption under section 3(a)(1) unavailable.

Since intrastate holding companies meeting the provisions of section 3(a) are not prohibited from non-utility diversification *per se*, it is the Commission's obligation under section 3(a)(1) to determine the circumstances in which such diversification is or could be detrimental to protected interests and, therefore, provide a basis for denying an exemption.

B. Section 11(b): Exempt Company Diversification.

In the early years of the administration of the Act, the Commission in some cases granted

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[2] H.R. Rep. No. 1318, 74th Cong., 1st Sess. 10 (1935) ("House Report"); *see also* S. Rep. No. 621, 74th Cong., 1st Sess. 24 (1935) ("Senate Report").

[3] *See, e.g.*, Senate Report, *supra* note 2, at 12; House Report, *supra* note 2, at 3. Other parts of the legislative history discuss particular difficulties faced by states in regulating interstate holding company systems. For example, the House Report describes a holding-company's keeping of its books in a state other than the one in which it is located, in order to escape effective state regulation, as "* * * [o]ne of the most obstructive features of the holding-company device from the point of view of State regulation of local' operating companies." House Report, *supora* note 2, at 20. *See also* 79 Cong. Rec. 8386–87 (1935) (Wheeler)

[4] *See, e.g.*, Report of National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess. 8 (1935) ("Power Policy Committee Report"); Senate Report at 11–12; House Report at 12. *See also* the statement by Senator Wheeler: This bill, * * * seeks not for further concentration of power in the hands of the Government * * *; on the contrary, the tendency of the bill is to make those power-holding companies decentralize, so that they can be controlled in a small number of States where they carry on their operating facilities. 79 Cong. Rec. 8384.

[5] Senate Report, *supra* note 2, at 24; House Report, *supra* note 2, at 10.

[6] The original draft of S. 2796 provided that the Commission "may exempt" a holding company. This was amended to "shall exempt" in order to remove the Commission's discretion whether to grant an exemption. 79 Cong. Rec. 8391, 8394, 8395 (Wheeler). Nevertheless, Congress made it clear that the Commission retained the ability to make certain that the exemptions conformed to the Act's purposes: By thus imposing a mandatory duty upon the Commission to exempt companies falling within defined categories except where such exemption is definitely detrimental to the basic purposes of the statute, the Committee has felt free to broaden the exemptions beyond what would be justified if the exemptions had been made unqualified and self-operative and beyond the power of the Commission to correct when abused or used to circumvent the purposes of the title. Senate Report, *supra* note 2, at 24. *See also* 79 Cong. Rec. 8395.

[7] *See, e.g., Long Island Lighting Co.*, 18 S.E.C. 717 (1945), where the Commission revoked an exemption from all provisions of the Act which it had granted nine years previously and granted instead a modified exemption from certain provisions of the Act, while requiring registration and compliance with others; *North American Co. v. S.E.C.*, 327 U.S. 686, 698–99 (1946), where the Supreme Court notes that the Commission could exempt a predominantly intrastate holding company from section 11 or any provision of the Act; *United Utilities*, 20 S.E.C. 496 (1945), where the Commission granted an exemption subject to the condition that the holding company sell its out-of-state assets. In the case of a partial exemption, the holding company would be required to register with respect to those provisions from which it is not exempt. *Lykes Bros., Inc.*, 46 S.E.C. 1196, 1198 (1978), citing *The Peoples Gas Light and Coke Co.*, 43 S.E.C. 624, 631 (1967); Washington Gas Light Co., 44 S.E.C. 515, 516 (1971); *American & Foreign Power Co.*, 6 S.E.C. 396, 402 (1939).

[8] Section 3(c) provides, in pertinent part, that: [w]henever the Commission, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempt by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

[9] In *Long Island Lighting Co.*, 18 S.E.C. 717 (1945), changed circumstances in the company's structure resulted in non-compliance with section 11(b)(2) (governing corporate structure and voting distribution), which the Commission determined was detrimental to the public interest. 18 S.E.C. at 772. The Commission also found detriment to the public in *Colonial Gas Energy Sys.*, HCAR No. 22144 (July 30, 1981), where changes in the financial structure of Colonial impaired its ability to raise needed capital and adversely affected its operating subsidiaries.

[10] Section 1(b)(4) provides that a detriment to protected interests exists when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties.

[11] Section 11(b)(1) (15 U.S.C. 79k(b)(1)) requires a registered holding company to limit its utility operations essentially to "a single integrated public-utility system." Section 11(b)(1) also forbids a registered holding company from diversifying into any non-utility business unless that business is "reasonably incidental or economically necessary or appropriate" to its utility operations. With respect to section 11(b)(1), it has been the Commission's consistent interpretation, subject to certain limited exceptions, that a registered holding company may not engage in a non-utility business unless it is functionally related to the operations of the public-utility system of the holding company. *See Michican Consolidated Gas Co. v. S.E.C* 444 F.2d 913 (D.C. Cir. 1971).

[12] *See North American Co. v. S.E.C.*, 327 U.S. at 698–99: Not all companies that are engaged in interstate activities, however, must necessarily comply with section 11(b)(1). By the terms of section 3(a)(1), if a holding company and all of its subsidiaries are predominantly intrastate in character * * * the Commission may grant an exemption from any provision of the Act unless and except insofar as it finds the exemption detrimental to the public interest * * * There also are indications in the legislative history that "the exemptions granted to such companies (pursuant to section 3(a)) would, of course, free them from the provisions of Section 11." 79 Cong. Rec. at 10359 (statement of Congressman Eicher).

exemptions under section 3(a), which permitted retention of non-utility properties that were not functionally related to the operations of public-utility companies. The Commission did not press for full compliance with the standards of section 11(b)(1) only as a matter of discretion, not for lack of authority under the Act.[13]

More recently, the Commission, on a few occasions, has considered the availability of a section 3(a)(1) exemption and the extent to which section 11(b)(1) should be applied to intrastate public utility holding companies that diversify into, especially, unrelated non-utility areas.[14] The most extensive, albeit inconclusive, consideration of the subject is found in *Pacific Lighting Corp.*, 45 S.E.C. 152 (1973), where four Commissioners considered for the first time whether a predominantly intrastate holding company's diversification into non-utility businesses made its continued exemption detrimental to protected interests within the meaning of the "unless and except" clause. Because a majority of the Commission considering the issue were unable to agree on whether Pacific Lighting met the appropriate standards, the company retained its exemption.[15]

Discussion

Recently, substantial diversification activities by some exempt intrastate holding companies have raised questions concerning whether these companies continue to be entitled to their exemptions from the Act.[16] Moreover, utilities whose major construction projects are completed or nearing completion or have been deferred because the increased demand for utility services, at least temporarily, has slowed or halted may be expected, because of surplus retained earnings, to increase unrelated non-utility business investment.[17]

When an exempt public-utility holding company engages in non-utility activities, there is a potential for detriment to protected interests.[18] Should non-utility investments prove unsuccessful, the investment caliber of the exempt holding company's securities may decline, the costs of raising additional capital for contribution to utility affiliates may rise, and the rates charged to consumers, which support the securities, may become higher than might otherwise be necessary. Other potential detriments that could result from non-utility diversification include the transfer of expertise and management acumen created within a utility to non-utility ventures, cost-shifting to the utility, utility purchases from non-utility affiliates at above market prices, and the potential for decreased reliability of utility service.[19] On the other hand, diversification by holding companies into areas unrelated to their core business could translate into improved earnings prospects for investors and could be potentially beneficial to consumers by reducing the utility's cost of capital and improving its access to the capital markets. To clarify the appropriate standards for permitting diversification activities of exempt intrastate holding companies, the Commission, pursuant to its authority under the Act, is publishing for comment this proposed rule.

We believe that the issues are most appropriately addressed through rulemaking. That process does not call into doubt the exempt status of any company that has substantially diversified into unrelated non-utility businesses. Rather, as a safe harbor 15 rule, rule 17 does not express the only circumstances in which diversification activities may be conducted without constituting detriment to protected interests. Moreover, our proposals afford a period of three years from their adoption for (1) an exempt intrastate public-utility holding company to adjust its degree of diversification in businesses unrelated to its utility operations and satisfy certain other conditions or (2) the holding company's state of organization to provide a regulatory structure meeting the requirements of the "state" safe harbor set forth in paragraph (a)(2) of rule 17.

At the end of the three-year period, any company exempt by order would continue to be exempt until, under section 3(c) of the Act, the Commission by order revoked its order. Claimants under rule 2 with investments in unrelated non-utility businesses at the end of such three-year period and not able to meet one of the safe harbor provisions of rule 17 would lose their exemptions at that time and would either have to register or file good faith applications for exemptions which would afford temporary exemptions pending Commission action on the applications.

1. The Proposed New Rule

The Commission believes Congress intended that the Act, among other things, regulate holding companies that escaped effective state regulation because of their interstate activities.[20]

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[13] This basis for Commission action was made explicit by the Commission in *Public Service Corp. of New Jersey*, 27 S.E.C. 682, 706–08 (1948).

[14] The Commission, in construing section 11(b)(1)in relation to *registered* holding companies, has adopted what has been referred to as the "functional relationship" test. *Michigan Consolidated Gas Co. v. S.E.C.*, 444 F.2d 913, 916–17 (D.C. Cir. 1971), *citing North American Co. v. S.E.C.*, 327 U.S. at 697 (dicta approving functional relationship test). To retain (or acquire pursuant to sections 9 and 10) a particular non-utility business, a registered holding company or its subsidiary must show that its "other business" is reasonably incidental or economically necessary or appropriate to the operations of such integrated public-utility system, and that the retention of the other business is necessary or appropriate in the public interest. *Id.* at 916.

[15] A similar result was reached in *National Utilities & Industries Corp.*, 45 S.E.C. 167 (1973).

[16] As of October 31, 1988, there were 88 companies that claimed exemption under rule 2 as intrastate holding companies. About one-half of such claimants had only non-utility interests that were functionally related to the utility operations of the holding-company system. The others divide roughly equally into two groups: One group consisted of claimants with 10% or more of consolidated assets attributable to non-utility, non-functionally related interests; the other group comprised claimants that were less diversified. Of the 34 companies exempted by order of the Commission under section 3(a)(1), about one-fifth appeared to be significantly diversified at that date.

[17] Other possibilities for surplus earnings are: (1) Pay higher dividends to shareholders; (2) repurchase common stock; (3) retire debt and preferred stock; (4) diversify into functionally related non-utility projects; (5) expand current plant beyond anticipated needs; (6) hold liquid capital for potential increase in plant capacity; and (7) decrease consumer rates.

[18] Actual harm to investors, consumers, or the public interest is not required to invoke the "unless and except" clause. The Commission has recognized that potential harm to protected interests is itself a detriment even though no actual harm has yet occurred. *Standard Oil Co.*, 10 S.E.C. 1122, 1129 (1942), *citing Detroit Edison Co. v. S.E.C.*, 119 F.2d 730, 739 (1941). ("The statute contemplates action prospectively. It is a preventive measure intended to regulate action before the interests of those concerned are adversely affected.")

[19] The Federal Energy Regulatory Commission ("FERC") has also recognized the potential detriments of an unfettered diversification program. Twice recently, first in *Central Vermont Public Service Corp.*, 39 FERC Para. 61,295 (1987), and then in *Central Illinois Public Service Co.*, Docket No. EL 87–60–000 (January 20, 1988), FERC invoked the provisions of section 203 of the Federal Power Act to assert jurisdiction over the formation of a new holding company. In *Central Vermont*, FERC stated its reasons for asserting jurisdiction as follows: Reorganizations wherein a jurisdictional public utility becomes the wholly-owned subsidiary of a parent holding company may present potential for abuses adverse to the public interest. *To the extent that utility revenues are used to finance non-utility operations, the cost of utility services may be increased. If the parent makes unwise investment decisions the reliability of service of jurisdictional facilities could be impaired.* This aspect of the holding company/operating utility relationship was a concern to those who enacted Title II of the Public Utility Act. (Footnote omitted.) We are asserting jurisdiction over this type of transaction so that in cases where (FERC) finds sufficient potential for abuse, (FERC) may disapprove the transaction, or place appropriate conditions on the use of operating utility funds, pursuant to its authority under section 203(b) of the statute (emphasis added).

[20] Section 1(a)(5) (15 U.S.C. 79a(a)(5)) states that public-utility holding companies and their

Continued

Congress also intended that the Commission have jurisdiction over companies exempt from the Act under section 3(a)(1) as predominantly intrastate. In addition, Congress did not intend that exempt intrastate companies be subject to section 11(b)(1) prohibitions against non-utility diversification to the same extent as registered companies. The nature, extent, and structure of such diversification and the regulatory environment in which it occurs would be relevant in the Commission's determination whether there is a detriment to protected interests that would limit the availability of an exemption under section 3(a)(1).[21] Where the relevant state has made a judgment that diversification would not conflict with its ability to exercise regulatory control and that control is manifested in a state public-utility holding company statute, an exemption from the Act under section 3(a)(1) for a predominantly intrastate company which has, or intends to have, diversification activities would be consistent with the purposes of the Act.

Accordingly, and assuming no other basis existed for denying an exemption under section 3(a)(1), the proposed rule would provide a "state" safe harbor under the following circumstances:

—The state has enacted a statute governing the formation and/or operations of intrastate public-utility holding companies and their affiliates;

—The state has considered, or authorized the appropriate state commission to consider, the issue of diversification of intrastate public-utility holding companies into non-utility businesses in light of the public policy goals of the Act, and the state and/or state commission has written policies with regard to such diversification; and

—The holding company is in compliance with any state statute and any state commission rules, regulations and orders pertaining to diversification activities.

The Commission recognizes that this formulation may be perceived as not reflecting the degree of state involvement appropriate under the Act. Specific comment is invited concerning alternative standards for the state safe harbor that would provide greater assurance to the Commission that the purposes and policies of the Act were being followed.

Not all states, however, have enacted or may enact a statutory structure addressing diversification. In the absence of a state judgment as to what is necessary for it to exercise regulatory control over diversification by intrastate holding companies, the rule would provide a "regulatory" safe harbor for companies seeking to diversify. In addition, should state regulation of diversification prove to be ineffective in safeguarding protected interests, the Commission could amend its rules to provide only for a "regulatory" safe harbor.

Paragraph (a) of the proposed rule sets forth the general proposition of the safe harbors that, on and after three years from the adoption of the rule, for purposes of the "unless and except" clause in section 3(a), interests in non-utility businesses would not be deemed detrimental to the protected interests specified in that clause in either of two situations.

Paragraph (a)(1) states the conditions of the "regulatory" safe harbor provision. The first three conditions are intended to insulate the utility business of an intrastate holding company to the extent possible from being adversely affected by losses in non-utility operations and to prevent the diversion of utility resources for non-utility purposes. The fourth condition would require that each unrelated non-utility interest, and the totality of such interests, be limited in size, relative too the consolidated assets of the holding company, and therefore that all other non-utility interests be attributable to functionally related businesses, that is, businesses a registered holding company could retain.

Paragraph (a)(2) is the "state" safe harbor provision, which provides that the Commission would not withhold exemption on the basis of diversification if (i) the state of organization of the holding company has enacted a statute governing the formation and/or operations of intrastate public-utility holding companies and their affiliates; (ii) the state has considered, or authorized the appropriate state commission to consider, the issue of diversification of intrastate public-utility holding companies into non-utility businesses in light of the public policy goals of the Act, and the state and/or state commission has written policies with regard to such diversification; and (iii) the holding company is in compliance with any state statute and any state commission rules, regulations and orders pertaining to diversification activities.

Holding companies exempt under section 3(a)(1) by order of the Commission when rule 17 and the related proposals become effective would have a one-time, and then an annual, filing requirement of certain information required of companies claiming exemption under rule 2(a)(1) under the Act to enable the Commission to determine if a safe harbor is available. Where none is available, the Commission would determine whether to initiate a proceeding to revoke the exempt company's order because of changed circumstances and potential detriment to protected interests.

The rule would have no force or effect for a period of three years after its adoption to allow affected companies to make any necessary adjustments, or to allow states to enact the appropriate public-utility holding company legislation to achieve regulatory control over intrastate holding companies.

2. The Proposed Amendment to Rule 2

There are two ways an intrastate holding company can obtain an exemption: by order upon application under section 3 or under rule 2. Rule 2(a)(1) allows a company to obtain the exemption afforded by section 3(a)(1) by filing a claim of exemption on form U-3A-2. Such a claim exempts the holding company from all provisions of the Act (except section 9(a)(2)). No notice is published and no order is issued, but the

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subsidiary companies are affected with a national public interest in that, among other things, "their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies."

[21] Consistent with the legislative history supporting the view that a major purpose of the Act is to control public-utility holding companies that escape effective state regulation, the Commission's decisions have at times given weight to the determinations of local authorities when analyzing the issue of detriment. In late 1986, in approving a restructuring transaction by Wisconsin Energy Corporation ("WEC") that essentially changed the basis for the company's exemption from section 3(a)(2) (15 U.S.C. 79c(a)(2)) to section 3(a)(1), the Commission reiterated its position that the "unless and except" clause does not subject unregistered holding companies to the diversification limits of section 11(b)(1) to the same extent as registered holding companies. *Wisconsin Energy Corp.*, HCAR No. 24267, 37 SEC Docket 387 (December 18, 1986). The Commission noted that there was a comprehensive Wisconsin law governing the formation and operation of utility holding companies and an order of the Public Service Commission of Wisconsin ("PSCW") limiting WEC's investment in non-utility assets to approximately 25% of holding-company assets, ensuring that the holding company would maintain its predominantly utility orientation. The Commission found that WEC's diversification activities, as specifically limited by the Wisconsin statute and PSCW order, would not be detrimental to carrying out the provisions of section 11(b)(1), as they might be applied to intrastate exempt holding companies under the "unless and except" clause of section 3(a). *Id.* at 395.

More recently, the Commission took the same position regarding diversification it had taken in WEC in a very similar restructuring by another Wisconsin intrastate holding company. *WPL Holding, Inc.*, HCAR No. 24590, 40 SEC Docket 634 (February 26, 1988).

claim must be renewed by annual filings on or before March 1 of each year.[22]

The Commission is proposing an amendment to rule 2 to provide that, on and after three years from the adoption of the amendment, claims of exemption by an intrastate public-utility holding company would, *in order to be effective*, require that, in addition to satisfying paragraph (a)(1) of rule 2, such holding company meet one of the safe harbor provisions of rule 17. Companies relying on rule 2 on its effective date would have 60 days in which to file an updated form U–3A–2, as proposed to be amended. Claimants who could no longer rely on amended rule 2, when effective, because they did not come within one of the safe harbor provisions of rule 17, may be able to file a good faith application for an order of the Commission under section 3(a)(1). In any proceeding on such an application, unrelated non-utility investments would not be presumed to be detrimental to protected interests.

3. The Proposed Amendment to Form U–3A–2

Form U–3A–2, the statement by a holding company claiming exemption under rule 2(a)(1) from all provisions of the Act except section 9(a)(2), would be amended to solicit information that would enable a determination that a rule 2 claim by an intrastate holding company was meritorious in view of the requirement added to rule 2.

Request for Comments

The Commission requests public comment on proposed rule 17, proposed amended rule 2, and proposed amended form U–3A–2. Specific comment is invited on: (1) The available empirical evidence with respect to the benefits and/or detriments of diversification into unrelated non-utility businesses by public-utility holding companies; (2) whether the conditions of the safe harbors in proposed rule 17 are appropriate, whether more restrictive conditions are needed, or whether less restrictive conditions would be adequate. In particular, the Commission invites comment on whether the consolidated asset test and the percentage limitations, in paragraph (a)(1)(iv), which derive from the Commission's opinions in *Pacific Lighting Corp.*, are appropriate, or whether some other test, for example the approximately 25% of holding-company-assets test in Wisconsin's holding company statute, which makes no distinction between diversification which is related and unrelated to utility operations, would be an appropriate standard; and (3) whether other measures (e.g., gross assets, total revenues, net income, shareholder equity, etc.) would be more appropriate. If you suggest other measures, please include related percentage figures that you recommend, and the basis therefor.

Pacific Enterprises (formerly Pacific Lighting Corporation) ("Pacific") and a subcommittee of the American Bar Association ("ABA") have submitted proposals, dated July 11 and July 14, 1988, respectively, concerning diversification by exempt holding companies.

Pacific suggests that the Commission issue a statement of administrative policy regarding exempt holding company diversification ("Policy Statement"). Under the Policy Statement:

—Diversification would not, in and of itself, be deemed detrimental to protected interests.
—Diversification would be first and foremost a matter for state regulation.
—A comprehensive state holding company statute should not be the only means by which states can adequately protect the interests the Act is intended to protect.
—Five non-exclusive factors (concerning operational and functional dealings between utility subsidiaries and the holding company and non-utility subsidiaries) would be listed for diversifying exempted holding companies to consider, these being factors the Commission would consider important in determining whether diversification is conducted in a manner that may be detrimental to protected interests.

The ABA's proposed Interpretive Release would create presumptions as to situations, on account of diversification, when the Commission would not challenge exemptions, and when it might do so, in its discretion. Under the Interpretive Release:

—Diversification would not affect an exemption if a state regulator with jurisdiction over utility rates and services has (1) approved or sanctioned diversification by formal decision or statement of general policy; (2) informed the Commission that the holding company diversification program is consistent with local laws and no substantial detriment to protected interests is perceived; or (3) in a proceeding involving a utility subsidiary of the holding company, in which any material question involving or arising out of diversification was specifically in issue, made no finding that diversification in and of itself is detrimental to protected interests.
—Diversification could cause the initiation of formal proceedings by the Commission in exceptional circumstances, such as when (1) a state regulator has determined that the diversification has a continuing material adverse effect on rates and services; (2) the state regulator, or others, have for good cause petitioned the Commission to initiate a proceeding under the "unless and except" clause to determine if the exemption is detrimental to protected interests; or (3) the Commission's staff has determined that there is imminent danger of substantial harm to a utility subsidiary of the exempt holding company by reason of diversification.

These submissions, which differ in form and substance from the Commission's rulemaking proposal, have been placed in the public comment file on the Commission's proposal and are available for inspection. While these submissions are not proposed as alternatives to the proposed Commission rule set forth below, the Commission invites comment on whether some or all of the provisions of these proposals should supplement or supplant the proposed rule.

Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("Analysis") in accordance with 5 U.S.C. 603 regarding the proposal of rule 17 and the proposed amendments to rule 2 and form U–3A–2. The Analysis explains that proposed rule 17 would specify certain circumstances, on and after three years from adoption, in which non-utility diversification by an intrastate public-utility holding company would not be deemed detrimental to the public interest or the interest of investors or consumers. By creating safe harbors, the proposed rule is intended to provide intrastate public-utility holding companies with greater certainty in determining the circumstances under which, because of diversified activities, exemptive orders would be entered or, having been granted, continued. The proposed amendment to rule 2, on and after three years from its adoption, would require that a claim of exemption under that rule by an intrastate holding

[22] Under rule 6, the exemption may be terminated by a registered letter from the Commission stating that a question exists about the holding company's entitlement to the exemption. A company receiving a termination letter has 30 days to either register under the Act or file a formal application for an exemption which, if filed in good faith, exempts the company from the Act until the Commission issues a final order.

company, in order to be effective, would require such holding company to meet one of the safe harbor provisions of rule 17. The proposed amendment to form U-3A-2 would require intrastate holding companies claiming exemption under rule 2 to furnish information supporting the company's ability to rely on one of the safe harbor provisions of rule 17. In passing the Act, Congress included in section 3(a)(1) a broad exemption for intrastate public-utility holding companies. The exemption apparently stemmed from Congress' belief that for such companies state regulation would provide sufficient public protection to obviate the need for additional federal regulation. Congress did not, however, shield such companies entirely from federal regulatory oversight; section 3(a)(1) requires the Commission to grant exemptions to intrastate holding companies "unless and except" as the Commission finds the exemption detrimental to protected interests. The Analysis states that substantial diversification activities by some intrastate holding companies have brought to the fore the need for the Commission to clarify the standards for determining when such activities jeopardize exemptions from the Act. The Analysis notes that presently only one exempt intrastate public-utility holding company, out of a total of 122, is a small entity as defined by the Commission's rules. The Analysis also states that the Commission believes that additional reporting or recordkeeping requirements imposed by the proposals call for information that is readily available and can be assembled with no significant increase in cost to any intrastate holding company. The proposals could significantly impact a small entity that intended to diversify and rely on one of the safe harbors by possibly causing such a holding company to limit its acquisition of unrelated non-utility interests as might be required by the "regulatory" safe harbor, or as might be required by a "state" safe harbor, depending on its requirements. The Analysis notes that the Commission has considered certain significant alternatives, including requiring fewer or less burdensome conditions to be satisfied for a safe harbor to be available to a small entity. The Analysis states, however, that the Commission believes that such an alternative would be inconsistent with the legislative intent of section 3(a). With respect to the reporting provisions the proposals would add, the Analysis states that the Commission believes that an exemption from all or part of those provisions for small entities is not appropriate in view of the minimal compliance costs involved and the need by the Commission of the information to evaluate entitlement to a safe harbor. A copy of this Analysis may be obtained by contacting Sidney L. Cimmet, Esq., Mail Stop 7-1, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Cost Benefit of Proposal

The proposed rule, rule amendment, and form amendment ("the proposals") could significantly increase regulatory compliance costs for those intrastate public-utility holding companies that have substantially diversified, or intend to substantially diversify into non-utility businesses unrelated to their utility operations. The proposals could require an intrastate holding company that seeks an exemption, or that seeks to preserve an existing exemption, to (1) forgo an acquisition of an unrelated non-utility interest or to divest itself of such interests previously acquired; or alternatively, (2) seek enactment by the legislature in its state of organization of a regulatory structure meeting the requirements of the "state" safe harbor set forth in paragraph (a)(2) of rule 17. However, the consequence of an intrastate holding company having to tailor diversification activities to come within a "regulatory" safe harbor, or a "state" safe harbor where one exists, to ensure the availability or continuation of exempt status, carries out the Commission's mandate to delimit detriment to protected interests that could result from diversification by intrastate holding companies into businesses bearing no relationship to the economy and management of utility operations.

Where the states do not act, the federal standard embodied in the "regulatory" safe harbor is intended to delimit detriment that could stem from diversification. However, where the relevant state has made a judgment that holding company system diversification would not conflict with its ability to exercise regulatory control over utility services, and that control flows from a state public-utility holding company statute, the Commission would permit effectuation of Congress' apparent view that an intrastate holding company could be effectively controlled by its state of organization.

The Commission invites specific comments as to its assessments of the costs and benefits associated with the proposals, in addition to estimates of any costs and benefits perceived by commenters.

Statutory Basis and Text of Amendments

Rule 17 and the amendments to rule 2(a)(1) and form U-3A-2 are being proposed pursuant to the authority set forth in sections 3(a)(1) and 20(a) of the Public Utility Holding Company Act of 1935.

List of Subjects in 17 CFR Parts 250 and 259

Accounting, Reporting and recordkeeping requirements, Securities, Utilities.

Text of Proposed Rule, Rule Amendment, and Form Amendment

Chapter II of Title 17 of the Code of Federal Regulations is proposed to be amended as follows:

PART 250—RULES AND REGULATIONS, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

1. The authority citation for Part 250 is amended by adding the following citation:

Authority: Secs. 3, 20, 49 Stat. 810, 833; 15 U.S.C. 79c, 79t, unless otherwise noted. * * * Section 250.17 also issued under 15 U.S.C. 79c(a)(1) and 79t(a).

2. By adding § 250.17 to read as follows:

§ 250.17 Diversification by intrastate holding companies.

(a) On and after three years from (insert date three years after date of publication of the adopted Rule in the **Federal Register**) the Commission, in determining whether to grant, modify, or revoke any order upon application under paragraph (1) of section 3(a) of the Act shall not deem holding-company direct or indirect interests in non-utility businesses to be detrimental to the public interest or the interest of investors or consumers, within the meaning of section 3(a) of the Act, if—

(1)(i) All such holding-company interests are segregated from its public-utility business through separate corporate subsidiaries;

(ii) There are no service, materials or other contracts between affiliated public-utility companies of the holding company and either the holding company or its non-utility affiliates except to the extent such contracts are subject to the supervision of a State commission;

(iii) Except for dividend payments to the holding company from its affiliated public-utility companies, which dividend payments have not been objected to by the State commission, there is no use of funds, or credit, or of operating

management of affiliated public-utility companies of the holding company for non-utility purposes; and

(iv) Holding-company interests in non-utility businesses not having a functional relationship, within the meaning of section 11(b)(1) of the Act, to its affiliated public-utility companies together with guarantees by the holding company of any obligations of such non-utility businesses constitute not more than 10% of the consolidated assets of the holding company; and holding-company interests in, and guarantees of obligations of, any one such business constitute not more than 2% of such assets; or

(2)(i) The State of organization of the holding company has enacted a statute governing the formation and/or operations of intrastate public-utility holding companies and their affiliates;

(ii) The State has considered, or authorized the appropriate State commission to consider, the issue of diversification of intrastate public-utility holding companies into non-utility businesses in light of the public policy goals of the Act, and the State and/or State commission has written policies with regard to such diversification; and

(iii) The holding company is in compliance with any State statute and any State commission rules, regulations and orders pertaining to diversification activities.

(b) For purposes of paragraph (a)(1)(iv) of this section, holding-company direct or indirect interests in securities which could be acquired by a registered holding company under section 9(c) of the Act, or by rules, regulations, or order of the Commission also under section 9(c), shall be excluded for purposes of computation from the numerator, but not the denominator, of the fraction in that calculation.

(c) Any holding company exempt under section 3(a)(1) of the Act by order of the Commission on (insert date three years after date of publication of the adopted Rule in the **Federal Register**) shall file with the Commission within 60 days after such date, and on or before March 1 of each year thereafter, a report, bearing the file number that had been assigned to the exemptive order by the Commission, containing the information, as of the close of the last calendar year, required by paragraph (4) and Exhibit A, or by Exhibits A and B, as appropriate, of amended Form U-3A-2.

3. Section 250.2 is amended by revising paragraph (a)(1) and adding paragraph (c) as follows:

§ 250.2 Exemption of holding companies which are intrastate or predominantly operating companies.

(a) * * *

(1)(i) Such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized; and

(ii) On or after (insert date three years after date of publication of the adopted Rule in the **Federal Register**) such holding company meets one of the safe harbor provisions of § 250.17.

* * * * *

(c) Any holding company which has filed an exemption statement in reliance on paragraph (a)(1) of this section prior to (insert date three years after date of publication of the adopted Rule in the **Federal Register**) shall file with the Commission within 60 days after such date a special one-time filing of Form U-3A-2, as amended, containing only the information, as of the close of the last calendar year, required by paragraph (4) and Exhibit A, or by Exhibits A and B, as appropriate, of amended Form U-3A-2.

PART 259—FORMS PRESCRIBED UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

4. The authority citation for Part 259 is amended by adding the following citation:

Authority: Secs. 5, 6, 7, 10, 12, 13, 14, 17(a), 20, 49 Stat. 812, 814, 815, 818, 823, 825, 827, 830, 833; 15 U.S.C. 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t. * * * Section 259.402 also issued under sections 3(a)(1) (15 U.S.C. 79c(a)(1)) and 20(a) (15 U.S.C. 79t(a)).

Form U-3A-2 [Amended]

5. By amending Form U-3A-2 (referenced in § 259.402) for annual reports pursuant to Rule 2 (§ 250.2 of this chapter) for exempt holding companies which are intrastate or predominantly operating companies by adding item 4 and revising Exhibit A and adding Exhibit B as follows:

* * * * *

Statement by Holding Company Claiming Exemption Under Rule 2 from the Provisions of the Public Utility Holding Company Act of 1935

* * * * *

4. If the claimant relies on § 250.2(a)(1) and § 250.17(a)(1) of this chapter, the following information as of the close of the last calendar year:

(a) Consolidated assets of claimant.

(b) A statement (1) identifying and describing with specificity each direct or indirect non-utility interest of claimant and (2) categorizing each such interest as functionally related, or unrelated, within the meaning of section 11(b)(1) of the Act.

(c) The percentage, showing its calculation, of consolidated assets represented by each such interest.

* * * * *

Exhibit A

A consolidating statement of income and surplus of the claimant and its direct or indirect affiliated companies for the last calendar year, together with a consolidating balance sheet of claimant and such affiliated companies as of the close of such calendar year.

Exhibit B

If the claimant relies on § 250.2(a)(1) and § 250.17(a)(2) of this chapter, a statement by the claimant that its State of organization has enacted a statute governing the formation and/or operations of intrastate public-utility holding companies and their affiliates; the State has considered, or authorized the appropriate State commission to consider, the issue of diversification of intrastate public-utility holding companies into non-utility businesses in light of the public policy goals of the Act, and the State and/or State commission has written policies with regard to such diversification; and that the holding company is in compliance with any State statute and any State commission rules, regulations and orders pertaining to diversification activities.

* * * * *

By the Commission.

February 7, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-3401 Filed 2-13-89; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 422

Social Security Numbers for Newborn Children

AGENCY: Social Security Administration, HHS.

ACTION: Proposed rule.

SUMMARY: In these proposed regulations, we are amending our rules on applying for a social security number. Under the proposed regulations, when a parent gives information to hospital personnel for the birth registration process of a State, including for this purpose, the District of Columbia, Puerto Rico, Guam, and New York City, the

parent will also be able to request a social security number for his or her newborn child. When a parent has requested a social security number for the child, the State vital statistics office will receive the request with the birth registration data from the hospital and then forward this information electronically to the Social Security Administration (SSA) where a social security number will be assigned and a card will be issued for the child. The vital statistics data that the State office receives from the hospital and forwards to SSA will serve as evidence of the age, identity, and U.S. citizenship of the newborn child for purposes of assigning a social security number to that child. Under these procedures, the parent will not be required to file a separate application for a social security number for the child.

DATES: Your comments will be considered if we receive them no later than March 16, 1989.

ADDRESSES: Comments should be submitted in writing to the Commissioner of Social Security, Department of Health and Human Services, P.O. Box 1585, Baltimore, MD 21235, or delivered to the Office of Regulations, Social Security Administration, 3–B–4 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, between 8:00 a.m. and 4:30 p.m. on regular business days. Comments received may be inspected during these same hours by making arrangements with the contact person shown below.

FOR FURTHER INFORMATION CONTACT: Jack Schanberger, Room 3–B–4 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, (301) 965–8471.

SUPPLEMENTARY INFORMATION: At the request of parents or guardians, the Secretary of Health and Human Services (the Secretary) is authorized under section 205(c)(2)(B)(i) of the Social Security Act (the Act) to take affirmative measures to assure that social security account numbers are assigned to or on behalf of children who are below school age. This section of the Act also provides that the Secretary shall require applicants for social security numbers to furnish the evidence necessary to establish their age, U.S. citizenship or alien status, and true identity.

Our current regulations at 20 CFR 422.103 provide that an individual may apply for a social security number by filing a signed Form SS–5 "Application for Social Security Number Card", and by submitting evidence of age, identity, and U.S. citizenship or alien status as described in § 422.107. Under these current rules, a U.S. birth certificate is generally accepted as evidence of age, as evidence of identity for a child under 7 years of age, and as evidence of U.S. citizenship.

In 1986, we assigned approximately 5.7 million social security numbers, including almost 2 million to children under age 3. We expect to be assigning many more social security numbers to young children, primarily because of the Tax Reform Act of 1986 (Pub. L. 99–514, section 1524) and the Family Support Act of 1988 (Pub. L. 100–485). The Tax Reform Act requires that a taxpayer who claims an exemption for a dependent must provide the taxpayer identification number of the dependent, which is usually a social security number, on tax returns due after December 31, 1987, if the dependent is age 5 or older. Under the Family Support Act, a taxpayer must provide a taxpayer identification number for dependents age 2 or older on tax returns due after December 31, 1989.

In 1987, we began a pilot project in three States (New Mexico, Iowa, and Indiana) to test the feasibility of assigning a social security number to a newborn child, based on a parent's request, as part of the State's birth registration process. At the request of these States, the procedures established for the pilot have continued. Under these pilot procedures, a parent's participation on behalf of his or her newborn child is voluntary, and we do not assign a number unless the parent requests it.

Because of the growing need for persons to obtain social security number cards at an early age, we initiated the pilot projects as an alternative to the existing process which is provided for by our current regulations. The process of issuing a social security number card based on a parent's request soon after the child's birth was well received by the new parents, the pilot States, and the participating hospitals. Our experience shows that on a monthly basis, more than 75 percent of parents requested social security number cards for their newborn children. Further, participation rates have increased because more parents have become aware of the service and the convenience of requesting a card in the hospital as part of the birth registration process rather than filing a Form SS–5 at a later time.

Because of the success of the pilot projects, we are asking the other States, including, for the purpose of this service, the District of Columbia, Puerto Rico, Guam, and New York City, to enter into agreements with us to make this service available nationally. We do not plan to extend this service to any other U.S. territories or possessions because of the relatively small number of births and requests for social security numbers in those places. We are proposing to amend our regulations to include this procedure as another means of applying for a social security number.

After reviewing the results of the pilot projects and discussing the pilot procedures with other State authorities, we are confident that the birth registration process provides reliable information for assigning social security numbers to newborn children. Further, the analysis we conducted in one of the pilot States shows that there is very little potential for fraud and error in the birth registration process.

Under these proposed rules, the birth registration processes of participating State vital statistics offices may be used to obtain a social security number card. A question will be added to the birth registration form, asking the parent whether he or she wants to have a social security number card issued to the newborn child. If a number is requested by the child's parent, the appropriate State vital statistics office will electronically forward the request and the child's name, date and place of birth, sex, mother's maiden name, father's name, address of mother, and birth certificate number to SSA. We will then assign a social security number to the child and send the card to the child at the mother's address.

In this process of assigning a social security number to a newborn child, we will consider a checked box or other affirmative response by a parent as indicated on the birth registration form as a request for a social security number for the child. We will consider the information transmitted to us from the birth registration form by these State offices to be acceptable evidence of the child's age, identity, and U.S. citizenship because it contains the information we need to establish these factors.

As noted above, section 205(c)(2)(B)(i) of the Act provides that the Secretary is authorized to assign social security numbers to or on behalf of children who are below school age at the request of their parents or guardians. Although our regulations governing the issuance of a social security number state that every individual needing a number may apply by filing a signed Form SS–5, we are not requiring a signed SS–5 for a number in the case of parents who request a number for their newborn child as part of the State birth registration process. We are modifying our procedures for several reasons. First, most States

require a parent's signature on the birth registration document. Additionally, when preparing the registration document, most hospitals will use a worksheet which includes the question on requesting a social security number and requires a parent's signature. We will work with States which do not require a signature on their registration document to prepare operating procedures and guidelines for all hospitals within their jurisdictions, including a facsimile of a worksheet which contains both the social security number question and a parent's signature, to assure that a parent who requested a number for a newborn child did so affirmatively. We, therefore, believe that the procedures we are proposing for assigning social security numbers to newborn children will minimize the possibility that we will assign numbers in error.

To emphasize the voluntary nature of the process, we will attempt to inform parents about the social security number process before the birth of their child so that they can make a knowledgeable choice about requesting a number. To do this, we plan to use, for each State that decides to participate in this enumeration process, the public information materials we have developed. The materials will include TV and radio promotions, articles in the print media, and, most important, public information materials distributed in hospitals, doctors' offices, prenatal clinics, etc.

Because of our desire to implement this procedure nationally in 1989, we are providing a 30-day comment period instead of the usual 60 days. We believe this is reasonable in view of the public interest considerations that have prompted the proposed rules and the favorable reactions we have received on the pilot projects.

Regulatory Procedures

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because the regulations do not meet any of the threshold criteria for a major rule. These changes are expected to save the Federal Government $11.4 million annually when fully implemented. Therefore, a regulatory impact analysis is not required.

Regulatory Flexibility Act

We certify that these regulations, which affect the issuance of social security number cards to newborn children, will not, if promulgated, have a significant economic impact on a substantial number of small entities, because they affect only the voluntary participation of parents, hospitals, and State vital statistics offices. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96–354, the Regulatory Flexibility Act, is not needed.

Paperwork Reduction Act

These regulations impose no new reporting/recordkeeping requirements requiring the Office of Management and Budget clearance.

(Catalog of Federal Domestic Assistance Programs Nos. 13.802 Social Security—Disability Insurance; 13.803 Social Security—Retirement Insurance; 13.805 Social Security—Survivors Insurance)

List of Subjects in 20 CFR Part 422

Administrative practice and procedure, Freedom of Information, Organization and Functions (Government agencies), Social Security.

Dated: September 16, 1988.

Dorcas R. Hardy,

Commissioner of Social Security.

Approved: December 30, 1988.

Otis R. Bowen,

Secretary of Health and Human Services.

For the reasons set out in the preamble, Subpart B of Part 422 of 20 CFR Chapter III is proposed to be amended as follows:

PART 422—ORGANIZATIONS AND PROCEDURES

The authority citation for Subpart B continues to read as follows:

Authority: Secs. 205 and 1102, Social Security Act (42 U.S.C. 405 and 1302).

2. Section 422.103 is amended by revising paragraphs (b) and (c), to read as follows:

§ 422.103 Social security numbers.

* * * * *

(b) *Applying for a number—(1) Form SS–5.* An individual needing a social security number may apply for one by filing a signed Form SS–5, "Application for A Social Security Number Card," at any social security office and submitting the required evidence. Upon request, the social security office may distribute a quantity of application Form SS–5 to labor unions, employers, or other representative organizations. An individual outside the United States may apply for a social security number card at the Veterans Administration regional office, Manila, Philippines, at any U.S. foreign service post, or at a U.S. military post outside the United States. See § 422.106 for special procedures for filing applications with other government agencies. Form SS–5 may be obtained at:

(i) Any local social security office;

(ii) The Social Security Administration, 300 N. Greene Street, Baltimore, Md. 21201;

(iii) Offices of District Directors of Internal Revenue;

(iv) U.S. Postal Service offices (except the main office in cities having a social security office);

(v) U.S. Employment Service offices in cities which do not have a social security office;

(vi) The Veterans, Administration Regional Office, Manila, Philippines;

(vii) Any U.S. foreign service post; and

(viii) U.S military posts outside the United States.

(2) *Birth registration document.* The Social Security Administration may enter into an agreement with officials of a State, including, for this purpose, the District of Columbia, Puerto Rico, Guam, and New York City, to establish, as part of the official birth registration process, a procedure to assist SSA in assigning social security numbers to newborn children. Where an agreement is in effect, a parent, as part of the official birth registration process, need not complete a Form SS–5 and may request that SSA assign a social security number to the newborn child.

(c) *How numbers are assigned—(1) Request on Form SS–5.* If the applicant has completed a Form SS–5, the social security office, the Veterans' Administration regional office, Manila, Philippines, the U.S. foreign service post, or the U.S. military post outside the United States that receives the completed Form SS–5 will require the applicant to furnish documentary evidence, as necessary, to assist SSA in establishing the age, U.S. citizenship or alien status, true identity, and previously assigned social security number(s), if any, of the applicant. A personal interview may be required of the applicant. See § 422.107 for evidence requirements. After review of the documentary evidence, the completed Form SS–5 is forwarded, or data from the SS–5 is transmitted, to SSA's central office in Baltimore, Md. where the data are electronically screened against SSA's files. If the applicant requests evidence to show that he or she has filed an application for a social security number card, a receipt or equivalent document may be furnished. If the electronic screening or other investigation does not disclose a previously assigned number, SSA's central office assigns a number and issues a social security number card. If investigation discloses a previously

assigned number for the applicant, a duplicate social security number card is issued.

(2) *Request on birth registration document.* Where a parent has requested a social security number for a newborn child as part of an official birth registration process described in paragraph (b)(2) of this section, the State vital statistics office will electronically transmit the request to SSA's central office in Baltimore, Md. along with the child's name, date and place of birth, sex, mother's maiden name, father's name (if shown on the birth registration), address of the mother, and birth certificate number. This birth registration information received by SSA from the State vital statistics office will be used to establish the age, identity, and U.S. citizenship of the newborn child. Using this information, SSA will assign a number to the child, and send the social security number card to the child at the mother's address.

* * * * *

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[EE-44-87]

Income Taxes; Minimum Participation

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to minimum participation standards under section 401(a)(26) of the Internal Revenue Code of 1986. They reflect changes made by section 1112(b) and (e) of the Tax Reform Act of 1986. These regulations will provide the public with guidance on the minimum participation standards and will affect sponsors of, and participants in, qualified pension, profit-sharing and stock bonus plans.

DATES: Written comments and requests for a public hearing must be delivered or mailed by April 17, 1989. The proposed amendments generally apply to plan years beginning after December 31, 1988, except as otherwise specified in the Tax Reform Act of 1986.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (EE-44-87), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Nancy J. Marks of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, (Attention: CC:LR:T) (202) 343-6954 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 401(a)(26) of the Internal Revenue Code of 1986 (Code). These amendments are proposed to conform the regulations to section 1112(b) and (e) of the Tax Reform Act of 1986. (TRA '86) (100 Stat. 2444).

Amendments to Qualified Plans

Generally, section 401(a)(26) imposes new minimum participation requirements that plans must meet in order to be qualified under section 401(a). These rules are, in general, operational. To the extent that a plan does not meet the requirements of section 401(a)(26), the plan must be amended as of the date provided herein in order to retain qualification, such amendment to be effective as of the first day of the first plan year to which section 401(a)(26) applies.

Analysis

In General

Section 401(a)(26) requires that a qualified plan benefit at least the lesser of 50 employees or 40 percent of all employees of the employer. Section 401(a)(26) applies separately to an employer's active employees and the employer's former employees. In addition, to the extent determined by the Secretary, section 401(a)(26) applies separately to certain separate benefit structures, trusts, and other arrangements. The minimum participation requirement may not be satisfied by aggregating separate plans, even if such plans are identical in all respects or are treated as a single plan for coverage and nondiscrimination purposes and, as such, are treated as providing nondiscriminatory employer contributions or benefits.

Pursuant to the grant of regulatory authority to provide that certain separate benefit structures may be treated as separate plans subject to section 401(a)(26), the proposed regulation provides that a plan satisfies section 401(a)(26) only if each current benefit structure under the plan satisfies section 401(a)(26) and, in the case of a defined benefit plan (but not a defined contribution plan), the plan's prior benefit structure satisfies section 401(a)(26). Under the regulation, a single current benefit structure exists with respect to each portion of a uniform benefit formula (either a formula for allocating contributions and forfeitures under a defined contribution plan or a formula for determining an employee's benefit attributable to the current year under a defined contribution plan) to the extent that subsidies, optional forms of benefit, rights and features are provided on a uniform basis to employees eligible to participate under such formula. Finally, each defined benefit plan (but not a defined contribution plan) includes a single prior benefit structure that includes all benefits accrued under the plan as of the end of the prior year.

Section 401(a)(26) generally is effective with respect to plan years beginning after December 31, 1988. A deferred effective date applies with respect to certain collectively bargained plans.

Significant Special and Transitional Rules

The proposed regulation includes a variety of permanent special rules designed to facilitate the application of and compliance with section 401(a)(26), and includes several transition rules for plan years beginning in 1989. The most significant of the special permanent rules are as follows:

1. A current benefit structure satisfies section 401(a)(26) even though the structure benefits less than 50 employees and less than 40 percent of the employer's employees as long as the structure benefits at least 20 employees who primarily are nonhighly compensated employees and the structure is included in a plan that currently provides meaningful benefit accruals to at least 50 total employees. If such a current benefit structure benefits only employees who become employed by the employer in connection with a corporate acquisition or similar transaction, the structure is treated as satisfying section 401(a)(26) for 5 plan years after the transaction even though the structure benefiting such employees may benefit fewer than 20 employees.

2. A current benefit structure satisfies section 401(a)(26) without regard to the number of employees that it benefits as long as such structure benefits only employees who are not, and have never been, highly compensated employees of the employer, and such structure (and the benefits thereunder) are not relied upon by any other plan or current benefit structure to satisfy sections 410(b) or 401(a)(4).

3. A defined contribution plan's prior benefit structure is deemed to satisfy

section 401(a)(26). Thus, a frozen defined contribution plan satisfies section 401(a)(26) without regard to the number of employees who have benefits under the plan.

4. A defined benefit plan's prior benefit structure satisfies section 401(a)(26) if at least 100 active and former employees have more than de minimis benefits under the plan and no three highly compensated employees have more than 25 percent of the total accrued benefits under the plan.

5. A defined benefit plan's prior benefit structure satisfies section 401(a)(26) if the plan provides additional, meaningful benefit accruals under one or more current benefit structures for at least 50 employees or 40 percent of the employer's employees.

6. Most defined benefit plans that satisfy section 401(a)(26) with respect to prior benefit structures because the plans provide additional meaningful current benefit accruals will satisfy section 401(a)(26) in subsequent years with respect to the plan's prior structure without any requirement for retesting as long as the current benefit formula (including the rate of accrual) relied on remains in effect and continues to provide benefit accruals to a group of employees that satisfies the requirements of section 401(a)(26).

The most significant of the transition rules included in the proposed regulation for plan years beginning in 1989 are as follows:

1. A simplified definition of current benefit structure applies for the 1989 plan year so that only major plan benefit features need to be taken into account.

2. A reasonable compliance standard applies for the 1989 plan year for determining whether a defined benefit plan's prior benefit structure satisfies section 401(a)(26).

3. Certain plans may be terminated on or before May 31, 1989, without being amended to comply with section 401(a)(26).

4. Employer reversions with respect to certain defined benefit plans may qualify for the waiver of the excise tax under section 4980 even though the date of plan termination occurs after section 401(a)(26) becomes effective with respect to the plan as long the date of plan termination occurs on or before May 31, 1989, and plan assets are distributed to participants within a reasonable time after such termination.

Separate Benefit Structures

The proposed regulation provides that each single plan within the meaning of section 414(l) is a separate plan for purposes of section 401(a)(26) that must satisfy section 401(a)(26). In addition, the regulation provides that each separate benefit structure under a plan must satisfy section 401(a)(26).

The rules in the proposed regulation that govern the identification and testing of separate benefit structures are designed to reflect these basic policy objectives of section 401(a)(26):

1. Promote the integrity of the distinctions in the deduction limits and the contribution and benefit limits as they apply to defined benefit plans and defined contribution plans by limiting the extent to which a defined benefit plan generally may operate as an individual account for one or a small group of employees.

2. Promote the nondiscriminatory provision of benefits by limiting the extent to which an employer is able to design different benefit formulas for different employees in order to maximize benefit disparities in favor of highly compensated employees.

3. Limit the extent to which an employer maintaining a defined benefit plan that is not providing active employees with meaningful, additional benefits (e.g., a frozen or substantially frozen defined benefit plan) is able to delay plan termination in order to (i) increase the amount of its reversion upon plan termination, (ii) delay its receipt of the reversion to maximize its own benefit, or (iii) delay a benefit increase to favor a small group of highly compensated employees who remain with benefits under the plan.

The proposed regulation thus exercises the grant of regulatory authority to provide that certain separate benefit structures are to be treated as separate plans subject to section 401(a)(26). Instead of providing that such separate benefit structures are to be treated as separate plans, the proposed regulation directly applies section 401(a)(26) to such separate benefit structures. Thus, the proposed regulation provides that each current benefit structure that is included in a single plan (within section 414(l) is a separate benefit structure that must satisfy section 401(a)(26). In addition, each defined benefit plan (within section 414(l) includes a single prior benefit structure that must satisfy section 401(a)(26).

Pursuant to the proposed regulation, a single current benefit structure under a defined contribution plan comprises a uniform formula under which contributions and forfeitures are allocated among employees for the current year and uniform subsidies, optional forms of benefits, rights and features are provided. In the case of a defined benefit plan, a single current benefit structure comprises a uniform benefit formula under which an employee's benefit attributable to the current year of service is determined and uniform subsidies, optional forms of benefits, rights and features are provided to the participants benefiting under such structure. Thus, for example, a defined benefit plan that currently provides three different benefit formulas for determining the benefits of three different groups of employees is treated as having three separate current benefit structures each of which must separately satisfy section 401(a)(26). Similarly, a defined benefit plan which provides for a single benefit formula but makes a single sum distribution available to division A employees and not to division B employees is treated as having two separate current benefit structures each of which must separately satisfy section 401(a)(26). A current structure exists whenever there is an increase in accruals whether as a result of additional years of service, changes in compensation, or other factors. Such increases are treated as benefit attributable to the year of service in which they accrue.

Multiple employer plans must satisfy the requirements of section 401(a)(26) on an employer-by-employer basis rather than on the basis of participating employers in the aggregate. Failure to satisfy the requirements of section 401(a)(26) with respect to any component of this testing process may result in disqualification of the plan for all participating employers. The proposed regulation does not provide an exception to this rule. However, in a proper case, the Commissioner could retain the plan's qualified status for innocent employers by requiring corrective and remedial action with respect to the plan such as allowing the withdrawal of an offending employer, allowing a disqualifying defect to be cured within a reasonable period of time after the plan administrator has or should have had knowledge of such disqualifying event or was otherwise notified by the Internal Revenue Service of the disqualifying defects, or requiring plan amendments to prevent future disqualifying events. To the extent that coverage under a multiemployer plan is treated as being provided, in whole or in part, under a multiple employer plan, this relief is applicable to the multiemployer plan.

Finally, the proposed regulation provides that a separate current benefit structure exists if any person has any priority, either under the terms of the plan or under any arrangement outside of the plan, with respect to any assets of a defined benefit plan, such as the right

to some or all of a possible reversion. Essentially, the proposed regulations provide that if, under all the facts and circumstances, an arrangement (either under or outside the plan) has the effect of modifying any feature under the plan taken into account in determining an employee's benefit, providing any employee with any priority or greater interest in a portion of the assets in the plan, or linking any financial matter involving an employee to all or a portion of the assets in the plan in a way that has the effect of creating separate accounts, such arrangement will be treated as creating a separate current benefit structure within the plan.

Current Benefit Structure Requirements

The proposed regulation provides that, in order for a plan to satisfy section 401(a)(26), each current benefit structure that benefits any active employee in the plan must benefit at least the lesser of 50 active employees or 40 percent of an employer's active employees. Similarly, a current benefit structure that benefits any former employee must benefit at least the lesser of 50 former employees or 40 percent of the employer's former employees. This approach to separate benefit structures is equivalent to providing that each current benefit structure is a separate plan that, as such, must satisfy section 401(a)(26).

The proposed regulation includes a special restructuring rule under which an employer may, solely for purposes of testing under section 401(a)(26), treat a benefit formula under a plan that would be a single current benefit structure but for differences in the rate of benefit accrual or contribution allocation into restructured separate benefit structures, one consisting of the lesser included portion of the formulas common to each of the benefit structures and one or more consisting of the portion(s) of the formula(s) that is not common to each of the benefit formulas. An employer may apply the rules of section 401(a)(26) to a plan's current benefit structures on the basis of this restructuring rule without amending the plan in any respect to reflect such restructuring. Thus, for example, a defined contribution plan that has a 10 percent of compensation allocation formula for one group of employees and a 15 percent of compensation allocation formula for another group of employees may be treated, under the restructuring rule, as having a 10 percent of compensation formula applicable to both groups of employees and a 5 percent of compensation formula applicable only to the group of employees subject to the explicit, 15 percent plan formula. Even though the plan explicitly includes the 10 percent and 15 percent formulas, the plan may be tested under section 401(a)(26) on the basis of the restructured 10 percent and 5 percent formulas.

The proposed regulation provides a special rule permitting a current benefit structure to satisfy section 401(a)(26) if such structure benefits at least the lesser of 20 active employees (rather than 50 active employees) or 40 percent of the employer's active employees. This special rule is available only if certain coverage and nondiscrimination requirements are satisfied and, in addition, the plan that includes the current benefit structure provides meaningful benefits (determined under the minimum current benefit structure test applicable with respect to prior benefit structures) to at least the lesser of 50 active employees or 40 percent of the employer's active employees.

The proposed regulation also includes special rules for certain current benefit structures that benefit only nonhighly compensated employees and for certain current benefit structures that benefit only employees "acquired" in connection with a merger or acquisition.

Prior Benefit Structure Requirements

Under the proposed regulation, a defined benefit plan (but not a defined contribution plan) is required to satisfy section 401(a)(26) with respect to the plan's prior benefit structure. As it does with current benefit structures, the proposed regulation does not provide that a prior benefit structure is a separate plan that, as such, must satisfy section 401(a)(26). Rather, the proposed regulation provides that each defined benefit plan has a single prior benefit structure that is treated as satisfying section 401(a)(26) only if at least one of several alternative tests is satisfied. This approach to separate benefit structures does not result in the application of any requirement that could not also have been applied by providing a narrower definition of separate prior benefit structures and then providing that such structures are separate plans subject to section 401(a)(26).

For example, in lieu of providing that a defined benefit plan's prior benefit structure satisfies section 401(a)(26) if the plan provides meaningful, additional benefit accruals to active employees, the proposed regulation could have been drafted to accomplish the same result by providing that a defined benefit plan does not have a prior benefit structure if the plan provides additional, meaningful benefits to active employees. Similarly, in lieu of providing that a frozen plan's prior benefit structure satisfies section 401(a)(26) if there are at least 50 active and former employees or 40 percent of the employer's active and former employees with meaningful benefits under the plan, the proposed regulation could have been drafted to provide that the portion of the frozen plan that includes employees with meaningful benefits is a separate benefit structure and that such separate structure is a separate plan which must benefit at least the lesser of 50 employees or 40 percent of the employer's employees.

The regulation includes six alternative tests under which a defined benefit plan's prior benefit structure may satisfy section 401(a)(26). These tests are designed to reflect the policy objectives of section 401(a)(26) without also requiring employers to track the many different benefit structures that may have been in effect at various times under their plans or to determine whether employees continue to have benefits under such different benefit structures.

A defined benefit plan need only satisfy one of the six alternative tests set forth in the proposed regulation. Thus, for example, in accordance with one of the alternative tests, if at least 100 active and former employees have at least de minimis benefits under a defined benefit plan and no three highly compensated employees have benefits in excess of 25 percent of the total benefits under the plan, the defined benefit plan's prior benefit structure satisfies section 401(a)(26). The employer need not satisfy any of the other alternative tests with respect to such plan's prior benefit structure.

The prior benefit structure tests fall into two general categories. The first category reflects the view that a defined benefit plan that is providing additional, meaningful, benefit accruals to active employees should not be forced either to improve benefits or to terminate simply because there is only a small number of employees with prior accrued benefits under the plan. The tests in this category thus provide that if a plan includes one or more current benefit structures for active employees that provide current benefit accruals that are meaningful relative to the benefits that have otherwise accrued under the plan, the plan's prior benefit structure is deemed to satisfy section 401(a)(26). (This is equivalent to providing that such plan does not include a prior benefit structure that must be treated as a separate plan subject to section 401(a)(26).)

The prior benefit structure tests in the second category are designed to determine whether a plan that does not include a meaningful current benefit

structure (e.g., a frozen or substantially frozen defined benefit plan) nevertheless includes meaningful or more than de minimis accrued benefits for sufficient numbers of active and former employees. (These tests are equivalent to defining a plan's prior benefit structure to include only those employees with prior accrued benefits equal to or above a meaningful or de minimis level of benefits and then treating only such portion of the plan as a separate benefit structure that must separately satisfy section 401(a)(26).)

The first category of prior benefit structure tests includes four alternative tests. Under the minimum current accrual rate test, a defined benefit plan's prior benefit structure satisfies section 401(a)(26) if at least 50 active employees or 40 percent of the employer's active employees have current accrual rates for the current year of service that are at least equal to 0.75 percent of final average compensation or 1.1 percent of career average compensation. Under the nondecreasing current benefit structure test, a defined benefit plan's prior benefit structure satisfies section 401(a)(26) if at least 50 active employees or 40 percent of the employer's active employees (including the top three highly compensated employees of the employer) have hypothetical accrued benefits (determined by assuming that current benefit structures under the plan have always been in effect) equal to or greater than their actual accrued benefits under the plan. Under the minimum current benefit structure test, a defined benefit plan's prior benefit structure satisfies section 401(a)(26) if the plan includes at least one current benefit structure that provides active employees with at least a minimum benefit accrued, which is determined by reference to the largest benefits under the plan for the highly compensated employees. Finally, under the benefit ratio test, a defined benefit plan's prior benefit structure satisfies section 401(a)(26) if the sum of the accrued benefits of all active employees under the plan is less than 60 percent of the sum of the projected accrued benefits of all active employees under the plan and if the plan satisfies the concentration test (described below).

The second category of prior benefit structure tests includes two alternative tests, which are designed for plans that do not satisfy at least one of the four preceding tests. Under the minimum accrued benefit test, a defined benefit plan's prior benefit structure satisfies section 401(a)(26) if there are at least 50 active and former employees or 40 percent of the employer's active and former employees with at least a minimum benefit, which is determined by reference to the largest benefits under the plan for the highly compensated employees. Under the minimum employee coverage test, a defined benefit plan's prior benefit structure satisfies section 401(a)(26) if at least 100 active and former employees of the employer have more than de minimis benefits under such plan and the plan satisfies the concentration test.

The concentration test, which applies under both the benefit ratio and the minimum employee coverage tests, is satisfied by a plan only if the sum of the benefits of the three highly compensated active and former employees of the employer with the largest benefits under the plan does not constitute more than 25 percent of the sum of the total benefits of all active and former employees under the plan.

In making these prior benefit structure determinations, an employee's accrued benefit under the plan being tested is the employee's actual accrued benefit under such plan. Thus, benefits provided under social security or similar Federal or state law, the permitted disparity under section 401(l), and benefits provided under any other plan generally are disregarded. However, the method for determining whether an employee's benefit is at least a minimum benefit relative to either the largest or other benefits under a plan is designed to take into account the permitted disparity under section 401(l) without regard to whether the plan being tested actually uses such permitted disparity.

Finally, the proposed regulation contains a delegation of authority to the Commissioner to prescribe additional tests under which a plan's prior benefit structure will satisfy section 401(a)(26). This delegation of authority, and similar delegations of authority in other sections of the proposed regulation, states that the delegation may be exercised only in the form of revenue rulings, notices or other documents of general applicability. No inferences should be drawn with respect to the manner in which the Commissioner may exercise other delegations of authority provided for in this or other regulations.

Exceptions

The proposed regulation includes three exceptions under which a plan is deemed to satisfy section 401(a)(26). First, the proposed regulation includes the statutory rule under which the portion of a multiemployer plan that benefits employees who are covered pursuant to a collective bargaining agreement is deemed to satisfy section 401(a)(26). However, this exception does not apply with respect to any collective bargaining agreement if more than two percent of the employees covered pursuant to such agreement are professional employees (e.g., doctors, lawyers, architects, and investment bankers).

In addition, the proposed regulation adopts a special rule described in the legislative history under which a plan is deemed to satisfy section 401(a)(26) if such plan does not benefit, either for the current year or for any of the five immediately preceding plan years, any employee who is or ever has been a highly compensated employee. This special rule is available only if the plan is not aggregated with any other plan for purposes of applying the minimum coverage or nondiscrimination rules to any such plan (including the average benefit test in section 410(b)(2)(A)(ii)).

Finally, the proposed regulation includes a limited exception for certain underfunded defined benefit plans. As set forth previously, if a defined benefit plan is frozen and does not include meaningful benefits for sufficient numbers of employees, section 401(a)(26) generally should operate to force the employer to wind up the plan when the number of employees with meaningful benefits under the plan is less than 50 employees or 40 percent of the employees of the employer. However, the proposed regulation provides that, in general, a defined benefit plan is deemed to satisfy section 401(a)(26) if such plan is subject to Title IV of ERISA or primarily benefits nonhighly compensated employees; the plan does not contain sufficient assets to satisfy all liabilities under the plan; all benefit accruals under the plan have ceased; and the plan does not rely on this rule for more than three years. In addition, a plan covered by Title IV of ERISA that would have failed section 401(a)(26) for the plan year containing August 16, 1986, if such section had been in effect for such year, can rely on this rule for plan years commencing before January 1, 1994.

Reliance on These Proposed Regulations

Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. Because these regulations are generally effective for plan years beginning after 1988, the Service will apply these proposed regulations in issuing rulings and in examining returns with respect to taxpayers and plans. If future regulations are more restrictive, such guidance will be applied without retroactive effect.

Special Analyses

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis is therefore not required. Although this document is a notice of proposed rulemaking which solicits public comments, the Internal Revenue Service has concluded that the regulations proposed herein are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, the proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Comments and Requests for Public Hearing

Before adopting there proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Drafting Information

The principal author of the proposed regulations is Nancy J. Marks of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations). However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the proposed regulations on matters of both substance and style.

List of Subjects in 26 CFR 1.401–0—1.425–1

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

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR Part 1 are as follows:

PART 1—[AMENDED]

Paragraph 1. The authority citation for Part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 * * *. Section 1.401(a)(26)–1 through 8 also issued under 26 U.S.C. 401(a)(26).* * *

Par. 2. The following new §§ 1.401(a)(26)–0 through 1.401(a)(26)–8 are added immediately after §1.401(a)–19 to read as follows:

§ 1.401(a)(26)–0 Table of contents.

The following sections provide rules under section 401(a)(26):

§1.401(a)(26)–1 Minimum participation rule.
§1.401(a)(26)–2 Definitions of plan, current benefit structure, and prior benefit structure.
§1.401(a)(26)–3 Employees who benefit under a plan and current benefit structure.
§1.401(a)(26)–4 Excludable employees.
§1.401(a)(26)–5 Testing methods.
§1.401(a)(26)–6 Testing prior benefit structures.
§1.401(a)(26)–7—Definitions.
§1.401(a)(26)–8—Effective dates and transition rules.
§1.401(a)(26)–1 Minimum participation rule.

(a) *General rules.* A plan is a qualified plan (and a trust related to a plan is a qualified trust) for a plan year only if such plan satisfies section 401(a)(26) for such year. Generally, a plan will satisfy section 401(a)(26) only if the plan satisfies paragraph (b)(1) of this section with respect to each current benefit structure for active employees. Paragraph (c) of this section contains special rules regarding the application of paragraph (b) of this section to current benefit structures. If a plan includes a current benefit structure for former employees, the plan also must satisfy paragraph (b)(2) of this section with respect to such current benefit structure. Also, a defined benefit plan (but not a defined contribution plan) must satisfy the requirements of § 1.401(a)(26)–6 with respect to its prior benefit structure. Finally, paragraph (d) of this section provides exceptions to section 401(a)(26) for plans that do not benefit any highly compensated employees, multiemployer plans, and underfunded defined benefit plans.

(b) *Current benefit structures*—(1) *Active employees*—(i) *General rule.* A plan satisfies this paragraph (b) for a plan year only if each current benefit structure included in the plan and benefiting active employees benefits at least the lesser of—

(A) 50 active employees of the employer, or

(B) 40 percent of the active employees of the employer. See paragraph (c) of this section for additional rules regarding the application of this paragraph (b)(1).

(ii) *Example.* The rule in this paragraph (b) is illustrated by the following example:

Example. Assume that employer A employees 100 active employees and maintains one defined contribution plan (plan X) and one defined benefit plan (plan Y). All 100 employees benefit under plan X's current benefit structure, which provides all employees under the plan with a contribution allocation of 5 percent of compensation. This current benefit structure satisfies this paragraph (b) and plan X thus satisfies section 401(a)(26). Plan Y includes two current benefit structures, one of which (Y1) provides for a benefit of 1 percent per year of service times final average compensation, and the other of which (Y2) provides for a benefit of 2 percent per year of service times career average compensation. Current benefit structure Y1 benefits 75 active employees and thus satisfies this paragraph (b). Current structure Y2, however, benefits only 25 active employees and thus fails to satisfy this paragraph (b). Accordingly, defined benefit plan Y fails to satisfy section 401(a)(26) for the year.

(2) *Former employees.* A plan satisfies this paragraph (b)(2) for a plan year only if each current benefit structure included in the plan and benefiting former employees benefits at least the lesser of—

(i) 50 former employees of the employer, or

(ii) 40 percent of the former employees of the employer. See paragraph (c) of this section for additional rules regarding the application of this paragraph (b)(2).

(c) *Special rules for testing current benefit structures*—(1) *Restructured current benefit formulas*—(i) *In general.* In testing current benefit structures under paragraphs (b)(1) and (b)(2) of this section, an employer may, in certain circumstances, restructure two or more current benefit formulas under a plan that would constitute a single structure but for differences in the rate of benefit accural or contribution allocation into restructured separate benefit structures, one consisting of the portion of the formulas that is common to each of the benefit structures and one or more consisting of the portion(s) of the formula that is not common to each of the benefit formulas. Each of the resulting restructured benefit structures must satisfy paragraph (b)(1) or (b)(2) of this section, whichever is applicable. See § 1.401(a)(26)–2(e)(1) for rules governing the restructuring of current benefit formulas.

(ii) *Example.* The rule in paragraph (c)(1)(i) of this section may be illustrated by the following example.

Example. Defined benefit plan A includes two current benefit structures—one of which benefits the 200 active employees of division X and provides a benefit of 1½ percent times years of service times final average compensation, and the other of which benefits the 30 active employees of division Y and provides a benefit of 1 percent times years of service times final average compensation. In all other respects,

employees have identical rights under the plan. Division X's current benefit structure satisfies paragraph (b)(1) of this section, but division Y's current benefit structure fails to satisfy such paragraph. However, the two current benefit structures may be retested on the basis of two restructured current benefit structures. (Under § 1.401(a)(26)-2(e)(1), an employer is not required to amend a plan to reflect the restructured current benefit structures in order to be able to use the restructuring method of testing under section 401(a)(26)). One restructured current benefit structure, which provides a benefit of 1 percent times years of service times final average compensation, benefits all 230 active employees of divisions X and Y. The other restructured current benefit structure, which provides a benefit of ½ percent times years of service times final average compensation, benefits division X's 200 active employees. Both of the restructured current benefit structures thus satisfy paragraph (b)(1) of this section.

(2) *Current benefit structures that benefit at least 20 active employees*—(i) *In general.* A plan may apply paragraph (b)(1)(i) of this section for a plan year by substituting "20 active employees" for "50 active employees" if the tests in paragraphs (c)(4)(ii) and (c)(4)(iii) of this section are satisfied for such plan year.

(ii) *Minimum nonhighly compensated employee test.* This test is satisfied for a plan year only if at least 70 percent of the active employees who benefit under the current benefit structure being tested are nonhighly compensated employees.

(iii) *Minimum participation test*—(A) *Defined benefit plans.* This test is satisfied with respect to a defined benefit plan for a plan year only if, as of the close of such year, at least the lesser of 50 active employees or 40 percent of the employer's active employees have future service benefit rates (or current accrual rates) under the plan that includes the current benefit structure being tested that are at least the minimum benefit rate (or the minimum current accrual rate) for such plan. See § 1.401(a)(26)-6(b)(2)(iv)(B) and (c)(2) for the defintions of future service benefit rate and minimum benefit rate. See § 1.401(a)(26)-6(b) (2) (ii)(C) and (D) for the definition of current accrual rate and minimum current accural rate. This test is deemed to be satisfied for a plan year if, as of the close of such year, at least 100 active employees of the employer are currently accruing greater than de minimis benefits under an ongoing benefit formula under the plan that includes the current benefit structure being tested and the plan satisfies the concentration test set forth in paragraph (b)(4) of § 1.401(a)(26)-6.

(B) *Defined contribution plans.* This test is satisfied with respect to a defined contribution plan for a plan year only if, for such plan year, at least the lesser of 50 active employees or 40 percent of the employer's active employees receive contribution allocations or, in the case of a plan subject to section 401(k) or 401(m), are eligible to receive contribution allocations, under the plan that includes the current benefit structure being tested, that are greater than de minimis allocations.

(3) *Current benefit structures that do not benefit any highly compensated employees.* A current benefit structure is deemed to satisfy paragraph (b)(1) of this section for a plan year if such current benefit structure does not benefit any active employee who is or ever has been a highly compensated employee of the employer. This paragraph (c)(5) is available to a current benefit structure only if such structure is included in a plan that benefits at least the lesser of 50 employees or 40 percent of the employer's employees, and all plans of the employer (including the plan that includes the current benefit structure being tested) would satisfy sections 401(a)(4) and 410(b) (including the average benefit test of section 410(b)(2)(A)(ii)) if the employees benefitting under the current benefit structure being tested were treated as accruing no benefits under such structure. For purposes of this paragraph (c)(5), employees who were highly compensated employees only for plan years ending before January 1, 1984, are treated as not having been highly compensated employees.

(4) *Qualified cash or deferred arrangements maintained by employers that include certain governmental or tax-exempt entities*—(i) *General rule.* In the case of a plan including a qualified cash or deferred arrangement under section 401(k) that is maintained by an employer which employs employees precluded from being eligible employees under the arrangement by reason of section 401(k)(4)(B), the current benefit structure consisting of elective contributions under the arrangement is deemed to satisfy paragraph (b)(1) of this section if more than 95 percent of all active employees of the employer benefit under such current benefit structure. Solely for purposes of this determination, employees precluded from being eligible employees under the qualified cash or deferred arrangement by reason of section 401(k)(4)(B) are to be treated as excludable employees. This paragraph (c)(6) applies also to employer matching contributions that are subject to section 401(m) and are geared to elective contributions under a qualified cash or deferred arrangement that satisfies this paragraph (c)(6).

(ii) *Example.* The rule of this paragraph (c)(6) can be illustrated by the following example:

Example: Assume that an employer (determined after application of sections 414 (b), (c), (m), (o), and (r)) consists of one taxable entity that has 30 active employees and several tax-exempt entities that have, in the aggregate, 500 active employees. Assume further that the employer maintains a plan including a qualified cash or deferred arrangement for the 30 active employees of the taxable entity, and that section 401(k)(4)(B) precludes all of the 500 active employees of the tax-exempt entities from eligibility under the arrangement. Because 30 active employees is less than the lesser of 50 active employees or 40 percent of the employer's 530 active employees (i.e., 212 employees), the current benefit structure consisting of the cash or deferred arrangement fails to satisfy paragraph (b)(1) of this section. However, under this paragraph (c)(6), this current benefit structure is deemed to satisfy paragraph (b)(1) of this section because the current benefit structure benefits 100 percent of the employer's active employees, determined by disregarding all of the 500 active employees of the tax-exempt entities who are precluded from eligibility by reason of section 401(k)(4)(B).

(5) *Current benefit structures for former employees.* In the case of a plan that includes a current benefit structure for former employees (e.g., a plan that is amended to provide an ad hoc cost-of-living adjustment to the benefit provided former employees under the plan), such current benefit structure is deemed to satisfy paragraph (b)(2) of this section if at least five former employees benefit under such current benefit structure and either more than 95 percent of all former employees with benefits under the plan benefit under such current benefit structure or at least 60 percent of the former employees who benefit under such current benefit structure are not highly compensated former employees. Solely for purposes of this determination, a former employee who has a vested accrued benefit under the plan and is an excludable former employee under § 1.401(a)(26)-4(c)(3) solely because such employee's vested accrued benefit is not in excess of $3,500 is not treated as an excludable former employee.

(6) *Certain acquisitions or dispositions*—(i) *In general.* Under section 401(a)(26), rules similar to rules prescribed under section 410(b)(6)(C)(i) shall apply.

(ii) *Transition rule.* Where there has been a transaction described in section 401(b)(6)(C) in the year prior to the first year in which section 401(a)(26) becomes effective with respect to a plan, affected by such transaction, which plan includes a current benefit structure, the

current benefit structure will satisfy section 401(a)(26) for the transition period commencing on the date of the transaction and ending on the last day of the first plan year beginning after the date of the transaction if either of the following two requirements is met:

(A) The current benefit structure satisfies section 401(a)(26) immediately before the transaction on the basis of only the applicable statutory provisions, without regard to the regulations under section 401(a)(26), in the manner provided in § 1.401(a)(26)–8(c)(3). Thus, a current benefit structure satisfies the requirements of section 401(a)(26), immediately prior to the transaction, if such structure was part of a plan that benefited 50 employees or 40 percent of the employees of the employer without regard to current or prior benefit structures existing under the plan.

(B) The current benefit structure affected by the transaction satisfies the rule in paragraph (c)(7) of this section.

(7) *Acquisition current benefit structures.* A current benefit structure under a defined benefit plan that benefits only employees (acquisition employees) who become employed by the employer in connection with a corporate acquisition, merger or similar transaction (transaction) is deemed to satisfy paragraph (b)(1) of this section for a plan year if all of the following requirements are satisfied for the plan year:

(i) The current benefit structure includes the same benefit formula that existed in the benefit structure under which such acquisition employees were benefiting immediately prior to the transaction or, if different, any difference reflects changes necessitated by changes in the applicable qualification requirements;

(ii) Immediately after the transaction, the current benefit structure satisfies the test of paragraph (c)(4)(ii) of this section;

(iii) The current benefit structure is included in a defined benefit plan that, as of the current plan year, satisfies the test of paragraph (c)(4)(iii) of this section; and

(iv) The transaction occurred either in the current plan year or any of the immediately preceding five plan years.

In the case of a transaction occurring prior to the effective date of section 401(a)(26) with respect to the plan, the requirements of paragraph (c)(3)(ii) of this section may be applied either immediately after the transaction or as of the first day of the first plan year for which section 401(a)(26) is effective, and the requirements of paragraph (c)(3)(iv) of this section may be applied as if the transaction occurred on December 31, 1988.

(d) *Exceptions*—(1) *Plans that do not benefit any highly compensated employees*—(i) *General rule.* A plan is deemed to satisfy section 401(a)(26) for a plan year if such plan is not a top-heavy plan under section 416 and such plan (and any predecessor plan) does not benefit, for such plan year and for any of the immediately preceding five plan years, any active or former employee who is or ever has been a highly compensated employee of the employer (either as an active employee, former employee, or both). This paragraph (d)(1) is available to a plan being tested under section 401(a)(26) only if all other plans of the employer would satisfy sections 401(a)(4) and 410(b) (including section 410(b)(2)(A)(ii)) if the employees under the plan being tested are treated as though they have no benefits under such plan. For purposes of applying this rule, employees who were highly compensated employees only for plan years ending before January 1, 1984, are not treated as highly compensated employees.

(ii) *Example.* This paragraph (d)(1) can be illustrated by the following example:

Example: Assume that an employer has 100 employees, only 5 of whom are highly compensated employees. The employer maintains two defined benefit plans during a particular year: plan X has a uniform, unit benefit formula and benefits the employer's 5 highly compensated employees and 70 of the nonhighly compensated employees, and plan Y benefits the remaining 25 nonhighly-compensated employees. Plan X satisfies the ratio coverage test of section 410(b)(1)(B) and section 401(a)(4) without regard to plan Y. Also, plan X is not top-heavy. If none of the nonhighly compensated employees benefit under plan Y have ever been highly compensated employees of the employer, plan Y is deemed to satisfy section 401(a)(26) for the year even though only 25 employees benefit under such plan.

(2) *Multiemployer plan exception*—(i) *In general.* The portion of a multiemployer plan that, for a plan year, benefits only employees included in a unit of employees covered by a collective bargaining agreement is deemed to be a separate plan that satisfies section 401(a)(26) for such plan year. If a multiemployer plan also benefits employees who are not included in any collective bargaining unit, the portion of the plan benefiting such employees must separately satisfy section 401(a)(26).

(ii) *Covered by a collective bargaining agreement.* An employee is covered by a collective bargaining agreement only if such employee is represented by a bona fide employee representative that is a party to the collective bargaining agreement or agreements under which the multiemployer plan is maintained. Thus, for example, an employee of either the multiemployer plan or the employee representative is not included in a unit of employees covered pursuant to the collective bargaining agreement under which the plan is maintained merely because the employee is covered under the plan pursuant to an agreement entered into by the multiemployer plan or employee representative on behalf of the employee (other than in the capacity of an employee representative with respect to such employee). This is the case even if all such employees covered under the plan constitute only a de minimis percentage of the total employees benefiting under the plan.

(iii) *Multiemployer plans covering professional employes.* This paragraph (d)(2) does not apply for a plan year with respect to a collective bargaining agreement if, for such year, more than 2 percent of the employees who are covered pursuant to such agreement are professionals as defined in §1.401(a)(26)–7(g). This paragraph (d)(2)(iii) is applied separately with respect to each collective baragaining agreement. Thus, for example, if a multiemployer plan benefits a group of employees covered by collective bargaining agreement X and a group of employees covered by collective bargaining agreement Y and if more than 2 percent of the employees covered pursuant to agreement X are professionals (but not agreement Y), this paragraph (d)(2) applies with respect to employees covered pursuant to agreement Y, but not with respect to employees covered pursuant to agreement X.

(3) *Certain underfunded defined benefit plans*—(i) *In general.* A defined benefit plan is deemed to satisfy section 401(a)(26) for a plan year if all of the conditions of pargraphs (d)(3)(ii) through (d)(3)(v) of this section are satisfied with respect to such plan for such year.

(ii) *Eligible plans.* This condition is satisfied for a plan year only if the defined benefit plan is subject to Title IV of ERISA for such year or if, as of the close of such year, the sum of the accrued benefits of the nonhighly compensated employees under the plan is at least 50 percent of the sum of the accrued benefits for all employees under the plan. See paragraph (c)(1) of §1.401(a)(26)–6 for the definition of accrued benefit.

(iii) *Actuarial certification.* This condition is satisfied for a plan year only if an enrolled actuary provides the

employer with an actuarial certification that, as of the last day of the immediately preceding plan year, the defined benefit plan does not have sufficient assets to satisfy all liabilities under the plan (determined in accordance with section 401(a)(2)). Such certification must be included with a timely filed actuarial report as required under section 6059.

(iv) *Cessation of all benefit accruals.* This condition is satisfied for a plan only if, for such year, no employees accrue any additional benefits under the plan (including benefits attributable to increases in compensation or in the section 415 or section 401(a)(17) limits), except for the minium benefits for non-key employees required by section 416.

(v) *Plan year limitation.* This condition is satisfied for a plan year only if the defined benefit plan does not rely on this paragraph (d)(3) to satisfy section 401(a)(26) for more than three plan years (including the current plan year). For plan years commencing before January 1, 1994, this condition may be applied by substituting "five plan years" for "three plan years" in the preceding sentence if the plan being tested was in existence on August 16, 1986; the plan would have failed to satisfy section 401(a)(26) for the plan year including August 16, 1986, if such section had applied with respect to such year; the plan fails to satisfy section 401(a)(26) for the first plan year for which section 401(a)(26) applies with respect to such plan; and the plan has not been involved in a plan merger, spinoff, asset or liability transfer or any similar transaction since August 16, 1986. The determination of whether a plan would have failed to satisfy section 401(a)(26) for the plan year including August 16, 1986 is to be made under the rules in §1.401(a)(26)–8(c)(3).

§ 1.401(a)(26)–2 Definitions of plan, current benefit structure, and prior benefit structure.

(a) *Plan.* In general, the term "plan" refers to a plan described in section 401(a) that includes one or more trusts intended to be exempt from tax under section 501(a), and an annuity plan described in section 403(a). As described in paragraph (b) of this section, each single plan under section 414(l) is treated as a plan for purposes of section 401(a)(26). Under paragraph (c) of this section, in certain cases (including certain outside arrangements), a plan that is a single plan under paragraph (b) may be treated as comprising separate plans for purposes of section 401(a)(26). Furthermore, in accordance with section 401(a)(26)(I), section 401(a)(26) also must be satisfied with respect to current benefit structures and, in the case of defined benefit plans, prior benefit structures. Paragraphs (d) and (e) of this section set forth rules for identifying a plan's current benefit structures and prior benefit structure.

(b) *Separate asset pools are separate plans.* Each single plan within the meaning of section 414(l) is a separate plan for purposes of section 401(a)(26). See § 1.414(l)–1(b). For example, if only a portion of the assets under a defined benefit plan is available, on an ongoing basis, to provide the benefits of certain employees and the remaining assets are available only in certain limited cases to provide such benefits (but are available, in all cases, for the benefits of other employees), there are two separate plans. A single plan under section 414(l) is a plan for purposes of section 401(a)(26) notwithstanding that such plan comprises separate, written plan documents and separate trusts, each of which have received separate determination letters from the Internal Revenue Service. A defined contribution plan does not comprise separate plans merely because it includes more than one trust or it provides for separate accounts and permits employees to direct the investment of the amounts allocated to their accounts. Further, a plan does not comprise separate plans merely because assets are invested in individual insurance or annuity contracts for employees.

(c) *Disaggregation of certain plans—*(1) *Plans that include individual account and defined benefit components.* The portion of a plan that provides benefits that are based solely on the contributions and other amounts allocated to employees' individual accounts (determined in accordance with section 414(i)) and the portion of the plan that provides benefits that are not based solely on the contributions and other amounts allocated to employees' individual accounts are to be treated as separate plans for purposes of section 401(a)(26). Thus, for example, a plan that provides benefits partly on the basis of defined benefits and partly on the basis of employees' individual accounts is to be treated as including both an individual account plan (with respect to those benefits based solely on employees' individual accounts) and a defined benefit plan (with respect to those benefits that are not based solely on employees' individual accounts), each of which must separately satisfy section 401(a)(26).

(2) *Plans benefiting collective bargaining employees.* An employer may treat the portion of a plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement and the portion of a plan that benefits employees who are not included in such a collective bargaining unit as separate plans for purposes of section 401(a)(26). Thus, for example, if a plan benefits employees who are included in collective bargaining unit A and employees who are not included in any collective bargaining unit, the employer may treat such plan as two separate plans for purposes of section 401(a)(26), even if all of such employees benefit under identical current benefit structures. This paragraph (c)(2) applies separately with respect to each collective bargaining agreement. Thus, for example, the portion of a plan that benefits employees included in a unit of employees covered by one collective bargaining agreement may be treated as a plan that is separate from the portion of the plan that benefits employees included in a unit of employees covered by another collective bargaining agreement.

(3) *ESOPS.* The portion of a plan that is an employee stock ownership plan described in section 4975(e)(7) (an ESOP) and the portion of such plan that is not an ESOP are to be treated as separate plans for purposes of section 401(a)(26). An employer may treat the rule in this paragraph (c)(3) as effective for plan years commencing on or after January 1, 1990.

(4) *Plans benefiting otherwise excludable employees.* If, in accordance with § 1.401(a)(26)–4(b)(1)(ii), an employer elects to apply section 401(a)(26) separately to the portion of a plan that benefits only employees who have failed to satisfy the highest minimum age and/or service conditions permissible under section 410(a)(1), such portion is to be treated as a separate plan for purposes of section 401(a)(26).

(5) *Plans maintained by more than one employer—*(i) *Multiple employer plans.* If a plan benefits employees of more than one employer and such employees are not included in a unit of employees covered by one or more collective bargaining agreements (a multiple employer plan), the plan is to be treated as comprising separate plans each of which is maintained by a separate employer and must separately satisfy section 401(a)(26) by reference only to such employer's employees.

(ii) *Multiemployer plans.* The portion of a multiemployer plan that benefits employees who are included in one or more units of employees covered by one or more collective bargaining agreements and the portion of such plan

that benefits employees who are not included in a unit of employees covered pursuant to any collective bargaining agreement are to be treated as separate plans for purposes of section 401(a)(26). See § 1.401(a)(26)–1(d)(2) for a multiemployer plan exception. The portion of a multiemployer plan that benefits employees who are not included in a unit of employees covered by a collective bargaining agreement is to be treated as plan maintained by one or more employers, depending on whether such employees are employed by one or more employers. See § 1.401(a)(26)–1(d)(2)(ii) for purposes of determining whether an employee is included in a unit of employees covered pursuant to a collective bargaining agreement.

(d) *Current benefit structures*—(1) *In general.* One or more current benefit structures exist whenever there is an allocation or benefit accrual whether as a result of additional years of service, changes in compensation, or other factors. Any such increases are treated as benefits attributable to the year of service in which they accrue. A single current benefit structure exists with respect to each portion of a uniform benefit formula (under which contributions and forfeitures are allocated with respect to a plan year in a defined contribution plan or under which an employee's benefit attributable to the current year of service is determined in a defined benefit plan) to the extent that subsidies, optional forms of benefits, rights and features (e.g. social security supplements, ancillary benefits, loans and investment options) are provided on a uniform basis to employees eligible to participate under such formula. To the extent that subsidies, optional forms of benefits, rights and features are not provided on a uniform basis, two or more single current structures exist. An otherwise single current benefit structure comprises separate current benefit structures to the extent it is included in separate plans (as determined under paragraphs (b) and (c) of this section). See § 1.401(a)(26)–8(b)(1) for a transition rule with respect to the provisions taken into account in identifying a plan's current benefit structures for plan years beginning before January 1, 1990.

(2) *Uniform formula*—(i) *In general.* In determining whether a benefit formula is uniform all features in the plan affecting the availability of the benefit and the amount of benefits or contributions accrued must be taken into account. Factors taken into account in making this determination include the rate of accrual in a defined benefit plan and the basis of and conditions to contributions or benefits (e.g. hour-of-service minimums, year-of-service requirements and limits, compensation definitions, benefit limits, employment conditions, vesting schedules, levels of mandatory employee contributions, eligibility requirements for participation).

(ii) *Difference in rates of allocation or benefit accrual.* In general, differences in rates of allocations or benefit accruals for differences in participants under plan will result in separate benefit structures under the plan. However, a formula does not fail to be a uniform formula merely because the rate of contribution allocations or benefit accruals (expressed as percentages of compensation or flat dollar amounts) varies, on a uniform basis for all employees, with years of service or participation (as, for example, in a formula that is backloaded to the extent permitted under section 411(b)(1)(B)) or varies with entry age (as, for example, with a formula under which benefits accrue under the fractional rule of section 411(b)(1)(C)). Similarly, a formula does not fail to be uniform merely because the rate at which benefits accrue above a stated compensation level differs from the rate at which benefits accrue below such level, without regard to whether such formula satisfies the requirements of section 401(l). A formula does not fail to be a uniform formula merely because it provides that an employee will receive the greatest contribution allocation or benefit accrual produced under one of several formulas that are reasonably available to all employees covered by the formula. In addition, a formula does not fail to be uniform merely because it provides for an allocation on the basis of account balances.

(iii) *Permitted disparity.* A benefit formula under a plan does not fail to be uniform merely because of differences under the formula that are permissible under section 401(l) and, under such rules, are treated as uniform. Thus, for example, if the rates under a defined benefit excess plan's benefit formulas differ based solely on employees' social security retirement ages such that the disparities under such formulas are treated as uniform under section 401(l), such differences are disregarded in determining whether the benfit formulas constitute one or more current benefit structures.

(3) *Uniform subsidies, optional forms of benefits, rights and features*—(i) *In general.* Subsidies, optional forms of benefit, right and feature is provided on a uniform basis to all participants eligible to benefit under such benefit formula. A subsidy, optional form of benefit, right and feature is provided on a uniform basis only if it is identical with respect to its terms (i.e. frequency of use, dollar limitations, actuarial assumptions). In addition, in the case of a subsidy, optional form of benefit, right or feature, the availability of which is conditioned, the subsidy, optional form of benefit, right or feature is provided on a uniform basis only with respect to those participants with respect to whom the conditions are identical and who satisfy the conditions.

(ii) *Conditions on availability*—(A) *In general.* Whether a participant satisfies conditions on availability of a subsidy, optional form of benefit, right or feature is determined on the basis of the current facts and circumstances with respect to the employee (e.g. the employee's current job classification, division of employment or net worth). Thus, for example, the fact that an employee may, in the future satisfy a condition on availability generally does not cause the conditioned benefit, right or feature to be treated as currently available to such employee. However, to the extent provided in paragraphs (d)(3)(ii) (B) and (C) and subject to the limitations in paragraph (d)(12) with respect to individualized formulas, certain conditions on availability are treated as currently satisfied for purposes of determining whether a subsidy, optional form of benefit, right or feature is provided on a uniform basis.

(B) *Age and service conditions.* In general, for purposes of the rules in this paragrpah (d)(3), age conditions and service conditions are treated as satisfied. This exception is not applicable to age or service conditions with respect to optional forms of benefit, rights and features that must be satisfied within a specified period of time, other than termination of employment. However, availability of an optional form of benefit, right or feature subject to such a limited age or service condition may be determined by projecting the age and service of employees to the last date on which such formula, right or feature is available under the plan. An employer's ability to project age and service to the last date on which the formula, right or feature is available under the plan is not cut off by a plan termination occurring prior to that date. Those employees who are not eligible for a benefit because they do not satisfy any applicable conditions during a specified time period are not treated as benefiting under a separate benefit structure.

(C) *Certain other conditions.* Conditions on the availability of benefit formulas, optional forms of benefits, rights or features requiring termination of employment, death, satisfaction of a specified health condition (or failure to meet such condition), disability, hardship, marital status, default on a plan loan secured by a participant's account balance, or execution of a covenant not to compete are treated as satisfied in determining the group of employees benefiting under the current benefit structure containing such formula, right or feature.

(4) *Sections 401(k) and 401(m)*—(i) *In general.* A plan (or portion thereof) that is subject to section 401(k) or 401(m) includes separate current benefit structures to the extent that there are differences in the availability and/or maximum rates of elective contributions subject to section 401(k), after-tax employee contributions subject to section 401(m), or matching contributions subject to section 401(m). Similarly, a plan (or portion thereof) that includes matching contributions subject to section 401(m) includes separate current benefit structures to the extent that the matching contributions are not allocated under a uniform formula with respect to employees' elective contributions or after-tax employee contributions.

(ii) *Elective contributions, employee contributions and matching contributions.* The portion of a plan to which elective contributions under a qualified cash or deferred arrangement (defined under section 401(k)) may be made is a separate benefit structure for purposes of section 401(a)(26). Similarly, the portion of a plan to which employee contributions subject to section 401(m) may be made is a separate benefit structure for purposes of section 401(a)(26). Finally, the portion of a plan to which matching contributions subject to section 401(m) may be made is a separate benefit structure for purposes of section 401(a)(26).

(iii) *Exceptions.* A plan (or portion thereof) that is subject to section 401(k) or 401(m) does not include separate current benefit structures merely because of differences in the allocation of elective contributions or after-tax employee contributions and matching contributions that are solely the result of employees' elections. Similarly, a plan (or portion thereof) that is subject to section 401(k) or 401(m) does not comprise separate current benefit structures merely because the plan imposes uniform limits on the elective contributions or employee contributions that may be made by highly compensated employees to facilitate compliance with the applicable nondiscrimination rules or imposes uniform limits on the elective contributions that any employee can make to assure compliance with the limits under section 402(g) and section 415. Also, separate current benefit structure do not arise merely because of the allocation of qualified nonelective contributions to some or all nonhighly compensated employees eligible under the plan (or portion thereof) subject to section 401(k) or 401(m) if such nonelective contributions both are taken into account for purposes of determining whether elective contributions, employee contributions, or matching contributions satisfy the requirements of section 401(k) or 401(m), as applicable, and are not taken into account in determining whether any other employer contributions satisfy sections 401(a)(4) and 410(b) (other than section 410(b)(2)(A)(ii)). The preceding sentence applies with respect to allocations of qualified nonelective contributions to nonhighly compensated employees without regard to whether such allocations are under a uniform formula.

(5) *Top-heavy contributions and benefits*—(i) *General rule.* A plan does not fail to provide a single current benefit structure merely because the plan includes a formula that provides non-key employees with contributions or benefits required under section 416.

(ii) *Examples.* This paragraph (d)(5) can be illustrated by the following examples:

Example 1. Assume that a defined benefit plan provides that all employees will receive a normal retirement benefit of 1 percent times years of service times final average compensation. However, the plan also provides that non-key employees who perform at least 1000 hours of service will receive a benefit of at least 2 percent times top-heavy years of service (not in excess of 10 years of service) times top-heavy compensation. In determining this plan's current benefit structures, the portion of the benefit formula that is required to comply with section 416 may be disregarded. Thus, this plan has one current benefit structure.

Example 2. Assume the same facts set forth in *Example 1*, except that the plan provides that, whether or not the plan is top-heavy, all employees (rather than only non-key employees) who perform at least 1000 hours of service will receive a benefit of at least 2 percent times years of service (Not in excess of 10 years) times compensation. The portion of the formula that reflects the top-heavy requirements must be taken into account in determining this plan's current benefit structure. In this case, the plan is treated as including only one current benefit structure under which each employee earns the greater benefit under the two parts of the formula.

(6) *Contributions for participants who are permanently and totally disabled.* A plan does not fail to provide a single current benefit structure merely because the plan includes a formula that uniformly provides nonhighly compensated employees with contributions pursuant to the provisions of section 415(c)(3)(C).

(7) *Grandfathered benefits*—(i) *General rule.* A defined benefit plan's benefit formula does not fail to be a single current benefit structure merely because such formula provides that an employee will not accrue additional benefits under the current portion of the benefit formula until such employee has accrued under such portion a benefit in excess of such employee's benefit under one or more formulas in effect for prior years that are based wholly on prior years. Such prior benefit may have accrued under the same or a separate plan and may relate to service with the same or prior employers. Benefits fail to be treated as based wholly on prior years if they are based, directly or indirectly, on compensation earned after such prior years (including compensation earned in in the current year). Benefits do not fail to be treated as based wholly on prior years merely because such benefits (e.g., early retirement benefits) are subject to an age or years-of-service condition and, in applying such condition or conditions, the current and prior years are taken into account. In addition, if a plan eliminates a right or feature (e.g., single sum distribution option or loan) with respect to future benefits, and provides that such right or feature remains available with respect to benefits accrued as of the date of elimination, the plan's grandfather of such right or feature with respect to prior accrued benefits does not create separate current benefit structures.

(ii) This paragraph (d)(7) can be illustrated by the following examples:

Example 1. Assume that an employer maintains a defined benefit plan under which an employee receives a benefit equal to 2 percent times years of service times final average compensation. Effective January 1, 1990, the plan is amended to provide that an employee receives the greater of (A) 2 percent times years of service up to January 1, 1990, times final average compensation as of December 31, 1989, and (ii) 1½ percent times all years of service times final average compensation as of separation from service. Even though the employees with service prior to 1990, are a closed group and may not accrue additional benefits under this two-part formula for one or more years after 1989 and the other employees will benefit immediately and in full under the latter part of the

formula, this is a uniform formula that is a single current benefit structure.

Example 2. Assume the same facts set forth in *Example 1*, except that final average compensation under the former part of the two-part formula is determined based on compensation as of separation from service (i.e., final average compensation is determined by reference to compensation after 1989). Because employees with service prior to 1990, may accrue additional benefits under the former part of the formula, this formula comprises two current benefit structures, one for employees with pre-1990 service and one for employees without any pre-1990 service.

(8) *Benefit offset arrangements*—(i) *General rule.* A plan's contribution or benefit formula that provides for a benefit under the positive portion of the formula that is offset or reduced by contributions or benefits under another plan maintained by the same employer does not fail to comprise a single current benefit structure to the extent that all of the conditions of paragraph (d)(8)(i)(A) through (d)(8)(i)(C) of this section are satisfied. To the extent that these conditions are not satisfied, the contribution or benefit formula will not be treated as uniform and will comprise two or more current benefit structures. See § 1.401(a)(26)–3(b)(6) for the determination of who is benefiting under a current benefit structure that includes an offset or reduction.

(A) *Offset condition.* This condition is satisfied only if the formula being treated provides that contributions or benefits under its positive portion are offset or reduced by contributions or benefits accrued under another plan maintained by the same employer, and the contributions or benefits used to offset or reduce the contributions or benefits under the positive portion of the formula being tested were originally accrued under such other plan (or a predecessor plan). Thus, contributions or benefits transferred or rolled over to the other plan generally may not be used to offset the benefit under the positive portion of the formula being tested.

(B) *Benefiting condition.* This condition is satisfied only if the employees who benefit under the formula being tested also benefit, with respect to those contributions or benefits that are used to offset or reduce contributions or benefits under the formula being tested, under the other plan on a reasonable and uniform basis. If, with respect to employees who benefit under the formula being tested, some employees benefit and some employees do not benefit under the other plan, the formula being tested fails to be a single current benefit structure. Similarly, employees under the formula being tested do not benefit under the other plan on a reasonable and uniform basis if, for any year, the contributions or benefits used to offset or reduce contributions or benefits under the formula being tested are attributable to a benefit structure that is not uniform with respect to all such employees. Finally, employees do not benefit on a reasonable or uniform basis under the other plan if the method and assumptions for calculating the extent to which contributions or benefits under the other plan offset or reduce contributions or benefits under the formula being tested are not uniform with respect to such employees.

(C) *Anti-multiple use condition.* This condition is satisfied only if the contributions or benefits under the plan that are used to offset or reduce the contributions or benefits under the formula being tested are not used to offset or reduce contributions or benefits under any other plan or any other formula.

(D) *Examples.* This paragraph (d)(8) can be illustrated by the following examples.

Example 1. Assume that all 100 active employees in defined benefit plan A benefit under a benefit formula that provides a benefit equal to 1½ percent times years of service times final average compensation. However, with respect to 30 active employees, the benefit under this positive benefit of the formula is offset by the benefit under a single formula in plan B of the employer. With respect to another 25 active employees, the positive plan A benefit is offset by the benefit under a separate formula in plan C, and with respect to the remaining 45 participants, the positive plan A benefit is not offset by any other benefit. The benefit formula in plan A comprises three separate current benefit structures for purposes of section 401(a)(26).

Example 2. Employer X, a partnership with two partners and seven common law employees, maintains two defined benefit plans (X and Y) and one defined contribution plan (Z). Partner X and the seven employees participate in defined benefit plan X, which has a single benefit formula that provides for an offset by any benefit provided under defined contribution plan Z. Partner Y and the seven employees participate in defined benefit plan Y, which has a single benefit formula (different from plan X's formula) that also provides for an offset by any benefit provided under plan Z. The seven employees (but not the partners) also participate in plan Z, which provides a uniform contribution allocation formula for all participants. Plans X and Y violate both the benefiting condition and the anti-multiple use condition. For both reasons, plans X and Y each provide two separate benefit structures, one for the participating partner and another for the seven employees.

(9) *Exception for certain section 414(n) recipient employers.* For purposes of the benefit-offset rule in paragraph (d)(8)(i) of this section , an employer–recipient within the meaning of section 414 (n) and (o) that maintains a defined contribution plan covering leased employees (which employees are treated as employees of such employer-recipient within the meaning of section 414(n)92) and 414(o)(2)) that is offset or reduced by contributions to defined contribution plan maintained by the leasing organization may treat such contributions as contributions to a plan maintained by the recipient organization for purposes of this paragraph (d)(8)(i)(A) and may treat employees of the recipient organization as benefiting under the plan of the leasing organization for purposes of this paragraph (d)(8)(i)(B) only if the following requirements are satisfied: The contribution relate to service with the recipient organization; the contributions are made to a money purchase plan that would be a safe-harbor plan within the meaning of section 414(n)(5) without regard to the 20-percent requirement applicable to such determination; and, the requirements in paragraph (d)(8)(i)(A) through (d)(8)(i)(C) of this section are otherwise satisfied with respect to such benefit offset arrangement. In applying the requirements of paragraph (d)(8)(i)(B) of this section, employees of the recipient who are not leased from the leasing organizations are not required to benefit under the plan of the leasing organization.

(10) *Inactive benefit formulas—(i) General rule.* If a plan includes a benefit formula but no employee is currently eligible to accrue any additional benefits under the formula, such formula is not a current benefit structure under the plan. Similarly, if a plan includes a benefit formula with respect to which one or more employees are eligible, but the benefit formula does not provide any additional benefit to such employees, such formula is not a current benefit structure.

(ii) *Certain profit-sharing plans.* A profit-sharing plan or stock bonus plan does not fail to have a current benefit structure merely because there is no allocation in the current year because the employer maintaining the plan fails to make a contribution. Any employee covered by such a profit-sharing or stock bonus plan is treated as benefiting under a current benefit structure in the profit-sharing plan for a plan year if such employee both satisfies all of the applicable conditions to receiving a maximum contribution allocation under such current benefit structure for such year and fails to receive such allocation merely because the employer fails to

make a contribution to the plan for such year and there are no forfeited amounts for reallocation for such year.

(11) *Other arrangements that create separate current benefit structures*—(i) *In general.* If, under all the facts and circumstances, an arrangement (either under or outside the plan) has the effect of modifying any feature under the plan taken into account in determining an employee's benefit, providing any employee with any priority or greater interest in a portion of the assets in the plan, or linking any financial matter involving an employee to all or a portion of the assets in the plan in a way that has the effect of creating separate accounts, such arrangement will be treated as creating a separate current benefit structure within the plan. However, separate current benefit structures do not arise merely because a partnership agreement provides for allocation of the cost of funding a defined benefit plan or the allocation of surplus assets upon termination of such plan among partners in proportion to their partnership interest.

(ii) *Examples.* The following examples illustrate certain situations in which other arrangements will or will not be treated as creating separeate benefit structures:

Example 1. Employer A maintains a defined benefit plan under which each highly compensated employee has the discretion and authority to direct the investment of a portion of the plan's assets that represent the accumulated contributions with respect to that employee's plan benefits. In addition, by agreement outside the plan, if the product of the employee's investment direction exceeds the value needed to fund that employee's benefits, Employer A agrees to make a special payment to the participant. In this case, each separate portion of the pool of assets over which an employee has investment authority is considered a separate current benefit structure for such employee.

Example 2. Employer B is a partnership that maintains a defined benefit plan. Under the partnership agreement, the cost of providing the current benefit accrual for each partner is allocated to such partner in determining such partner's distributive share of profit or loss. This plan does not include separate plans merely because of this arrangement.

Example 3. Employer C is a partnership that maintains a defined benefit plan. The partnership agreement provides that, upon termination of the plan, a special allocation is to be made to a partner representing the amount of the excess plan assets in proportion to such partner's accrued benefit under the plan. This arrangement results in the defined benefit plan being treated as including a separate current benefit structure for each partner. The same agreement modified to allocate excess plan assets after reversion to the partnership on the basis of partnership share does not create a separate benefit structure with respect to the partner.

(12) *Examples*—(i) *Defined contribution plans.* The following examples illustrate the meaning of current benefit structure with respect to defined contribution plans. Assume that the plans in the following examples provide identical benefits with respect to all participants except to the extent specifically described in the example. Also, assume that, based on all of the facts and circumstances, none of the formulas described in these examples comprise individualized formulas.

Example 1. Plan A allocates contributions and forfeitures uniformly on the basis of the ratio of each participant's compensation to the total compensation of a participant under the plan using the same definition of compensation for all participants. Plan A has one current benefit structure.

Example 2. Plan B benefits two categories of plan participants, category 1 and 2. Category 1 participants are allocated contributions equal to 4 percent of compensation, while category 2 participants are allocated contributions equal to 10 percent of compensation. Plan B has two current benefit structures.

Example 3. All participants in Plan C receive contribution allocations equal to 5 percent of current compensation. However, forfeitures are allocated among category 1 participants on the basis of compensation and among category 2 participants on the basis of account balances. Plan C has two current benefit structures. The result would be the same if the allocation of forfeitures in plan C for category 1 participants was on the basis of the ratio of the participant's current compensation to the current compensation of all category 1 participants and among category 2 participants on the basis of the ratio of the participant's current compensation of all category 2 participants.

Example 4. Under Plan D, the employer contributions for category 1 particpants and category 2 participants are determined separately—the contribution for category 1 participants is based on the profits in divison A, while the contribution for category 2 participants is based on the profits in division B. The employer contributions for each category of participants are allocated among participants on a uniform basis. Plan D has two current benefit structures.

Example 5. Plan E. allocates contributions among all participants under a uniform a uniform allocation formula which is based, in part, on a participant's years of service with the employer. Participants with 10 or fewer years of service receive allocations equal to 5 percent of compensation, and participants with additional years of service receive an additional allocation of 1 percent of compensation for every 2 additional years of service (in excess of 10 years) with the employer. Plan E has one current benefit structure.

Example 6. Plan F allocates contributons among all participants on the basis of units. Participants are credited with one unit for each $2500 of compensation and one unit for each year of service with the employer. Also, plan F allocates forfeitures among all participants on the basis of the ratio of a participant's compensation to the total compensation of all participants. Plan F has one current benefit structure.

Example 7. Plan G allocates contributions among all participants equal to 5 percent of compensation, but in no event less than $300. Plan G has one current benefit structure even through the actual allocation for particular participants may vary as a percentage of compensation due to the minimum allocation provisions.

Example 8. Plan H is a target benefit plan that allocates contributions among all participants based on a uniform unit benefit formula providing a retirement benefit of 1 percent of compensation per year of service. A uniform method is used to derive the contribution allocation for each employee. Plan H has one current benefit structure, even though the contribution allocations for participants are not a uniform percentage of compensation.

(ii) *Defined benefit plans.* The following examples illustrate the meaning of current benefit structure with repect to defined benefit plans. Assume that the plan in the following examples provide indentical benefits with respect to all partcipants except to the extent specifically described in the example. Also, assume that, based on all of the facts and circumstances, none of the formulas described in these examples comprise individualized formulas.

Example 1. Plan A has a uniform, unit benefit formula that provides an annual benefit commencing at normal retirement age of 1 percent of final average pay per year of service. Plan A has one current benefit structure.

Example 2. Plan B's benefit formula provides a benefit of $10 per month for each of a particpant's first 10 years of service, $11 per month for each of the second 10 years of service, $12 per month for each of the next 10 years of service, and no additional benefit for any additional years of service. Because plan B's benefit formula provides for a uniform schedule of benefit accurals for all particpants, plan B has one current benefit structure.

Example 3. Plan C's formual provides each employees with a benefit equal to 22 percent per year of service times final average pay for the first 15 years of service and 1 percent per year of service times final average pay for each additional year of service beyond 15 years. Plan C has one current benefit structure even though, under the formula for a year, different employees have different accrual rates.

Example 4. Plan D's benefit formula provides an annual pension amount for life for every participant equal to the greatest of (A) $500 for each year of service; (B) 2 percent of each year's compensation times years of service; or (C) $3,000. Plan D has one current benefit structure even though

participants may benefit under different parts of the formula.

Example 5. Plan E's benefit formula provides all participants with a benefit of 35 percent of final average pay, which is accrued ratably under the fractional rule over years of plan participation until normal retirement age. Plan E has one current benefit structure even though the rates of annual accrual for participants differ.

Example 6. Plan F's benefit formula provides all participants with an annual benefit for life of 2 percent of average annual pay times years of service. Plan F also provides an unreduced joint and survivor annuity for married participants. Plan F has one current benefit structure, even though some participants are married and some participants are not married, because all participants are accruing benefits under a single benefit structure.

Example 7. Plan G's benefit formula provides all participants with an annual benefit for life equal to 2½ percent of compensation per year of service for compensation above covered compensation and 2 percent of compensation per year of service for compensation below covered compensation. Plan G has one current benefit structure even though the actual benefit rates for participants will differ based on the amounts of a participant's compensation above covered compensation.

Example 8. Plan H's benefit formula provides all participants an annual benefit for life of 45 percent of final average pay. Such benefit is accrued under the fractional rule for category 1 participants, with a 15 year minimum accrual period. For category 2 participants, the benefit is accrued under a unit benefit formula that provides an annual accrual of 3 percent times years of service (not in excess of 15 years) times final average pay. Plan H has two current benefit structures.

Example 9. Plan I's benefit formula provides for all participants an annual retirement benefit for life of 50 percent of final average pay. The retirement benefit is payable to category 1 participants at normal retirement age, with an actuarial reduction for early commencement. For category 2 participants, there is no actuarial reduction for early commencement if a participant has 30 years of service and has attained age 55. Plan I has two current benefit structures.

Example 10. Plan J's benefit formula provides for all participants an annual benefit for life of 2 percent of the participant's compensation times years of service. For category 1 participants, the compensation taken into account is career average compensation, while for category 2 participants the compensation is the annual average of the participant's final 5 years of service. Plan J has two current benefit.

Example 11. Plan K is a contributory defined benefit plan with a benefit formula that provides an annual benefit of 1 percent of final average compensation for each year of service for which the participant makes an employee contribution of one percent of compensation, and an additional ½ percent of final average compensation for each year of service for which the participant makes an additional employee contribution of 1 percent of compensation. Participants may make employee contributions of 0 percent, 1 percent, 2 percent, or 3 percent of compensation. Plan K does not separately account for the employee contributions. Because the special rule for plans subject to section 401(m) does not apply with respect to the employee contributions under plan K, such plan has three current benefit structures (i.e., employee contributions of 1 percent, 2 percent, and 3 percent). (In accordance with §1.401(a)(26)–1(c)(1), these three current benefit structures may be restructured as three current benefit structures, each one providing for an employee contribution of 1 percent.)

Example 12. Plan L is a defined benefit plan under which all participants earn an annual benefit for life, commencing at age 65, equal to 1 percent times years of service times final average compensation. In January 1990, the employer amends the plan to provide that any employee who is at least 55 years of age, has at least 25 years of service, and separates from service between July 1 and October 1 of 1990, may receive an unreduced annual benefit commencing upon separation from service. Plan L has two current benefit structures for 1990.

(13) *Retroactive benefits.* A benefit increase provided with respect to active employees in the current year is one or more current benefit structures even if the benefit increase is based on prior years of service. Similarly, a benefit increase provided to former employees (including, for example, ad hoc cost-of-living increases) is one or more current benefit structures for the year in which the increase is provided. Also, a provision that provides for the allocation, among employees under a terminating defined benefit plan, of assets in excess of the amount necessary to satisfy all of the plan's liabilities is one or more current benefit structures in the year of allocation, depending on the uniformity and characteristics of the allocation formula. A formula providing a retroactive benefit increase that differs with respect to years prior to a specified date (e.g., December 31, 1989, or plan years beginning before the first plan year beginning after December 31, 1989) and years after a specified date comprises two current benefit structures because all portions of the formula are not reasonably available to all employees.

(14) *Individualized formulas*—(i) *General rule.* Notwithstanding the rules provided in this section, an otherwise uniform formula, subsidy, optional form of benefit, right or feature may be treated as comprising separate current benefit structures if, under the facts and circumstances, the formula, subsidy, optional form of benefit, right or feature is based on significantly individualized factors or the effect of such formula, right or feature with respect to employees' allocation or benefit rates, or other rights under the plan is similar to the effect of separate formulas, rights or features.

(ii) *Examples.* This paragraph (d)(14) may be illustrated by the following examples:

Example 1. Assume that an employer with 500 active employees maintains a defined contribution plan under which contributions are allocated among all of the employer's active employees based on their years of service with the employer. Under the allocation formula, each employee receives a contribution allocation for a plan year equal to 5 percent of compensation, plus an additional 1 percent of compensation for each year of service with the employer. The maximum allocation for any year is 20 percent of compensation. Because, in this case, the number of employees under the plan substantially exceeds the number of different allocation rates under the plan's allocation formula and all allocation rates are reasonably available to all employees, the facts and circumstances indicate that the plan's formula does not comprise separate, individualized formulas.

Example 2. Assume that an employer with 5 active employees maintains a defined contribution plan under which contributions are allocated among all of the active employees based on their years of service with the employer. Under the allocation formula, each employee with fewer than 10 years of service receives an allocation of 7 percent of compensation and each employee with 10 or more years of service receives an allocation of 10 percent of compensation. One employee, who is the sole highly compensated employee of the employer, has over 10 years of service; the other four employees each have fewer than 5 years of service. In addition, no employees have separated from service with more than 10 years of service and, based on the facts and circumstances, it is not reasonable to expect that the four employees will remain with the employer for a full 10 years of service. Thus, these facts and circumstances indicate that this allocation formula comprises two individualized formulas and accordingly is treated as two separate current benefit structures.

(e) *Restructuring current benefit formulas*—(1) *General rule.* If two or more current benefit structures under a plan would constitute a single structure but for differences in the benefit formulas, and the formulas are identical in all respects except that the rates of accrual or contribution allocation are different (thus, for example, the formulas use the same compensation base, credit service in the same manner and have the same vesting schedule), an employer may restructure the benefit

structures as two or more separate benefit structures, one including the portion of the formulas that is common to each of the benefit structures, and one or more benefit structures including the portion of the formula that is not common to each of the original benefit structures. For purposes of this paragraph (e), the common or lesser included benefit formula within a plan must be treated as a single current benefit structure with respect to such plan and each restructured benefit structure must be uniform with respect to the benefit formula. Thus, if a plan that is otherwise uniform with respect to all benefits, rights and features, provides a benefit of 50% final average pay for division A, 55% final average pay for division B, and 60% final average pay for division C, restructuring under this rule would result in a benefit structure of 50% of final average pay for employees of divisions A, B and C, 5% of final average pay for employees of division B and C, and 5% of final average pay for employees of division C. Restructuring under this paragraph (e) does not require that the employer actually amend a plan's provisions to reflect the restructuring. Rather, restructuring is merely one method of testing current benefit structures under section 401(a)(26). See § 1.401(a)(26)–1(c)(1) for rules about testing two or more restructured current benefit formulas.

(2) *Examples.* The rule in this paragraph (e) may be illustrated by the following examples:

Example 1. Assume that a defined benefit plan includes two current benefit formulas—one of which benefits the 300 active employees of division A and provides a benefit of 1¼ percent times years of service times final average compensation, and the other of which benefits the 30 active employees of division B and provides a benefit of 1 percent times years of service times final average compensation. Solely for purposes of testing these current benefit structures under section 401(a)(26), such formulas may be restructured as one restructured current benefit formula providing a benefit of 1 percent times years of service times final average compensation (and benefits all 330 active employees of divisions A and B), and one restructured current benefit formula providing a benefit of ¼ percent times years of service times final average compensation (and benefits division A's 300 active employees).

Example 2. Employer B maintains a defined contribution plan that provides a 5 percent contribution for 100 Division A employees, and a 4 percent contribution for 30 Division B employees. All other rights and features under the plan are identical with respect to all employees. Solely for purposes of testing these current benefit formulas under section 401(a)(26), such formulas may be restructured the following two benefit formulas: A separate formula providing a 4 percent contribution to the 100 Division A employees and the 30 Division B employees, and a separate formula providing an additional 1 percent contribution to the 100 Division A employees.

Example 3. Employer C maintains a plan including a qualified cash or deferred arrangement in which both 70 division A employees and 30 division B employees are eligible to participate. Under the plan, the employer makes a matching contribution with respect to the first six percent of elective contributions: In the case of Division A employees the employer matching contribution is 50 percent of an employee's elective contributions, in the case of Division B employees, the employer matching contribution is 30 percent of an employee's elective contributions. In all other respects, all employees have identical rights under the plan. The plan includes three separate benefit structures: a cash or deferred arrangement benefiting 100 employees, a 50 percent matching arrangement benefiting 70 Division A employees, and a 30 percent matching arrangement benefiting 30 Division B employees. The 30 percent matching benefit structure fails to satisfy section 401(a)(26) because it benefits only 30 employees. The plan may be restructured and treated as if it contained the following three separate benefit formulas: a cash or deferred arrangement benefiting 100 employees, a 30 percent matching feature benefiting 100 employees (including the 30 division B employees, and the 70 Division A employees), and an additional 20 percent matching feature benefiting the 70 Division A employees. As restructured, all three separate structures benefit at least 50 employees, and thus satisfy section 401(a)(26).

Example 4. Employer D maintains a defined benefit plan under which 100 employees benefit. The plan provides a normal retirement benefit of 2 percent of pay times final average compensation times years of service. All employees under the plan have identical rights except that the plan provides for an unreduced early retirement benefit for employees with at least 20 years of service and such early retirement benefit is available only to a group of 80 employees. The plan contains two separate benefit structures: one structure benefits 80 employees and includes the early retirement benefit, the second structure has no early retirement benefit and benefits 20 employees. The plan cannot be restructured and treated as if it contained two separate benefit structures, one benefit structure including all rights and features under the plan that benefits all 100 employees, and the other benefit structure including only the early retirement benefit that benefits 80 employees because rights and features cannot be restructured.

Example 5. Employer E maintains a defined contribution plan providing a 6 percent contribution for 30 division A employees, and a 3 percent contribution for 50 division B employees. The plan contains two separate benefit formulas, a 6 percent benefit formula, benefiting 30 employees, and a 3 percent benefit formula benefiting 50 employees. The 6 percent benefit formula fails to satisfy section 401(a)(26). Assume that the 6 percent formula does not satisfy the requirements of § 1.401(a)(26)–1(c)(4). The plan cannot be restructured into benefit structures that satisfy 401(a)(26). The plan can be restructured into a 3 percent benefit formula that benefits all 80 Division A and B employees, and a 3 percent benefit formula that benefits 30 Division A employees. Under this restructuring, the latter 3 percent benefit formula would fail to satisfy section 401(a)(26).

Example 6. Employer F maintains a defined benefit plan covering 100 employees that provides a benefit equal to 1 percent of final average compensation times years of service to 50 category 1 employees, and a benefit equal to 2 percent times career average compensation times years of service to 50 category 2 employees. A lump sum distribution option is available to 50 employees, including 25 category 1 employees and 25 category 2 employees. The plan includes four separate benefit structures: one benefiting 25 employees under the final average compensation formula who cannot receive a lump sum; one benefiting 25 employees under the final average compensation formula who may receive a lump sum; one benefiting 25 employees under the career average compensation formula who cannot receive a lump sum; and one benefiting 25 employees under the career average compensation formula who may receive a lump sum. The plan cannot be restructured in a manner that establishes that the plan satisfies section 401(a)(26) even though 50 employees benefit under the final average compensation formula and so under the career average compensation formula, and 50 employees may receive a lump sum.

(f) *Prior benefit structure.* The prior benefit structure under a defined benefit plan includes all benefit structures that, for prior years, were (or, prior to the first day for which section 401(a)(26) applies to such plan, would have been) current benefit structures under the plan (or under any other plan) and are or were taken into account at any time in determining any employee's benefit under the plan (including benefits originally accrued under another plan). This is the case even if the plan's prior benefit structure is identical to the plan's current benefit structure. Each defined benefit plan has only one prior benefit structure and all accrued benefits under the plan as of the beginning of a plan year (including benefits rolled over or transferred to such plan) are included in such prior benefit structure for such year.

(g) *Additional rules.* The Commissioner may, only in revenue rulings, notices or other documents of general applicability, prescribe such additional guidance as may be necessary or appropriate with respect to the application of this section.

§ 1.401(a)(26)–3 Employees who benefit under a plan and current benefit structure

(a) *In general.* An employee is treated as benefiting under a current benefit structure under a plan only in accordance with the rules of paragraph (b) of this section. Also, in certain situations, it is necessary to determine whether an employee is benefiting under a plan (rather than under the plan's current benefit structure). Such determination may be made only in accordance with the rules of paragraph (c) of this section.

(b) *Benefiting under a current benefit structure*—(1) *Maximum benefit accrual rule*—(i) *General rule.* Except as otherwise provided in this paragraph (b), an employee is treated as benefiting under a current benefit structure for a plan year only if the employee actually accrues the maximum benefit that is available to such employee under the current benefit structure for such year. In the case of a defined contribution plan, an employee is treated as accruing the maximum benefit under a current benefit structure only if such employee actually receives the maximum contribution allocation that is available to such employee under the current benefit structure for such year. The maximum benefit or allocation under a current benefit structure for an employee for a plan year is to be determined under the structure by assuming that the employee satisfied all of the applicable accrual or allocation conditions relating to the current year (e.g., hour-of-service or employment conditions, and mandatory employee contributions). Failure to receive a maximum contribution or benefit allocation that arises solely because of a uniform and otherwise permissible entry date provision under a plan will not result in an employee being treated as failing to benefit under a current benefit structure.

(ii) *Examples.* The following are examples of benefiting within the meaning of paragraph (b)(1) of this section:

Example 1. An employer maintains a defined benefit plan under which all active employees accrue a benefit equal to 2 percent times years of service times final average compensation by making a mandatory employee contribution equal to 1 percent of compensation. Employees who fail to make the mandatory employee contribution, and thus do not accrue the benefit under the current benefit structure, are not treated as benefiting under the current benefit structure for the year.

Example 2. An employer maintains a defined benefit plan under which all employees who perform at least 1000 hours of service during the plan year accrue a benefit of 2 percent times years of service times final average compensation for the year. Only those employees who perform at least 1000 hours of service during the plan year are treated as benefiting under the current benefit structure for the year.

Example 3. An employer maintains a defined contribution plan under which all employees who are employed by the employer on the last day of the plan year receive a 10 percent of compensation allocation under a current benefit structure. Only employees who are employed by the employer on the last day of the plan year, and who thus receive an allocation, are treated as benefiting under the current benefit structure for the year.

Example 4. Plan M is a defined benefit plan under which all employees earn an annual benefit for life, commencing at age 65, equal to 1 percent times years of service times final average compensation. In January 1990, the employer amends the plan to provide that any employee who is at least 55 years of age, has at least 25 years of service, and separates from service between July 1 and October 1 of 1990, may receive an unreduced annual benefit commencing upon separation from service. Plan M has two current benefit structures for 1990. An employee who satisfies the applicable age and service eligibility conditions and thus who would receive the unreduced early retirement benefit if such employee separated from service during the applicable window period is treated as benefiting under the current benefit structure providing the unreduced early retirment benefit, without regard to whether the employee actually separates from service and receives the unreduced early retirement benefit.

(2) *Partial benefit accruals*—(i) *In general.* An employee is treated as benefiting under a current benefit structure under a defined benefit plan even though such employee fails to accrue the maximum benefit under the plan for the current year of service, if such failure was merely because the employee performed fewer than the required minimum number of hours of service for the maximum benefit for the year and, instead, the employee accrued a pro rata portion of the maximum benefit for such year. For purposes of this rule, in determining the pro rata portion of the maximum benefit for an employee for a year, the maximum benefit for the year is the maximum benefit available under the formula determined by assuming that all hour-of-service requirements are satisfied. Also, the pro rata portion of this maximum benefit must be determined as if such maximum benefit were available for the lesser of the actual number of hours of service required under the plan or 2080 hours of service.

(ii) *Examples.* The following are examples of the partial benefit accrual rules of this paragraph (b)(2):

Example 1. Defined benefit plan X's benefit formula provides that a participant who performs fewer than 1000 hours of service for a year does not accrue any benefit for such year, a participant who performs at least 2000 hours of service for a year accrues the maximum benefit for such year (i.e., 1 percent times final pay times years of service), and a participant who performs between 1000 and 2000 hours of service for a plan year accrues a partial benefit in such year based on a fraction, the numerator of which is the number of hours performed by the participant and denominator of which is 200 hours. (An employee's pay is annualized under the plan formula.) Plan X has one current benefit structure. Participant A performs 900 hours of service for the year and thus does not accrue any benefit under the plan for such year. Participant B performs 1000 hours of service and, thus, accrues 50 percent of the maximum benefit. Participant C performs 1500 hours and thus accrues 75 percent of the maximum benefit for the year. Participant D performs over 2000 hours and thus accrues the maximum benefit for the year. Participant A is treated as not benefiting under the current benefit structure for such year, while participants B, C, and D are treated as having accrued the maximum benefit for the current year and thus as having benefited under the current benefit structure.

Example 2. Assume the same facts as in *Example 1*, except that the defined benefit plan's formula also provides that each participant accrues a minimum benefit of ¼ percent times career average compensation times years of service regardless of the participant's number of hours of service for any year. Such formula continues to be a single current benefit structure because each participant will accrue the greater of the benefit based on the participant's hours of service (in excess of 1,000 hours) or the minimum ¼ percent benefit. Nevertheless, even if participant A accrues an additional benefit for the current year, such participant did not accrue the maximum benefit and thus is not treated as benefiting for the year.

Example 3. Assume the same facts as in *Example 1*, except that the plan provides that a participant who performs at least 100 hours of service for a year will accrue a pro rata portion of the maximum benefit available under the formula, which is a full 1 percent for participants with at least 2000 hours. Participant A performed 900 hours of service and thus receives a benefit equal to 0.45 percent times final average pay for the current year. Participant A thus may be treated as benefiting under the plan's current benefit structure.

(3) *Section 401(k) and section 401(m).* (i) An employee is treated as benefiting under a current benefit structure that is subject to either section 401(k) or section 401(m) for a plan year only if such employee is an eligible employee with respect to such current benefit structure for such year. For example, an employee is treated as benefiting under a current benefit structure that is a qualified cash or deferred arrangement only if the employee is an eligible employee with respect to such

arrangement for the year. This is the case without regard to whether the employee has a benefit under the plan and without regard to whether the employee makes elective contributions under the arrangement for such year. Similarly, an employee is treated as benefiting under a current benefit structure of a plan that accepts after-tax employee contributions subject to section 401(m) only if such employee is an eligible employee with respect to such current benefit structure for such year.

(ii) *Example.* Defined contribution plan Z permits eligible employees to make after-tax employee contributions and provides for employer matching contributions equal to employee contributions up to 6 percent of compensation. This plan has two current benefit structures. For the current year, employee A is eligible to make employee contributions but declines to do so and, thus, is not credited with any employer matching contributions. Employee A may be treated as benefiting under both current benefit structures for the year.

(4) *Section 415 limits.* An employee may be treated as benefiting under a current benefit structure for a plan year if such employee both satisfies all of the applicable conditions for accruing the maximum benefit under the current benefit structure for such year and fails to accrue the maximum benefit merely because of the section 415 limits on annual contributions and benefits.

(5) *Certain plan limits.* (i) An employee may be treated as benefiting under a current benefit structure for a plan year if such employee both satisfies all of the applicable conditions to accruing the maximum benefit under such current benefit structure for such year and fails to accrue such maximum benefit merely because of a uniformly applicable benefit limit under the plan's current benefit structure.

(ii) The following example illustrates the rule of this paragraph (b)(5):

Example. Defined benefit plan Y has one current benefit structure that provides for a an annual benefit for life equal to 1 percent times final average compensation times years of service. However, only an employee's first 30 years for service are taken into account under this formula. For the current year, employee Z is age 60 and has performed over 30 years of service. Employee Z may be treated as benefiting under the current benefit structure for the year even though Z is not credited with an additional year under the plan's current benefit structure because of the 30-year limit on years of service taken into account under plan.

(6) *Benefit offset arrangements.* In the case of a current benefit structure under a plan that provides that the benefit determined under the positive portion of the formula is offset or reduced by contributions or benefits under another plan, an employee is treated as accruing the maximum benefit under such structure for a plan year only if the current benefit structure that includes an offset or reduction for other benefits satisfies § 1.401(a)(26)–2(d)(8), and the employee would have accrued the maximum benefit if the offset or reduction portion of the benefit formula were disregarded.

(7) *Certain grandfathered benefits.* An employee is treated as accruing the maximum benefit under a current benefit structure under a defined benefit plan that includes an offset or reduction for grandfathered benefits and satisfies § 1.401(a)(26)–2(d)(7)(i) only if such employee accrues the maximum benefit under such current benefit structure for such year, or if such employee would have accrued the maximum benefit if the offset or reduction portion of the benefit formula were disregarded.

(c) *Benefiting under a plan.* An employee is treated as benefiting under a plan for a plan year only if the employee has a benefit under the plan at some time during the year. An employee who does not have a benefit under a plan at any time during the year is not treated as benefiting under the plan for such year. This is the case even if the employee is eligible to (but does not) accrue a benefit for the plan year and without regard to the reason for the failure of an employee to accrue a benefit. Thus, for example, an employee who, at the beginning of a plan year, does not have an accrued benefit will be treated as benefiting under the plan only if, during such year, the employee actually accrues a benefit under the plan. Similarly, an employee who, as of the beginning of a plan year, has an accrued benefit under a plan is treated as benefiting under the plan for the plan year even though such employee does not accrue, or is not eligible to accrue, an additional benefit under the plan for such year. An employee who receives a total distribution of his benefit during a plan year is treated as benefiting under the plan for such year.

(d) *Additional rules.* The Commissioner may, only in revenue rulings, notices or other documents of general applicability, prescribe such additional guidance as may be necessary or appropriate with respect to the application of this section.

§ 1.401(a)(26)–4 Excludable employees.

(a) *Employees*—(1) *In general.* Except as specifically provided otherwise in this section, in applying section 401(a)(26) with respect to either active employees, former employees, or both active and former employees, as applicable, all active employees (other than excludable active employees described in paragraph (b) of this section), all former employees (other than excludable former employees described in paragraph (c) of this section), or both, as the case may be, are to be taken into account.

(2) *Rules of application.* Except as specifically provided otherwise in this section, the rules of this section are to be applied by reference only to the plan, or current benefit structures, or prior benefit structure being tested. See § 1.401(a)(26)–2 for rules governing the identification of the plan, current benefit structures, and prior benefit structure for purposes of section 401(a)(26).

(b) *Excludable active employees.* An active employee is an excludable active employee if such employee is covered by one or more of the following exclusions:

(1) *Minimum age and service exclusions*—(i) *In general.* An employee who is excluded from consideration under section 410(b)(4)(A) (relating to employees not satisfying certain minimum age and service requirements) for purposes of determining whether a plan satisfies section 410(b) may be treated as an excludable employee with respect to such plan and the current and prior benefit structures included therein.

(ii) *Coverage extended to otherwise excludable employees.* An active employee who would be excludable under paragraph (b)(1)(i) of this section but for the fact that the employee (or another employee with the same age and service) is not excluded from coverage under the plan (i.e., an otherwise excludable employee) may nevertheless be treated as an excludable employee with respect to such plan and the current benefit structures and prior benefit structure included therein if each of the following conditions is satisfied:

(A) The plan under which the otherwise excludable employee benefits also benefits active employees who are not otherwise excludable.

(B) The plan and current benefit structure under which the otherwise excludable employee benefits satisfy § 1.401(a)(26)–1(b), both by reference only to otherwise excludable employees and by reference only to active employees who are not otherwise excludable.

(C) The contributions or benefits provided to the otherwise excludable employees (expressed as percentages of compensation) are not greater than the contributions or benefits provided to the employees who are not otherwise excludable under the plan.

(D) No highly compensated employee is included in the group of otherwise excludable employees for more than one plan year.

(iii) *Examples.* The following examples illustrate certain of the minimum age and service exclusion requirements:

Example 1. Employer Y maintains Plan Y under which employees who have not completed 1 year of service are not eligible to participate. Employer Y has six employees, two of whom participate in Plan Y and four of whom have not completed 1 year of service and are, therefore, not eligible to participate in Plan Y. The four employees who have not completed 1 year of service are excludable employees and may be disregarded for purposes of applying the minimum participation test. Therefore, Plan Y meets the minimum participation requirements because both of the two employees who must be considered are participants in Plan Y.

Example 2. Employer X has 100 employees and maintains two plans, Plan 1 and Plan 2. Plan 1 has a minimum age and service requirement and Plan 2 does not. Twenty of X's employees do not meet the minimum age and service requirement under Plan 1. Each plan satisfies the 70-percent ration test under section 410(b)(1)(B). In testing Plan 1 to determine whether it satisfies the minimum participation requirements, the 20 employees not meeting the minimum age and service requirement under Plan 1 are treated as excludable employees to the same extent that they are treated as excludable employees under section 410(b)(1). In testing Plan 2 to determine whether it satisfies the minimum participation requirements, no employees are treated as excludable employees because they are not treated as excludable employees in testing Plan 2 under section 410(b)(1).

Example 3. Employer Z has 10 employees and maintains a defined benefit plan that has no minimum age and service requirement. However, the plan provides for a lesser accrual for Z's 7 employees who have not met the minimum age and service requirements described in section 410(a)(1)(A). The plan is treated as consisting of two separate benefit structures. In general, none of Z's employees would be treated as excludable in determining whether each separate benefit structure satisfies the minimum participation requirements. However, Z may elect, under paragraph (b)(1) of this section, to exclude the 7 employees not meeting the minimum age and service requirements of the greater benefit structure, provided that the requirements of that section are met.

(2) *Certain air pilots.* An employee who is to be excluded from consideration under section 410(b)(3)(B) (relating to certain air pilots) with respect to a plan may be treated as an excludable employee with respect to such plan and the current and prior benefit structures included therein.

(3) *Certain nonresident aliens.* An employee who is to be excluded from consideration under section 410(b)(3)(C) (relating to certain nonresident aliens) with respect to a plan may be treated as an excludable employee with respect to such plan and the current and prior benefit structures included therein.

(4) *Certain employees covered pursuant to a collective bargaining agreement*—(i) *In general.* An employee who may be excluded from consideration under section 410(b)(3)(A) with respect to a plan (or with respect to any portion of a plan that is treated as a separate plan under paragraph (c) of § 1.401(a)(26)–2) may be treated as an excludable employee with respect to such plan (or portion thereof) and the current and prior benefit structures included therein. This rule may be applied separately with respect to each collective bargaining agreement. See § 1.401(a)(26)–1(d)(2)(ii) with respect to whether employees are covered pursuant to a collective bargaining agreement.

(ii) *Exception for professionals.* Paragraph (b)(4)(i) of this section does not apply to a collective bargaining agreement if more than 2 percent of the employees of the employer who are covered pursuant to such agreement are professionals (as defined in § 1.401(a)(26)–7(g)).

(5) *Certain employees not covered pursuant to a collective bargaining agreement.* An employee who is not included in any group of employees who are covered under any plan pursuant to any collective bargaining agreement may be treated as an excludable employee with respect to any plan (including any portion of a plan that is treated as a separate plan under § 1.401(a)(26)–2) that covers only employees who are included in a group of employees who are covered pursuant to one or more collective bargining agreements.

(6) *Examples.* The following examples illustrate the excludable employee rules that relate to employees covered pursuant to collective bargaining agreements:

Example 1. Employer Z has 70 collectively bargained employees and 30 non-collectively bargained employees. Under Plan Z, only non-collectively bargained employees are eligible to participate. The 70 collectively bargained employees are treated as excludable employees and thus may be disregarded in applying section 401(a)(26) to Plan Z.

Example 2. Assume the same facts as *Example 1*, except that the Commissioner has determined that the employee representative is not a bona fide employee representative under section 7701(a)(46) and thus there are no "collectively bargained employees." In this case, all employees of Z must be considered in determining whether section 401(a)(26) is met.

Example 3. Employer X has 30 collectively bargained employees and 70 non-collectively bargained employees and maintains Plan X, which benefits only the 30 collectively bargained employees. Employer X may elect to treat the non-collectively bargained employees as excludable employees and disregard such excludable employees in applying section 401(a)(26) to the collectively bargained plan.

Example 4. Assume the same facts as *Example 3*, except that the Commissioner has determined that the employee representative is not a bona fide employee representative under section 7701(a)(46) and thus there is no recognized collective bargaining agreement. In this case, the employer may not elect to treat the non-collectively bargained employees of X as excludable employees.

Example 5. Assume the same facts as *Example 3*, except that 3 percent of the 30 collectivey bargained employees are professionals. In this case, the employer may not elect to treat the non-collectively bargained employees of X as excludable employees.

Example 6. Employer W has 100 collectively bargained employees. Thirty of W's employees are represented by Collective Bargaining Unit 1 and covered under Plan 1. Seventy of W's employees are represented by Collective Bargaining Unit 2 and covered under Plan 2. In this case, the employees of each collective bargaining unit are tested separately. Thus, in testing Plan 1, only the 30 employees represented by Collective Bargaining Unit 1 are considered. In testing Plan 2, only the 70 employees represented by Collective Bargaining 2 are considered.

(c) *Excludable former employees.* A former employee is an excludable former employee with respect to a plan if such employee is within one or more of the following exclusions. Excludable former employees may be disregarded in determining the number of former employees that is equal to 40 percent of the former employees of the employer for purposes of applying § 1.401(a)(26)–1(b)(2) and § 1.401(a)(26)–6(b).

(1) *Minimum age and service and collective bargaining rules.* A former employee is an excludable former employee if the employee was excluded (or, if section 401(a)(26) was in effect, would have been excluded) from consideration under paragraph (b)(1)(i) of this section (relating to employees not satisfying certain minimum age and service requirements) at all times as an active employee or under paragraph (b)(4) of this section (relating to certain employees covered pursuant to collective bargaining agreements) at substantially all times as an active employee.

(2) *Rules analogous to excludable active employee rules.* A former employee is an excludable former employee if the former employee would qualify as an excludable active employee under rules of paragraphs (b)(1)(ii), (b)(2), (b)(3), or (b)(5) of this

section if such former employee were an active employee. Thus, for example, a former employee who was a nonresident alien and received no earned income (under section 911(d)(2)) from the employer which constituted income from sources within the United States (within section 861(a)(3)) qualifies as an excludable former employee under this test.

(3) *Vested accrued benefits eligible for mandatory distribution.* A former employee is an excludable former employee if the present value of the former employee's vested accrued benefit is not in excess of $3,500. This determination is to be made in accordance with the rules of sections 411(a)(11) and 417(e).

(d) *Special rule for governmental plans—(1) Grandfathered participants.* In the case of a governmental plan (within the meaning of section 414(d)) for plan years beginning before January 1, 1993, an employee who became a plan participant before July 15, 1988, may be treated as an excludable employee with respect to such plan and the current and prior benefit structures included therein. Consequently, a governmental plan will be deemed to satisfy section 401(a)(26) with respect to such participants for such years, and such participants need not be taken into account in determining whether or not any plan satisfies section 401(a)(26) with respect to other plan participants.

(2) *Special rule for certain police or firefighters.* An employer may apply section 401(a)(26) separately with respect to any classification of qualified public safety employees for whom a separate plan is maintained. Consequently, all employees other than those in that classification of qualified public safety employees are treated as excludable employees. Also, such employees need not be taken into account in determining whether or not any plan satisfies section 401(a)(26) with respect to other plan participants. For purposes of this paragraph (d)(2) the term "qualified public safety employee" means any employee of any police department or fire department organized and operated by a State or political subdivision if the employee provides police protection, firefighting services, or emergency medical services for any are a within the jurisdiction of such State or political subdivision.

(e) *Additional rules.* The Commissioner may, only in revenue rulings, notices or other documents of general applicability, prescribe such additional guidance as may be necessary or appropriate with respect to the application of this section.

§ 1.401(a)(26)-5 Testing methods.

(a) *Testing period—(1) Each day of the plan year.* A plan will satisfy section 401(a)(26) for a plan year only if such plan satisfies section 401(a)(26) on each day on the plan year. An employee benefits on a day if the employee is an active participant for such day and benefits under the plan for the year under the rules in § 1.401(a)(26)-3(b).

(2) *Retroactive correction.* (i) if a plan fails to satisfy section 401(a)(26) for one or more days during a plan year, such plan may be amended by the last day of such plan year to retroactively satisfy section 401(a)(26), based on the facts as they existed on the day or days of failure, by expanding coverage or by improving benefits or contributions or by modifying eligibility conditions under the plan or a current benefit structure. Plans that are merged will not be treated as failing to satisfy section 401(a)(26) soley because the plans failed to satisfy § 1.401(a)(26)-2(b) prior to the merger. The need to retroactively amend to satisfy section 401(a)(26) does not constitute a basis for eliminating or reducing a benefit in violation of section 411(d)(6).

(ii) *Example.*

Assume that an employer with 500 active employees maintains two defined benefit plans that each include one current benefit structure. During a plan year, only 45 active employees benefit under the current benefit structure under Plan A. Immediately before the end of the year, however, the employer expands the coverage of Plan A to include 20 additional active employees under the current benefit structure for the year. Thus, Plan A's current benefit structure satisfies paragraph (b)(1) of this section for the plan year. Alternatively, before the end of the year, the employer could merge Plan A with the other defined benefit plan and then, under the merged plan, either expand the coverage of active employees under Plan's current benefit structure or, if Plan A's current benefit structure provides for a lower benefit than the current benefit structure of the other defined benefit plan, provide that the active employees who had been benefiting under Plan A will benefit for the year under the such more valuable current benefit structure.

(b) *Additional rules.* The Commissioner may, only in revenue rulings, notices or other documents of general applicability, prescribe such additional guidance as may be necessary or appropriate with respect to the application of this section, including additional guidance for testing compliance with section 401(a)(26) for a plan year.

§1.401(a)(26)-6 Testing of prior benefit structures in defined benefit plans.

(a) *General rule.* A defined benefit plan (but not a defined contribution plan) that does not satisfy section 401(a)(26) by means of satisfying the rules in §1.401(a)(26)-1(d) must satisfy the requirements of paragraph (b) of this section with respect to its prior benefit structure. Paragraph (c) of this section contains definitions and special rules regarding the application of paragraph (b) of this section with respect to prior benefit structures.

(b) *Prior benefit structure under a defined benefit plan—(1) General rules*—(i) *In general.* If the benefits currently accruing under a defined benefit plan for active employees for a plan year are meaningful relative to the benefits accrued under the plan, the defined benefit plan's prior benefit structure satisfies this paragraph (b) for the plan year. Whether the benefits currently accruing are meaningful relative to the benefits accrued under the plan is to be determined in accordance with paragraph (b)(2) of this section. If the benefits currently accruing under a defined benefit plan for active employees are not meaningful relative to the benefits accrued under the plan, the plan's prior benefit structure satisfies paragraph (b) for a plan year only if the group of active and former employees with meaningful benefits under the plan satisfies section 401(a)(26). Whether the group of active and former employees with meaningful benefits under the plan satisfies section 401(a)(26) is to be determined in accordance with paragraph (b)(3) of this section. See paragraph (c) of this section for definitions of accrued benefit, minimum benefit rate, and compensation. Also, see §1.401(a)(26)-8(b)(2) for a transition rule with respect to the prior benefit structure determination for plan years beginning before January 1, 1990.

(ii) *Application of prior benefit structure requirements.* If a defined benefit plan satisfies any one of the six alternative tests set forth in paragraph (b)(2) (ii), (iii), (iv) and (v) of this section and paragraph (b)(3) (ii) and (iii) of this section for a plan year, the defined benefit plan satisfies this paragraph (b) with respect to its prior benefit structure for such plan year. For example, if, in accordance with the minimum employee coverage test of paragraph (b)(3)(iii) of this section, at least 100 employees have greater than de minimis accrued benefits under a defined benefit plan and the three highly compensated employees with the largest benefits under the plan do not have more than 25 percent of the

total benefits under the plan, the defined benefit plan's prior benefit structure satisfies this paragraph (b). This is the case without regard to whether the defined benefit plan satisfies any of the other tests relating to prior benefit structures under this paragraph (b).

(2) *Meaningful current benefit accruals*—(i) *In general.* A defined benefit plan is treated as providing current benefit accruals for active employees that are meaningful relatives to the benefits accrued under the plan only if the plan satisfies at least one of the tests set forth in paragraphs (b)(2)(ii),(b)(2)(iii), (b)(2)(iv), and (b)(2)(v) of this section.

(ii) *Minimum current accrual rate test*—(A) *In general.* A plan satisfies this test for a plan year only if, as of the close of such year, at least the lesser of 50 active employees or 40 percent of the employer's active employees have current accrual rates that are equal to or greater than the minimum current accrual rate. Employees who do not have either greater than de minimus accrued benefits or greater than de minimus accrued benefit rates under the plan are treated as not having current accruals under the plan.

(B) *Deemed satisfaction of minimum current accrual rate test.* A plan that satisfies the minimum current accrual rate test in this paragraph (b)(2)(iii) for a plan year will be deemed to continue to satisfy such test with respect to its prior benefit structure on an ongoing basis without any requirement for retesting as long as both the current benefit formula and the rate of accrual relied on remain in effect and continue to provide benefit accruals to a group of employees that satisfies the requirements of section 401(a)(26).

(C) *Current accrual rates.* The current accrual rate for an active employee is the additional accrued benefit (expressed either as a percentage of final average compensation or as a percentage of career average compensation consistent with the plan's method of computing benefits) attributable to the employee's current year of service under a current benefit structure under the plan.

(D) *Minimum current accrual rate.* (*1*) If the plan determines benefits based on final average compensation, the minimum current accrual rate for a plan year is 0.75 percent times final average compensation. If the plan determines benefits based on career average compensation, the minimum current accrual rate for a plan year is 1.1 percent times career average compensation.

(*2*) In the case of a current benefit structure that provides employees with a flat accrued benefit (expressed as a percentage of compensation) that employees accrue over their years of participation, the minimum current accrual rate for a plan year is the annual rate resulting for such employee under a formula that provides a flat accrued benefit at normal retirement age of either 30 percent of final average compensation or 45 percent of career average compensation, depending on the compensation base on which the plan benefits are determined, accrued on a level basis over all years of plan participation.

(E) *Compensation.* (*1*) A plan that determines benefits based on the highest average annual compensation averaged over a specified period not exceeding 5 consecutive years (or a participant's entire period of service for the employer if shorter than such specified period) shall be considered to base benefits on final average compensation and a plan that determines benefits based on average annual compensation averaged over a specified period exceeding 5 consecutive years (or a participant's entire period of service for the employer, if shorter than such specified period) shall be considered to base benefits on career average compensation.

(*2*) Compensation shall be compensation as defined under the plan, provided that such definition is reasonable and is nondiscriminatory under section 414(s). A definition of compensation that is significantly less inclusive than the maximum amount of compensation that may be taken into account under section 414(s) and the regulations thereunder is not reasonable. In addition, a definition of compensation is not reasonable if it provides that compensation is a uniform percentage of a basic definition of compensation under section 414(s) and the regulations thereunder (e.g., 95 percent of W–2 compensation). For purposes of determining final average compensation under this rule, compensation for years commencing prior to January 1, 1989, may be defined as compensation taken into account under the plan in such year.

(iii) *Nondecreasing benefit structure test*—(A) *In general.* A plan satisifies this test for a plan year only if, as of the close of such year, the hypothetical accrued benefits of at least the lesser of 50 active employees or 40 percent of the employer's active employees benefiting under one or more current benefit structures included in the plan are equal to or greater than the employees' actual accrued benefits under the plan. This test is satisfied only if the group of active employees with hypothetical accrued benefits equal to or greater than actual accrued benefits includes the three highly compensated active employees of the employer with the largest amounts of accrued benefits under the plan. If there are fewer than three highly compensated active employees with accrued benefits under the plan, all highly compensated active employees with accrued benefits under the plan must be among the employees with hypothetical accrued benefits equal to or greater than actual accrued benefits.

(B) *Deemed satisfaction of nondecreasing benefit structure test.* A plan that satisfies the nondecreasing benefit structure test in this paragraph (b)(2)(iii) for a plan year will be deemed to continue to satisfy such test with respect to its prior benefit structure on an ongoing basis without any requirement for retesting as long as both the current benefit formula and the rate of accrual relied on remain in effect and continue to provide benefit accruals to a group of employees that satisfies the requirements of section 401(a)(26).

(C) *Hypothetical accrued benefit.* An employee's hypothetical accrued benefit as of the close of a plan year is computed by using only the current benefit structure applicable to such employee for such plan year and by assuming that such current benefit structure has been in effect for all years through the close of such year. In making this determination of an employee's hypothetical accrued benefit, an employee's actual accrued benefit under the plan is disregarded. In addition, employees who do not have either greater than de minimus accrued benefits or greater that de minimis accrued benefit rates under a plan are treated as not having any hypothetical accrued benefit under the plan.

(D) *Examples.* The following examples illustrate the rules of this paragraph (b)(2)(iii):

Example 1. Assume that an employer with 1,000 active employees has maintained a defined benefit plan for 20 years and that over 100 active employees currently benefit under the plan. During this entire period, the plan has had only one benefit structure—½ percent times years of service (not in excess of 30 years) times final average compensation. In this case, the hypothetical accrued benefit of each active employee benefiting under the plan equals such employee's actual accrued benefit. Thus, this defined benefit plan provides current benefits to active employees that are meaningful relative to the benefits accrued under the plan. If the employer were to amend the plan to improve the current benefit structure by increasing the rate from ½ to .6 percent, the plan would continue to provide benefits that are meaningful relative to the benefits

accrued under the plan. This would be the case without regard to whether the increased rate applied to prior years of service under the plan.

Example 2. Assume the same facts as in *Example 1*, except that the employer amends the plan's formula for future years of service by increasing the rate from ½ to .6 percent, applying such higher rate to career average compensation (rather than final average compensation), and eliminating the 30 years of service limit. Whether this new current benefit structure provides benefits that are meaningful relative to the benefits accrued under the plan under the nondecreasing benefit structure test depends on whether there are at least 50 active employees with hypothetical accrued benefits (determined by applying the new current benefit structure using career average compensation to the current and all prior years) equal to or greater than actual accrued benefits under the plan.

(iv) *Minimum current benefit structure test*—(A) *In general.* A plan satisfies this test for a plan year only if, as of the close of such year, at least the lesser of 50 active employees or 40 percent of the employer's active employees benefiting under one or more current benefit structures under the plan have future service benefit rates that are equal to or greater than the plan's minimum benefit rate (as defined in paragraph (c)(2) of this section).

(B) *Future service benefit rate.* The future service benefit rate for an active employee is the hypothetical, projected accrued benefit (expressed as a percentage of compensation) that would be accrued under the current benefit structure over the employee's future years of service, divided by such employee's future years of service under the plan. This determination is to be made on a basis consistent with the rules of paragraph (b)(2)(v)(B) of this section and by assuming that the employee commenced employment and plan participation at the beginning of the current plan year, assuming no change in the employee's annual compensation and annual hours of service and projecting the employee's age and service from the beginning of the current year to normal retirement age under the plan. This determination is to be made without projecting any increase in the annual limit on contributions and benefits under section 415. Also, in making this determination, the current year is to be taken into account as a future year of service. Finally, employees who do not have either greater than de minimis accrued benefits or greater than de minimis accrued benefit rates under a plan are treated as not having any future service benefit rate under the plan.

(C) *Examples.* The following examples illustrate the rules of this paragraph (b)(2)(iv):

Example 1. Assume that an employer maintains a defined benefit plan that currently benefits 100 active employees. During its 20 prior years of existence, the plan has had many different benefit structures. The plan's current benefit structure provides a benefit of 1 percent times years of service times career average compensation. The plan's minimum benefit rate for the plan is 85/100 percent times years of service times career average compensation. Accordingly, the benefits under the plan's current benefit structure are meaningful relative to the benefits accrued under the plan.

Example 2. Assume that an employer maintains a defined benefit plan that currently benefits 100 active employees. During its 20 prior years of existence, the plan has had many different benefit structures. The plan's current benefit structure provides a benefit of 35 percent times final average compensation and is accrued over employees' years of participation under the plan. The plan's minimum benefit rate for the plan is 1 1/10 percent times years of service times final average compensation. Based on the ages of the active employees currently benefiting under the plan, 60 of such employees have future service benefit rates of at least 1 1/10 percent times years of service times final average compensation. Thus, the benefits under the plan's current benefit structure are meaningful relative to the benefits accrued under the plan.

(v) *Benefit ratio test*—(A) *In general.* A plan satisfies this test for a plan year only if, as of the close of such year, the sum of the accrued benefits of all active employees under the plan is less than 60 percent of the sum of the projected accrued benefits of all active employees benefiting under the plan, and the plan satisfies the concentration test set forth in paragraph (b)(4) of this section.

(B) *Projected accrued benefit.* An employee's projected accrued benefit is determined by projecting the employee's accrued benefit to which the employee would be entitled at the plan's normal retirement age under the current benefit structure applicable to such employee under the plan, expressed in the form of an annuity for the life of the employee and assuming no change in the employee's annual compensation or in the annual hours of service. In determining an employee's projected accrued benefit under a current benefit structure, any change in such current benefit structure (e.g., a change in the accrual rate or in the definition of compensation) that does not currently apply to any individual who is or could be an employee under the current benefit structure is disregarded. This determination is to be made without projecting any increase in the annual limit on contributions and benefits under section 415. Also, in making this determination, the current year is to be taken into account. Thus, for example, in the case of an employee whose current age is equal to or greater than normal retirement age, the employee's projected accrued benefit includes the accrued benefit attributable to the current year of service. Finally, employees who do not have either greater than de minimis accrued benefits or greater than de minimis accrued benefit rates under a plan are treated as not having any projected accrued benefit under the plan.

(C) *Example.* The following example illustrates the rules of this paragraph (b)(2)(v):

Example. Assume that an employer maintains a defined benefit plan that currently benefits 100 active employees. During its 20 prior years of existence, the plan has had many different benefit structures. In general, the benefit structures for prior years were richer than the current benefit structure, which provides a benefit of 1 percent times years of service times career average compensation. Also, for nearly all prior years, only about 10 active employees benefited under the plan for any year. In the current year, the plan benefits many more, generally younger employees. Because of the significant increase in the number of younger employees benefiting under the plan and in spite of the reduction in the plan's benefit structure, the sum of the accrued benefits of all active employees under the plan is less than 60 percent of the sum of the projected accrued benefits for all active employees under the plan. Thus, assuming that the plan also satisfies the concentration test set forth in paragraph (b)(4) of this section, this plan's current benefit structure is meaningful relative to the benefits under the plan.

(3) *Prior benefit structure requirement*—(i) *In general.* The group of active and former employees with meaningful benefits under a defined benefit plan satisfies section 401(a)(26) only if the plan satisfies at least one of tests set forth in paragraph (b)(3)(ii) and (b)(3)(iii) of this section. These tests are applied by taking into account active and former employees with benefits under the plan.

(ii) *Minimum accrued benefit test*—(A) *In general.* A plan satisfies this test for a plan year only if, as of the close of such year, at least the lesser of 50 employees or 40 percent of the employer's employees benefiting under the plan have accrued benefit rates that are at least the plan's minimum benefit rate (determined in accordance with paragraph (c)(2) of this section).

(B) *Accrued benefit rate.* The accrued benefit rate for an employee for a plan year is the employee's accrued benefit under the plan (expressed as a percentage of compensation) as of the close of the plan year, divided by the years of service with the employer as of

the close of such year. In making this determination, all of an employee's years of service with the employer may be taken into account (including years of service before and after the employee accrued benefits under the plan), other than years of service that both are not taken into account under the plan and may be disregarded under section 401(a)(1).

(C) *Example.* The following example illustrates the rules of this paragraph (b)(3)(ii):

Example. Assume that an employer maintains a defined benefit plan that provides for no additional benefit accruals. Before becoming a frozen plan, the plan had many different benefit structures. Currently, 100 active and former employees have accrued benefits under the plan, and the plan is not top-heavy. The plan's minimum benefit rate is 1.1 percent times years of service times final average compensation. Based on the accrued benefits and years of service of the active and former employees with accrued benefits under the plan, 58 of the 100 employees have accrued benefit rates that are greater than the minimum benefit rate. Thus, the plan satisfies the minimum accrued benefit test of this paragraph (b)(3)(ii) and the plan's prior benefit structure satisfies this paragraph (b) for the plan year.

(iii) *Minimum employee coverage test*—(A) *General rule.* A plan satisfies this test for a plan year only if, as of the close of such year, at least 100 employees of the employer have accrued benefits or accrued benefit rates (or both) under the plan that are greater than de minimis and the plan satisfies the concentration test set forth in paragraph (b)(4) of this section.

(B) *Example.* The minimum employee coverage test can be illustrated by the following example:

Example: Assume that an employer maintains a defined benefit plan that benefits 500 active and former employees. The plan does not include a current benefit structure and thus the plan is a frozen plan. Also, the plan is not top-heavy. This plan has had many different benefit structures over its 25 years of existence. Assuming that at least 100 employees have either accrued benefits or accrued benefit rates that are greater than de minimis and the plan satisfies the concentration test of paragraph (b)(4) of this section, this plan satisfies the minimum employee coverage test of this paragraph (b)(3)(iii) and thus the plan's prior benefit structure satisfies this paragraph (b) for the plan year.

(4) *Concentration test.* (i) A plan satisfies this test for a plan year only if, as of the close of such year, the sum of the accrued benefits under the plan of the three employees who are or ever have been highly compensated employees (either as active employees, former employees or both) and who have the largest accrued benefits under the plan does not constitute more than 25 percent of the sum of the accrued benefits of all employees under the plan. If there are fewer than three employees with accrued benefits under the plan who are or ever have been highly compensated employees, this determination is to be made by reference to all employees with accrued benefits under the plan who are or ever have been highly compensated employees. This test is applied by taking into account all active and former employees with benefits under the plan.

(ii) *Example.*

Assume that an employer maintains a frozen defined benefit plan under which 125 active and former employees have accrued benefits that are more than de minimis accured benefits. However, because for its first 15 years of existence this plan benefited only three highly compensated employees and coverage under the plan was expanded under a significantly reduced benefit structure to 122 nonhighly compensated employees for only a year before the plan was frozen, the sum of the accrued benefits of the three highly compensated employees under the plan with the largest accrued benefits constitute over 25 percent of the total accrued benefits under the plan. This plan fails to satisfy the concentration test of this paragraph (b)(4).

(c) *Definitions for prior benefit structure tests*—(1) *Accrued benefit*—(i) *In general.* Solely for purposes of applying paragraph (b) of this section, an employee's accrued benefit under a defined benefit plan is the accrued benefit to which the employee is entitled commencing at the plan's normal retirement age, expressed as an annuity for such employees life. Thus, the accrued benefit, for purposes of this paragraph (c)(1), is not adjusted to reflect benefit subsidies such as subsidized early retirement benefits or subsidized joint and survivor annuity provisions, whether or not the employee has satisfied the conditions for such benefit subsidy.

(ii) *Social security benefits and permitted disparity.* An employees accrued benefit is to be determined based only on the employee's benefit under the plan being tested, without regard to benefits provided under social security or similar Federal or state law and without regard to the permitted disparity under section 401(l).

(iii) *Benefits under other plans.* An employee's accrued benefit is based only on the employee's benefit under the plan being tested. Thus, for example, if benefits under the plan being tested are reduced by benefits under another plan maintained by the employer maintaining the plan being tested (e.g., in a floor-offset arrangement) an employee's benefit under the plan being tested is determined after the reduction by benefits provided under such other plan. An employer may elect to disregard benefits under the plan being tested if such benefits were rolled over (rather than transferred) to such plan and such benefits are treated as voluntary employee contributions under such plan. A plan may not disregard benefits that were transferred to the plan being tested from any other plan, including a plan of an unrelated employer; or benefits that were originally accrued under another plan that was merged with the plan being tested.

(2) *Minimum benefit rate*—(i) *General rule.* The minimum benefit rate for a plan for a plan year is determined in the following manner. If the highly compensated benefit rate for such year is equal to or greater than 1½ percent, the minimum benefit rate is equal to 60 percent of the excess of the highly compensated benefit rate over ¾ percent. If the highly compensated benefit rate is less than 1½ percent, the minimum benefit rate is equal to 30 percent of the highly compensated benefit rate. If the minimum current accrual rate (determined under paragraph (b)(2)(ii) of this section) is less than the minimum benefit rate determined under the preceding two sentences, then the minimum benefit rate is such minimum current accrual rate.

(ii) *Highly compensated benefit rate.* (A) The highly compensated benefit rate for a plan year is the highest of the accrued benefit rates for the three active employees or former employees who are or ever were highly compensated employees of the employer (either as active employees, former employees, or both) with the largest accrued benefits under the plan as of the close of the plan year. For purposes of this rule, an employer may limit consideration of highly compensated former employees to those employees who had an hour of service with the employer during the plan year or any of the immediately preceding five plan years. In addition, the employer may disregard highly compensated former employees who became former employees prior to January 1, 1988. If more than three employees have the largest amounts of accrued benefits under the plan, all of such employees are taken into account in determining the highest accrued benefit rate. If there are fewer than three employees with accrued benefits under the plan who are or ever were highly compensated employees, this determination is to be made by reference to all employees with accrued benefits under the plan who are or ever were highly compensated employees.

For purposes of applying this rule, employees who were highly compensated employees only for plan years ending before January 1, 1984, are not treated as highly compensated employees.

(B) *Example.*

Assume that an employer maintains a defined benefit plan that benefits five active employees and five former employees who are or ever were highly compensated employees of the employer. To determine the plan's highly compensated benefit rate, the employer first must identify the 3 of these 10 employees who have the largest accrued benefits under the plan. Thus, if $90,000 is the largest accrued benefit for any employee under the plan and if 3 of the 10 employees each have a $90,000 accrued benefit, these 3 employees are taken into account in determining the plan's highly compensated benefit rate. If 4 of the 10 employees have $90,000 accrued benefits, all 4 are taken into account. Similarly, if 2 of the 10 employees have $90,000 accrued benefits and 2 of the 10 employees have $89,000 accrued benefits (the second largest amount under the plan), all 4 of these employees are taken into account in determining the plan's highly compensated benefit rate. Then, the employer must determine which of these employees who are taken into account has the highest accrued benefit rate, and such rate is the highly compensated benefit rate for the year.

(3) *Compensation.* An employee's compensation is compensation as defined by the plan for purposes of determining employees' benefits. Such definition must satisfy section 414(s) and the regulations thereunder. In applying the rules of paragraph (b) of this section, a plan must use a uniform definition of compensation and a uniform applicable period for determining compensation. Thus, for example, in applying the minimum current benefit structure test of paragraph (b)(2)(iv) of this section, a uniform definition of compensation must be used in determining the future service benefit rates and the minimum benefit rate. Similarly, in applying the minimum accrued benefit test of paragraph (b)(3)(ii) of this section, a uniform definition of compensation must be used in determining the accrued benefit rates and the minimum benefit rate. Also, a plan may not take into account, for any plan year, compensation in excess of the amount that may be taken into account for such year under section 401(a)(17), and a plan may not project any increase in such amount.

(d) *Additional rules.* The Commissioner may, only in revenue rulings, notices or other documents of general applicability, prescribe such additional guidance as may be necessary or appropriate with respect to the application of this section.

§ 1.401(a)(26)–7 Definitions.

The following definitions are applicable for purposes of section 401(a)(26) and the regulations thereunder:

(a) *Collective bargaining agreement.* The term "collective bargaining agreement" refers to an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and the employer, which agreement satisfies § 301.7701–17T. Employees described in section 413(b)(8) who are employees of the union or the plan and are treated as employees of an employer are not considered to be employees covered pursuant to a collective bargaining agreement for purposes of section 401(a)(26) unless such employees are actually covered pursuant to such an agreement.

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

(2) *Active and former employees.* An active employee is an individual currently performing services as an employee for the employer. An individual ceases to be an active employee and is treated as a former employee commencing with the day after the day on which the employee terminates from service for the employer. Thus, an employee who terminates from service for an employer during a plan year is both an active employee and a former employee for such plan year.

(3) *Highly compensated employee.* The term "highly compensated employee" means a highly compensated employee within the meaning of section 414(q).

(4) *Nonhighly compensated employee.* The term "nonhighly compensated employee" means an employee who is not a highly compensated employee.

(c) *Employer.* For purposes of section 401(a)(26), except as specifically provided otherwise in the regulations under section 401(a)(26), the term "employer" means the employer maintaining the plan and those employers required to be aggregated with such employer under sections 414 (b), (c), (m), or (o). An individual who owns the entire interest of an unincorporated trade or business is treated as an employer. Also, a partnership is treated as the employer of each partner and each employee of the partnership.

(d) *Defined contribution plan.* The term "defined contribution plan" means a defined contribution plan within the meaning of section 414(i).

(e) *Defined benefit plan.* The term "defined benefit plan" means a defined benefit plan within the meaning of section 414(j).

(f) *Multiemployer plan.* A multiemployer plan is a multiemployer plan within the meaning of section 414(f).

(g) *Professional.* The term "professional" means any individual who, on any day of the plan year, performs professional services for the employer as a certified or other public accountant, actuary, architect, attorney, chiropodist, chiropractor, executive, investment banker, medical doctor, dentist, optometrist, osteopath, podiatrist, engineer, psychologist, stockbroker, veterinarian or in such other professional capacity determined by the Commissioner in a notice or other document of general applicability to constitute the performance of services as a professional.

§ 1.401(a)(26)–8 Effective dates and transition rules.

(a) *In general.* Except as provided in paragraphs (b), (c), and (d) of this section, section 401(a)(26) and the regulations thereunder shall apply to plan years beginning after December 31, 1988.

(b) *Transition rules*—(1) *Current benefit structures.* Notwithstanding paragraph (a) of this section, for plan years beginning after December 31, 1988, and before January 1, 1990, the only rights and features to be taken into account in identifying current benefit structures under § 1.401(a)(26)–2(d)(3) are the bases and conditions applicable to the determination of an employee's contribution allocation under a defined contribution plan and the bases and

conditions applicable to the determination of an employee's normal retirement benefit, any early retirement benefit that is reduced by less than 3 percent for each year of early commencement, the employee's qualified joint and survivor annuity benefit and any accrual, availability and eligibility conditions related to these normal retirement, early retirement or joint and survivor annuity benefits. Thus, for example, except to the extent included in the preceding sentence, optional forms of benefit, loans, self-directed investment options and ancillary benefits are to be disregarded for purposes of identifying a plan's current benefit structures for plan years beginning in 1989. However, the rules relating to other arrangements that, in accordance with § 1.401(a)(26)–2(d)(11), may cause a defined benefit plan to be treated as comprising separate current benefit structures are effective for all plan years that are subject to section 401(a)(26) under paragraph (a) of this section, including those that begin before January 1, 1990.

(2) *Prior benefit structures.* Notwithstanding paragraph (a) of this section, for plan years beginning after December 31, 1988, and before January 1, 1990, if a defined benefit plan reasonably complies with the rules in § 1.401(a)(26)–6(b)(2) applicable in determining whether the plan has a current benefit structure that is meaningful relative to the benefits accrued under the plan and whether a plan's prior benefit structure satisfies section 401(a)(26), such plan will be treated as satisfying such standards. Whether compliance is reasonable is to be determined on the basis of all facts and circumstances; precise application and satisfaction of the rules in § 1.401(a)(26)–6(b)(2) is not required. In making this determination, special emphasis will be placed on whether a defined benefit plan that fails to satisfy the rules set forth in § 1.401(a)(26)–6(b)(2) is an ongoing plan providing meaningful, additional benefits to employees or whether such plan is substantially inactive and whether the plan's design or operation is consistent with an attempt to avoid or has the effect of avoiding the requirements, objectives, or effective dates of section 401(a)(26).

(3) *Certain plan terminations*—(i) *In general.* Except as provided in paragraph (b)(3)(ii) of this section, if a plan terminates after section 401(a)(26) becomes effective with respect to the plan (as determined under paragraph (a) of this section), the plan will not be treated as a qualified plan upon termination unless it complies with section 401(a)(26) and the regulations thereunder (to the extent they are applicable) for all periods for which section 401(a)(26) is effective with respect to the plan.

(ii) *Exception.* Notwithstanding paragraphs (a) and (b)(3)(i) of this section, a plan will not fail to be treated as a qualified plan upon termination merely because such plan fails to satisfy the requirements of section 401(a)(26) and the regulations thereunder if all of the following applicable conditions are satisfied:

(A) In the case of a defined benefit plan, no highly compensated employee has an accrued benefit under the plan in addition to the lesser of either the benefit such employee had accrued as of the close of the last plan year beginning before January 1, 1989, or the benefit such employee would have accrued as of the close of such last plan year under the terms of the plan in effect and applicable with respect to such employee on December 13, 1988.

(B) In the case of a defined contribution plan, no highly compensated employee receives a contribution allocation for any plan year beginning after December 31, 1988. For this reason, a contribution allocation with respect to an employee for a plan year beginning before January 1, 1989, may be treated as a contribution allocation for a plan year beginning after December 31, 1988 if the allocation for the prior year is in excess of the allocation that the employee would have received for such year under the terms of the plan in effect and applicable with respect to such employee on December 13, 1988. An allocation of forfeitures to highly compensated employees with respect to contributions made for plan years beginning before January 1, 1988, will not cause a defined contribution plan to fail to satisfy the requirements in this paragraph (b)(2)(ii)(B).

(C) The plan is terminated with a termination date on or before May 31, 1989.

(c) *Waiver of excise tax on reversions*—(1) *In general.* Pursuant to section 1112(e)(3) of the Tax Reform Act of 1986 (TRA '86), if certain conditions are satisfied, a waiver of the excise tax under section 4980 applies with respect to any employer reversion that occurs by reason of the termination or merger of a plan before the first year to which section 401(a)(26) applies to such plan. In general, the applicable conditions are that the plan must have been in existence on August 16, 1986; the plan would have failed to satisfy the requirements of section 401(a)(26) if such section were in effect for the plan year including August 16, 1986, and such plan continued to fail such requirements at all times thereafter; the plan satisfies the applicable conditions in paragraph (b)(3)(ii)(A) or (B) of this section; and certain requirements regarding asset or liability transfers and mergers and spinoffs involving such plan after August 16, 1986, are satisfied.

(2) *Termination date.* An employer reversion with respect to a plan will be eligible for the section 4980 excise tax waiver only if such employer reversion occurs by reason of the termination of the plan with a termination date, prior to the first plan year for which section 401(a)(26) applies to such plan. Solely for purposes of this waiver, the employer reversion will be treated as satisfying this paragraph (c)(2) even though the plan's termination date is during the first plan year for which section 401(a)(26) applies to such plan if the plan's termination date is on or before May 31, 1989. If the termination date occurs in the first plan year for which section 401(a)(26) applied to the plan and the employer receives a reversion that is eligible for the waiver of the section 4980 tax, the plan is subject to the interest rate restriction set forth in section 1112(e)(3)(B) of TRA '86.

(3) *Failure to satisfy section 401(a)(26).* An employer reversion with respect to a plan will be eligible for the excise tax waiver only if such plan was in existence on August 16, 1986 and, if section 401(a)(26) had applied to the plan for the plan year including such date, the plan would have failed to satisfy section 401(a)(26) for such plan year and continuously thereafter until such plan's termination or merger. For purposes of this paragraph (c), a plan will be treated as though it would have failed to satisfy section 401(a)(26) before such section actually applied with respect to the plan only if the plan (as defined under section 414(l)) failed to benefit at least the lesser of 50 active employees or 40 percent of the employer's active employees. In general, this determination is to be made on the basis of only the applicable statutory provisions, without regard to the regulations under section 401(a)(26). Thus, for example, the current and prior benefit structure rules in the regulations under section 401(a)(26) are not applicable in determining whether a plan would have failed to satisfy section 401(a)(26) for plan years prior to the effective date of section 401(a)(26) with respect to such plan. Similarly, the failure to benefit at least the lesser of 50 former employees or 40 percent of the employer's former employees does not

cause the plan to be treated as failing to satisfy section 401(a)(26) for plan years prior to the effective date of section 401(a)(26) with respect to the plan.

(d) *Special rule for collective bargaining agreements.* In the case of a plan maintained pursuant to one or more collective bargaining agreements (as defined in § 1.401(a)(26)-7(a)) that were ratified before March 1, 1986, section 401(a)(26) and the regulations thereunder shall not apply to plan years beginning before the earlier of—

(1) The later of—

(i) January 1, 1989, or

(ii) The date on which the last of such collective bargaining agreements terminates, or

(2) January 1, 1991. For purposes of this paragraph (b) of this section, any extension or renegotiation of any collective bargaining agreement that is ratified after February 28, 1986 shall be disregarded in determining the date on which such collective bargaining agreement terminates.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 89-3321 Filed 2-13-89; 8:45 am]

BILLING CODE 4830-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[FRL. 3519-6]

Designation of Areas for Air Quality Planning Purposes; Attainment Status Designations; Ohio

AGENCY: United States Environmental Protection Agency (USEPA).

ACTION: Proposed rule.

SUMMARY: USEPA is proposing to disapprove a request from the State of Ohio to revise the attainment status designations, at 40 Code of Federal Regulations (CFR) 81.336, for Mahoning and Trumbull Counties in Ohio from nonattainment to attainment relative to the ozone National Ambient Air Quality Standard (NAAQS). USEPA is proposing to disapprove the request because of recent violations of the ozone NAAQS.

The intent of this proposed notice is to discuss the results of USEPA's review of the State redesignation request and to provide an opportunity for the public to comment. Under the Clean Air Act (CAA), designations can be changed if sufficient data are available to warrant such a change.

DATE: Comments on this redesignation request and on the proposed USEPA action must be received by March 16, 1989.

ADDRESSES: Copies on the redesignation request, technical support documents and the supporting air quality data are available at the following addresses:

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch (5AR-26), 230 South Dearborn Street, Chicago, Illinois 60604.

Ohio Environmental Protection Agency, Office of Air Polution Control, 1800 Water Mark, P.O. Box 1049, Columbus, Ohio 43266-0149.

Comments on this proposed rule should be addressed to: (Please submit an original and three copies, if possible.) Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Uylaine E. McMahan, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Chicago, Illinois 60604, (312) 886-6031.

SUPPLEMENTARY INFORMATION: Under section 107(d) of the CAA, the Administrator of USEPA has promulgated the NAAQS attainment status for all areas within each State. For Ohio, see 43 FR 8962 (March 3, 1978), 43 FR 45993 (October 5, 1978), and 40 CFR 81.336. These area designations are subject to revision whenever sufficient data become available to warrant a redesignation. Mahoning and Trumbull Counties, Ohio were designated as not attaining the ozone standard on the basis of a measured violation of the ozone NAAQS.[1] For areas designated nonattainment for ozone, a revised ozone SIP was required which satisfies the requirements of Section 110(a) and Part D of the CAA and which provides for attainment and maintenance of the ozone NAAQS.

Redesignation Criteria for Ozone

Specific criteria for ozone redesignation reviews are given in the following USEPA memoranda:

1. December 7, 1979, from Richard G. Rhoads to the Directors of Air and Hazardous Materials Division, Region I-X, Subject: Criteria for Ozone Redesignation Under Section 107.

2. April 21, 1983, from Sheldon Meyers to Director of Air Management Divisions, Subject: Section 107 Designations Policy Summary.

3. December 23, 1983, from G.T. Helms to Chiefs of Air Programs Branches, Region I-X, Subject: Section 107 Questions and Answers.

4. April 6, 1987, from Gerald A. Emison, Director, Office of Air to the Air Division Directors, Quality Planning and Standards, Subject: Ozone Redesignation Policy.

The general USEPA policy relevant to this ozone redesignation request is summarized as follows:

1. Generally, the most recent 3 years of quality assured ozone monitoring data are to be considered. The ozone standard can not be violated at any of the monitoring sites. If 3 years of data are not available, the most recent 8 quarters may be considered provided no exceedances have occurred.

2. The designation given for an area generally applies to whole counties.

3. Urban areas should have a single designation, with the designated area including the entire urbanized area and fringe areas of development. The designation should be based on data from the worst case downwind monitor.

4. The nonattainment area should be of sufficient size to include all significant impacting volatile organic compound emission sources.

5. For an area to be redesignated to attainment, the area must have an implemented SIP which USEPA has fully approved.

For a more detailed discussion of USEPA's redesignation policy and on ozone formation and transport see 53 FR 52727 (December 29, 1988) (proposing to disapprove the Kane and Dupage Counties to attainment for ozone.)

Redesignation Request

On March 1, 1985, pursuant to Section 107(d)(5) of the CAA, the Ohio Enviromental Protection Agency (OEPA) requested that Mahoning and Trumbull Counties be redesignated to attainment of the ozone NAAQS. The OEPA submitted air quality data and several Reasonable Further Progress (RFP) reports as evidence that the implemented VOC emission reductions are responsible for the observed air quality improvement in Mahoning and Trumbull Counties.

Mahoning and Trumbull Counties both contain a significant portion of the Youngstown-Warren urbanized area. Therefore, both Counties were designated nonattainment based on

[1] The NAAQS for ozone is defined at 40 CFR Part 50 to be violated when the annual average expected number of daily exceedances of the standard (0.12 parts per million (ppm), 1-hour average) is greater than one (1.0). A daily exceedance occurs when the maximum hourly ozone concentration monitored during a given day exceeds 0.124 ppm (See "Guideline for the Interpretation of Ozone Air Quality Standard", EPA-450/4-79-003, which has been included in the record for this rulemaking action). The expected number of daily exceedances is calculated from the observed number of exceedances by making the assumption that non-monitored days (invalid or incomplete data) have the same fraction of daily exceedances as observed on monitored days (EPA-450/4-79-003).

measured air quality violations which occurred at the Youngstown monitor. Although USEPA approved Ohio's 1979 ozone SIP control strategy for the Youngstown area on October 31, 1980 (45 FR 921222), and June 29, 1982 (47 FR 28097), review of the available ozone data show that seven exceedances (five in 1988, one in 1987, and one in 1986) of the ozone NAAQS have been monitored in Farrell, Pennsylvania, which is ten miles northeast of Youngstown.[2] Since the prevailing summertime warm weather (ozone conductive) winds in the upper Midwest are from the quadrant bounded by the directions south and west, the Farrell site is expected to be downwind of the Youngstown-Warren area on most high ozone days. Lacking data to the contrary, it is assumed that the ozone standard exceedances observed in Farrell were primarily due to ozone precursor emissions from Mahoning and Trumbull Counties. Therefore, current violations of the NAAQS exist in the Youngstown area and its downwind environs, and the area cannot be redesignated to attainment.

Conclusion

USEPA has determined that violations of the ozone NAAQS have been monitored at a site adversely impacted by emissions from Mahoning and Trumbull Counties. Therefore, USEPA is proposing to disapprove OEPA's request to redesignate Mahoning and Trumbull Counties to attainment for ozone because it does not meet all the requirements for redesignation.

The Office Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

All interested persons are invited to submit written comments on the proposed redesignation. Written comments received by the date specified above will be considered in determining whether USEPA will approve the redesignation. After review of all comments submitted, the Administrator of USEPA will publish in the **Federal Register** the Agency's final action on the redesignation request.

Under 5 U.S.C. section 605(b), I certify that these disapprovals of proposed redesignation requests will not have a significant economic impact on a substantial number of small entities because it applies only to Mahoning and Trumbull Counties and imposes no new requirements on anyone.

[2] Additionally, preliminary 1988 data show an exceedance of the standard was monitored at the 9 West Front monitor in Youngstown.

List of Subject in 40 CFR Part 81

Air pollution control, National Parks, Wilderness areas.

Authority: 41 U.S.C 7401–7642

Dated: September 17, 1989.

Valdas V. Adamkus,

Regional Administrator.

[FR Doc. 89–3389 Filed 2–13–89; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 672

[Docket No. 81132–9033]

Groundfish of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of closure; request for comments.

SUMMARY: The Director, Alaska Region, NMFS (Regional Director), has determined that the shares of the total allowable catch (TAC) for sablefish that will be allocated to trawl gear in part of the Gulf of Alaska for the 1989 fishing year are needed as bycatch amounts to support directed trawl fisheries for other groundfish species in the Gulf of Alaska during the 1989 fishing year. The Secretary of Commerce is prohibiting directed fishing for sablefish in part of the Gulf of Alaska by persons using trawl gear during the 1989 fishing year. This action is necessary to prevent wastage of sablefish that would otherwise occur if sablefish quotas were reached prematurely. This action is intended to carry out objectives contained in the fishery management plan used for managing groundfish resources in the Gulf of Alaska.

EFFECTIVE DATE: February 9, 1989. Comments are invited until February 24, 1989.

ADDRESS: Comments should be addressed to Steven Pennoyer, Director, Alaska Region (Regional Director), National Marine Fisheries Service, P.O. Box 21668, Juneau, Alaska 99802–1668.

FOR FURTHER INFORMATION CONTACT: Ronald J. Berg (Fishery Management Biologist, NMFS), 907–586–7230.

SUPPLEMENTARY INFORMATION: This notice addresses the need to close the directed sablefish fishery by vessels using trawl gear in the Central and Western Regulatory Areas in the Gulf of Alaska. Regulations pertaining to management of the Central and Western Regulatory Areas are at 50 CFR Part 672. These regulations implement the Fishery Management Plan for the Groundfish of the Gulf of Alaska.

Sablefish are caught in directed fisheries, and are also caught incidentally while fishing for other groundfish species. Amounts of incidental catches of sablefish must be considered when managing total allowable catches (TACs) available in 1989. The Secretary is establishing TACs for each of the target groundfish species, including sablefish, after having consulted with the North Pacific Fishery Management Council (Council). The Council met during December 5–9, 1988, and adopted TACs for each of the target species, and is recommending that the Secretary implement these for the 1989 fishing year, which begins January 1. For sablefish, the Council recommended a Gulf of Alaska-wide TAC of 26,000 mt for the 1989 fishing year, with 11,700 mt and 3,770 mt distributed between the Central and Western Regulatory Areas, respectively. Under § 672.22(b)(2), 20 percent of the sablefish TAC in each of the two regulatory areas is allocated to trawl gear. In the Central and Western Regulatory Areas, 2,340 mt and 750 mt, respectively, are allocated to trawl gear.

All the amounts currently allocated to trawl gear in the Central and Western Regulatory Areas are expected to be caught as bycatch while fishing for other groundfish species. The Secretary of Commerce is closing the Central and Western Regulatory Areas to directed fishing for sablefish by vessels using trawl gear, effective February 9, 1989.

Under § 672.24(b)(3)(i) of regulations governing the Gulf of Alaska groundfish fishery, if the Regional Director determines that the share of the sablefish TAC assigned to any type of gear and in any area or district may be taken before the end of the year, the Secretary will prohibit directed fishing for sablefish by persons using that gear type for the remainder of the year by publishing a notice in the **Federal Register.** Since sablefish bycatches would be retainable, wastage is reduced.

Trawl vessels conducted directed fisheries for sablefish in the Gulf of Alaska in 1987. The Secretary closed the Central and Western Regulatory Areas to further retention on May 5, 1987 (52 FR 17404, May 8, 1987). Further catches were required to be discarded at sea for the remaining seven and three-quarter months of the fishing year. In 1988, the Secretary closed the Central and Western Regulatory Areas to directed fishing by vessels using trawl gear at the beginning of the fishing year. This slowed the achievement of the sablefish

trawl share in the Central Regulatory Area until September 15, 1988 (53 FR 36462, September 20, 1988), which shortened the amount of time fishermen were required to discard sablefish, thereby lessening the amount of waste.

The Regional Director finds that directed fishing on sablefish by trawl vessels in the Central and Western Regulatory Areas of the Gulf of Alaska would likely occur early in the 1989 fishing year. The Regional Director's findings are based on two facts. First, the price paid to fishermen for sablefish in 1988 averaged about $1.70 per pound, and will likely be this much in 1989, which will continue to attract significant effort early in the year. Second, the Council adopted a management policy at its December 1988 meeting which rejects the current access system in the sablefish fishery. The Council intends to develop an alternative management system which would rationalize future participation in the sablefish fishery. Additional numbers of fishermen are likely to participate in the 1989 sablefish fishery to gain possible future rights.

Absent this closure, available amounts of sablefish would be caught early, and force the Secretary to declare sablefish a prohibited species. Additional catches could not be retained, resulting in their being discarded at sea which would be a waste of a commercially valuable resource. Therefore, under § 672.24(b)(3)(i), the Secretary, in order to provide adequate bycatch amounts to promote continued groundfish fishing by trawl vessels on other species, is prohibiting directed fishing for sablefish, defined at § 672.2, in the Central and Western Regulatory Areas of the Gulf of Alaska by operators of trawl vessels during the 1989 fishing year.

Public comments on this notice of closure may be submitted to the Regional Director at the address above until February 24, 1989.

Classification

This action is taken under § 672.24 and complies with Executive Order 12291.

List of Subjects in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

Dated: February 9, 1989.

Alan Dean Parsons,

Acting Director of Office Fisheries, Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-3462 Filed 2-9-89; 5:01 pm]

BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 54, No. 29
Tuesday, February 14, 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.

FEDERAL CROP INSURANCE CORPORATION

[Doc. No. 6617S]

Address for the Federal Crop Insurance Commission

This notice serves to advise all interested parties of the establishment of an office address for the Commission on the Improvement of the Federal Crop Insurance Program. The 25 member commission, popularly known as the Federal Crop Insurance Commission, was authorized by the Federal Crop Insurance Commission Act (Pub. L. 100–546, October 28, 1988), and is composed of 20 representatives of the agricultural and crop insurance industries, the Manager of FCIC, and 4 ex officio non-voting members from the House and Senate. Members of the commission serve without compensation.

Commission members representing the agricultural industry include three from the largest general farm organizations and seven growers. Insurance industry members include representatives from large and small insurance companies reinsured by FCIC, sales and service contractors selling federally underwritten crop insurance, and agent trade associations.

This notice serves to advise all interested parties that all communications to be brought to the attention of the Commission should be sent to the following address: Mr. M.J. Felt and Mr. Ray Davis, Co-Chairs, Commission on the Improvement of the Federal Crop Insurance Program, 1255 23rd Street, NW., Suite 880, Washington, DC 20037. Telephone: (202) 887–6700.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89–3374 Filed 2–13–89; 8:45 am]

BILLING CODE 3410–08–M

DEPARTMENT OF AGRICULTURE

Forest Service

Allegheny National Forest; Allegheny Wild and Scenic River Study; Armstrong, Butler, Clarion, Forest, Venango and Warren Counties, Pennsylvania; Extension of Public Involvement Period on Draft Environmental Impact Statement

The USDA, Forest Service is extending the 90-day pubilc involvement period for the Allegheny Wild and Scenic River Study to May 15, 1989. The origianl Notice of Intent was published in the November 10, 1988 **Federal Register** (53 FR 45546). Written comments postmarekd on or before May 15, 1989 will be accepted and addressed in a Final Environmental Impact Statement.

Written comments on the analysis should be sent to: *River Study,* Allegheny National Forest, P.O. Box 847, Warren, PA 16365.

The Allegheny River Study Corridor is 128 miles long and located in northwestern Pennsylvania between Kinzua Dam and East Brady. The Study was authorized by Congress in Pub. L. 95–625, the National Parks and Recreation Act of 1978.

Information on the proposed action and draft environmental impact statement may be obtained by either writing the Allegheny National Forest at the above listed address or calling (814) 723–5150.

Date: February 6, 1989.

David J. Wright,

Forest Supervisor.

[FR Doc. 89–3412 Filed 2–13–89; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–779–602]

Standard Carnations From Kenya; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to a request by the petitioner, the Department of Commerce has conducted an administrative review of the antidumping duty order on standard carnations from Kenya. The review covers three producers and one third-country reseller of this merchandise to the United States and the period November 3, 1986 through March 31, 1988. The review indicates the existence of dumping margins during this period.

As a result of the review, the Department has preliminarily determined to assess antidumping duties equal to the calculated differences between United States price and foreign market value.

We used best information available for two firms which failed to respond or provided an inadequate response to our request for information.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: February 14, 1989.

FOR FURTHER INFORMATION CONTACT: Linda L. Pasden or Robert J. Marenick, Office of Compliance, International Trade Administation, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–5255.

SUPPLEMENTARY INFORMATION:

Background

On April 23, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 13490) an antidumping duty order on standard carnations from Kenya. The petitioner requested in accordance with § 353.53a(a) of the Commerce Regulations that we conduct the administrative review. We published a notice of initiation of the antidumping duty administrative review on May 23, 1988 (53 FR 18324). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule ("HTS"), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn

from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s).

Imports covered by this review are shipments of standard carnations. During the review period, such merchandise was classifiable under item 192.2100 of the Tariff Schedules of the United States Annotated. This merchandise is currently classifiable under HTS item 0603.10.90. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers three manufacturers/exporters and one third-country reseller of standard carnations from Kenya and the period November 3, 1986 through March 31, 1988. Kenya Flowers, the third-country reseller with shipments during the period, provided an inadequate response to our request for information. After the Department notified Kenya Flowers of the deficiencies in its response, the respondent failed to provide a list of prices to unrelated purchasers. In addition, the respondent did not provide a non-proprietary summary of its response. Sulmac, the producer, did not respond to our questionnaire. Therefore, the Department used the best information available for these two firms, which was the rate published in the antidumping duty order (52 FR 13490, April 23, 1987).

We did not cover Flaco because we were unable to locate them. It is reported by the counsel for the Government of the Republic of Kenya that they may be out of business. The petitioner requested that the Department conduct a review of Bobs Harries Limited, Guy Robin, Brooke Bond Kenya and Oserian. We did not cover these four firms because they had no shipments during the period and we have no evidence that these firms are producers or exporters of the subject merchandise. If these firms should begin to export the subject merchandise, we will treat them as new shippers.

Preliminary Results of the Review

As a result of our review, we preliminarily determine that the following margins exist for the period November 3, 1986 through March 31, 1988:

Producer/exporter/3rd country reseller	Margin (percent)
Sulmac/Kenya Flowers	2.34
Updown	[1] 2.34
Plantana Limited	[1] 2.34
ADC Agriculture	[1] 2.34

[1] No shipments during the period; margins represent each company's most recent rate.

Interested parties may request disclosure and/or an administrative protective order within 5 days of the date of publication of this notice and may request a hearing within 8 days of publication. Any hearing, if requested, will be held 35 days after the date of publication, or the first workday thereafter. Prehearing briefs and/or written comments from interested parties may be submitted not later than 25 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in those comments, may be filed not later than 32 days after the date of publication. The Department will publish the final results of the administrative review, including the results of its analysis of any such comments or hearing.

The Department shall determine, and the Customs Service shall assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided by section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margins shal be required. For any future entries of this merchandise from a new exporter, not covered in this administrative review, whose first shipments occurred after March 31, 1988, and who is unrelated to any reviewed firm, a cash deposit of 2.34 percent shall be required.

These deposit requirements are effective for all shipments of Kenyan standard carnations entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a(a) of the Commerce Regulations (19 CFR 353.53a).

Date: February 8, 1989.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 89-3443 Filed 2-13-89; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-045]

Steel Wire Rope From Japan; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On November 1, 1988, the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on steel wire rope from Japan. The review covers 30 manufacturers and/or exporters of this merchandise to the United States, and various periods from March 1, 1975 through September 30, 1984.

We gave interested parties an opportunity to comment on the preliminary results. We received comments from one respondent, Kanematsu-Gosho Ltd. Based on our analysis of the comments received, the final results are unchanged from those presented in the preliminary results.

EFFECTIVE DATE: February 14, 1989.

FOR FURTHER INFORMATION CONTACT: Linda L. Pasden or Robert J. Marenick, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5255.

SUPPLEMENTARY INFORMATION:

Background

On November 1, 1988, the Department of Commerce ("the Department") published in the **Federal Register** (53 FR 44055) the preliminary results of its administrative review of the antidumping finding on steel wire rope from Japan (38 FR 28571, October 15, 1973). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930, as amended ("the Tariff Act").

Scope of the Review

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule ("HTS"), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s).

Imports covered by this review are shipments of steel wire rope, except brass electroplated steel truck tire cord of cable construction specially packaged for protection against moisture and atmosphere. During the review period, such merchandise was classifiable under item 642.1200, 642.1400, 642.1500, 642.1600, and 642.1700 of the Tariff Schedules of the United States Annotated. This merchandise is currently classifiable under HTS items 7312.1060, 7312.1080, 7312.1090, and 7312.1050. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers 30 manufacturers and/or exporters of Japanese steel wire rope and various periods for which reviews were requested, from March 1, 1975 through September 30, 1984.

Ataka, Chrysanthemum, Kent-Moore, Far East, Vanguard, Kanematsu-Gosho, C. Itoh, Higashishiba, Kohshin (Koshin), Kokoku, Okura, Shinyo, Taisei Int'l., Teikoku, and Yutoku did not respond or provided an inadequate or untimely response to the Department's antidumping questionnarie for certain periods. (Ataka and Taisei Int'l. are reported by our office in Tokyo to be out of business.) For these periods and firms, the Department used the best information available for assessment and cash deposit purposes.

Best information available for time periods through December 31, 1979, was the bonding rate at time of entry. Beginning January 1, 1980, we used the highest rate for each firm previously reviewed because those rates were higher than any rates found during this review. For non-shipping firms we used their most recent rate.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received comments from one respondent, Kanematsu-Gosho Ltd., concerning its shipments produced by Kokoku.

Comment 1: The respondent contends that the rate published in the preliminary results is incorrect for kokoku/Kanematsu-Gosho because it is not the most recent rate. The most recent rate is the rate that was published on July 31, 1987, and that rate was 0.35 percent. Because the 0.35 percent rate is *de minimis*, the cash deposit of estimated antidumping duties should be waived.

Department's Position: In the results of our review, published on July 31, 1987, covering the period January 1, 1977 through March 31, 1978, was stated that "* * * these margins shall not change the current rates for cash deposits of estimated antidumping duties * * *." The most recent rate for the most recent period for Kokoku/Kanematsu-Gosho was published on March 29, 1984, for the period October 1, 1981 though September 30, 1982, and that rate is 7.29 percent.

Comment 2: The respondent contends that the period covered in the preliminary results of review is incorrect. The period should cover October 1, 1983 through September 30, 1984. As a result, Kanematsu-Gosho requests revocation based on the fact that it had no shipments for 3 years.

Department's Position: The original review request was for the period October 1, 1983 through September 30, 1984; it was amended by the petitioner in their letter dated September 1, 1987. The period covered in this review for Kokoku/Kanematsu-Gosho reflects the amended period. Therefore, Kanematsu-Gosho is not eligible for revocation.

Final Results of the Review

As a result of our review of the comments received, the final results are unchanged from those presented in the preliminary results of review. We determine that the following margins exist:

Manufacturer/exporter	Margin (percent)
Chrysanthemum (a.k.a. Kiku)/Ataka	
10/01/82—09/30/84	[2] 11.88
Chrysanthemum/C. Itoh	
10/01/82—09/30/83	[1] 0
10/01/83—09/30/84	[2] 11.88
Chrysanthemum/Kent-Moore Japan	
10/01/82—09/30/83	[2] 7.29
10/01/83—09/30/84	[1] 7.29
Chrysanthemum/Watanabe Trading	
10/01/82—09/30/84	[1] 1.08
Daiyu Kogyo (a.k.a. Dia Steel Wire and Dia Kogyo)	
02/01/82—02/28/83	[1] 7.29
Hannan Rope	
02/01/82—09/30/84	[1] 7.29
Hannan Rope/Far East	
10/01/82—09/30/83	[2] 7.29
10/01/83—09/30/84	[1] 7.29
Hannan Rope/Higashishiba	
03/01/75—03/31/78	[2] 18.32
10/01/82—09/30/84	[2] 7.29
Higashishiba	
02/01/82—09/30/84	[2] 11.88
Kawatetsu Wire/Taisei Int'l	
08/01/75—03/31/78	[2] 29.80
10/01/80—09/30/83	[2] 29.80
Kokoku/Kanematsu-Gosho	
10/01/83—03/31/84	[1] 7.29
Kokoku/Kohshin (Koshin)	
10/01/82—03/31/84	[2] 7.29
Kokoku/Nissho-Iwai	
10/01/82—03/31/84	[2] 7.29
Kokoku/Shinsho (a.k.a. Shinkyo Shoji, Shinko Shoji and Shinko Wire Corp.)	
10/01/82—03/31/84	[1] 7.29
Shinko Wire Rope/Kanematsu-Gosho	
10/01/83—09/30/84	[1] 0
Shinko Wire Rope/Nissho-Iwai	
10/01/82—09/30/84	[1] 0
Shinyo Ropes/Higashishiba	
03/01/83—09/30/84	[2] 7.29
Shinyo Ropes/Vanguard	
10/01/83—03/31/84	[1] 7.29
Shinyo Ropes/Yutoku (a.k.a. S.M. Industries)	
10/01/82—09/30/83	[2] 4.62
10/01/83—09/30/84	0
Teikoku/C. Itoh	
04/01/78—01/31/82	[2] 11.88
Teikoku/Kanematsu-Gosho	
12/01/76—01/31/82	[1] 20.57
Teikoku/Okura Trading	
12/01/76—09/30/81	[2] 20.57
10/01/81—01/31/82	[1] 20.57
Teikoku/Sakai	
12/01/76—03/31/78	[1] 20.57
10/01/80—01/31/82	[1] 20.57
Teikoku/Shinko Shoji	
04/02/78—01/31/82	[1] 20.57
Teikoku/Showa Boeki	
10/01/80—01/31/82	[1] 0
Teikoku/Taisei Int'l	
12/01/76—03/31/78	[2] 20.57
04/01/79—01/31/82	[2] 20.57
Tokyo Rope/Alaska Boeki	
01/01/77—09/30/81	[1] 17.18
Tokyo Rope/Ataka	
04/01/78—09/30/84	[2] 17.18
Tokyo Rope/Mitsubishi Corp.	
04/01/78—02/28/83	[1] 0
Union Wire Rope/Sanyo Bussan (a.k.a. Sanyu)	
10/01/82—09/30/84	0

[1] No shipments during the period; margins are their most recent rate.
[2] Used best information available.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions on each exporter directly to the Customs Service.

Further, as provided by section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margins for the most recent period for each firm shall be required. For any shipments from the remaining known manufacturers and exporters not covered by this review, the cash deposit will continue to be at the latest rate applicable for each of those firms (47 FR 3395, January 25, 1982; 48 FR 8524, March 1, 1983; and 49 FR 12295, March 29, 1984). For any future entries of this merchandise manufactured or exported by a new manufacturer and/or exporter, whose first shipments occurred after September 30, 1984, and who is unrelated to any reviewed firm or previously reviewed firm, a cash deposit of zero percent shall be required. These deposit requirements are effective for all shipments of Japanese steel wire rope entered, or

withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.53a.

Jan W. Mares,

Assistant Secretary for Import Administration.

Date: February 8, 1989.

[FR Doc. 89-3444 Filed 2-13-89; 8:45 am]

BILLING CODE 3510-DS-M

Export Trade Certificate of Review

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of application.

SUMMARY: The Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, has received an application for an Export Trade Certificate of Review. This notice summarizes the conduct for which certification is sought and requests comments relevant to whether the Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Thomas H. Stillman, Director, Office of Export Trading Company Affairs, International Trade Administration, 202/377-5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (Pub. L. 97-290) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether a Certificate should be issued. An original and five (5) copies should be submitted not later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, Room 1223, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Comments should refer to this application as "Export Trade Certificate of Review, application number 89-00002." A summary of the application follows.

Applicant: Custom Business Solutions, Limited (CBSL); 120 Corporate Woods, Suite 180; Rochester, New York 14623; Contact: Marcy Mallory, Office Manager; Telephone: (716) 272-1220.

Application No.: 89-00002

Date Deemed Submitted: January 30, 1989

Members (in addition to applicant): Jerry McSpadden.

Summary of the Application

Export Trade Products and Services

All products and services.

Export Trade Facilitation Services (as They Relate to the Export of Products and Services)

Acting as distributor or broker; conducting market research; and conducting studies to determine the ability of suppliers to provide Products and Services to certain foreign buyers.

Export Markets

The Export Markets include all parts of the world except the United States (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

Export Trade Activities and Methods of Operation

CBSL may enter into exclusive arrangements with U.S. suppliers of Products and Services to furnish those suppliers' Products and Services to foreign buyers.

Date: February 9, 1989.

Thomas H. Stillman,

Director, Office of Export Trading Company Affairs.

[FR Doc. 89-3442 Filed 2-13-89; 8:45 am]

BILLING CODE 3510-DR-M

Minority Business Development Agency

Business Development Center Applications

Date: February 8, 1989.

AGENCY: Minority Business Development Agency.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC for a 3-year period, subject to available funds. The cost of performance for the first 12 months is estimated at $541,765 for the project performance of 7/1/89 to 6/30/90. The MBDC will operate in the Miami Fort Lauderdale, Florida, Metropolitan Statistical Area (MSA). The first year cost for the MBDC will consist of $460,500 in Federal Funds and a minimum of $81,265 in non-Federal funds (which can be a combination of cash, in-kind contribution and fees for services).

The funding instrument for the MBDC will be a cooperative agreement and competition is open to individuals, non-profit and for-profit organizations, local and state governments, American Indian tribes and educational institutions.

The MBDC will provide management and technical assistance to eligible clients for the establishment and operation of businesses. The MBDC program is designed to assist those minority businesses that have the highest potential for success. In order to accomplish this, MBDA supports MBDC programs that can: coordinate and broker public and private sector resources on behalf of minority individuals and firms; offer them a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be judged on the experience and capability of the firm and its staff in addressing the needs of minority business individuals and organizations; the resources available to the firm in providing management and technical assistance; the firm's proposed approach to performing the work requirements included in the application; and the firm's estimated cost for providing such assistance. It is advisable that applicants have an existing office in the geographic region for which they are applying.

The MBDC will operate for a 3-year period with periodic reviews culminating in annual evaluations to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds, and Agency priorities.

DATES: Closing Date: The closing date for applications March 17, 1989. Applications must be postmarked on or before March 17, 1989.

ADDRESS: Atlanta Regional Office, Minority Business Development Agency, U.S. Department of Commerce, Suite 505, Atlanta, Georgia 30309, 404/347–4091.

FOR FURTHER INFORMATION CONTACT: Carlton L. Eccles, Regional Director of the Atlanta Regional Office.

SUPPLEMENTARY INFORMATION: Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

(11.800 Minority Business Development Catalog of Federal Domestic Assistance)

Date: February 8, 1989.

Carlton L. Eccles,

Regional Director, Atlanta Regional Office.

Note.—A pre-application conference to assist all interested applicants will be held at the U.S. Department of Commerce, Minority Business Development Agency, 1371 Peachtree Street, NE., Suite 505, Atlanta, Georgia, Wednesday, March 1, 1989, at 10:00 a.m.

[FR Doc. 89–3410 Filed 2–13–89; 8:45 am]

BILLING CODE 3510–21–M

Business Development Center Applications

Date: February 8, 1989.

AGENCY: Minority Business Development Agency.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC for a 3-year period, subject to available funds. The cost of performance for the first 12 months is estimated at $194,118 for the project performance of 7/1/89 to 6/30/90. The MBDC will operate in the Jacksonville, Florida, Metropolitan Statitical Area (MSA). The first year cost for the MBDC will consist of $165,000 in Federal Funds and a minimum of $29,118 in non-Federal funds (which can be a combination of cash, in-kind contribution and fees for services).

The funding instrument for the MBDC will be a cooperative agreement and competition is open to individuals, non-profit and for-profit organizations, local and state governments, American Indian tribes and educational institutions.

The MBDC will provide management and technical assistance to eligible clients for the establishment and operation of businesses. The MBDC program is designed to assist those minority businesses that have the highest potential for success. In order to accomplish this, MBDA supports MBDC programs that can: coordinate and broker public and private sector resources on behalf of minority individuals and firms; offer them a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be judged on the experience and capability of the firm and its staff in addressing the needs of minority business individuals and organizations; the resources available to the firm in providing management and technical assistance; the firm's proposed approach to performing the work requirements included in the application; and the firm's estimated cost for providing such assistance. It is advisable that applicants have an existing office in the geographic region for which they are applying.

The MBDC will operate for a 3-year period with periodic reviews culminating in annual evaluations to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds, and Agency priorities.

DATES: Closing Date: The closing date for applications March 17, 1989. Applications must be postmarked on or before March 17, 1989.

ADDRESS: Atlanta Regional Office, Minority Business Development Agency, U.S. Department of Commerce, Suite 505, Atlanta, Georgia 30309, 404/347–4091.

FOR FURTHER INFORMATION CONTACT: Carlton L. Eccles, Regional Director of the Atlanta Regional Office.

SUPPLEMENTARY INFORMATION: Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Date: February 8, 1989.

Carlton L. Eccles,

Regional Director, Atlanta Regional Office.

Note.—A pre-application conference to assist all interested applicants will be held at the U.S. Department of Commerce, Minority Business Development Agency, 1371 Peachtree Street, NE., Suite 505, Atlanta, Georgia, Wednesday, March 1, 1989, at 10:00 a.m.

[FR Doc. 89–3411 Filed 2–13–89; 8:45 am]

BILLING CODE 3510–21–M

National Oceanic and Atmospheric Administration

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The salmon management advisory bodies of the Pacific Fishery Management Council will hold an initial ocean salmon fishing season assessment meeting. The meeting will convene at 10 a.m., on February 27, 1989, at the Red Lion Inn-Portland Center, 310 SW. Lincoln Street, Portland, OR. The meeting is open to the public. The advisory bodies includes the Salmon Advisory Subpanel (SAS), Salmon Technical Team (STT), selected Scientific and Statistical Committee (SSC) members, and policy representatives from the state, tribal, and federal fishery management entities.

The meeting is intended to provide SAS members with an initial assessment of salmon stock abundance and management concerns and recommendations for the 1989 ocean salmon fishing season. This information will assist SAS members in drafting proposed fishing season options for presentation to the Council on March 7.

Written and oral statements pertaining to planning for the 1989 ocean salmon seasons will be accepted at appropriate times during the meeting. For further information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, Metro Center, suite 420, 2000 SW. First Avenue, Portland, OR 97201; telephone: (503) 221–6352.

Date: February 9, 1989.

Alan Dean Parsons,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89–3463 Filed 2–13–89; 8:45 am]

BILLING CODE 3510–22–M

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's Groundfish Fishery Management Plan (FMP) Rewrite Oversight Group (Group) will meet to review progress on FMP Amendment #4, and to continue preparation of the public review document scheduled to be released in April 1989. The Group will convene at 8 a.m., on February 22, 1989, and will adjourn on February 23 at 5 p.m. The meeting is open to the public.

For further information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, Metro Center, Suite 420, 2000 SW., First Avenue, Portland, OR 97201; telephone: (503) 221–6352.

Date: February 9, 1989.

Alan Dean Parsons,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89–3464 Filed 2–13–89; 8:45 am]

BILLING CODE 3510-22-M

DEPARTMENT OF DEFENSE

Department of The Army

Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcements is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB)

Date of Meeting: 8 March 1989

Time of Meeting: 1300–1700 hours

Place: Army Space Programs Office, Fairfax, VA

Agenda: The Army Science Board Ad Hoc Subgroup for Space Systems will meet to receive briefing and discussions on space issues and programs. This meeting will be closed to the public in accordance with section 552b(c) of Title 5, U.S.C., specifically subparagraph (1) thereof, and Title 5, U.S.C., Appendix 2, subsection 10(d). The classified and unclassified matters to be discussed are so inextricably intertwined so as to preclude opening any portion of the meeting. Contact the Army Science Board Administrative Officer, Sally Warner, for further information at (202) 695–3039 or 695–7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 89–3372 Filed 2–13–89; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF EDUCATION

[CFDA No. 84.029H1]

Invitation of Applications for New State Grant Awards for Fiscal Year 1989

Title of Program: Training Personnel for the Education of the Handicapped—Grants to State Education Agencies or Institutions of Higher Education.

Purpose of Program: Grants made under this program are for the purpose of assisting States in establishing and maintaining preservice and inservice programs to prepare personnel to meet the needs of handicapped infants, toddlers, children, and youth or supervisors of such persons, consistent with the personnel needs identified in the State's comprehensive system of personnel development.

Deadline For Transmittal of Applications: March 31, 1989.

Deadline For Intergovernmental Review: June 1, 1989.

Applications Available: February 15, 1989.

Total Available Funds: $5,584,500.

Estimated Range of Awards: $75,000—$250,000.

Estimated Number of Awards: 45.

Note.—The Department is not bound by any estimates in this notice.

Average Project Period: 12 months.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations), Part 75 (Direct Grant Programs), Part 77 (Definitions that Apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs and Activities), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement)); and (b) the regulations for this program in 34 CFR Part 319.

Note.—Part 319 applies only to applications from State educational agencies (SEAs).

Eligible Applicants: Applications for State grants may be submitted by SEAs and, in any State in which the SEA does not apply for such a grant, any institution of higher education (IHE) within such State for those purposes may apply. SEAs that apply for a continuation grant are not eligible for a new State grant in fiscal year 1989. If an SEA chooses not to apply for any State grant award in fiscal year 1989, it must notify all IHEs within the State of this intention by March 3, 1989. Applications by IHEs will be considered only if no new or continuation proposal is received from the SEA.

Description of Program: If applications are submitted by more than one IHE within a State, the Secretary will use the selection criteria in EDGAR (34 CFR 75.210) to evaluate the applications. These regulations authorize the Secretary to distribute an additional 15 points among the selection criteria in 34 CFR 75.210 to bring the total possible points to a maximum of 100 points. For the purpose of this competition, the Secretary will distribute the additional points as follows:

Quality of key personnel, 34 CFR 75.210(b)(4): Three (3) additional points will be added for a possible total of 10 points for this criterion.

Evaluation plan, 34 CFR 75.210(b)(6): Ten (10) additional points will be added for a possible total of 15 points for this criterion.

Adequacy of resources, 34 CFR 75.210(b)(7): Two (2) additional points will be added for a possible total of 5 points for this criterion.

A grant of at least $75,000 will be awarded to meet the needs of each State from which an eligible application is submitted. To determine the amount of a grant the Secretary considers the State's need for assistance and the quality of the application using the criteria published in 34 CFR Part 319. In addition, as required by the Handicapped Programs Technical Amendments Act of 1988, Pub. L. 100–630, the Secretary will ensure that each grant awarded is of sufficient size and scope to assist States in meeting the requirements of section 632(c) of the Education of the Handicapped Act, as amended.

Funds available for new awards under this program exceed those available for new awards in fiscal year 1988. Therefore, it is anticipated that no State will receive a smaller award than during fiscal year 1988.

For Applications or Information Contact: Frank S. King, U.S. Department of Education, Office of Special Education Programs, Divison of Personnel Preparation, 400 Maryland Avenue SW., (Switzer Building, Room 3094—M/S 2651), Washington, DC 20202. Telephone: (202) 732–1086.

Program Authority: 20 U.S.C. 1432.

Dated: February 9, 1989.

(Catalog of Federal Domestic Assistance No. 84.029: Training Personnel for the Education of the Handicapped)

Madeleine Will,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 89–3467 Filed 2–13–89; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No.: 84.120—A & B]

Minority Science Improvement Program (MSIP); Invitation of Applications for New Awards for Special Projects, and for Institutional, Design and Cooperative Projects for Fiscal Year 1989

Purpose: Provides grants to support projects designed to effect long-range improvement in science and engineering education at predominantly minority institutions and to increase the participation of underrepresented ethnic minorities in scientific and technological careers.

Deadline for Transmittal of Applications: April 7, 1989

Applications Available: February 14, 1989

Available Funds: $5,307,000. Approximately $3,980,000 will be available for Institutional, Design, and Cooperative Projects. The remaining $1,327,000 will be available for Special Projects.

Maximum Size of Awards: $300,000 for Institutional, $20,000 for Design, $500,000 for Cooperative Projects, and $150,000 for Special Projects.

Estimated Average Size of Awards: $230,000 for Institutional and Cooperative Projects, $19,000 for Design Projects, and $45,000 for Special Projects.

Estimated Number of Awards: Institutional, Design and Cooperative Projects—20. Special Projects—20.

Note.—The Department is not bound by any estimates in this notice.

Project Period: 12 to 36 Months

Applicable Regulations: (a) The regulations governing the Minority Science Improvement Program, 34 CFR Part 637, and (b) The Education Department General Administrative Regulations (EDGAR), 34 CFR Parts 75 and 77.

For Applications or Information Contact: Dr. Argelia Velez-Rodriguez on (202) 732–4396 or Dr. John Bonas on (202) 732–4397, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3022, ROB–3, Washington, DC 20202–5251.

Program Authority: 20 U.S.C. 1135b–1135b–3 and 1135d–1135d–6

Dated: February 7, 1989.

Kenneth D. Whitehead,

Assistant Secretary for Postsecondary Education.

[FR Doc. 89–3469 Filed 2–13–89; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Assistant Secretary for International Affairs and Energy Emergencies

Proposed Subsequent Arrangement; Australia

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the Government of Australia concerning Civil Uses of Nuclear Energy.

The subsequent arrangement to be carried out under the above-mentioned agreement involves approval of the following sale:

Contract Number S–AU–133, for the sale of 84.8 grams of natural uranium and 153.8 grams of thorium to Queenland Mines Ltd., Australia, for use as standard reference material.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

Date: February 9, 1989.

George J. Bradley, Jr.,

Principal Deputy Assistant Secretary for International Affairs and Energy Emergencies.

[FR Doc. 89–3455 filed 2–13–89; 8:45 am]

BILLING CODE 6450–01–M

Energy Information Administration

Agency Information Collections Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, DOE.

ACTION: Notice of requests submitted for review by the Office of Management and Budget.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The listing does not include information collection requirements contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); (2) collection number(s); (3) current OMB docket number (if applicable); (4) collection title; (5) type of request, e.g., new, revision, or extension; (6) frequency of collection; (7) response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) affected public; (9) an estimate of the number of respondents per report period; (10) an estimate of the number of responses annually; (11) an estimate of the average hours per response; (12) the estimated total annual respondent burden, and (13) a brief abstract describing the proposed collection and the respondents.

DATES: March 16, 1989.

ADDRESS: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards, at the address below.)

FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT: Carole Patton, Office of Statistical Standards (EI–70) Energy Information Administration, M.S. 1H–023, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–2222.

SUPPLEMENTARY INFORMATION: If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the OMB DOE Desk Officer of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395–3084. (Also, please notify the DOE contact listed above.)

The energy information collection submitted to OMB for review was:

1. Federal Energy Regulatory Commission
2. FERC–516
3. 1902–0096
4. Electric Rate Schedule Filings
5. Extension
6. On occasion
7. Mandatory
8. Businesses or other for profit
9. 234 respondents
10. 630 responses
11. 976 hours per reponse
12. 614,775 hours (total)

13. The Federal Power Act requires each public utility, certain hydroelectric project licensees and qualifying small power producers, to file for approval, rate schedules together with related contracts and service condition. Supporting data is required to determine the reasonableness of the rates.

Statutory Authority: Sec. 5(a), 5(b), 13(b), and 52, Pub. L. 93–275, Federal Energy Administration Act of 1974, 15 U.S.C. 764(a), 764(b), 772(b), and 790a.

Issued in Washington, DC, February 8, 1989.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 89–3457 Filed 2–13–89; 8:45 am]

BILLING CODE 6450–01–M

Agency Information Collections Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, DOE.

ACTION: Notice of requests submitted for review by the Office of Management and Budget.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The listing does not include information collection requirements contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); (2) collection number(s); (3) current OMB docket number (if applicable); (4) collection title; (5) type of request, e.g., new, revision, or extension; (6) frequency of collection; (7) response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) affected public; (9) an estimate of the number of respondents per report period; (10) an estimate of the number of responses annually; (11) an estimate of the average hours per response; (12) the estimated total annual respondent burden, and (13) a brief abstract describing the proposed collection and the respondents.

DATE: March 16, 1989.

ADDRESS: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards, at the address below.)

FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT: Carole Patton, Office of Statistical Standards (EI–70), Energy Information Administration, M.S. 1H–023, Forrestal Building, 1000 Indpendence Avenue SW., Washington, DC 20585, (202) 586–2222.

SUPPLEMENTARY INFORMATION: If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the OMB DOE Desk Officer of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395–3084. (Also, please notify the DOE contact listed above.)

The energy information collection submitted to OMB for review was:

1. Energy Information Administration.
2. EIA–800–804, 806, 810–814, 816–818, 820, and 825.
3. 1905–0165.
4. Petroleum Supply Reporting System.
5. Extension.
6. Weekly; Monthly; Annual; Triennial.
7. Mandatory.
8. Businesses or other for profit and Federal agencies or employees.
9. 3264 respondents.
10. 48000 responses.
11. 1.16 hours per response.
12. 55594 hours (total).
13. The Petroleum Supply Reporting System collects information needed for determining the supply and disposition of crude petroleum, petroleum products, and natural gas liquids. These data are published by the EIA. Respondents are operators of petroleum refining facilities, blending plants, bulk terminals, crude oil and product pipelines, natural gas plant facilities, tankers and barges, and oil importers.

Statutory Authority: Sec. 5(a), 5(b), 13(b), and 52, Pub. L. 93–275, Federal Energy Administration Act of 1974, 15 U.S.C. 764(a), 764(b), 772(b), and 790a.

Issued in Washington, DC, February 8, 1989.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 89–3458 Filed 2–13–89; 8:45 am]

BILLING CODE 6450–01–M

Changes to DOE Energy Information Reporting and Record-Keeping Requirements

AGENCY: Energy Information Administration, DOE.

ACTION: Notice of changes to the inventory of energy information reporting and record-keeping requirements.

SUMMARY: The Energy Information Administration (EIA) of the Department of Energy (DOE) hereby gives notice to respondents and other interested parties of changes to the inventory of current information collections as defined in the Paperwork Reduction Act of 1980 (Pub. L. 96–511), for which EIA is responsible. DOE management and procurement assistance collections, which are the responsibility of the Office of Management and Administration, are not included in these notices. During the first quarter of fiscal year 1989 (October 1, 1988 through December 31, 1988), changes were made to the October 1, 1988 inventory of DOE information collections, which was published in the **Federal Register**, 53 FR 48287 (November 30, 1988).

The first quarter changes are listed below, and include new information collections approved by the Office of Management and Budget (OMB), collections extended, reinstated, discontinued or allowed to expire, and changes to continuing information collections. For each new requirement, requirement extension, or requirement reinstatement, the current DOE control or form number, the title, the OMB control number, and the OMB approval expiration date are listed by the DOE sponsoring office. For the list of discontinued requirements, the discontinued date is shown instead of the expiration date. If applicable, the appropriate Code of Federal Regulations citation is also listed. For revised information collections, a brief summary of the type of revision is noted. Information collections not utilizing structured forms are designated by an asterisk (*) placed to the right of the control or form number.

FOR FURTHER INFORMATION CONTACT: Etta Harris, EI–73, Energy Information Administration, Mail Stop 1H–023, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–2165.

Information on the availability of single, blank information copies of those collections utilizing structured forms may be obtained by contacting the National Energy Information Center, EI–231, Forrestal Building, U.S. Department

of Energy, Washington, DC 20585, (202) 586–8800.

Statutory Authority: Sec. 3506, Pub. L. No. 96–511, Paperwork Reduction Act of 1980, as amended, 44 U.S.C. 3506.

Issued in Washington, DC, February 8, 1989.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

NEW DOE ENERGY INFORMATION COLLECTIONS APPROVED BY OMB

DOE Number and Title	OMB Control Number	Expiration Date	CFR Citation
Energy Information Administration:			
None			

DOE ENERGY INFORMATION COLLECTIONS EXTENDED

DOE Number and Title	OMB Control Number	Expiration Date	CFR Citation
Economic Regulatory Administration:			
ERA–329R*—Regulatory Reporting and Recordkeeping Requirements Pursuant to 10 CFR 500, 501, 503, and 504.	19030075	01/31/89	10 CFR 500, 501, 503, 504, 505, 508, 515.
Energy Information Administration:			
EIA–23—Annual Survey of Domestic Oil and Gas Reserves	19050057	12/31/91	
EIA–23P—Oil and Gas Well Operator List Update Report	19050057	12/31/91	
EIA–64A—Annual Report of the Origin of Natural Gas Liquids Production	19050057	12/31/91	
Federal Energy Regulatory Commission:			
FERC–16—Report of Gas Supply and Requirements	19020025	03/31/89	18 CFR 260.12.
FERC–510*—Application for Surrender of Electric License	19020068	11/30/91	18 CFR 6.1, 6.4.
FERC–511*—Application for Transfer of Electric License	19020069	10/31/91	18 CFR 9.1, 9.2, 9.10.
FERC–516*—Electric Rate Schedule Filings	19020096	02/28/89	18 CFR 35 Subpart A, 35.12–.16, 35.26, 35.30, 35.31, 292.301.
FERC–520*—Application for Authority to Hold Interlocking Directorate Positions	19020083	02/28/89	18 CFR 45.
FERC–548*—Staff Adjustment Under Natural Gas Policy Act Section 502(c)	19020085	10/31/91	18 CFR 270–277, 281, 282, 284, 385, Subpart K.
FERC–570*—Recordkeeping Requirements for Certain Sales of Natural Gas	19020124	10/31/91	18 CFR 271.503, 271.603, 271.903.
FPC–14—Annual Report for Importers and Exporters of Natural Gas	19020027	03/31/89	18 CFR 260.4.

*Does not utilize structured forms.

REINSTATED DOE ENERGY INFORMATION COLLECTIONS

DOE Number and Title	OMB Control Number	Expiration Date	CFR Citation
Energy Information Administration:			
NONE			

DOE ENERGY INFORMATION COLLECTIONS DISCONTINUED OR ALLOWED TO EXPIRE

DOE Number and Title	OMB Control Number	Discontinued Date	CFR Citation
Energy Information Administration:			
NONE			

DOE ENERGY INFORMATION COLLECTIONS REVISED

Form Number	Revision
EIA–782A–C	Added midgrade unleaded gasoline.
EIA–800–804, 806, 810–814, 816–818, 820, 825.	Minor revisions to forms and approved through 11/30/89.
FERC–1	Change to Regulations.
FERC–1F	Do.
FERC–2	Do.
FERC–2A	Do.
FERC–6	Do.

DOE ENERGY INFORMATION COLLECTIONS REVISED—Continued

Form Number	Revision
FERC–121	Do.
FERC–500*	Do.
FERC–505*	Do.
FERC–556*	Do.
FERC–568*	Do.

*Does not utilize a structured form.

[FR Doc. 89–3459 Filed 2–13–89; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket Nos. ER89-211-000, et al.]

Duke Power Co., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

February 8, 1989.

Take notice that the following filings have been made with the Commission:

1. Duke Power Company

[Docket No. ER89-211-000]

Take notice that Duke Power Company (Duke or Company) on February 1, 1989 tendered for filing a revision to its Contract with the United States of America, Department of Energy, acting by and through the Southeastern Power Administration (SEPA). The revision is in the form of a Letter Agreement dated February 23, 1989, and designated as "Supplemental Agreement No. 3 to Contract No. 89-000-1501-770." It provides for an extension of the term of Supplemental Agreement No. 2 to the Contract, which expired January 1, 1989, unless otherwise agreed to by both parties, whereby Duke sells replacement energy, if available, to provide to SEPA a source of energy to replace energy not currently available from SEPA Projects. SEPA notified Duke that, because of the possibility of present drought conditions extending into calendar year 1989, SEPA desired to extend the term of Supplemental Agreement No. 2 for one year. The amended term of the Agreement is from January 1, 1989 until such time as SEPA no longer requires such energy but, in any event, no later than January 1, 1990.

Because of the emergency nature of this service, Duke requests an effective date of January 1, 1989.

Copies of this filing were served on SEPA, the North Carolina Utilities Commission, and the South Carolina Public Services Commission.

Comment date: February 23, 1989, in accordance with Standard Paragraph E at the end of this notice.

Pacific Power & Light Company, an assumed business name of PacifiCorp.

[Docket No. ER89-210-000]

Take notice that Pacific Power & Light Company (Pacific), an assumed business name of PacifiCorp, on January 31, 1989 tendered for filing, Pacific's Revised Appendix 1 for the state of Idaho and Bonneville Power Administration's (Bonneville) Determination of Average System Cost (ASC) for the State of Idaho (Bonneville's Docket No. 5-A3-8801). The Revised Appendix 1 calculates the ASC for the state of Idaho applicable to the exchange of power between Bonneville and Pacific.

Pacific requests waiver of the Commission's notice requirements to permit this rate schedule to become effective March 1, 1988, which it claims is the date of commencement of service.

Copies of the filing were supplied to Bonneville, the Idaho Public Utilities Commission, and Bonneville's Direct Service Industrial Customers.

Comment date: February 23, 1989, in accordance with Standard Paragraph E at the end of this notice.

3. Ohio Power Company

[Docket No. ER89-209-000]

Take notice that on Ohio Power Company (OPCo), on January 31, 1989, tendered for filing with the Commission an electric service agreement that was executed by OPCo and the City of Clyde, Ohio (City of Clyde) on May 27, 1988. OPCo states that the City of Clyde recently established a municipal electric utility system and is not currently served at wholesale by any supplier.

To match the effective date requested by the City of Clyde, OPCo proposes an effective date of on or about April 17, 1989, for the tendered agreement.

OPCo states that copies of its filing were served upon the City of Clyde, Ohio, The Toledo Edison Company, and the Public Utilities Commission of Ohio.

Comment date: February 23, 1989, in accordance with Standard Paragraph E at the end of this notice.

4. Canal Electric Company

[Docket No. ER89-208-000]

Take notice that Canal Electric Company on January 31, 1989, tendered for filing a proposed amendment to Appendix A of its previously filed Power Contract FERC Rate Schedule No. 23.

Subsequent to the filing of the original Power Contract, Canal received from its suppliers more accurate data concerning the entitlements that were the subject matter of the Power Contract and proposes a revised Appendix A to reflect that data. This proposed revision reflects changes in the minimum number of MWs acquired, dates of commencement and the termination of the Gas Turbine Additional Units Package. However, Canal's rates will not be affected by the proposed revision.

Copies of this filing were served upon the Cambridge Electric Light Company and Commonwealth Electric Company, the utility's jurisdictional customers.

Comment date: February 23, 1989, in accordance with Standard Paragraph E at the end of this notice.

5. Indiana Michigan Power Company

[Docket Nos. EL88-1-000, ER88-30-000, ER88-33-000 and ER88-34-000]

Take notice that on January 17, 1989, Indiana Michigan Power Company tendered for filing its refund report in compliance with the Commission's order issued on December 1, 1988.

Comment date: February 23, 1989, in accordance with Standard Paragraph E at the end of this notice.

6. Delmarva Power & Light Company

[Docket No. ER87-556-000]

Take notice that on December 21, 1989, Delmarva Power & Light Company (Delmarva) filed revised pages and worksheets to its Refund Compliance Report originally filed on November 17, 1988, which corrected certain mathematical errors found in the Compliance Report.

Delmarva states that on December 16, 1988 it refunded to the Old Dominion Electric Cooperative an additional $66,829.74 reflect the difference between the amount refunded on October 18, 1988 and the amount due after correction of the discovered mathematical errors. Such refund included interest through December 16, 1988. With this additional refund, Delmarva submits that it has refunded to the affected wholesale customers the difference between the amounts collected under "interim" rates and the rates contained in the Settlement Agreement in Docket No. ER87-556-000.

Copies of the filing were served upon each of the affected wholesale customers, the parties of record and the state regulatory agencies in Delaware, Maryland and Virginia.

Comment date: February 23, 1989, in accordance with Standard Paragraph E at the end of this notice.

7. Consolidated Edison Company of New York, Inc.

[Docket No. ER89-200-000]

Take notice that on Consolidated Edison Company of New York, Inc. (Con Edison), on January 30, 1989, tendered for filing proposed changes in its rate schedule for transmission and distribution service to the Power Authority of the State of New York (PASNY), under Con Edison Rate Schedule No. 42. The proposed supplement No. 14 to Schedule No. 42 would increase Con Edison's revenues by about $0.8 million in the historical 1986 period. Con Edison has requested an effective date of January 13, 1989, for

the rate change and accordingly seeks waiver of the notice requirement of the Commission's rules.

The proposed changes are the result of a proposal to expand the number of PASNY customers subject to mandatory time-of-day billing. This proposal has been reviewed and approved by the New York State Public Service Commission (NYPSC), the state agency that makes rate determinations for these services subject to Commission review. PASNY has received actual notice of the proposal.

A copy of the filing has been served upon PASNY and NYPSC.

Comment date: February 23, 1989, in accordance with Standard Paragraph E at the end of this document.

8. Westinghouse Electric Corporation

[Docket No. QF89-134-000]

On January 26, 1989, Westinghouse Electric Corporation (Applicant), of 2400 Ardmore Boulevard, Pittsburgh, Pennsylvania 15221 submitted for filing an application for certification of a facility as a qualifying small power production facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The small power production facility will be located in San Juan, Puerto Rico. The facility will consist of three (3) waterwall rotary boilers and one condensing turbine generator. The net electric power production capacity will be 22 megawatts. The primary energy source will be biomass in the form of municipal solid waste. The use of natural gas, oil or coal will be used for ignition, start-up, testing, flame stabilization, temperature control and other uses permitted under section 3(17)(B) of the Federal Power Act, however, such fossil fuel usage will not exceed 25% of the total energy input during any calendar year period. Construction of the facility is expected to begin in May 1989.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-3440 Filed 2-13-89; 8:45 am]

BILLING CODE 6717-01-M

List of First Sellers Who Have Asserted Contractual Authority To Collect Delivery Allowances; Compression Allowances and Protest Procedures Under NGPA Section 110

[Docket No. GP89-33-000]

February 9, 1989.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Publication of Arkla Energy Resources's, (Arkla) lists of first sellers who have asserted contractual authority to collect delivery allowances pursuant to § 271.1104(h) of the Commission's regulations.

SUMMARY: In Order No. 473, 52 FR 21,660 (June 9, 1987), the Federal Energy Regulatory Commission amended its regulations to provide parties an opportunity to protest allowances for the delivery of natural gas which were heretofore presumed authorized by "area rate" clauses in gas sales contracts. Order No. 473 amended 18 CFR 271.1104(h) to require all interstate pipelines to provide a listing of those producers that have claimed an entitlement to delivery allowances pursuant to an "area rate" clause. The interstate pipelines were required to indicate whether they concurred in the producers' claim for delivery allowances.

Arkla's listing of its contracts was submitted on December 28, 1988. List I sets forth those first sellers with contracts which Arkla contends do not contain contractual authority to collect production-related costs. List II sets forth those first sellers with contracts which Arkla agrees do contain contractual authority for producers to collect production-related costs.

DATE: As provided in 18 CFR 271.1104(h)(4)(i) (1987), any protest must be filed by May 15, 1989.

ADDRESS: An original and 14 copies of each protest must be filed with the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Edward G. Gingold, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426.

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

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 357-8997. A copy of Arkla's filing may be contained from CIPS up to 10 days following the date of issuance of this notice by the Commission. The complete text of this notice on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in Room 1000, 825 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

List I

ARKLA ENERGY RESOURCES, A DIVISION OF ARKLA, INC. LIST OF FIRST SELLERS WITHOUT CONTRACTUAL AUTHORITY TO COLLECT PRODUCTION-RELATED COSTS

Producer	Arkla contract	
	Number	Date
1. Flynn Energy Corporation	GP-4491	11/21/79
2. National Oil Company	GP-4554	03/17/80
3. Pennzoil Producing Company	GP-4304	01/08/79
4. Pennzoil Producing Company	GP-4550	03/18/80
5. Pennzoil Producing Company	GP-2710	09/30/49
6. Pennzoil Producing Company	GP-3814	12/21/71
7. Samson Resources Company	GP-4130	02/28/77
8. Samson Resources Inc	GP-4389	05/10/79
9. Samson Resources Inc	GP-4601	04/28/80
10. Samson Resources Inc	GP-4804	06/15/81
11. Samson Resources Inc	GP-4911	11/17/81
12. Samson Resources Inc	GP-4974	04/01/82
13. Sun Exploration & Production	GP-3454	10/05/59
14. Tenneco Oil Company	GP-4115	01/03/77

ARKLA ENERGY RESOURCES, A DIVISION OF ARKLA, INC. LIST OF FIRST SELLERS WITHOUT CONTRACTUAL AUTHORITY TO COLLECT PRODUCTION-RELATED COSTS—Continued

Producer	Arkla contract	
	Number	Date
15. Tenneco Oil Company	GP-4060	01/14/76
16. Tenneco Oil Company	GP-3970	02/14/75
17. Tenneco Oil Company	GP-4285	10/17/78
18. Texaco, Inc.	GP-3717	10/11/68

List II

ARKLA ENERGY RESOURCES A DIVISION OF ARKLA, INC. LIST OF FIRST SELLERS WITH CONTRACTRUAL AUTHORITY TO COLLECT PRODUCTION-RELATED COSTS

Producer	Arkla contract	
	Number	Date
1. Alice Sydney Oil Company	GP-2499	11/14/51
2. Amoco Production Company	GP-3946	09/16/74
3. Amoco Production Company	GP-3944	09/16/74
4. Amoco Production Company	GP-4109	10/01/76
5. Amoco Production Company	GP-4465	10/12/79
6. Amoco Production Company	GP-3844	04/18/72
7. Andover Oil Company	GP-4863	09/08/81
8. Arco Oil and Gas Company	GP-3978	03/01/75
9. Arco Oil and Gas Company	GP-4989	04/06/82
10. Arco Oil and Gas Company	OK-224	03/25/53
11. Arco Oil and Gas Company	GP-4496	01/25/80
12. Arco Oil and Gas Company	GP-4040	10/01/81
13. Arco Oil and Gas Company	GP-4494	12/28/79
14. Cenergy Exploration Company	GP-4481	11/16/79
15. Cities Service Oil & Gas Corporation	GP-5000	04/22/82
16. Cities Service Oil & Gas Corporation	GP-3753	07/09/84
17. Conoco, Inc.	GP-4119	12/17/76
18. Crystal Oil Company	GP-4744	03/18/81
19. Damson Oil Company	GP-4233	03/27/78
20. Diamond Shamrock Corporation	GP-4334	02/01/79
21. Farmland Industries, Inc.	GP-5166	09/27/82
22. Farmland Industries, Inc.	OK-1041	05/07/62
23. Farmland Industries, Inc.	GP-4630	07/10/80
24. Getty Oil Company	GP-5185	09/30/82
25. Getty Oil Company	GP-2765	08/27/73
26. Getty Oil Company	GP-3840	05/03/72
27. Hassie Hunt Exploration Company	GP-3929	09/16/74
28. Hunt Oil Company	GP-4423	07/26/79
29. Hunt Oil Company	GP-4412	06/20/79
30. Lamar Hunt	GP-3930	09/13/74

ARKLA ENERGY RESOURCES A DIVISION OF ARKLA, INC. LIST OF FIRST SELLERS WITH CONTRACTRUAL AUTHORITY TO COLLECT PRODUCTION-RELATED COSTS—Continued

Producer	Arkla contract	
	Number	Date
31. Marathon Oil Company	GP-4185	09/12/77
32. Marshall Exploration, Inc.	GP-4893	12/01/81
33. Marshall Exploration, Inc.	GP-5056	07/13/82
34. Marshall Exploration, Inc.	GP-5024	06/03/82
35. Marshall Exploration, Inc.	GP-5033	04/07/82
36. Mobil Producing Texas & New Mexico	GP-3892	09/01/73
37. Petro-Lewis Corporation	GP-4621	11/12/79
38. Richard B. Nelson	GP-4744	03/18/81
39. Sun Exploration and Production	GP-3840	05/03/72
40. Sun Exploration and Production	GP-3969	02/14/75
41. Sun Exploration and Production	GP-3817	12/22/71
42. Sun Exploration and Production	GP-4104	09/20/76
43. Sun Exploration and Production	OK-1057	10/15/62
44. Tenneco Oil Company	GP-3913	03/11/74
45. Tenneco Oil Company	GP-3914	03/11/74
46. Tenneco Oil Company	GP-3893	10/26/73
47. Tenneco Oil Company	GP-4028	09/17/75
48. Tenneco Oil Company	GP-3915	03/11/83
49. Texaco, Inc	GP-4420	08/31/79
50. Texaco, Inc	GP-4831	08/05/81
51. Texaco, Inc	GP-5020	06/02/82
52. Texaco, Inc	GP-3838	09/24/72
53. Triton Oil and Gas Corporation	GP-4971	07/01/86
54. Union Texas Petroleum Corporation	GP-5166	09/27/82

[FR Doc. 89-3439 Filed 2-13-89; 8:45 am]

BILLING CODE 6717-01-M

Southeastern Power Administration

Proposed Rate Adjustment, Public Forum, and Opportunities for Public Review and Comment; Cumberland Basin Projects

AGENCY: Southeastern Power Administration (Southeastern), DOE.

ACTION: Notice of proposed rate adjustment for Cumberland Basin projects, notice of public forum and opportunity for review and comment.

SUMMARY: Southeastern proposes to replace Rate Schedules CC-1-B, CK-1-A, CM-1-A, CBR-1-A, CEK-1-A, CSI-1-A, and CTV-1-A currently applicable to Cumberland Basin projects power and seeks approval of new Rate Schedules CC-1-C, CK-1-B, CM-1-B, CBR-1-B, CEK-1-B, CSI-1-B, and CTV-1-B, for a five-year period July 1, 1989, through June 30, 1994.

Opportunities will be available for interested persons to review the present rates, to review the proposed rates and supporting studies, to participate in a public forum and to submit written comments. Southeastern will evaluate all comments received in this process.

DATES: Written comments are due on or before May 3, 1989. A public information and comment forum will be held in Nashville, Tennessee, on March 21, 1989. Persons desiring to speak at the forum should notify Southeastern at least 4 days before the forum is scheduled, so that a list of forum participants can be prepared. Others may speak if time permits.

ADDRESSES: Five copies of written comments should be submitted to: Administrator, Southeastern Power Administration, Department of Energy, Samuel Elbert Building, Elberton, Georgia 30635. The public information and comment forum for the Cumberland Basin projects will begin at 10 a.m. on March 21, 1989, in Conference Room A761, U.S. Courthouse—Annex, 801 Broadway, Nashville, Tennessee 37203.

FOR FURTHER INFORMATION CONTACT: Leon Jourolmon, Jr., Director, Power Marketing Division, Southeastern Power Administration, Department of Energy, Samuel Elbert Building, Elberton, Georgia 30635, (404) 283-9911.

SUPPLEMENTARY INFORMATION: The Federal Energy Regulatory Commission (FERC) by order issued December 27, 1984, in Docket No. EF84-3021, confirmed and approved Wholesale Power Rate Schedules CBR-1-A, CSI-1-A, CM-1-A, CC-1-A, CK-1-A and CTV-1-A applicable to Cumberland Basin projects' power for the period ending July 1, 1984, through June 30, 1989. The Commission by order issued January 20, 1987, in Docket EF86-3021, confirmed and approved Wholesale Power Rate Schedule CC-1-B applicable to Cumberland Basin projects' power for a period September 1, 1986, through June 30, 1989.

Discussion

Existing rate schedules for the present Cumberland System are predicated upon a March 1984 repayment study and other supporting data all of which is contained in FERC Docket No. EF84-3021.

The current repayment study prepared in January of 1989 for the combined Cumberland System shows that existing

rates are not adequate to recover all costs required by present repayment criteria.

A revised repayment study with a net $5,218,000 revenue increase in each future year over the current repayment study demonstrates that all costs are paid within their repayment life.

The net additional requirement amounts to a net 17 percent increase in revenues and is primarily due to escalated costs at the generating projects. It is proposed that revised rate schedules applicable to TVA (for the benefit of preference customers served from the TVA System) and Other Preference Customers of Southeastern contain the following unit rates:

TVA RATE SCHEDULE

Capacity at the generator/kw/year	$13.56
Energy at the generator/kw (mills)	6.32
Other Customers Rate Schedules (Excluding Carolina Power & Light Area):	
Capacity delivered at interconnections with adjacent utilities/kw/year	20.28
Energy delivered at interconnections with adjacent utilities/kwh (mills)	6.45
Customers served through the facilities of Carolina Power & Light, Western Division (Rate Schedule CC-1-C):	
Capacity delivered kw/year	23.04
Energy delivered kwh (mills)	6.86

The referenced January 1989 current repayment study along with a revised repayment study dated January 1989 and previous system repayment studies are available for examination at the Samuel Elbert Building, Elberton, Georgia 30635. Proposed Rate Schedules CC-1-C, CK-1-B, CM-1-B, CBR-1-B, CSI-1-B, CEK-1-B, and CTV-1-B are also available.

Issued at Elberton, Georgia, February 1, 1989.

Harry C. Geisinger,

Administrator.

[FR Doc. 89-3456 Filed 2-13-89; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3520-2]

Designation of a New Ocean Dredged Material Disposal Site (ODMDS) Offshore Pascagoula, Mississippi; Intent To Prepare an Environmental Impact Statement

AGENCY: U.S. Environmental Protection Agency (EPA), Region IV.

ACTION: Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) on the EPA permanent designation of a new ODMDS offshore Pascagoula, Mississippi, in the Gulf of Mexico. This NOI supersdes the NOI published by the U.S. Army Corps of Engineers (COE), Mobile District, on the same action (52 FR 43382, November 12, 1987). The COE is a cooperating agency for the proposed EIS.

In addition to the primary EPA site designation function, the COE will provide information in the ODMDS EIS to allow the COE to determine that the EIS meets the standards for an adequate EIS in compliance with the National Environmental Policy Act (NEPA). Therefore, pursuant to relevant regulations, the COE proposes to adopt the EIS for its purposes relative to the *disposal* of new work and maintenance dredged material from the existing Pascagoula Harbor Federal Navigation Project and the authorized improvements for that Project. The COE proposes to limit its adoption of the ODMDS EIS to these projects. The COE's existing NEPA project documentation for these projects will be incorporated by reference into the ODMDS designation EIS.

Purpose

EPA, Region IV, in accordance with section 102(2)(C) of NEPA will prepare a Draft EIS on the designation of a new ODMDS offshore Pascagoula, Mississippi. An EIS is needed to provide the information necessary to designate the ODMDS. This is issued pursuant to section 102 of the Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972, as amended, and 40 CFR Part 228 (Criteria for the Management of Disposal Sites for Ocean Dumping). Also, as indicated above, the COE proposes to adopt the EIS for its purposes. Therefore, communication regarding site designation should be addressed to EPA while communication regarding the Federal navigation project should be addressed to the COE (Mobile District).

For Further Information and To Be Placed on the Project Mailing List Contact: Reginald Rogers; U.S. EPA, Region IV; 345 Courtland Street NE; Atlanta, Georgia 30365; (404) 347-2126 or FTS 257-2126. Susan Ivester Rees; U.S. Army Engineer District, Mobile; P.O. Box 2288; Mobile, Alabama 36628-0001; (205) 690-2724.

Summary: EPA proposes to permanently designate a new ODMDS offshore Pascagoula, Mississippi for the disposal of dredged material that meets the criteria for ocean disposal contained in 40 CFR Part 227. The proposed ODMDS would be an enlargement of local discontinued disposal sites. It is to encompass two previously-used disposal sites south of Horn Island to the maximum extent possible, including a portion of the EPA interim-designated ODMDS located outside (eastern side) of the Horn Island Pass safety fairway. That designation expired on December 31, 1988.

The Final EIS for the designation of the Pensacola (FL), Mobile (AL), and Gulfport (MS) ODMDSs was supplemented to include the final designation of the interim Pascagoula ODMDS and was circulated to review agencies and the public. However, the proposed EIS for the new ODMDS is being prepared in lieu of a Final Supplement to the Final EIS for the interim ODMDS, since it is too small for the anticipated local dredged material volumes.

Need For Action: EPA's proposal is made at this time because of the expiration of the interim ODMDS at Pascagoula, the anticipation of local disposal needs, and the volume of anticipated dredged material. In particular, approximately 1 million cubic yards of maintenance dredged material every 18 months from the existing Federally-authorized project at Pascagoula and 11 million cubic yards of new work dredged material from the authorized activities are candidates for ocean disposal. Designation of the ODMDS would serve to make available an ocean alternative for receiving suitable dredged material from the general eastern Mississippi Sound area. Designation of the ODMDS would not by itself, however, authorize any dredging project or dredged material disposal at the ODMDS. The COE proposal covered in this action is limited to *disposal* of dredged material from the existing Pascagoula Harbor Navigation Federal Project and the authorized improvements for that Project. The COE's existing NEPA project documentation for these projects will be incorporated by reference into the ODMDS designation EIS.

Alternatives

1. No action (The No-Action Alternative is defined as no permanent designation of any ODMDS).

2. An expanded ODMDS offshore Pascagoula, Mississippi.

3. Other Gulf of Mexico ocean sites.

Scoping: A scoping meeting will not be held. However, EPA encourages Federal, State and local agencies as well as interested parties to identify significant issues to be addressed in the EIS at this time. Comments and

concerns should be sent to the above address.

Estimated Date of Release: The Draft EIS is scheduled to be published and available in February of 1989.

Responsible Official: Greer C. Tidwell, Regional Administrator; EPA, Region IV.

Dated: February 9, 1989.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 89-3460 Filed 2-13-89; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-62072; FRL-3519-7]

Asbestos-Containing Materials in Schools; Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA will hold a meeting of a panel of expert electron microscopists to discuss possible revisions to the existing Interim Transmission Electron Microscopy Methodology contained in EPA's final asbestos in schools regulation of October 30, 1987 (52 FR 41826).

DATES: The meeting will be held on Wednesday, Thursday, and Friday February 22, 23, and 24, 1989.

ADDRESS: the meeting will be held at the National Institute of Standards and Technology (formerly the National Bureau of Standards) in Gaithersburg, Maryland, Physics Building, Room B165.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Room EB-44, 401 M Street SW., Washington, DC 20460 (202-554-1404) (TDD): (202-554-0551).

SUPPLEMENTARY INFORMATION: On October 30, 1987, EPA promulgated its final regulation for Asbestos-Containing Materials in Schools. The regulation contained a transmission electron microscopy (TEM) methodology for the analysis of air samples taken for clearance of asbestos abatement projects. The methodology was prepared by a group of experienced electron microscopists. Since the rule's promulgation, the method has been utilized by TEM laboratories throughout the United States. Based on the panel of electron microscopists' experience in using this method, EPA will discuss possible revisions to the analytical procedure. Proposed amendments to the method will then be published for public consideration and comment.

Dated: February 2, 1989.

Michael Shapiro,

Acting Deputy Director, Office of Toxic Substances.

[FR Doc. 89-3418 Filed 2-13-89; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3519-5]

Science Advisory Board, Global Climate Research Subcommittee; Open Meeting

SUMMARY: Under the Federal Advisory Committee Act, Pub. L. 92-463, notice is hereby given that a two-day meeting of the Global Climate Research Subcommittee of the Executive Committee of the Science Advisory Board (SAB) will be held on February 23 and 24, 1989. The meeting will begin at 9:00 a.m. and will be held in the Capitol Hill Room of The Capitol Hill, at 200 "C" Street SE., Washington, DC 20003. The meeting will adjourn no later than 5:00 p.m. on Friday.

The Subcommittee has been charged with evaluating the scientific and technical foundations of a proposed research plan for a Global Climate Change Program at EPA. The goals of the plan; namely to establish a rationale for EPA's program, to develop a strategy, to define and discuss goals and objective, to outline project areas, and to establish a basis for coordination and cooperation with national and international research communities, will be examined as they relate to the described program.

Purpose: The specific purpose of this meeting is to review the research plan that EPA's Office of Research and Development (ORD) has developed for a Global Climate Change Program. The technical aspects of the plan will be presented by ORD staff for evaluation by the Subcommittee. Conclusions will be reached on the appropriateness of the research plan, and consensus will be achieved on recommendations for strengthening the scientific approach that underlies the program.

For further information: This meeting will be open to the public. Any member of the public who wishes to present information, or receive further details should contact Ms. Janis C. Kurtz, Executive Secretary or Mrs. Lutithia Barbee, Staff Secretary (A-101 F) Science Advisory Board, U.S. EPA, 401 M Street, SW., Washington, DC. Telephone: (202) 382-2552 or FTS-8-382-2552. Written comments will be accepted and fifteen copies can be sent to Ms. Kurtz at the address above. Persons interested in making brief oral statements before the Subcommittee must contact Ms. Kurtz no later than February 17, 1989 to be assured of space on the agenda. Oral presentations should be supplemented by a written statement for the record, which may be submitted (15 copies) to Ms. Kurtz at the time of the meeting for distribution to members of the Subcommittee.

Date: February 8, 1989.

Donald G. Barnes,

Director, Science Advisory Board.

[FR Doc. 89-3390 Filed 2-9-89; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3517-7]

Water Pollution Control; Final Determination Concerning the Proposed Lake Alma Recreational Lake Project on Hurricane Creek, Alma, Bacon County, GA.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of decision to restrict the designation of wetlands in Hurricane Creek and unnamed tributaries in Alma, Georgia, as discharge sites for the placement of fill material.

SUMMARY: This is notice of EPA's final determination pursuant to section 404(c) of the Clean Water Act to restrict the designation of approximately 1155 acres of wetlands in and near Alma, Georgia. EPA's determination is based upon a finding that the placement of fill material associated with implementation of the proposed Lake Alma impoundment would result in unacceptable adverse impacts to wildlife.

EFFECTIVE DATE: The effective date of the final determination is December 16, 1988.

FOR FURTHER INFORMATION CONTACT: William Garvey, Office of Wetlands Protection, US Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 245-3900.

Copies of EPA's Final Determination are available for inspection in the EPA Headquarters Public Information Reference Unit, EPA Library, Room M2904, 401 M Street, SW., Washington DC and the EPA Region IV Marine and Estuarine Branch, 345 Courtland Street, NE., Atlanta, Georgia.

Section 404(c) of the Clean Water Act (33 U.S.C. § 1251 *et seq.*) provides that, if the Administrator of the U.S. Environmental Protection Agency (EPA) determines, after notice and opportunity for public comment, that unacceptable adverse effects on municipal water supplies, shellfish beds, fishery areas (including spawning and breeding

areas), wildlife, or recreational areas would result from the discharge of dredged or fill material, he may exercise his authority to withdraw or prohibit the specification, or deny, restrict or withdraw the use for specification, of any defined area as a disposal site for dredged or fill material. Before making such a determination, the Administrator must consult with the Chief of the Army Corps of Engineers (Corps), the property owner(s), and the applicant where there has been an application for a section 404 permit. The procedures for implementation of section 404(c) are set forth in the Code of Federal Regulations, 40 CFR Part 231.

EPA's regulations for implementing section 404(c) establish procedures to be followed in exercising the Administrator's authority pursuant to that section. Three major milestones in the process are: (1) The Regional Administrator's proposed decision to withdraw, deny, restrict or prohibit the use of a site (Proposed Determination); (2) the Regional Administrator's recommendation to the Administrator to withdraw, deny, restrict or prohibit the use of a site (Recommended Determination); and (3) the Administrator's final decision to affirm, modify, or rescind the Regional recommendation (Final Determination). The Administrator has delegated the authority to make final decisions under section 404(c) to the Assistant Administrator for Water, who is EPA's national Clean Water Act section 404 program manager.

EPA's Final Determination concerns the proposed placement of dredged or fill material for the purpose of creating a recreational impoundment and mitigation reservoirs on Hurricane Creek and unnamed tributaries in the City of Alma and in Bacon County, Georgia.

EPA Region IV's Regional Administrator recommended withdrawal of specification of the disposal site necessary for construction of the proposed impoundment described in Permit No. 074 OYN 003752. The Recommended Determination further recommended that EPA also restrict specification or use of described waters of the United States, including wetlands, as a disposal site for dredged or fill material in connection with the construction of any lake and reservoirs in mitigation thereof. Region IV's Regional Administrator based the recommendations upon his finding that the discharge of materials in connection with the above described activities would have an unacceptable adverse effect on wildlife.

The Final Determination is based on consideration of the record developed by EPA and by the Corps in this case, including public comment submitted in response to the Regional Proposed Determination, comment received at the public hearing and comments from other Federal and State agencies. This Final Determination also reflects comment and information received during EPA Headquarters' consultation pursuant to § 231.6 of the Clean Water Act section 404(c) regulations.

As described in the Final Determination, it is the finding of EPA that the proposed Lake Alma project, including activities proposed to mitigate adverse impacts, would result in the destruction and loss of vegetated wetland habitat that is of vital importance to wildlife in the Hurricane Creek bottomland hardwood wetlands system and associated areas and would adversely limit the present ability of the Hurricane Creek forested wetland floodplain to function as a corridor for the movement, dispersal and migration of wildlife species. These findings lead to the conclusion that the discharge of dredged or fill material in connection with the proposed Lake Alma recreational impoundment and associated mitigation impoundments would result in unacceptable adverse impacts to wildlife. This Final Determination therefore affirms the Regional Recommended Determination and restricts the designation of the subject waters of the United States as discharge sites for dredged or fill material. EPA's section 404(c) action is based on adverse impacts of activities associated with creation of any reservoir, lake or impoundment on described waters, including wetlands, of Hurricane Creek and unnamed tributaries to Hurricane Creek, and as such prohibits the placement of fill for that purpose. This Final Determination does not pertain to other types of filling activities. Other proposals involving the discharge of dredged or fill material on the wetland sites at issue will be evaluated on their merits within the Corps of Engineers' section 404 regulatory program.

Date: February 1, 1989.

Rebecca W. Hanmer,

Acting Assistant Administrator for Water.

[FR Doc. 89-3392 Filed 2-13-89; 8:45 am]

BILLING CODE 6560-50-M

[FRL-OW-3519-4]

Availability of Water Quality Standards Program Documents

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability.

SUMMARY: Notice is hereby given that numerous public information documents relating to the water quality standards program, including water quality criteria information, are available to the public. There is no new policy or guidance contained in these documents. Previously published and still applicable policy and guidance documents are available and are included in the listing below, as is updated information on State-adopted standards in summary form. Also, general information on the standards program is included.

Copies of documents identified in this Notice may be obtained by making written request to the U.S. Environmental Protection Agency (EPA), the National Technical Information Service (NTIS), and/or the U.S. Government Printing Office (GPO) at the addresses provided below. The EPA is not able to process orders for the documents available from NTIS or GPO.

FOR FURTHER INFORMATION CONTACT: U.S. Environmental Protection Agency, Office of Water Regulations and Standards, Criteria and Standards Division (WH-585), 401 M Street., SW., Washington, DC 20460, (202) 475-7315; National Technical Information Service, 5285 Front Royal Road, Springfield, Va 22161, (703) 487-4650; U.S. Government Printing Office, Superintendent of Documents, North Capitol & H Sts, NW., Washington, DC 20401, (202) 783-3238.

SUPPLEMENTARY INFORMATION: Each document being made available to the public is identified below along with a brief description. The following documents may be obtained only from the EPA. Documents available from the EPA are free of charge.

1. Water Quality Standards Regulation, 48 FR 51400, November 8, 1983 (40 CFR Part 131).

This regulation sets forth the provisions for development, review and revision and approval of water quality standards pursuant to section 303 of the Clean Water Act.

2. Water Quality Standards Handbook, U.S. Environmental Protection Agency. December 1983.

This handbook contains guidance prepared by EPA to assist States in implementing the water quality standards regulation (48 FR 51400, November 8, 1983). The handbook provides a description of the overall standards setting process, information on general program administrative policies and procedures and a description of analyses which may be used in the water quality standards setting process.

3. Summary of Federally Promulgated State Water Quality Standards Actions. U.S. Environmental Protection Agency. November 1988.

This document contains the date, type of action and **Federal Register** citation for State water quality standards promulgated by EPA. The publication also contains information on Federally promulgated water quality standards which have been withdrawn and replaced with State approved standards.

4. Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analysis. U.S. Environmental Protection Agency. November 1983.

This technical support manual provides guidance for conducting use attainability analyses. The manual supplements Chapter 3 of the Water Quality Standards Handbook published by the U.S. Environmental Protection Agency on December 1983.

5. Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analyses—Volume II: Estuarine Systems. U.S. Environmental Protection Agency. November 1983.

This volume of the Technical Support Manual addresses the unique characteristics of estuarine systems and supplements item 4 above.

6. Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analyses—Volume III: Lake Systems. U.S. Environmental Protection Agency. November 1984.

This volume of the Technical Support Manual addresses the unique characteristics of lake systems and supplements items 4 and 5 above.

7. Introduction to Water Quality Standards. U.S. Environmental Protection Agency. September 1988. EPA Order Number 440/5 88–089.

This publication contains general information on the water quality standards program. The document, written in question and answer format, is designed to give the general public a basic understanding of the water quality standards program.

8. State Adoption/Proposal of Numeric Criteria for Priority Pollutants. U.S. Environmental Protection Agency. August 1988. EPA Order Number 440/5 89–001.

This report contains information on efforts by the States to address section 303(c)(2)(B) of the Clean Water Act which requires States to include priority pollutant numeric criteria, where appropriate, in State water quality standards.

The following documents may be obtained only from the NTIS. A fee of $3.00 is charged for each individual order.

9. Water Quality Standards Criteria Summaries: A Compilation of State/Federal Criteria. U.S. Environmental Protection Agency. September 1988.

Twenty-six summaries have been compiled which contain information extracted from State water quality standards.

Acidity-Alkalinity (ph), NTIS Order No. PB89–141527
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Antidegradation, NTIS Order No. PB89–141600
Paper Copy, #A05, Price $15.95
Microfiche, #A01, Price $6.95
Arsenic, NTIS Order No. PB89–141501
Paper Copy, #A04. Price $15.95
Microfiche, #A01, Price $6.95
Bacteria, NTIS Order No. PB89–141394
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Cadmium, NTIS Order No. PB89–141469
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Chromium, NTIS Order No. PB89–141584
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Copper, NTIS Order No. PB89–141592
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Cyanide, NTIS Order No. PB89–141485
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Definitions, NTIS Order No. PB89–141493
Paper Copy, #A08, Price $21.95
Microfiche, #A01, Price $6.95
Designated Uses, NTIS Order No. PB89–141402
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Dissolved Oxygen, NTIS Order No. PB89–141568
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Dissolved Solids, NTIS Order No. PB89–141576
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
General Provisions, NTIS Order No. PB89–141428
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Intermittent Streams, NTIS Order No. PB89–141410
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Iron, NTIS Order No. PB89–141543
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Lead, NTIS Order No. PB89–141626
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Mercury, NTIS Order No. PB89–141378
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Mixing Zones, NTIS Order No. PB89–141477
Paper Copy, #A05, Price $15.95
Microfiche, #A01, Price $6.95
Nitrogen/Ammonia/Nitrate/Nitrate, NTIS Order No. PB89–141618
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Organics, NTIS Order No. PB89–141386
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Other Elements, NTIS Order No. P89–141436
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Pesticides, NTIS Order No. PB89–141535
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95
Phosphorus, NTIS Order No. PB89–141444
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Temperature, NTIS Order No. PB89–141550
Paper Copy, #A05, Price $21.95
Microfiche, #A01, Price $6.95
Turbidity, NTIS Order No. PB89–141451
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95
Zinc, NTIS Order No. PB89–141519
Paper Copy, #A04, Price $15.95
Microfiche, #A01, Price $6.95

10. State Water Quality Standards Summaries. U.S. Environmental Protection Agency. September 1988.

NTIS Order No. PB89–141634
Paper Copy, #A18, Price $42.95
Microfiche, #A01, Price $6.95

This document contains a complete summary of the water quality standards of 56 States and U.S. Territories (District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands). A summary is not provided for California. (A source for obtaining information about the water quality standards for the State of California is however, provided.)

Included in each State summary is the name of a contact person, use classification and waterbodies and other pertinent information about the States and U.S. Territories. The above document contains the water quality standards of all 56 States and Territories, except for California. (In contrast, the documents listed immediately below are individual State summaries.)

11. State Water Quality Standards Summaries (one for each of the 56 States and Territories). U.S. Environmental Protection Agency. September 1988.

Fifty-six individual summaries of State water quality standards are available. The individual summaries

contain information on use classification of waterbodies, mixing zones, antidegradation and other pertinent information.

Alaska, NTIS Order No. PB89–141642
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Alabama, NTIS Order No. PB89–141659
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Arkansas, NTIS Order No. PB89–141667
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

American Samoa, NTIS Order No. PB89–141675
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Arizona, NTIS Order No. PB89–141683
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

California, (A summary is not provided for California. A source for obtaining information about water quality standards for California is however, available).
NTIS Order No. PB89–141691
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Northern Mariana Islands, NTIS Order No. PB89–141717
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Colorado, NTIS Order No. PB89–141709
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Connecticut, NTIS Order No. PB89–141725
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

District of Columbia, NTIS Order No. PB89–141733
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Delaware, NTIS Order No. PB89–141741
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Florida, NTIS Order No. PB89–141758
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Georgia, NTIS Order No. PB89–141766
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Guam, NTIS Order No. PB89–141774
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Hawaii, NTIS Order No. FB89–141782
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Iowa, NTIS Order No. PB89–141790
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Idaho, NTIS Order No. PB89–141808
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Illinois, NTIS Order No. PB89–141816
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Indiana, NTIS Order No. PB89–141824
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Kansas, NTIS Order No. PB89–141832
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Kentucky, NTIS Order No. PB89–141840
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Louisiana, NTIS Order No. PB89–141857
Paper Copy, #A03, Price $10.95
Microfiche, #A01, Price $6.95

Massachusetts, NTIS Order No. PB89–141865
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Maryland, NTIS Order No. PB89–141873
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Maine, NTIS Order No. PB89–141881
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Michigan, NTIS Order No. PB89–141899
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Minnesota, NTIS Order No. PB89–141907
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Missouri, NTIS Order No. PB89–141915
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Mississippi, NTIS Order No. PB89–141923
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Montana, NTIS Order No. PB89–141931
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

North Carolina, NTIS Order No. PB89–141949
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

North Dakota, NTIS Order No. PB89–141956
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Nebraska, NTIS Order No. PB89–141964
Paper Copy, #A03, Price $13.95
Microfiche. #A01, Price $6.95

New Hampshire, NTIS Order No. PB89–141972
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

New Jersey, NTIS Order No. PB89–141980
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

New Mexico, NTIS Order No. PB89–141998
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Nevada, NTIS Order No. PB89–142004
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

New York, NTIS Order No. PB89–142012
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Ohio, NTIS Order No. PB89–142020
Paper Copy, #A03, Price $13.95
Microfiche. #A01, Price $6.95

Oklahoma, NTIS Order No. PB89–142038
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Oregon, NTIS Order No. PB89–142046
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Pennsylvania, NTIS Order No. PB89–142053
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Puerto Rico, NTIS Order No. PB89–142061
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Rhode Island, NTIS Order No. PB89–142079
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

South Carolina, NTIS Order No. PB89–142087
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

South Dakota, NTIS Order No. PB89–142095
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Tennessee, NTIS Order No. PB89–142103
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Trust Territories, NTIS Order No. PB89–142111
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Texas, NTIS Order No. PB89–142129
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Utah, NTIS Order No. PB89–142137
Paper Copy, #A03, Price $13.95
Microfiche, #A01, Price $6.95

Virginia, NTIS Order No. PB89–142145
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Virgin Islands, NTIS Order No. PB89–142152
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Vermont, NTIS Order No. PB89–142160
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Washington, NTIS Order No. PB89–142178
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Wisconsin, NTIS Order No. PB89–142186
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

West Virginia, NTIS Order No. PB89–142194
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

Wyoming, NTIS Order No. PB89–142202
Paper Copy, #A02, Price $10.95
Microfiche, #A01, Price $6.95

This following document may be obtained only from the GPO:

12. Quality Criteria for Water, 1986. (Gold Book, includes updates 1 & 2). U.S.

Environmental Protection Agency. May 1987.

This document contains summaries of all contaminants for which EPA has developed criteria recommendations through 1987. Copies of this publication may be obtained from the U.S. Government Printing Office (GPO) at the address listed above. A fee of $23.00 is charged for the document. The GPO Order Number 955–002–00000–8.

Each document listed in this Notice may be obtained by written request from the specific addresses indicated above. When requesting publications, identify the documents by title along with the specific reference citation and order numbers and include the quantities desired. There may be a 4–6 week delay in filling some requests. Publications contained in this Notice are updated periodically. If updated versions are available at the time of the written request those documents will be provided.

Date: December 29, 1988.

William A. Whittington,

Acting Assistant Administrator for Water.

[FR Doc. 89–3391 Filed 2–13–89; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirements Submitted to Office of Management and Budget for Review

February 1, 1989.

The Federal Communications Commission has submitted the following information collection requirements to the Office of Management and Budget for review and clearance under the Paperwork Reduction Act, as amended (44 U.S.C. 3501 *et seq.).*

Copies of the submissions may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street NW., Suite 140, Washington, DC 20037. Persons wishing to comment on these information collections should contact Eyvette Flynn, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, (202) 395–3785. Copies of these comments should also be sent to the Commission. For further information contact Jerry Cowden, Federal Communications Commission, (202) 632–7513.

OMB Number: 3060–0291.

Title: Section 90.477, Interconnected systems.

Action: Extension.

Respondents: State or local governments, businesses (including small businesses), and non-profit institutions.

Frequency of Response: Recordkeeping requirement.

Estimated Annual Burden: 1,000 recordkeepers; 1,000 hours; 1 hour each.

Needs and Uses: Cost sharing records are required to ensure that interconnection by land mobile radio licensees to the public switched telephone network is on a non-profit cost sharing basis.

OMB Number: 3060–0281.

Title: Section 90.651, Supplemental reports required of licensees authorized under this subpart.

Action: Extension.

Respondents: State or local governments, businesses (including small businesses), and non-profit institutions.

Frequency of Response: Annually.

Estimated Annual Burden: 16,408 responses; 2,740 hours; 10 minutes each.

Needs and Uses: Licensees are required to report the actual number of mobile units served by each base station. This information is used by the Commission to prevent frequency hoarding.

OMB Number: 3060–0284.

Title: Section 94.25 (f), (g), & (i)—Filing of applications.

Action: Extension.

Respondents: State or local governments, businesses (including small businesses), and non-profit institutions.

Frequency of Response: On occasion.

Estimated Annual Burden: 25 responses; 13 hours; 30 minutes each.

Needs and Uses: Rule requires applicants proposing to locate transmitters near certain sensitive federal radio receiving sites to notify these facilities to protect them from interference.

OMB Number: 3060–0300.

Title: Section 94.107, Posting of station authorization and transmitter identification cards, plates, or signs.

Action: Extension.

Respondents: State or local governments, businesses (including small businesses), and non-profit institutions.

Frequency of Response: Recordkeeping requirement.

Estimated Annual Burden: 12,140 recordkeepers; 17 hours; 5 seconds each.

Needs and Uses: Rule requires transmitter authorization to be posted or available at station location. It is used by field personnel to determine if the transmitter is operating in accordance with authorization.

OMB Number: 3060–0272.

Title: Section 94.31, Supplemental information to be submitted with application.

Action: Revision.

Respondents: State or local governments, businesses (including small businesses), and non-profit institutions.

Frequency of Response: On occasion.

Estimated Annual Burden: 4,300 responses; 8,600 hours; 2 hours each.

Needs and Uses: This rule stipulates supplemental information required by the Commission before it can grant a microwave authorization. Information is required to ensure specified operations on designated frequencies.

OMB Number: 3060–0206.

Title: Part 21, Domestic Public Fixed Radio Services (§§ 21.201, 21.307, 21.406, 21.708, 21.808).

Action: Revision.

Respondents: Businesses (including small businesses).

Frequency of Response: Recordkeeping and on occasion reporting.

Estimated Annual Burden: 2,272 responses; 100 recordkeepers; 1,200 hours; 30 minutes each (average).

Needs and Uses: This information is used by the Commission, other licensees of the spectrum, and the public to ensure that Part 21 licensees are operating within the parameters of their authorizations and Commission rules. The information is also used by the Commission to ensure that the stations are properly maintained.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89–3381 Filed 2–13–89; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL RESERVE SYSTEM

Northern New York Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for

processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than March 8, 1989.

A. **Federal Reserve Bank of New York** (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. *Northern New York Bancorp, Inc.,* Alexandria Bay, New York; to become a bank holding company by acquiring 100 percent of the voting shares of The Redwood National Bank, Alexandria Bay, New York.

B. **Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Community Financial Bancorp, Inc.,* Maysville, Kentucky; to become a bank holding company by acquiring 100 percent of the voting shares of Farmers State Bank, Warsaw, Kentucky.

Board of Governors of the Federal Reserve System, February 8, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89–3378 Filed 2–13–89; 8:45 am]

BILLING CODE 6210-01-M

Philip L. Pankonin; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 28, 1989.

A. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Philip L. Pankonin,* Louisville, Nebraska; to acquire an additional 10.67 percent of the voting shares of Louisville Company, Louisville, Nebraska, and thereby indirectly acquire Home State Bank, Louisville, Nebraska.

B. **Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *Windsor Association, Inc.,* Dallas, Texas; to acquire 10.18 percent of the voting shares of Fidelity Resources Company, Dallas, Texas, and thereby indirectly acquire Fidelity National Bank.

2. *Joe M. Bennatte,* Hempstead, Texas; to acquire 50 percent; David Swalm, Houston, Texas, to acquire 20 percent; David Swalm, Jr., Houston, Texas, to acquire 10 percent; John Shelton, Houston, Texas, to acquire 10 percent; and Ronald Woliver, Houston, Texas, to acquire 10 percent of the voting shares of Community Bank, Katy, Texas.

Board of Governors of the Federal Reserve System, February 8, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89–3379 Filed 2–13–89; 8:45 am]

BILLING CODE 6210-01-M

Societe Generale, et al.; Applications To Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo,* either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 3, 1989.

A. **Federal Reserve Bank of New York** (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. *Societe Generale,* Paris, France; to engage *de novo* through its subsidiary Fimat Futures USA, Inc., Chicago, Illinois, in the execution of futures contracts and options on futures contracts for non-affiliated companies on or subject to the rules of any contract market pursuant to § 225.25(b)(18) of the Board's Regulation Y. Comments on this application must be received by February 28, 1989.

B. **Federal Reserve Bank of Chicago** (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Citizens Banking Corporation,* Flint, Michigan; to engage *de novo* through its subsidiary, Citizens Commercial Leasing Corporation, Flint, Michigan, in leasing personal property or acting as an agent or broker with respect to leasing personal property pursuant to § 225.25(b)(5) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, February 8, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89–3380 Filed 2–13–89; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration

Meeting; Advisory Committee: March

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

NOTICE: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of the forthcoming meetings of the agency's initial review committees in the month of March 1989. these committees will be performing initial review of applications for Federal assistance. Therefore, portions of the meetings 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 this meeting is required under the Federal Advisory Committee Act, Pub. L. 92–463.

Committee Name: Biological and Neurosciences Subcommittee of the Mental Health Small Grant Review Committee, NIMH.

Date and Time: March 2–3: 9:00 a.m.

Place: The Omni Shoreham Hotel, 2500 Calvert Street, NW., Washington, DC 20008.

Status of Meeting: Open—March 2: 9:00–10:00 a.m.; Closed—Otherwise.

Contact: Monica Woodfork, Room 9C–05, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–4843.

Purpose: The Committee is charged with the initial review of applications for research in all disciplines pertaining to alcohol, drug abuse, and mental health for support of research in the areas of psychology, psychiatry, and the behavioral and biological sciences.

Committee Name: Clinical and Behavioral Sciences Subcommittee of the Mental Health Small Grant Review Committee, NIMH.

Date and Time: March 2–3: 9:30 a.m.

Place: The Omni Shoreham Hotel, 2500 Calvert Street, NW., Washington, DC 20008.

Status of Meeting: Open—March 2–3: 9:00–10:00 a.m.; Closed—Otherwise.

Contact: Kimberly Crown, Room 9C–05, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–4843.

Purpose:. The Committee is charged with the initial review of applications for research in all disciplines pertaining to alcohol, drug abuse, and mental health for support of research in the areas of psychology, psychiatry, and the behavioral and biological sciences.

Committee Name: Services Subcommittee of the Epidemiologic and Services Research Review Committee, NIMH.

Date and Time: March 8–10: 9:00 a.m.

Place: Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Status of Meeting: Open—March 8: 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 Committee 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.

Committee Name: Biobehavioral/ Clinical Subcommittee of the Drug Abuse AIDS Research Review Committee, NIDA.

Date and Time: March 14–16: 9:00 a.m.

Place: Georgetown I & II, Congressional Park-Days Inn, 1750 Rockville Pike, Rockville, MD 20852.

Status of Meeting: Open—March 14: 9:00–9:30 a.m; Closed—Otherwise.

Contact: Iris O'Brien, Room 10–42, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–2620.

Purpose: The Committee is charged with the initial review of applications for assistance from the National Institute on Drug Abuse for support of research and research training activities, and makes recommendations to the National Advisory Council on Drug Abuse for final review.

Committee Name: Sociobehavioral Research Subcommittee of the Drug Abuse AIDS Research Review Committee, NIDA.

Date and Time: March 14–16: 9:00 a.m.

Place: Montrose I & II, Days Inn, Congressional Park 1775 Rockville Pike, Rockville, MD 20852.

Status of Meeting: Open—March 14: 9:00–9:30 a.m.; Closed—Otherwise.

Contact: H. Noble Jones, Room 10–42, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–2620.

Purpose: The Committee is charged with the initial review of applications for assistance from the National Institute on Drug Abuse for support of research and research training activities, and makes recommendations to the National Advisory Council on Drug Abuse for final review.

Committee Name: Mental Health Acquired Immunodeficiency Syndrome Research Review Committee, NIMH.

Date and Time: March 30–April 2: 8:30 a.m.

Place: Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Status of Meeting: Open—March 30: 8:30–9:30 a.m.; Closed—Otherwise.

Contact: Irma Fisher, Room 9C–15, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–6470.

Purpose: The Committee is charged with the initial review of applications for assistance from the National Institute of Mental Health for support of activities in the fields of research and research training activities in the areas of psychoneuroimmunological, psychosocial, behavioral, and psychological aspects of AIDS as they relate to mental health, with recommendations to the National Advisory Mental Health Council for final review.

Substantive information, summaries of meetings, and rosters of committee members may be obtained as follows: Ms. Camilla Holland, NIDA Committee Management Officer, Room 10–42, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–2620: Ms. Joanna Kieffer, NIMH Committee Management Officer, Room 9–105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–4333.

Date: February 9, 1989.

Peggy W. Cockrill,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 89–3431 Filed 2–13–89; 8:45 am]

BILLING CODE 4160–20–M

Centers for Disease Control

[Announcement No. 914]

Centers for Disease Control; Immunization Demonstration Projects

Introduction

The Centers for Disease Control (CDC) announces the availability of funds for Fiscal Year 1989 for cooperative agreements for: (1) Assessment Projects to develop methods/strategies to effectively assess immunization protection in the general preschool-age population (birth up to entry into school) at the State or county level; and (2) Intervention Projects to develop innovative ways to successfully identify and vaccinate preschool-age (birth up to entry into school) children living in inner-city, high disease morbidity areas.

Authority

This program is authorized under section 317(k)(1) of the Public Health Service Act (42 U.S.C. 247b(k)(3)), as amended.

Eligible Applicants

Eligible applicants for this program are the official public health agencies of State and local governments, including

the District of Columbia, American Samoa, the Commonwealth of Puerto Rico, the Federated States of Micronesia, Guam, the Marshall Islands, the Northern Mariana Islands, Palau, and the Virgin Islands, and other public and nonprofit private entities. Applicants for both *Assessment Projects* and *Intervention Projects* must have access to public and private provider immunization records for the pre-school age population from which a statistically valid sample (95% confidence level with plus or minus 5% reliability) can be obtained so that results are transferable to other areas. In addition, in order to be eligible for the *Intervention Projects*, applicants must meet the above criteria and have existing immunization clinics that serve the inner-city population in order to be responsive to the needs of this project.

Availability of Funds

Approximately $1,000,000 will be available in Fiscal Year 1989 to fund up to 9 cooperative agreements. Depending on the number and quality of applications received and approved, approximately 5 *Assessment Projects* and 4 *Intervention Projects* will be supported. Average awards are expected to be $110,000 with individual cooperative agreements ranging from $50,000 to $250,000. It is expected that the cooperative agreement will begin on or about July 1, 1989 for a 12-month budget period within a 1–3 year project period. Funding estimates outlined above are subject to change.

There are no matching or cost participation requirements. However, the applicant's contribution to the overall program costs, if any, should be provided in the application.

Purpose

The purposes of this program are to investigate new means of assessing vaccine coverage among preschool-age children at the State or county level and to deliver vaccines to the preschool-age population in inner-city, high diseases morbidity areas.

Demonstrations should focus on new and innovative ways to improve the core capacity of State, local, and private health agencies to assess vaccination protection levels and to deliver vaccinations to the target populations in the most cost-efficient manner.

Measuring patient knowledge and attitudes about the risks/benefits of immunization and reasons their children are not immunized is not the primary focus of these demonstration projects.

Progam Requirements

Recipient Activities

1. Assessment Project

A. Develop cost-effective methods/strategies for accurately assessing, at the State or county level, the percent of the preschool-age population, vaccinated against diphtheria, tetanus, pertussia, polio, measles, mumps, rubella, and haemophilus influenza b. Children receiving vaccinations from both the public and private sectors should be included in the assessment. The assessment strategies developed should include and describe survey type (prospective versus retrospective), frequency (annual versus bi-annual), source of information (e.g., day care center records, school enterer records, clinic records, or questionnaires), standards for assessment (dose and antigen specific), minimum number of records to be assessed for statistical validity, and sampling procedures.

B. Demonstrate that the measured immunization levels are valid. Validation could include verifying existing parent or school records with the providers of the vaccinations or by selected serosurvey. Proposals to conduct serosurveys other than to verify accuracy of record assessment data will not be considered for funding.

C. Develop methods and strategies which are financially feasible, cost effective, and universally applicable for any State or local health department use.

Projects funded through a cooperative agreement that involve collection of information from 10 or more individuals will be subject to review under the Paperwork Reduction Act.

2. Intervention Projects

Develop methods/strategies to successfully identify and vaccinate preschool-age children in inner-city high disease morbidity areas. The strategies should be applicable to the preschool-age inner-city populations anywhere in the country. Strategies should include, but are not limited to:

A. Intensifying educational in-service training for public health immunization clinic staff and other health professionals in the private sector responsible for delivery of vaccinations. Educational efforts should focus on ways to minimize missed opportunities for vaccinating because of failure to follow the United States Public Health Service Immunization Practices Advisory Committee (ACIP) recommendations. Examples of failure to follow these recommendations include: not administering diphtheria/tetanus/pertussis (DTP), oral polio (OPV), and measles/mumps/rubella (MMR) vaccines simultaneously when appropriate; deferring immunizations for reasons that are not medical contraindications, i.e., afebrile upper respiratory illness, or recent use of antibiotics, or excessively restrictive intervals between doses, or pregnant household members.

B. Increasing opportunities for immunization by (1) integrating immunization services with other health department services, such as Women, Infants and Children (WIC) or family planning clinics, and (2) screening immunization records and offering vaccinations during any health department or physician encounter should contribute to higher vaccination protection. Traditionally, vaccinations are not offered except at well-baby or scheduled immunization clinics. Plans to implement policy and procedural changes necessary to integrate immunization services with other public health programs and make any other changes needed in the immunization clinic delivery system to effectively identify and vaccinate the preschool-age population are encouraged.

C. Removing unnecessary barriers to immunization, such as inflexible, inconvenient, infrequent, inadequate clinic hours, pre-vaccination temperature screening, or requiring a physician examination prior to vaccination.

D. Developing special educational efforts for the parent(s) of the preschool child during the first visit to the health care provider. These efforts should stress the need for the parent(s) to return at the appropriate intervals so their child can receive all recommended vaccine doses by age two.

E. Conducting special outreach efforts to identify inadequately vaccinated children and motivate parents to return to the health provider to complete their child's vaccinations. Such efforts might include reminder telephone calls or postcards and calls or postcards to families missing appointments.

F. Evaluating the impact and cost of the various intervention strategies for increasing the percent of preschool-age children receiving the recommended vaccines and required doses appropriate for their age. Evaluation of interventions will require the assessment of the percent of preschool-age children age-appropriately vaccinated prior to the interventions and the resulting percent of preschool-age children age-appropriately vaccinated as a result of the interventions. Evaluation should include, but is not restricted to,

measuring the corresponding changes when:

(1) ACIP recommendations are followed;

(2) Missed opportunities are eliminated by better integration of health department services;

(3) Unnecessary barriers are removed;

(4) Parents are given special educational motivational information during their first visit; and,

(5) Special outreach efforts are carried out.

Centers for Disease Control Activities

1. Provide consultation and technical assistance in planning, operating, and evaluating activities designed to reach the target populations.

2. Provide current scientific information regarding known strategies for improving immunization levels and measuring impact among the inner-city preschool-age population.

3. Provide assistance in data management/analysis.

4. Transfer intervention and assessment methods and techniques developed in this program to other States and communities when appropriate.

Evaluation Criteria

Applications will be evaluated on an individual basis according to the criteria below:

1. New Applications

A. Assessment Projects

(1) The applicant's understanding of the purpose of the program and the appropriateness and feasibility of the project and the potential for positive impact of the project on meeting the stated goals of the program. (10 points)

(2) The extent to which background information and other data demonstrate that the applicant has the appropriate organizational structure, administrative support, accessibility to an adequate number of immunization records of the target population to produce statistically valid results, and the ability to accomplish project goals. (10 points)

(3) The degree to which long- and short-term objectives are consistent with the purpose of the demonstration project and are realistic, specific, measurable, and time-phased. (10 points)

(4) The quality of the plan of operation for conducting and monitoring proposed activities and the degree to which the plan covers each proposed assessment activity oulined under "Recipient Activities" and specifies the what, who, where, how, and the timing for start and completion of each. (25 points)

(5) The quality of the immunization record validation strategies to verify that data obtained are accurate. (10 points)

(6) The degree to which the evaluation plan will be able to measure achievement of each objective and the quality of the methods and instruments to be used. (10 points)

(7) The extent to which methods and strategies proposed are financially feasible and transferable to other States or counties. (15 points)

(8) The extent to which qualified and experienced personnel are available to carry out the proposed activities of the project. (10 points)

B. Intervention Projects

(1) The applicant's understanding of the purpose of the program and the appropriateness and feasibility of the project and the potential for positive impact of the project on meeting the stated goals of the program. (10 points)

(2) The extent to which background information and other data demonstrate that the applicant has the appropriate organizational structure, administrative support, accessibility to an adequate number of immunization clinics and clinic records of the target population in both the demonstration site(s) and comparison site(s) to produce statistically valid results, and the ability to accomplish project goals. (10 points)

(3) The degree to which long- and short-term objectives are consistent with the purpose of the demonstration project and are realistic, specific, measurable, and time-phased. (10 points)

(4) The quality of the plan of operation for conducting and monitoring proposed activities and the degree to which the plan covers each proposed intervention activity outlined under "Recipient Activities" and specifies the what, who, where, how, and the timing for start and completion of each. (25 points)

(5) The quality of the immunization record validation strategies to verify that data obtained are accurate. (5 points)

(6) The degree to which the evaluation plan will be able to measure success and costs of the various intervention strategies to increase the percent of preschool-age children receiving the recommended vaccines and required doses appropriate for their age, and specifies the methods and instruments to be used. (10 points)

(7) The extent to which methods and strategies proposed are financially feasible and transferable to other inner-city preschool-age populations. (10 points)

(8) The extent to which qualified and experienced personnel are available to carry out the proposed activities of the project. (10 points)

(9) The ability of the applicant to make policy and procedural changes necessary to integrate immunization services with other public health programs and make other changes needed in the immunization clinic delivery system to effectively identify and vaccinate the inner-city preschool-age population. (10 points)

In addition, consideration will be given to the extent to which the budget request and proposed use of project funds are appropriate and reasonable.

2. Continuation Awards

Continuation awards within an approved project period will be made on the basis of availability of funds and documented progress toward the achievement of established short- and long-range objectives; the extent to which objectives for the new budget period are consistent with the purposes for which the cooperative agreement was originally approved; are realistic, specific, measurable, and time-phased; and the extent to which proposed changes in the need for support, long-term objectives, methods of operation, evaluation plans or personnel are likely to enhance the success of the project. In addition, consideration will be given to the extent to which the budget request and proposed use of project funds are appropriate and reasonable.

E.O. 12372 Review

Applications are subject to review as governed by Executive order 12372, Intergovernmental Review of Federal Programs.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number is 13.283.

Application Submission and Deadline

Applicants may submit more than one application under this announcement. Each application, however, must be complete as it will be evaluated separately without reference to any other application.

The original and two copies of the application (PHS Form 5161–1) must be submitted to Nancy C. Bridger, Grants Management Officer, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control, 255 East Paces Ferry Road, NE., Room 300, Atlanta, GA 30305, on or before *April 14, 1989.*

1. Deadline: Applications shall be considered as meeting the deadline if they are either: A. Received on or before the deadline date; or, B. Sent on or before the deadline date and received in time for submission to the independent review group. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be accepted as proof of timely mailing.)

2. Late Applications: Applications which do not meet the criteria in 1.A. or B. above are considered late applications. Late applications will not be considered in the current competition and will be returned to the applicant.

Where To Obtain Additional Information

A complete program description, information on application procedures and application package may be obtained from Anne Foglesong, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, 255 East Paces Ferry Road, NE., Room 300, Atlanta, GA 30305 (404) 842-6640 or FTS 236-6640.

Please refer to Announcement Number 914 when requesting information and submitting any application on the RFA.

Technical assistance may be obtained from Roger Bernier, Ph.D., Division of Immunization, Center for Prevention Services, Centers for Disease Control, Atlanta, GA 30333, (404) 639-1864 or FTS 236-1864.

Dated: February 8, 1989.

Robert L. Foster,

Acting Director, Office of Program Support, Centers for Disease Control.

[FR Doc. 89-3409 Filed 2-13-89; 8:45 am]

BILLING CODE 4160-18-M

Food and Drug Administration

Fenbendazole for Use in Rocky Mountain Bighorn Sheep; Availability of Data

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of target animal safety and effectiveness and environmental data to be used in support of a new animal drug application (NADA) or supplemental NADA for use of fenbendazole in Type C feed for Rocky Mountain bighorn sheep. The data, contained in Public Master File (PMF) 5071, were compiled under Interregional Research Project No. 4 (IR-4), a national agriculture program for obtaining clearances for use of agricultural products for minor or special uses.

ADDRESS: Submit NADA's to the Document Control Section (HFV-16), Center for Veterinary Medicine, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Dianne T. McRae, Center for Veterinary Medicine (HFV-135), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4913.

SUPPLEMENTARY INFORMATION: Fenbendazole, when used in sheep feed, is a new animal drug under section 201(w) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321(w)). As a new animal drug, fenbendazole is subject to section 512 of the act (21 U.S.C. 360b). Therefore, its uses in sheep must be covered by an approved NADA or supplemental NADA. IR-4, Rutgers University, Cook College, New Brunswick, NJ 08903, has provided data and information to demonstrate effectiveness and safety to the target animal for use of fenbendazole in Type C feed for treatment and control of lungworms (*Protostrongylus* spp.) in Rocky Mountain bighorn sheep (*Ovis canadensis canadensis*).

IR-4 also provided an environmental assessment of possible impacts at the site of use of the animal drug product.

The data and information submitted by IR-4 are contained in PMF 5071. Sponsors of NADA's or supplemental NADA's may, without further authorization, reference the PMF to support approval. An NADA or supplemental NADA should include, in addition to a reference to the PMF (and any necessary, authorized reference to data in previously approved NADA's), drug labeling, and other information needed for approval, such as data concerning manufacturing methods, facilities and controls, and information addressing the potential environmental impacts of the manufacturing process. More information concerning the PMF or requirements for approval of an NADA may be obtained from the contact person (address above).

In accordance with the freedom of information provisions of Part 20 (21 CFR Part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii)), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, from 9 a.m. to 4 p.m., Monday through Friday.

Dated: February 7, 1989.

Richard H. Teske,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. 89-3385 Filed 2-13-89; 8:45 am]

BILLING CODE 4160-01-M

Health Resources and Services Administration

Acquired Immune Deficiency Syndrome; Service Demonstration Program Grants

AGENCY: Health Resources and Services Administration, PHS, DHHS.

ACTION: Notice of availability of funds.

SUMMARY: The Bureau of Material and Child Health and Resources Development (BMCHRD), Health Resources and Services Administration (HRSA), announces that Fiscal Year (FY) 1980 funds are available for Service Demonstration Program grants to develop projects demonstrating a comprehensive, cost effective, ambulatory and community-based health care and support system for persons with Acquired Immune Deficiency Syndrome (AIDS) and other Human Immunodeficiency Virus (HIV) related conditions. Applicants will be expected to demonstrate a thorough understanding of the AIDS/HIV epidemic as it affects their community, the need and demand for services, and a realistic and comprehensive plan for a service delivery system which builds upon existing community health resources. The planned service delivery system should be structured on a continuum of care model such that appropriate services are available to an HIV-infected individual as these are required.

Applicants from the Standard Metropolitan Statistical Areas (SMSAs) with a cumulative total of 400 or more AIDs cases as reported by the Centers for Disease Control as of September 12, 1988 are eligible to compete for new and renewal grants (see Appendix A).

Funds were appropriated by Pub. L. 100-436 for this purpose under the authority of section 301 of the Public Health Service (PHS) Act (42 U.S.C. 241).

DATE: To receive consideration, grant application must be received by the Grants Management Officer by April 17, 1989. Applications shall be considered as meeting the deadline if they are either (1) received on or before the deadline date; or (2) postmarked on or

before the deadline date and received in time for submission to the review committee. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be accepted as proof of timely mailing. Applicants which do not meet the deadline will be considered late applications and will be returned to the applicant.

FOR FURTHER INFORMATION CONTACT: Requests for technical or programmatic information should be directed to Mr. George Ersek, Project Office, AIDs Services Branch, BMCHRD, Parklawn Building, Room 9A–05, 5600 Fishers Lane, Rockville, Maryland 20857 (301 443–0652). Grant applicants (Form PHS 5161–1 with revised face sheet HHS Form 424 approved under OMB Number 0348–0006), accompanying guidance materials, and additional information regarding business administration or fiscal issues related to the awarding of grants under this notice may be requeted from Ms. Glenna Wilcom, Grants Management Specialist, BMCHRD, Parklawn Building, Room 11A–18, 5600 Fishers Lane, Rockville, Maryland 20857 (301 443–1440). The original and two copies of the application must be submitted to Ms. Wilcom.

SUPPLEMENTARY INFORMATION:

Program Objectives.

The AIDS Service Demonstration Program is intended to support the development and demonstration of community-based systems of care which provide the spectrum of needed services for people with HIV infection and its complications, and provide appropriate alternatives to inpatient hospital care. Such systems must be developed in response to a careful assessment of the community's needs and must assure the coordination of the community's health care resources. Applicants should propose innovative, cost effective means of providing services, and should develop specific strategies to reduce the need for inpatient hospital care and to link together community health resources. For purposes of the grant, consideration must be given to the needs and resources of the entire community, defined as the SMSA for which the application is submitted.

Since a disproportionately high number of persons with AIDs and HIV infection are from minority populations, particular attention should be placed on developing appropriate outreach and culturally-sensitive case management strategies, as well as arranging for services so that cultural and language differences are adequately addressed. Additionally, specific AIDs education outreach and counseling programs must be directed toward intravenous drug users and their sexual partners, and accessible services for infected women and their children need to be identified and linked to other community services.

Because of the demonstration nature of the program, emphasis should be placed on how the program can operate when Federal funding is no longer available and on how the proposed project might serve as a model for other communities with significant numbers of persons with AIDs and other HIV-related conditions.

Technical Assistance

The Division of AIDs Programs will conduct a Technical Assistance workshop to provide assistance in developing and/or competing a grant application for submission. The one-day workshop will be held March 21, 1989 in the Parklawn Building, 5600 Fishers Lane, Rockville, Maryland, starting at approximately 9:00 a.m. Please contact Ms. Janice Edmonds on 301 443–0652 for further details.

Availability of Funds

Approximately $14.0 million is available in FY 1989 for the AIDs Service Demonstration Program grants.

Both new and renewal grants will be competitively awarded. Renewal applicants are defined as those organizations which have previously been awarded HRSA AIDs Service Demonstration grants and whose original budget and project periods expire on September 30, 1989. It should be noted that not only will the renewal applications be awarded on a competitive basis but that new applicant organizations from the same SMSAs are permitted to submit competing applications. These new applicants must demonstrate the ability to work within established coalitions that have been working successfully with previously HRSA-funded projects.

The budget and project periods for new and renewal grants will begin October 1, 1989. The budget and project period for all applicants will be for 2 to 3 years, i.e., funds awarded in FY 1989 may be expanded over the 2 to 3 year project period. This requires all applicants to submit a budget for each of the 2 to 3 years as well as a summary budget for the entire period. Not more than one grant award will be made in any one SMSA.

Pending the availability of funds, an announcement may appear in the **Federal Register** at a future date for current grantees in the following cities:

Phoenix, Arizona
San Diego, California
Santa Ana-Anaheim, California
Washington, DC
Palm Beach, Florida
Ft. Lauderdale, Florida
Atlanta, Georgia
Chicago, Illinois
New Orelans, Louisiana
Boston, Massachusetts
Newark, New Jersey
Nassau-Suffolk, New York
Philadelphia, Pennsylvania and Camden, New Jersey
San Juan, Puerto Rico
Dallas, Texas
Seattle, Washington

Eligible Applicants

Public and private entities, non-proft and for-profit, located in and providing services to the SMSAs listed in Appendix A are eligible to apply. Eligible entities may include, but not limited to State or local health departments; public or private hospitals; and consortia of health care and community organizations which can develop a comprehensive ambulatory community- and home-based AIDS support program offering appropriate and compassionate care at reduced costs.

Collaboration/Coordination with Other AIDS Programs

To the maximum extent possible, the grantees will be expected to work closely and coordinate their activities with the Robert Wood Johnson Foundation AIDS Health Services Program grantees; the Pediatric AIDS Health Care Demonstration Projects funded by HRSA; the AIDS Community Outreach Demonstration Projects supported by the National Institute of Drug Abuse; information, public education/prevention and testing programs supported by the Centers for Disease Control; the drug clinical trial studies and other research programs conducted by the National Institutes of Health; the Community Health Centers, funded under section 330, Migrant Health Centers funded under section 329, and Health Care for the Homeless Projects funded under section 340 of the PHS Act supported by HRSA; State Health Departments or other appropriate State-level representatives; and community-based AIDS service organizations.

Review and Evaluation Criteria for Applications

Applications for the new FY 1989 grants will be reviewed and rated by an objective review committee based on the applicant's demonstrating: The ability to coalesce broad-based

community support among appropriate agencies and programs and involve such agencies and programs from all of the cities and counties of the SMSAs listed on Appendix A. This application should indicate that the applicant has a thorough understanding of AIDS and the HIV epidemic; the need and demand for ambulatory and mental health, and community- and home-based services, including education and prevention services for individuals with high risk behaviors; and an indentification of gaps in the continuum of care. The applicant should further demonstrate the availability and accessibility of advocacy services for persons with HIV infection such that these individuals may avail themselves of existing Federal, State and local laws providing nondiscrimination protection and the experience and potential to provide treatment and support to the largest number of patients with AIDS and other HIV-related conditions within eligible SMSAs at the least cost. Current grantees applying to have their grant renewed must demonstrate and document their progress in achieving the above noted criteria. In addition, renewal applicants must provide a budgetary status report indicating the applicant's progress in obtaining other sources of funding for those activities and services previously suppported by HRSA funding under the Service Demonstration grant. Renewal applicants are expected to provide an evaluation of the effectiveness of each component of their current Service Demonstration project and indicate on a priority basis those components that require continued HRSA grant support. A renewal application must present an adequate needs assessment documenting continuing gap(s) in services in order to be considered acceptable.

All applicants must develop an implementation plan that includes a milestone chart or time schedule that shows the phase-in of each component of the delivery system and the expected completion dates of various project objectives over the course of the grant period. All sources of funding to support the organizations that will work with the grantee must be accurately reflected in the applicant's budget. Specific attention must be given to assuring comprehensiveness and appropriateness of services, and access to all segments of the affected population. Where appropriate, applicants from contiguous communities should undertake cooperative regional systems of care in order that duplication of services can be avoided. More detailed information on the review and evaluation criteria and how to prepare the application may be found in the grant application kit and technical assistance manual that will be mailed upon request.

Allowable Costs

The basis for determining the allowability and allocability of costs charged to PHS grants is set forth in 45 CFR Part 74, Subpart Q and 45 CFR Part 92 for State and local governments. These regulations implement the five separate sets of cost principles prescribed for grant recipients, which are: OMB Circular A–87 for State and local governments; OMB Circular A–21 for institutions of higher education; 45 CFR Part 74, Appendix E for hospitals; OMB Circular A–122 for nonprofit organizations; and 48 CFR Chapter 1, Subpart 31.2 for for-profit (commercial) organizations.

Other Award Information

A successful applicant under this notice will submit reports in accordance with the provisions of the general regulations which apply under 45 CFR Part 74, Subpart J, Monitoring and Reporting of Program Performance and Part 92.40 which applies to State and local governments.

Executive Order 12372

The AIDS Service Demonstration Program has been determined to be a program which is subject to the provisions of Executive Order 12372 concerning intragovernmental review of Federal programs, as implemented by 45 CFR Part 100. Executive Order 12372 allows States the option of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. The application package under this notice will contain a listing of States which have chosen to set up such a review and will provide a point of contact in the States for the review. Applicants should promptly contact their State single point of contact (SPOC) and follow their instructions prior to the submission of an application. The SPOC has 60 days after the application deadline date to submit its review comments.

The OMB Catalog of Federal Domestic Assistance number for the AIDS Service Demonstration Program is 13.133.

Date. December 28, 1988.

John H. Kelso,

Acting Administrator.

Appendix A

CITIES ELIGIBLE FOR NEW AND RENEWAL GRANTS: CUMULATIVE CASES OF AIDS REPORTED TO THE CENTERS FOR DISEASE CONTROL AS OF SEPTEMBER 12, 1988, FOR SMSAS WITH MORE THAN 400 CASES OF AIDS

Standard metropolitan statistical area	Cities and counties included in the SMSA	Cumulative cases
1. New York, NY–NJ (R).	NY; New York City—Bronx County, Kings County, New York County, Putnam County, Queens County, Richmond County, Rockland County, Westchester County.	16,151
	NJ; Bergen County...	
2. San Francisco-Oakland, CA (R).	San Francisco City, Oakland City—Alameda County, Contra Costa County, Marin County, San Francisco County, San Mateo County.	6,082
3. Los Angeles-Long Beach, CA (R).	Los Angeles City, Long Beach City—Los Angeles County..	5,461
4. Houston, TX (N)...	Houston City—Brazoria County, Fort Bend County, Harris County, Liberty County, Montgomery County, Waller County.	2,299
5. Miami, FL (R).....	Miami City—Dade County.	1,823
6. Jersey City, NJ (N).	Jersey City City—Hudson County.	933
7. Baltimore, MD (N).	Baltimore City—Anne Arundel County, Baltimore County, Carroll County, Harford County, Howard County.	648
8. Denver-Boulder, CO (N).	Boulder City; Denver City—Adams County.	634
9. Tampa-St. Petersburg (N).	St. Petersburg City—Hillsborough County, Pasco County, Pinellas County.	605

CITIES ELIGIBLE FOR NEW AND RENEWAL GRANTS: CUMULATIVE CASES OF AIDS REPORTED TO THE CENTERS FOR DISEASE CONTROL AS OF SEPTEMBER 12, 1988, FOR SMSAS WITH MORE THAN 400 CASES OF AIDS—Continued

Standard metropolitan statistical area	Cities and counties included in the SMSA	Cumulative cases
10. Detroit, MI (N)	Detroit City—Lapeer County, Livingston County, Macomb County, Oakland County, St. Clair County, Wayne County.	557
11. Riverside-San Bernardino-Ontario (N).	Ontario City; Riverside City; San Bernardino City—Riverside County, San Bernardino County.	428
12. Paterson-Clifton-Passaic, NJ (N).	Passaic City; Paterson City—Passaic County.	424

R=Renewal.
N=New.

[FR Doc. 89-3433 Filed 2-13-89; 8:45 am]
BILLING CODE 4160-15-M

Program Announcement, Proposed Review Criteria and Funding Priority for Grants for Two-Year Programs of Schools of Medicine or Osteopathy

The Health Resources and Services Administration announces that applications for Fiscal Year 1989 Grants for Two-Year Programs of Schools of Medicine or Osteopathy are now being accepted under the authority of section 788(a), Public Health Service Act and section 631 of Pub. L. 100-607. Comments are invited on the proposed review criteria and proposed funding priority listed below.

Section 788(a) authorizes the award of grants to maintain and improve schools which provide the first or last two years of education leading to the degree of doctor of medicine or osteopathy. Grants provided under this authority to schools that were in existence on September 30, 1985, may also request support for construction and purchase of equipment.

To be eligible for a grant under this authority, the applicant must be a public or nonprofit private school providing the first or last two years of education leading to the degree of doctor of medicine or osteopathy and be accredited or be operated jointly with a school that is accredited by a recognized body or bodies approved for such purpose by the Secretary of Education.

Approximately $460,000 is being made available for new awards for Fiscal Year 1989. It is estimated that 2-3 projects averaging $153,000 will be supported.

Proposed Review Criteria

Approval of all applications will be based on an analysis of the following factors:

(1) The extent to which the project meets the intent of section 788(a) legislation;

(2) The administrative and management ability of the applicant to carry out grant supported objectives in a cost effective manner;

(3) The adequacy of the qualifications and experience of the staff and faculty;

(4) The relative effectiveness of the proposed project in improving the quality of and/or access to medical education; and

(5) The extent to which the project is effective in its recruitment and retention of minority and disadvantaged students.

In addition, the following mechanisms may be applied in determining the funding of approved applications:

1. Funding preferences—funding of a specific category or group of approved applications ahead of other categories or groups of applications, such as competing continuations ahead of new projects.

2. Funding priorities—favorable adjustment of review scores when applications meet specified objective criteria.

3. Special consideration—enhancement of priority scores by merit reviewers based on the extent to which applications address special areas of concern.

Proposed Funding Priority

For FY 1989 in determining the order of funding of approved applications, it is proposed to give priority to: Projects which satisfactorily demonstrate a net increase in enrollment of underrepresented minorities in proportion or more to their numbers in the general population or can document extent to which applicant attracts, retains, and assures program completion of underrepresented minorities (i.e., Black, Hispanic, and American Indian, Alaskan Native minority trainees). These population groups continue to be underrepresented in the medical profession and have insufficient access to primary medical care. Their representation should be increased to ensure equitable opportunities to a career in medicine and equal access to health care services. Studies show that minority physicians provide a greater proportion of health care for medically underserved populations than other United States physicians. Therefore, this funding priority is designed to increase the number of underrepresented minority physicians.

Interested persons are invited to comment on the proposed review criteria and funding priority. Normally, the comment period would be 60 days. However, due to the need to implement any changes for the Fiscal Year 1989 award cycle, this comment period has been reduced to 30 days. All comments received on or before March 16, 1989 will be considered before the final review criteria and funding priority are established. No funds will be allocated or final selections made until a final notice is published stating whether the final review criteria and funding priority will be applied.

Written comments should be addressed to:

Director, Division of Medicine, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 4C-25, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443-6190.

All comments received will be available for public inspection and copying at the Division of Medicine, Bureau of Health Professions, at the above address weekdays (Federal holidays excepted) between the hours 8:30 a.m. and 5:00 p.m.

The application deadline is March 31, 1989. Applications shall be considered as meeting the deadline if they are either:

1. *Received on* or before the deadline date, or

2. *Postmarked on* or before the deadline and received in time for submission to the independent review group. A legibly dated receipt from a commercial carrier or the U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be acceptable as proof of timely mailing.

Applications received after the deadline will be returned to the applicant. Requests for application materials, questions regarding grants policy and completed applications should be directed to:

Grants Management Officer (D-31), Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8C-22, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443-6960.

Should additional programmatic information be required, please contact:

Primary Care Medical Education Branch, Division of Medicine, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 4C–18, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–3614.

The standard application form PHS 6025–1, HRSA Competing Traning Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915–0060.

This program is listed at 13.149 in the Catalog of Federal Domestic Assistance. Applications submitted in response to this announcement that request construction assistance are subject to the intergovernmental review under provisions of Executive Order 12372, as supplemented by 42 CFR Part 100, Intergovernmental Review of Federal Programs. Applications submitted for program support only are not subject to intergovernmental review under these provisions.

Dated: January 19, 1989.

John H. Kelso,

Acting Administrator.

[FR Doc. 89–3432 Filed 2–13–89; 8:45 am]

BILLING CODE 4160–15–M

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Meeting

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of Meeting.

SUMMARY: Notice is hereby given that the Advisory Council on Historic Preservation will meet on Tuesday, February 28, 1989. The meeting will be held in the Renaissance Room at the Le Pavillon Hotel, 833 Poydras Street, New Orleans, Louisiana, beginning at 8:30 a.m.

The Council was established by the National Historic Preservation Act of 1966 (16 U.S.C. 470) to advise the President and the Congress on matters relating to historic preservation and to comment upon Federal, federally assisted, and federally licensed undertakings having an effect upon properties listed in or eligible for inclusion in the National Register of Historic Places. The Council's members are the Architect of the Capitol; the Secretaries of the Interior, Agriculture, Housing and Urban Development, Treasury, and Transportation; the Director, Office of Administration; the Chairman of the National Trust for Historic Preservation; the Chairman of the National Conference of State Historic Preservation Officers; a Governor; a Mayor; and eight non-Federal members appointed by the President.

The agenda for the meeting includes the following:

I. Chairman's Welcome
II. Council Business
III. Exeuctive Director's Report
IV. Section 106 Cases
V. Adjourn

Note.—The meetings of the Council are open to the public. If you need special accommodations due to a disability, please contact the Advisory Council on Historic Preservation, 1100 Pennsylvania Ave., NW., Room 809, Washington, DC, 202–786–0503, at least seven (7) days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the meeting is available from the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Ave., NW., No. 809, Washington, DC 20004.

Robert D. Bush,

Executive Director.

Date: February 8, 1989.

[FR Doc. 89–3435 Filed 2–13–89; 8:45 am]

BILLING CODE 4310–10–M

Programmatic Agreement Regarding the Ground Wave Emergency Network Final Operational Capability

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of Proposed Programmatic Agreement.

SUMMARY: The Advisory Council on Historic Preservation proposes to execute a Programmatic Agreement (PA) pursuant to section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and § 800.13 of its regulations (36 CFR Part 800) with the U.S. Air Force and the National Conference of State Historic Preservation Officers, providing for the identification and treatment of historic properties subject to effect by the proposed Ground Wave Emergency Network Final Operational Capability (GWEN FOC). Public comments are invited on the likely effects of GWEN FOC on historic properties (properties included in or eligible for inclusion in the National Register of Historic Places), and on effective ways to identify and avoid or mitigate such effects. The Council has been provided with the Environmental Impact Statement (EIS) on GWEN FOC, in which a PA is proposed; the Council has also been provided with copies of public comments obtained by the Air Force during development of the EIS. While all comments will be considered, it is requested that responses to this notice not duplicate comments provided in the EIS, and they be limited to the content of the proposed PA, that is, to the identification and treatment of effects on historic properties.

DATES: *Comments Due:* March 16, 1989.

ADDRESS: Executive Director, Advisory Council on Historic Preservation, Attn. OPRE, 1100 Pennsylvania Avenue NW., Room 803, Washington, DC 20004.

Robert D. Bush,

Executive Director.

Dated February 8, 1989.

[FR Doc. 89–3434 Filed 2–13–89; 8:45 am]

BILLING CODE 4310–10–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N–89–1936]

Submission of Proposed Information Collection to the Office of Management and Budget

AGENCY: Office of Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410, telephone (202) 755–6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). It is also requested that OMB complete its review within seven days.

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: February 7, 1989.

James E. Schoenberger,

General Deputy Assistant, Secretary for Housing—Federal Housing Commissioner.

Proposal: Quarterly Survey of Mortgage-Related Security Investments.

Office: Housing.

Description of the Need for the Information and Its Proposed Use: This information is necessary for measuring progress toward the Congressionally declared goal, expressed in section 301, Title III of the National Housing Act, of establishing a secondary mortgage market, and increasing the liquidity of mortgage investments. It is vital in evaluating the growth of private mortgage conduits, and formulating policies on affordable housing. Such data helps identify the sources of funds to finance the nation's housing needs.

Form number: None.

Respondents: Businesses or other for-profit.

Frequency of Submission: Quarterly.

Reporting Burden:

	Number of respondents	X	Frequency of response	X	Hours per response	=	Burden hours
Financial Institutions	586		4		1/6, or 10 min.		391

Total estimated burden hours: 391.

Status: Revision.

Contact: Mike Lasky, HUD, (202) 755-7270; John Allison, OMB (202) 395-6880.

Date: February 7, 1989.

A. Justification for the Proposed Survey

1. *Reason Information is Needed*

Under a cooperative arrangement organized by the Office of Management and Budget (OMB) and as authorized in section 502 g Title V of the Housing and Urban Development Act of 1970,[1] the Department of Housing and Urban Development (HUD) has coordinated periodic surveys of the mortgage lending and commitment activity of the principal groups of financial institutions actively involved in the mortgage market. In addition to providing the Secretary, in his role as the President's principal housing advisor, information on the current status of the mortage lending activity, the data collected is used by: The Federal Reserve (flow of funds), Treasury (state ceilings for mortgage revenue bonds), BEA (national income accounts), Congress, FHLBB, FNMA, and OMB itself.

Congress declared an intention, in section 301, Title III of the National Housing Act to establish a secondary market for home mortgages. In order "to provide a degree of liquidity for mortgage investments, thereby improving the distribution of investment capital available for home mortgage financing" Congress, in section 302 of the above title created two corporations, the GNMA and the FNMA. Both of these corporations, subject to various restrictions and overseen by the Secretary of HUD, were authorized to engage in the purchase and sale of home mortgages. They were joined by the FHLMC, (established by FHLMC Act) in 1976.

Since 1980 the extent and complexity of the secondary mortgage market has increased dramatically. The number and kind of securities have increased from basic government-issued pass through mortgage pools to include private pools, CMO's, REMICs and Stripped securities. Between 1980 and 1987 the annual volume of activity in this market has grown from $78 billion to $428 billion; an increase of 449 percent. Sales on the secondary market accounted for 64 percent of mortgage loans closed on all types of properties in 1987.

With the integration of the mortgage market into the capital market, accurate information pertaining to the ultimate source of funds for Housing cannot be obtained from examination of the traditional mortgage lenders. In recognition of this HUD has initiated quarterly surveys (already approved by OMB) of the mortgage backed security and mortgage-oriented agency coupons of public and private pension funds and life insurance companies. However two major holders of mortgage backed securities are not being surveyed. Commercial and Savings Banks and Savings and Loans Associations.[2]

[1] "The Secretary is authorized to request and receive such information or data as he deems appropriate from private individuals and organizations, and from public agencies. Any such inforamtion or data shall be used only for the purposes for which it is supplied, and no publication shall be made by the Secretary whereby the information or data furnished by any particular person or establishment can be identified, except with the consent of such person or establishment."

[2] Currently no plans exist to conduct a survey of Savings and Loan institutions. Initially it was our understanding that the FHLBB was going to undertake to gather such information. At present we have submitted several suggestions for additions to FHLBB 'Thrift Financial Report of Condition' Schedule SC which is currently under being modified. If our suggestions are taken, the information obtained by the Bank Board will be barely sufficient to compare with the date that we hope to have for all other institutions.

Commercial and Savings Banks are major holders of mortgage backed securities. As of the March 1987 Call report, commercial bank holdings of mortgage pools had a book value of $83.8 billion and savings bank holdings of mortgage pools had a book value of $4.3 billion. The mortgage backed security holdings of the banking industry are expected to increase over the next few years as the risk based capital holding requirements mandated by the three federal bank regulatory authorities [3] are phased in.

Currently banks have flat capital holding requirements. For each dollar of assets they must have a certain amount of capital. In general the bank's risk of failure is thought to be inversely related to the capital/asset ratio. Unfortunately, identical capital holding requirement on all assets provides banks with an incentive to hold more risky assets. Under the new risk based requirements, each dollar of assets held is weighted according to which of five risk categories the asset is a member of. For every dollar of risk weighted dollar a set amount of capital must then be held. The weighing is believed to be positively related with the level of risk.

Mortgage related instruments are accorded very favorable treatment under these new guidelines. GNMA securities, and all derivative instuments collateralized by GNMA securities require no capital holdings whatsoever. FNMA and FHLMC securities, and all derivative instruments collateralized by them are assigned a 20% risk weight. Each dollar of such securities counts as only $.20 in the determination of the capital holding requirements. Whole mortgages, and all privately issued mortgage conduit securities are assigned a 50% risk weight. Each dollar of such securities counts as only $.50 in the determination of the capital holding requirements. This favorable treatment is expected to induce banks to increase their holdings of mortgage backed securities.[4] By increasing the portion of such assets in its portfolio a bank moves toward meeting its capital requirements without additional capital.

2. *Use of Information by the Federal Government*

Section 501 Title V of the Housing and Urban Development Act of 1970 authorize the Secretary to undertake programs of research relating to the mission and programs of the Department that he deems necessary and appropriate. In section 301, Title III of the National Housing Act Congress declares that the "purpose of the title is to establish a secondary market for home mortgages." This market is thought to increase liquidity of home mortgages and therefore improve the distribution of investment capital available for home mortgage financing. In order to evaluate the degree of liquidity and evaluate the distribution of said capital, accurate information on the mortgage security holding's of the major holders of these securities is necessary. In recognition of this, the Secretary requested that information on the mortgage security holdings of banks, which are already large and are likely to become the largest, be obtained.

As the principal Housing advisor to the President this information is important in the evaluation of the state of the housing industry. Given this industry's sensitivity to credit policies, and this industry's important role in overall economic performance such information will be useful in an economic macroeconomic policy perspective. Also the affordability of home-ownership and the problem of homelessness are currently emotionally charged issues. The likelihood that policy will be formulated to address these concerns is very high. Information that factually describes the availability and flow of funds to housing industry will prove to be extremely valuable in crafting these policies.

This information will also be useful to the Secretary in his role as the Administrator of GNMA and regulator of FNMA. Information regarding the banking industry's demand for these securities is crucial in the determination of the appropriate ceiling quantities of GNMA securities and the fees charged on GNMA and FNMA securities. As FNMA needs the approval of the Secretary of HUD and the Secretary of the Treasury for each REMIC issued, the information provided in the survey will be useful in the regulation of these securities.

As bank demand for mortgage backed securities increase, it is likely that GNMA, FNMA and FHLMC will aspire to craft securities that have attributes particularly attractive to banks. The information acquired in this survey will be useful in the construction of such financial instruments. In addition this information will also aid the Secretary in his determination of whether such securities are congruent with the purposes and programs of the Department.

Finally the information will prove useful to the Secretary in his evaluation of the growth of private mortgage conduits. Knowledge of the extent of such issues and the identity of who holds such securities is crucial in the determination of whether the federally sponsored mortgage conduit facilities are hindering the development of private mortgage conduit facilities.

4. & 5. *Duplication and Use of Existing Information*

The information that is being sought in this survey does not currently exist in another location. The Call Reports filed with the FDIC contains some of this information, but in too aggregate a form. All government mortgage pool securities (GNMA, FNMA, FHLMC) are aggregated together. Derivative issues based on these pools are lumped with other government debt in general (Along with say Treasury securities). Similarly, private derivative instruments are aggregated with all private debt. Other securities issued by the three federally sponsored secondary market facilities are distributed in about five other possible categories throughout the call report.

Neither FNMA, GNMA, nor FHLMC know who hold their securities, neither do they know who hold the derivative securities based on their primary securities. However FHLMC has expressed great interest in knowing what the bank holdings of their securities are.

7. *Reporting Frequency*

The quarterly frequency of this survey is chosen to coincide with the bank's preparation of the call report. The coincidence of the collected data with the call report will allow industry wide figures to be inferred on the basis of the actual data contained in the call reports. Decreasing the frequency of collected data would make it difficult to disentangle seasonal or other periodic cyclical fluctuation in the date.

9. *Consultation With Persons Outside of the Agency*

Outside views were sought in the development of the survey with respect to the information to be collected and the clarity of instructions and definition of terms. A few potential respondents were consulted in order to estimate the time it would require to complete the survey.

The names of the individuals contacted were:

Jack Goodman, Federal Reserve—452–2871.

[3] The risk based capital holding requirements have been jointly drafted and imposed by the Federal Reserve, the Computroller of the Currency, and the F.D.I.C.

[4] This statement is derived from a model in which banks maximize their portfolio return (in which the costs of deposits enters negatively), subject to the constraint imposed by capital holding requirements. Provided that mortgage backed assets are "normal" with respect to other assets, than as the constraint cost of these assets declines relative to other assets, bank holdings of these assets will increase.

Frank Nothaft, FHLMC—759–8019.
Richard Pickering, FHLBB—272–4957.
Norma Marshall, First Fidelity Bank—(201) 790–2280.
Jim Pratt, Hills Bank and Trust—(319) 679–2291.
J.G. Evans, Equitable Bank—(301) 547–4000.

10. *Assurance of Confidentiality*

HUD promises respondents that the individual responses will be held in strictest confidence, will not be released to anyone, and will be made public only in aggregate form to show total mortgage security holdings of the banking industry. Statutory authorization for confidentiality is contained in section 502 g Title V of the Housing and Urban Development Act of 1970.[5]

12. & 13. *Burden and Costs*

In the survey sample there are 23 Savings Banks and 146 Commercial Banks. On the basis of consultation with a few respondents the average time to complete this survey is estimated at 10 minutes. It is assumed that the average compensation of the individual who will complete this survey is ten dollars an hour. As there are four surveys a year the cost to each firm $6.60 per year. This amounts to a cost of $1102.20 per year to the banking industry.

Estimated quarterly cost to the government.

I. Staff time (hours):	
Label, collate and prepare survey forms for mailing	6
Answer inquiries, tracking responses and phoning late respondents	20
Editing and preparing forms for keypunch	24
Analysis of data and preparation of press release	8
Total	58
II. Cost of staff time	$1,184.00
Mailing, printing, and supply costs	47.50
Keypunch services	127.50
Data processing	58.50
Total costs to Government	1,410.50

14. Change in Burden

On April 13, 1988, OMB approved the continued use of Survey of Pension Funds, OMB No. 2052–0244, through August 31, 1989. This approval covered an increase from 186 to 278 reporting burden hours so that the survey could be extended to cover state and local retirement systems. In our previous submission dated January 27, 1988, it was noted: "In addition, the Secretary of HUD has asked that a similar survey be conducted of commercial and mutual savings banks." Plans for this additional effort have been finalized, including the sampling methodology, and drawing the actual sample. The total number of responses has been increased to 586 for inclusion of commercial and mutual savings bank component, therefore the reporting burden has been increased by 113 hours. No change in the information collection is involved other than the increase of the sample size.

The data for block 17 for the additional respondent/hours is detailed below:

1. Number of respondents:	
Commercial banks	146
Mutual savings banks	23
Total (169+417=586)	169
2. Number of responses per year per respondent	4
3. Total annual responses (676+1,668=2,344)	676
4. Hours per response	⅙
5. Total hours (113+278=391 hours)	113

15. Reporting

Responses are expected to be received during the second month following the survey date (the survey date is the date forms are mailed on which will be the end of the quarter). The responses are edited, results tabulated, expanded to universe estimates during the third month, and the report written. The data is published four months following the survey date.

B. Collection of Information Employing Statistical Methods

1. Statistical Universe

The source of respondents for this survey is a data tape of the December 1987 "consolidated Reports of Condition and Income" (hereafter referred to as the call report or "the call"). This tape was obtained form the Federal Deposit Insurance Corporation. This tape contains condition and income records for 13,753 distinct commercial banks and 463 savings banks, i.e. the "universe."

2. Sampling Methodology

Examination of the condition reports reveal four variables which represent mortgage backed security holdings of a bank. They are the book and market value of holdings of government issues or guaranteed certificates of participation in pools of residential mortgages [6] and the book and market values of holdings of certificates of participation in pools of residential mortgages that are not government issued or guaranteed. These holdings will be referred to as public pools and private pools, respectively.

The securities denoted by these holdings represent an actual ownership interest in the mortgages that comprise these pools. While these types of securities represent a substantial portion of mortgage related securities they are not inclusive. Lumped in with other U.S. debt and other private debt are the majority of the other mortgage related securities. These are securities that do not confer an ownership interest. Rather they are debt issues of another party who holds either the whole mortgage or a public or private pool security. Such issues are represented by collateralized mortgage obligations, (CMOs) and mortgage backed bonds. It is the non-explicit extent of these holdings in the call report which makes this survey necessary to obtain precise information on the mortgage backed security holdings of the banking system.

It is assumed that a bank's propensity to hold mortgage pool holdings is a good indication of their propensity to hold other mortgage backed securities.[7] Examination of the pool holdings across banks led to the rejection of private pools as a possible guide in the sampling plan. Essentially most banks, 92% of commercial banks and 89% of savings banks, do not hold any private pools. Of the 1,035 commercial banks that hold some quantity of private pools 53% (555) hold under a million dollars worth and 44% (453) hold between one and fifty million dollars. Of the 51 savings banks that hold private pools 20% (10) hold under a million and 63% (31) hold between one and fifty million.

The distribution of public pools, while skewed has considerably more banks with positive holdings. Among commercial banks 48% (6,568) hold none, 20% (2,787) hold under a million dollars worth, 30% (4,243) hold between one and fifty million, and 1% (155) hold over fifty million. Among savings banks 37% (173) do not hold any, 15% (71) hold under a million, 37% (175) hold between one and fifty million and 10% (46) hold over fifty million.

[5] See Footnote 1 for the next of statute.

[6] Despite its current status as an independent corporation FNMA pools are considered government issued or guaranteed in the call report.

[7] As information will be gathered on the basis of book value, to avoid changes in portfolio value due to market swings, and to avoid differences in the calculation of market value it was decided to focus on book value rather than market value throughout this sampling exercise.

Strata No.	Definition	Number of case	Percent of total pools
Strata for commercial banks:			
0	No public pools	6,586	0
1	1,000,000 to 10,000,000	4,786	19
2	10,000,000 to 100,000,000	652	22
3	100,000,000 to 500,000,000	73	24
4	G.T. 500,000,000	20	35
Strata for savings banks:			
0	No public pools	1,736	0
1	1,000,000 to 200,000,000	218	22
2	200,000,000 to 1,000,000,000	13	24
3	G.T. 1,000,000,000	4	54

As the distribution was so highly skewed it was decided to stratify the data on the book value of public pools.[8] Five strata were defined for commercial banks and four for savings banks. Shown in the tables below are the stratum numbers, the stratum definitions, the number of cases in each stratum and the percentage of total pool holdings held by commercial banks and savings banks in that stratum.

The goal of the sample selection process was to select a sample that will produce estimates of the total magnitude of the banking system's holdings of mortgage related securities with a 5% margin of error with 99% confidence. Following Cochran [9] (1964, p. 97,105) a Neymen allocation (minimum variance) requires a sample size of 123 commercial banks and 17 savings banks to produce this degree of precision.

The Neymen allocation scheme for commercial banks suggests that 37% of the sample (45 cases) should be allocated to stratum 4, 18% (22 cases) to stratum 3, 23% (29 cases) to stratum 2, and 22% (27 cases) to stratum 1. The Neymen allocation for savings banks suggests 46% of the sample (8 cases) be allocated to stratum 3, 22% (4 cases) to stratum 2, and 32% (5 cases) to stratum 1. As there are only 20 cases in stratum four of commercial banks and four in stratum three for savings banks the differences (45 minus 20 and 8 minus 4) are proportionally allocated to the stratum 1 through 3 for commercial banks and 1 and 2 for savings banks.

When the actual survey sample is recruited it is unlikely that 100% of those whose recruitment is attempted will agree to participate. To acquire the desired number in each stratum, rates of acceptance were assumed and the attempt was made to recruit the reciprocal of these acceptance rates.

The acceptance rate for the largest stratum (4 for commercial banks, 3 for savings banks), the one where all members are selected is assumed to be 100%. All of these institutions are large, with over a billion dollars in total assets. Such banks are known (from the office's past experience in the performance of bank surveys) to be very cooperative with government data collection exercises.

The next largest stratum consists of commercial banks with total assets between $100 million and $1 billion with 92% of them having assets over one billion dollars and savings banks with total assets over $500 million. While a larger portion will probably respond an acceptance rate of 50% is chosen here for safety. For the remaining stratum an acceptance rate of 25% is assumed. Finally, for completeness, the mean value of the allocation of stratum 1 through 4 and one through three are allocated to stratum zero of commercial banks and savings banks respectively.

These acceptance rates dictate a sample draw of 466 commercial banks and 68 savings banks to acquire the desired sample of 146 commercial banks and 23 savings banks. The allocation of banks to their respective stratum for this recruitment effort is as follows:

RECRUITMENT DRAW

Stratum No.	No. cases commercial	No. cases saving
0	93	16
1	142	32
2	152	11
3	59	4
4	20	—

This allocation should produce the following sample.[10]

EXPECTED RESPONSE

Stratum No.	No. cases commercial	No. cases saving
0	23	4
1	36	8
2	38	5
3	29	4
4	20	—

Such a sample of commercial banks was actually drawn using the pseudo-random number generator in SPSS–X. This sample produced an estimated total of public pools of $73,341.9 million (true value is $71,802 million). This represents an error of 2%, well within the desired 5%. The 95% confidence band about this estimate is $67,541.08 million to $79,142.71 million.

As a further test of the sample the private pool holdings of the banking system were estimated from this sample. The estimated total was $8,085.34 million (true value $10,094 million). Though the percentage error of 19% is considerably larger, the 95% confidence interval of this estimate, $4,216.84 million to $11,953.84 million, includes the true value. As the variability of private pool holdings is known to be considerably greater than the variability of public pool holdings the larger percentage error in this case is not viewed as a problem.

3. Method to Maximize Response

In order to maximize the response rate every bank in the sample is recruited prior to any actual collection of data. This recruitment effort is made most effective by personalizing each recruitment package. The name of the chief executive officer of every potential respondent bank was determined. Then a letter, signed by The Secretary, was sent to this named individual. The letter requests the bank's participation in the survey. In addition a sample survey form was sent so the extent of effort involved in participation could be clearly evaluated.

[8] The extent of all holdings are rounded to the nearest million dollars.

[9] Cochran, William, *Sampling Techniques*, John Wiley and Sons Inc. New York, 1964

[10] When the actual recruitment was undertaken it was decided to systematically sample every other bank in the selected sample of stratum 0, 1 and 2 for commercial banks and 0 and 1 for savings banks. This amounts to a practical assumption that the response for recruitment in these strata will be 50%. The actual recruitment process vindicated this assumption, producing a margin of approximately 10% in each strata.

Those banks agreeing to participate are asked to return a response form in a provided envelope. The response form indicated who at the bank would be responsible for completing this survey. All future correspondence regarding the survey will then be sent directly to that specific person.

5. Responsibility for Sample Design

The sample exercise was designed and conducted by Dr. Michael Lasky of the Office of Financial Policy, at HUD. His phone number is 755–7270. Dr. Lasky will also be responsible for the collection and analysis of the data. In the process of designing the sample consultations were made with Dr. Tom Holloway at the Mortgage Bankers Association (861–3133) and Dr. Robert Gillette at the Office of Tax Analysis (566–6075).

BILLING CODE 4210-27-M

Bank Name _____

Person Completing _____

Address _____

Telephone Number ( ) _____

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SURVEY OF MORTGAGE RELATED INVESTMENTS*

Please report data as of the end of the quarter. Total assets and Fixed income assets, and securities should be reported at book value. Please read instructions before completing this form.

Data for Quarter Ending _____ 19__

($ THOUSANDS)

A. **Total Assets of the Bank** _____

Fixed Income Assets (Treasuries, Government Agency Securities, mortgage-backed securities, corporate and foreign bonds, and mortgages.) _____

B. **Selected U. S. Government Agency Securities**
(Exclude Farm Credit Banks, Sallie Mae and other Government sponsored agencies not listed below.)

1. Fannie Mae - (Federal National Mortgage Association) Short-term notes and debentures, including strip securities, zero coupon bonds, subordinate obligations _____
2. FHLB - (Federal Home Loan Banks) -- Short-term notes and bonds _____
3. FICO (Financing Corporation) -- Bonds issued _____
4. a. Freddie Mac - (Federal Home Loan Mortgage Corp.) Debentures, zero coupon bonds, short-term notes and subordinate obligations _____
   b. Freddie Mac - Collaterized Mortgage Obligations (CMOs) _____
5. FHA Multifamily Project Debentures _____

C. **Mortgage-Backed Securities**

1. Ginnie Mae - Government National Mortgage Association: Guaranteed Mortgage-Backed Pass-Through Securities _____
2. Freddie Mac - Federal Home Loan Mortgage Corporation
   (a) Guaranteed Participation Certificates, Guaranteed Mortgage Certificates. _____
   (b) Real Estate Mortgage Investment Conduits (REMICs) _____
3. Fannie Mae - Federal National Mortgage Association Guaranteed Conventional Mortgage-Backed Pass-Through Securities _____
   Real Estate Mortgage Investment Conduits (REMICs) _____
4. a. Private Conduit Securities -- Home Mortgages - public issues and private placements, including pass-through securities, participation certificates, CMO's, and bonds backed by whole mortgages. _____
   b. Private Conduit Securities - Multifamily and Commercial Mortgages _____
5. Mortgage-Backed Bonds (One class or tranche) collateralized by securities guaranteed by Ginnie Mae, Fannie Mae, or Freddie Mac) _____
6. Collateralized Mortgage Obligations (CMOs) (Two or more classes or tranches) Collateralized by securities guaranteed by Ginnie Mae, Fannie Mae, or Freddie Mac (exclude Fannie Mae and Freddie Mac securities which CMO issuers elect to be treated as a REMIC). _____

D. **Direct Mortgage Holdings** (Book Value)
All directly held mortgage loans, including residential properties, commercial and other non-residential properties, farm dwellings, land and land development loans. _____

* Includes mortgage loans plus mortgage-related securities.

Definitions and Reporting Instructions for the Survey of Mortgage-Related Investments

A. *Total Assets.* Total assets at the end of the reporting period are the book value of properties owned, gross of any valuation reserves.

B. *Selected U.S. Government Sponsored Agency Securities.* The securities issued by the Federal sponsored agencies identified below are deemed to have a direct link to the provision of funds for real estate finance. Except for FHA debentures, the securities are not guaranteed by the U.S. Government, but are partially backed by lines of credit with the U.S. Treasury.

1. *Federal National Mortgage Association (Fannie Mae).* Securities issued by Fannie Mae evidencing corporate debt obligations, including stirp securities (both principal only and interest only). Obligations include debentures, short-term notes, and subordinated obligations, including those convertible into shares of common stock.

2. *Federal Home Loan Banks (FHLB).* These securities are consolidated obligations consisting of bonds and discount notes issued as joint and several debt of all Federal Home Loan Banks.

3. *Financing Corporation (FICO).* Issues bonds and then lends funds to the Federal Savings and Loan Insurance Corporation (FSLIC).

4. *Federal Home Loan Mortgage Corporation (Freddie Mac).* Securities issued by Freddie Mac in its own name evidencing corporate debt. Obligations include collateralized mortgage obligations, debentures, zero coupon bonds, short-term notes, and subordinate obligations. Collateralized mortgage obligations consist of two or more classes or tranches of bonds with stated maturities.

5. *FHA Multifamily Project Debentures.* Bonds issued by the Federal Housing Administration (FHA) of the U.S. Department of Housing and Urban Development. These are not mortgages, but instead are liabilities of the FHA insurance funds under which they are issued. Interest is paid semi-annually and the maturity is usually 20 years. The debentures are registered and transferrable. They are available in denominations of $50, $100, $500, $1,000, $5,000, and $10,000. They are fully and unconditionally guaranteed as to principal and interest by the United States.

C. *Mortgage-Backed Securities (MBS)*—1. *General Definition.* A mortgage-backed security is issued to finance a pool of mortgages. These securities are pass-through certificates. A pass-through certificate represents a pro rata undivided fractional interest in the equitable ownership of a pool of mortgage loans. Payments of principal and interest are used to make monthly disbursements to security holders. Pass-through certificates represent a sale of assets (mortgages) by the sponsor to an entity.

2. *Government National Mortgage Association (Ginnie Mae).* Mortgage-backed pass-through securities guaranteed by Ginnie Mae as to the timely payment of principal and interest. The securities are issued by Ginnie Mae approved financial institutions and backed by a pool of FHA-insured and/or VA-guaranteed mortgages. Ginnie Mae guaranteed securities bear the full faith and credit of the U.S. Government.

3. *Federal Home Loan Mortgage Corporation (Freddie Mac).* Freddie Mac issues two types of pass-through instruments to finance its mortgage loan acquisitions: (1) Guaranteed mortgage certificates (GMCs) and (2) mortgage participation certificates (PCs) and also collateralized mortgage obligations. GMCs and PCs represent undivided interests in pools of conventional residential mortgages set aside by Freddie Mac. GMCs return principal once a year in guaranteed minimum amounts regardless of the status of the underlying mortgages. Interest is paid semi-annually. For PCs, each certificate holder receives every month a prorata share of the principal payments collected on the mortgages in the underlying pool, plus prepayments and interest on the outstanding balance. Freddie Mac guarantees the timely payment of interest at the certificate rate and the full return of principal regardless of the status of the underlying loans.

4. *Federal National Mortgage Association.* (Fannie Mae): Fannie Mae is the issuer and guarantor of MBS or trust securities, providing 100 percent guaranty of full and timely payment of interest and principal. The securities represent interests in pools of residential mortgage loans set aside by Fannie Mae.

5. *Private Pass-Through Securities.* These securities are issued by private financial entities (sometimes called "private conduits") with no guarantees by any government or government-sponsored agency. The securities are credit enhanced by mortgage pool insurance (provided by a private mortgage insurance company), guaranty by the sponsor, issuance of subordinate lien securities, or by over collateralization of underlying mortgages. Some securities are issued via public offering (registered through SEC), and others are marketed through private placement.

6. *Private Mortgage-Backed Bonds.* Mortgage-backed bonds have been sold principally by affiliates of home builders (builder bonds) and savings and loan associations to raise funds without having to realize sizable losses thorugh an outright sale of an asset. They have a single maturity date and are of smaller size than pass-through issues. The bonds are general obligations of the issuer, additionally secured by mortgage collateral.

7. *Collateralized Mortgage Obligations and Real Estate Mortgage Investment Conduit Securities (REMICs).* Collateralized mortgage obligations, or CMOs, are debt obligations of an entity established by a financial institution or other sponsor. They are collateralized by whole mortgage loans or by mortgage-backed pass-through securities guaranteed by Ginnie Mae, Fannie Mae, or Freddie Mac.

CMOs are sold in multi-maturity classes, that is they mature over a wide range of years versus a mortgage-backed bond with a single maturity. Many CMO issuers elect to be treated as a REMIC (real estate mortgage investment conduit). A REMIC can be structured as a entity that issues pass-through securities, or as a CMO-issuing entity.

D. *Direct Mortgage Holdings.* These are the principal balances remaining on all mortgage loans which were either originated by your organization or purchased from another financial institution at some point in the past.

Instructions

A. General Instructions

Please complete and return the form with the least possible delay, preferably within two weeks after the end of the reporting period.

All entries should be reported in dollars, rounded to the nearest thousand dollars. Do not report number of transactions.

This form is designated to provide information on the amount of funds provided for mortgages through investments in securities (the proceeds of which are used to finance such mortgages), and through investments in direct mortgage loans. Item D on the form requests the amount of mortgage loan holdings (outstanding) as of the end of the report period.

B. Specific Instructions

The form consists of four parts (identified on the left-hand stub). Part A—Total Assets and Fixed Income Assets, Part B—U.S. Government-Sponsored Agency Securities, Part C—Mortgage-Backed Securities, and Part D—Direct Mortgage Holdings. All data in Parts A, B, and C should be reported on a market valuation basis unless stated by respondent and should be as of the last day of the reporting month. Data in Part D should be reported on a book valuation basis.

Part A—Total Assets should include miscellaneous assets represented by participation in commingled trust funds. Total assets are used to estimate total assets of all such institutions and to expand the holdings of mortgages and mortgage-related securities to obtain industry-wide universe estimates.

Fixed income assets include holdings of U.S. Treasury obligations, U.S. Government Agency Securities, mortgage-backed securities, corporate and foreign bonds and mortgages loans. Fixed income assets are used to track changes in the proportion of total assets allocated to fixed income investments, as compared to holdings of corporate stocks, real estate, and other assets.

Part B—Selected U.S. Government-sponsored Agency Securities include the holdings of notes, bonds, and debentures issued directly by: (1) The Federal National Mortgage Association (Fannie Mae); (2) Federal Home Loan Banks (FHLB); (3) The Financing Corporation (FICO); (4) the Federal Home Loan Mortgage Corporation (Freddie Mac); and (5) FHA multifamily project debentures (securities issued by Sallie Mae and the Farm Credit Banks are excluded).

Part C—Mortgage-Backed Securities are broken down into two categories: (1) Guaranteed mortgage-backed securities, including those guaranteed by Ginnie Mae, Freddie Mac, and Fannie Mae. (2) non-guaranteed issues by private conduits, including participation certificates, pass-through certificates, and mortgage-backed bonds.

Part D—Direct mortgage holdings reflect mortgage loans held as of the end of the report period. These should be reported on a gross basis, that is, gross of any valuation reserves.

All mortgage holdings should be included. Such holdings are comprised of residential (1–4 family and multifamily) properties, commercial and other non-residential structures, farm dwellings, land and land development loans.

To avoid double counting of the same mortgage loan among the different lenders in the comprehensive data system, entries should relate only to those mortgage loans your organization owns. That is, include only those loans acquired in the organization's own name and counted as holdings on its balance sheet. Exclude any loans acquired in the name of, or for the account of, any other lender.

Entries should relate to all mortgage loans secured by liens on real properties located in the United States and such outlying areas as Puerto Rico, Virgin Islands, and Guam. Exclude any mortgage loans for properties located in Canada or other foreign countries.

Public Reporting Burden for this collection of information is estimated to average ⅙th or 10 min. per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Policies and Systems, AII, U.S. Department of Housing and Urban Development, Washington, DC 20410–3600; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

[FR Doc. 89–3393 Filed 2–13–89; 8:45 am]
BILLING CODE 4210–27–M

Office of Administration

[Docket No. N–89–1937]

Submission of Proposed Information Collection to the Office of Management and Budget

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755–6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following informaiton: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: February 8, 1989.

John T. Murphy,

Director, Information Policy and Management Division.

Proposal: Real Estate Settlement Procedures Act of 1974 (RESPA)

Office: Housing

Description of the Need for the Information and Its Proposed Use: Section 5 of the Real Estate Settlement Procedures Act (RESPA) requires lenders to provide a Special Information Booklet and Good Faith Estimate of settlement costs. Section 4 of RESPA requires settlement agents to provide borrowers and sellers the Form HUD–1 which sets forth all settlement costs. Section 8(c)(4) requires the Disclosure and Estimate on controlled business arrangements.

Form Number: HUD–1

Respondents: Businesses or Other For-Profit

Frequency of Submission: On Occasion

Reporting Burden:

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Good Faith Estimate	20,000		200		.25		1,000,000
HUD-1 Settlement Statement	20,000		150		1		1
Disclosure and Estimate	10,000		100		.1		100,000

Total Estimated Burden Hours: 1,100,001
Status: Revision
Contact: Richard E. Harrington, HUD, (202) 755-5676; John Allison, OMB, (202) 395-6880.

Date: February 8, 1989.

[FR Doc. 89-3451 Filed 2-13-89; 8:45 am]
BILLING CODE 4210-01-M

[Docket No. N-89-1938]

Submission of Proposed Information Collection to the Office of Management and Budget

AGENCY: Office of Administration, HUD.
ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: February 9, 1989.

John T. Murphy,
Director, Information Policy and Management Division.

Proposal: Transmittal of Closing Information
Office: Housing
Description of the Need for the Information and Its Proposed Use: This information collection will enable HUD to verify the accuracy of data and eliminate errors commonly found in the closing packages. It will also ensure that the FHA insurance fund is properly credited and that HUD receives the correct information to maintain Departmental financial records properly.
Form Number: HUD-9589
Respondents: Individuals or Households and Businesses or Other For-Profit
Frequency of Submission: Other
Reporting Burden:

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Information Collection	70,000		1		.17		11,900

Total Estimated Burden Hours: 11,900
Status: Revision
Contact: David H. Patton, HUD, (202) 755-5832; John Allison, OMB, (202) 395-6880.

Date: February 9, 1989.

[FR Doc. 89-3452 Filed 2-13-89; 8:45 am]
BILLING CODE 4210-01-M

Office of Assistant Secretary for Housing-Federal Housing Commissioner

[Docket No. N-89-1935; FR-2574]

Adjustable Rate Mortgage Disclosures

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.
ACTION: Statement of policy.

SUMMARY: The Federal Reserve Board recently revised its disclosure requirements in Regulation Z (12 CFR Part 226) for a closed end adjustable rate mortgage (ARM). HUD has issued Mortgagee Letter 88-26 to permit mortgagees, by complying with Regulation Z, to satisfy HUD's requirements governing the disclosure statement that mortgagees must provide to prospective mortgagors when application is submitted for an FHA-insured ARM. HUD's policy is to accommodate both homebuyers and the lending industry by permitting the use of a unified format in lieu of the somewhast duplicative disclosure requirements that HUD and other Federal agencies have imposed heretofore.

FOR FURTHER INFORMATION CONTACT: Morris Carter, Director, Single Family Development Division, Room 9272, Department of Housing and Urban

Development, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 755–6700. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Since the adoption of rules to govern an ARM insurance program under section 251 of the National Housing Act (NHA), HUD procedures and format for the initial or pre-loan disclosure statement that a lender must give a prospective borrower have been described in 24 CFR 203.49(f) [1] and in Mortgagee Letter 84–16 (July 18, 1984). Over the past several years, at the recommendation of the Federal Financial Institutions Examination Council, those Federal agencies requiring various classes of lending institutions under their jurisdiction to provide prospective borrowers with cautionary information about ARM transactions have sought to standardize their requirements. HUD has been involved in this effort and has expressed its support for a unified disclosure format, even though section 251(b) of the NHA mandates that HUD impose disclosure procedures that are more rigorous than those that had been set by some of the other agencies. HUD and the Federal Reserve Board have worked to resolve problems raised by this statutory obligation, which requires, among other things, "a written explanation of the features of the adjustable rate mortgage, including a hypothetical payment schedule that displays the maximum potential increases in monthly payments to the mortgagor over the first 5 years of the mortgage term."

On December 24, 1987, after extensive rulemaking, the Board published changes to the disclosure provisions of Regulation Z (52 FR 18670). The provision relevant for this Notice is 12 CFR 226.19(b)(2). Subsequently, the Office of the Comptroller of the Currency and the Federal Home Loan Bank Board undertook revision of their respective requirements to reflect the Regulation Z disclosure provisions. On July 21, 1988, HUD issued Mortgagee Letter 88–26, which recognizes that compliance with 12 CFR 226.19(b)(2) now satisfies the requirements of section 251(b) of the NHA, and that the Regulation Z format may be used in lieu of the disclosure prescribed in 24 CFR 203.49(f) and in Mortgagee Letter 84–16.

Footnote 45a of the Board's rule explains, however, that "[i]nformation provided in accordance with variable-rate regulations of other federal agencies may be substituted for the disclosures required by paragraph (b) of this section."

Mortgagee Letter 88–26, therefore, points out that lenders may continue to use the disclosure statement in Appendix II of Mortgage Letter 84–16 if it "better suits the lender's needs and operations."

Dated: January 27, 1989.

James E. Schoenberger,

General Deputy Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 89–3394 Filed 2–13–89; 8:45 am]

BILLING CODE 4210–27–M

[1] Parallel requirements for ARMs disclosures are also contained in 24 CFR 234.79(f) with respect to condominium properties.

Office of the Assistant Secretary for Public and Indian Housing

[Docket No. N–89–1934; FR–2611]

Public Housing Program; Demolition or Disposition of Public Housing Projects; Application Submission Deadline

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: This Notice informs public housing agencies and Indian housing authorities (both referred to as PHAs) that HUD is establishing a March 31, 1989 deadline date for the submission of demolition or disposition applications that involve the loss of public housing units and call for assisted housing units to satisfy requirements for a replacement housing plan.

DATES: Effective Date: February 14, 1989. Application Submission Deadline: April 14, 1989.

FOR FURTHER INFORMATION CONTACT: Janice Rattley, Director, Project Management Division, Office of Public Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Telephone (202) 755–1800. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: HUD has a limited number of public housing units and Section 8, 15-year project-based assistance units available for use as replacement housing units this Federal Fiscal Year (FFY). In approving a PHA's demolition or disposition application which calls for HUD assisted units in its Replacement Housing Plan, the Secretary is also promising (subject to the availability of funding) to provide those replacement units. Therefore, in order to accommodate the replacement units planned by PHAs in applications for unit demolitions or dispositions this FFY and to accomodate the public housing development application process, the Department has decided to impose a deadline of April 14, 1989, for submission by PHAs of complete public housing demolition or disposition applications. This deadline is only for applications involving the loss of dwelling units, *i.e.*, those required to meet the one-for-one replacement requirement imposed by the recent amendment to Section 18 of the U.S. Housing Act of 1937 (42 U.S.C. 1437p) and covered by the revised regulation published in the **Federal Register** on August 17, 1988, at 53 FR 30984. For those requests for demolition or diposition not involving replacement units, the deadline is not applicable.

Regional Offices shall review all of the demolition and diposition applications and submit the Regional Administrator's recommendations to Headquarters, not later than May 26, 1989. Only those Indian housing applications approved by Headquarters by July 28, 1989 will be considered eligible to receive replacement housing units in this FFY, and only those public housing applications approved by July 28, 1989 will be considered eligible to receive a priority rating of outstanding for replacement housing units in this FFY.

To assist them in meeting these deadlines, PHAs are reminded of the new statutory and regulatory requirement that any replacement housing plan must be approved by the governing body of the unit of general local government. For Indian housing, approval by the Tribal governing body is required.

Authority: Sec. 18, U.S. Housing Act of 1937 (42 U.S.C. 1437p); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Date: February 1, 1989.

Jacqueline Aamot,

Associate General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 89–3395 Filed 2–13–89; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–920–09–4111–14; NDM 71447]

Proposed Reinstatement of Terminated Oil and Gas Lease; North Dakota

Under the provisions of Pub. L. 97–451, a petition for reinstatement of oil and gas lease NDM 71447, Bowman County, North Dakota, was timely filed and accompanied by the required rental accruing from the date of termination.

No valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre and 16⅔% respectively. Payment of a $500 administration fee has been made.

Having met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective as of the date of termination, subject to the original terms and conditions of the lease, the increased rental and royalty rates cited above, and reimbursement for cost of publication of this notice.

Dated: February 1, 1989.

June A. Bailey,

Chief, Leasing Unit.

[FR Doc. 89-3375 Filed 2-13-89; 8:45 am]

BILLING CODE 4310-DN-M

Fish and Wildlife Service

Receipt of Applications for Permits; University of California et al.

The following applicants have applied for permits to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

PRT-734408

Applicant: University of California, San Diego, La Jolla, CA

The applicant requests a permit to import samples of naturally shed hair of chimpanzees (*Pan troglodytes*) from Tanzania and the Congo for genetic research.

PRT-720141

Applicant: Tommy Hanneford, Sarasota, FL

The applicant requests a permit to export and reimport one male leopard (*Panthera pardus*) for circus performances, during which the applicant will present information to the public on the Leopard's ecological role and conservation needs.

PRT-734045

Applicant: Riverbanks Zoological Park, Columbia, SC

The applicant requests a permit to import six captive born Amazon River turtles or Tartaruga (*Podocnemis expansa*) from the Emperor Valley Zoo, Port of Spain, Trinidad, for purposes of display and breeding to enhance the propagation and survival of the species.

PRT-734030

Applicant: Taxidermy International for Arnold Alward, Clayton, NC

The applicant requests a permit to reexport the trophy of one bontebok (*Damaliscus dorcas dorcas*) taken from the captive-herd of J.H. Cloete, Beford, Republic of South Africa previously imported under PRT-715117; and to export one wild yak (*Bos grunniens*) taken from a captive-herd in the United States.

PRT-734436

Applicant: Nancy Nicolai, Bakersfield, CA

The applicant requests a permit to take (live-trap and release) Tipton's kangaroo rats (*Dipodomys nitratoides* ssp. *nitratoides*) from the wild in the Southern San Joaquin Valley, California for the purpose of enhancement of propagation and survival of the species.

PRT-734492

Applicant: Zoological Society of San Diego, San Diego

The applicant requests a permit to import one captive-born female dhole (=Asian wild dog), (*Cuon alpinus*), from the Assiniboine Park Zoo, Manitoba, Canada, for the purpose of enhancement of propagation.

Documents and other information submitted with these applications are available to the public during normal business hours (7:45 am to 4:15 pm) Room 403, 1375 K. Street NW., Washington, DC 20005, or by writing to the Director, U.S. Office of Management Authority, P.O. Box 27329, Central Station, Washington, DC 20038-7329.

Interested persons may comment on any of these applications within 30 days of the date of this publication by submitting written views, arguments, or data to the Director at the above address. Please refer to the appropriate PRT number when submitting comments.

Date: February 3, 1989.

R.K. Robinson,

Chief, Branch of Permits, U.S. Office of Management Authority.

[FR Doc. 89-3471 Filed 2-13-89; 8:45 am]

BILLING CODE 4310-AN-M

Receipt of Applications for Permits; Zoological Society of San Diego

February 9, 1989.

The following applicants have applied for permits to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

PRT-734642

Applicant: Zoological Society of San Diego, San Diego, CA

The applicant requests a permit to export one captive-born male great Indian rhinoceros (*Rhinoceros unicornis*) to the Singapore Zoological Gardens, Republic of Singapore, for the purpose of enhancement of propagation.

PRT-734609

Applicant: Joan V. Gordon, Lake George, CO

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus dorcas dorcas*) to be culled from the captive herd maintained by Mr. F. Bowker, Jr., Grahamstown, Republic of South Africa, for the purpose of enhancement of survival of the species.

PRT-734822

Applicant: Lowry Park Zoological Garden, Tampa, FL

The applicant requests a permit to import one captive born male Sumatran tiger (*Panthera tigris sumatrae*) from the Rotterdam Zoo, Holland, for captive breeding and zoological display.

PRT-734870

Applicant: San Diego Zoo, San Diego, CA

The applicant requests a permit to import one male and two female Northern white rhinoceroses (*Ceratotheium simum cottoni*) from the Zoological Garden Dvur Kralove, Czechoslovakia, for the purpose of enhancement of propagation. These rhinoceroses were wild-caught in Sudan in 1972.

PRT-734312

Applicant: Dr. Michael Baden Thompson, Gainesville, FL

The applicant requests a permit to import 20 leatherback sea turtle (*Dermochelys coriacea*) eggs to be collected by the Caribbean Conservation Corporation in Costa Rica between March and April 1989. These eggs will be used for scientific research to determine patterns of ontogenetic oxygen consumption for assistance in long term sea turtle management. All twenty eggs may ultimately be sacrificed.

PRT-734828

Applicant: Hexagon Farm, San Juan Bautista, CA

The applicant requests a permit to import one pair of captive born black-footed cats (*Felis nigripes*) from the Zoologischer Garten Wuppertal, Germany, for captive breeding purposes.

PRT-734918

Applicant: Arleone Dibben-Young, Kula, HI

The applicant requests a permit to purchase two pairs of captive-hatched Hawaiian (=nene) geese (*Nesochen*

(=*Branta*) *sandvicensis*) from Sylvan Heights Waterfowl, Sylva, North Carolina, for captive breeding purposes.

PRT-734307

Applicant: California Department of Fish and Game

The applicant requests a permit to collect (by use of nets, traps, and electroshockers) and release an undetermined number of Owens tui chubs (*Gila bicolor snyderi*) in the Owens River gorge, CA, for the purpose of population studies. Of those collected, a maximum of 150 will be sacrificed for electrophoresis, age and growth studies.

Documents and other information submitted with these applications are available to the public during normal business hours (7:45 am to 4:15 pm), Room 403, 1375 K Street NW., Washington DC 20005 or by writing to the Director, U.S. Office of Management Authority, P.O. Box 27329, Central Station, Washington, DC 20038-7329.

Interested persons may comment on any of these applications within 30 days of the date of this publication by submitting written views, arguments, or data to the Director at the above address. Please refer to the appropriate PRT number when submitting comments.

Date: February 9, 1989.

R.K. Robinson,

Chief, Branch of Permits, U.S. Office of Management Authority.

[FR Doc. 89-3466 Filed 2-13-89; 8:45 am]

BILLING CODE 4310-AN-M

Fish Health Policy and Implementation Guidelines

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of adoption of revised policy and implementation guidelines; notice of availability of revised guidelines.

SUMMARY: This Notice is to inform interested parties that the U.S. Fish and Wildlife Service has adopted a revised fish health policy and implementation guidelines. The policy and guidelines provide direction for controlling the impact and spread of serious fish pathogens in Service facilities. Comments on the revised policy and guidelines will be considered in preparing future revisions.

DATE: February 14, 1989.

ADDRESS: Copies of the guidelines may be obtained from and comments forwarded to: Chief, Division of National Fish Hatcheries, U.S. Fish and Wildlife Service, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Dr. John G. Nickum, address above, telephone (202) 653-8746.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service has revised the Fish Health Protection Policy and Salmonid Fish Health Protection Program, dated May 30, 1984, to consider new information and procedures developed since that date. Newly adopted procedures for amending the revised Policy will enable the Service to respond more rapidly to future developments and to incorporate appropriate suggestions and comments received as a result of this Notice.

National Policy Directive: Fish Health.

Effective: November 29, 1988.

Expires: This Policy remains in effect until superseded by a new National Policy Directive. Implementation guidelines (Appendix) may be modified by signed, numbered memorandum from the Director.

Subject: Fish Health Policy And Implementation Guidelines.

Policy: In accordance with its mission, objectives, and stated responsibilities and role, the Fish and Wildlife Service (Service) will:

- Conduct Service fishery activities in such manner as to prevent the spread of fish pathogens into areas where they are not known to exist; eradicate, where possible, certain serious fish pathogens; and use the best available procedures for detecting, controlling, and minimizing the impact of fish pathogens that cannot be eradicated;
- Provide leadership, direction, and training to enable international agencies, foreign governments, Indian tribes, States, and the private sector to organize and carry out programs to maintain and manage fish health;
- Develop programs in cooperation with other Federal and State agencies, Indian tribes, and the private sector to address fish health issues and prevent the spread of serious fish pathogens;
- Rear or use the healthiest fish to meet Service fishery responsibilities; and
- Undertake research and development studies on fish diseases to improve pathogen detection and disease diagnostic techniques; develop procedures for hygiene, therapy, and pathogen eradication; and improve the disease resistance of cultured fish.

Scope: This Policy provides national guidance concerning fish health. All Service fishery activities must be conducted in compliance with this Policy. Each Regional Director of the Service is delegated authority to apply more rigorous standards and to require implementation procedures with more extensive sampling and diagnosis. In addition, alternative procedures may be authorized by the Regional Director to protect scarce stocks. Regional implementation of this Policy must also be in accord with applicable interjurisdictional (e.g., interstate compacts), State, and foreign fish health regulations. This Policy pertains to all Service facilities and activities involving fish. Only Service personnel are responsible for its implementation. It is intended, however, that this Policy will provide a model and a basis for cooperative efforts with other Federal agencies, the private sector, States, Indian tribes, foreign governments, and international agencies through which the spread and impact of fish pathogens and diseases can be controlled.

Purpose: This Policy sets forth the position of the Service relative to matters of fish health. It will serve as the basis for Service efforts to contain, control, and minimize the impacts of fish pathogens and diseases. The Service has maintained a Fish Health Policy since 1968. Service efforts to understand and control fish health problems started over 60 years ago. These efforts are based on recognition that serious diseases are more likely to occur under high density hatchery rearing conditions than in low density "wild" populations and that certain serious diseases can negate the fishery resource benefits derived from the National Fish Hatchery System.

Definitions: Terms with special meanings, as used in the context of this National Policy Directives are defined in the Appendix to this National Policy Directive.

Implementation: To implement this Policy, the Service will develop and maintain National Guidelines that: Describe managerial and technical responsibilities; provide systems to monitor the range and distribution of selected fish pathogens among stocks and facilities for purposes of preventing the spread of these pathogens; establish minimum standards for inspection and monitoring activities; and delineate required fish health management and reporting activities. Regional Implementation Plans that establish procedures and schedules for inspection and monitoring activities to serve the particular needs of each Region will be developed within the limits of the National Guidelines. National Implementation Guidelines are included in the Appendix to this National Policy Directive.

Supersession: This National Policy Directive supersedes and replaces the "Fish Health Protection Policy and

Salmonid Fish Health Protection Program" dated May 30, 1984.

Date: February 1, 1989.

Steve Robinson,

Deputy Director, United States Fish and Wildlife Service.

[FR Doc. 89-3414 Filed 2-13-89; 8:45 am]

BILLING CODE 4310-55-M

Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: On Friday, May 6, 1988 (53 FR 16344) the Service published the regulations governing the conduct of the annual Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest. The dates and location of this year's contest are announced, and the public is invited to attend.

DATES: 1. This action is effective July 1, 1989, the beginning of the 1989–1990 contest.

2. This year's contest will be held on November 6 and 7, 1989, beginning at 11 a.m. on Monday and 9 a.m. on Tuesday.

3. Persons wishing to enter this year's contest may submit entries anytime after July 1, but all must be postmarked to later than midnight September 15.

ADDRESSES: Requests for complete copies of the regulations, reproduction rights and display agreements should be addressed to: Federal Duck Stamp Contest, U.S. Fish and Wildlife Service, Department of the Interior, 1800 C Street NW., Washington, DC 20240.

Location of contest: Department of the Interior Building Auditorium (C Street Entrance), 1800 C Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Norma Opgrand, Chief, Federal Duck Stamp Program, U.S. Fish and Wildlife Service, Washington, DC 20240, Telephone: (202) 343–4354.

SUPPLEMENTARY INFORMATION: The following five eligible species for the 1989–1990 duck stamp contest are listed below:

(1) Black-bellied Whistling Duck
(2) Spectacled Eider
(3) Barrow's Goldeneye
(4) Red-breasted Merganser
(5) Black Scoter.

The primary author of this document is Norma E. Opgrand, U.S. Fish and Wildlife Service.

Date: February 7, 1989.

Steve Robinson,

Deputy Director.

[FR Doc. 89-3371 Filed 2-13-89; 8:45 am]

BILLING CODE 4310-55-M

National Park Service

National Register of Historic Places; Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before February 4, 1989, pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by March 1, 1989.

Beth L. Savage,

Acting Chief of Registration, National Register.

GEORGIA

Coweta County

Senoia Historic District, Roughly bounded by Couch St., Seaboard Coast Line Railroad tracks, GA 16, and Pylant St., Senoia, 89000149

Douglas County

Roberts, Col. William T., House, 8652 Campbellton St., Douglasville, 89000153

Effingham County

Reiser—Zoller Farm, GA 119, 4 mi. N of Springfield, Springfield vicinity, 89000152

Fulton County

Stewart Avenue Methodist Episcopal Church South, 867 Stewart Ave., SW, Atlanta, 89000154

IDAHO

Bingham County

US Post Office—Blackfoot Main (US Post Offices in Idaho 1900—1941 MPS), 165 W. Pacific, Blackfoot, 89000128

Boundary County

US Post Office—Bonners Ferry Main (US Post Offices in Idaho 1900—1941 MPS), 215 First, Bonners Ferry, 89000129

Canyon County

US Post Office—Caldwell Main (US Post Offices in Idaho 1900—1941 MPS), 823 Arthur St., Caldwell, 89000131

US Post Office—Nampa Main (US Post Offices in Idaho 1900—1941 MPS), 123 11th Ave. South, Nampa, 89000132

Clearwater County

US Post Office—Orofino Main (US Post Offices in Idaho 1900—1941 MPS), 320 Michigan Ave., Orofino, 89000133

Franklin County

US Post Office—Preston Main (US Post Offices in Idaho 1900—1941 MPS), 55 E. Oneida St., Preston, 89000135

Fremont County

US Post Office—St. Anthony Main (US Post Offices in Idaho 1900—1941 MPS), 48 W. First North, St. Anthony, 89000136

Payette County

US Post Office—Payette Main (US Post Offices in Idaho 1900—1941 MPS), 915 Center Ave., Payette, 89000134

Shoshone County

US Post Office—Wallace Main (US Post Offices in Idaho 1900—1941 MPS), 403 Cedar St., Wallace, 89000137

Twin Falls County

US Post Office—Buhl Main (US Post Offices in Idaho 1900—1941 MPS), 830 Main, Buhl 89000130

MASSACHUSETTS

Hampden County

Chester Factory Village Historic District, Roughly bounded by Middlefield Rd., River, Main, and Maple Sts., US 20, and Williams St., Chester, 89000145

Middlesex County

Union Station, 20 Commonwealth Ave., Concord, 89000143

Suffolk County

Roxbury Highlands Historic District, Roughly bounded by Dudley St., Washington St., and Columbus Ave., Boston, 89000147

Worcester County

Ayer Main Street Historic District, Main St., Ayer, 89000150

MINNESOTA

Becker County

Edgewater Beach Cottages, 321 Park Lake Blvd., Detroit Lakes, 89000138

Jackson County

Church of the Sacred Heart (Catholic), 9th St. and 4th Ave., Heron Lake, 89000157

Kandiyohi County

Larson, A., & Co. Building, 539 W. Pacific Ave., Willmar, 89000156

St. Louis County

Civilian Conservation Corps Camp S-52, Off US 53, Orr vicinity, 89000158

Flint Creek Farm Historic District, MM 1, Cook vicinity, 89000139

LeMoine Building, Off Co. Hwy. 74, Orr vicinity, 89000140

Stearns County

St. Benedict's Convent and College Historic District, College Ave. and Minnesota St., St. Joseph, 89000160

MONTANA

Carbon County

Lockhart, Caroline, Ranch, Davis Creek, 70 mi. S of Hardin, Dead Hill, 89000155

NEW JERSEY

Bergen County

LeHigh Valley Railroad Barge No. 79, 1263 River Rd., Edgewater, 89000151

RHODE ISLAND

Providence County

Lippitt Hill Historic District, Hope Rd., Burlingame Rd., and Lippett Ave., Cranston, 89000142

TENNESSEE

Giles County

Sam Davis Avenue Historic District, Sam Davis Ave. and E. Madison St., Pulaski, 89000148

Hickman County

Walker, James Buchanan, House, West End and S. Barnwell Aves., Centerville, 89000146

Loudon County

Griffitts, William H. House, Jackson Ferry—Greenback Rd., Greenback vicinity, 89000141

Williamson County

Old Town Archeological Site (40HM2) (Mississippian Cultural Resources of the Central Basin (AD 900—AD 1450) MPS), Address Restricted, Franklin vicinity, 89000159.

The following property is also being considered for listing in the National Register:

NEW YORK

Monroe County

Brown's Race Historic District, Brown's Race St. from Platt St. to Conrail railroad tracks Rochester, 89000067

The commenting period for the following property has been shortened to seven days in order to assist in its preservation:

MASSACHUSETTS

Suffolk County

Roxbury Highlands Historic District, Roughly bounded by Dudley St., Washington St., and Columbus Ave., Boston, 89000147.

[FR Doc. 89-3400 Filed 2-13-89; 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31339]

Chesapeake Western Railway; Lease and Operation Exemption; Southern Railway Co.

Southern Railway Company (Southern) has agreed to lease approximately 28 miles of its line of railroad between milepost B-112.0 at Harrisonburg, VA and milepost B-84.0 at Mount Jackson, VA, to Chesapeake Western Railway (CW). CW's lease and operation of the line segment will take effect simultaneously with the discontinuance of operations by Southern on or about March 15, 1989.[1]

Southern is a Class I railroad controlled through stock ownership by Norfolk Southern Corporation (NSC), a holding company. NSC also controls Norfolk and Western Railway Company, which is the parent of CW. Thus, Southern and CW are, respectively, direct and indirect subsidiaries of NSC.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). It is a transaction that will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

This notice is filed under 49 CFR 1180.2(d)(3). Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: N.S. Fleischman, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

As a condition to the use of this exemption, any employees affected by the lease will be protected pursuant to *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980).

Dated: February 8, 1989.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89-3419 Filed 2-13-89; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-290 (Sub-No. 51X)]

Southern Railway Co.; Discontinuance Exemption; Operations Between Mount Jackson and Edinburg, VA

Applicant has filed a notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to discontinue service over its 5.1-mile line of railroad between milepost B-84.0 at Mount Jackson, VA and milepost B-78.9 at Edinburg, VA.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on March 16, 1989 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve environmental issues,[1] and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[2] must be filed by February 24, 1989. Petitions for reconsideration must be filed by March 7, 1989, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: N.S. Fleischman, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this discontinuance.

[1] A notice of exemption relating to the discontinuance of operations by Southern is the subject of Docket No. AB-290 (Sub-No. 51X), *Southern Railway Company—Discontinuance Exemption—Operations Between Mount Jackson and Edinburg, VA* published and served concurrently with this decision.

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines*, 4 I.C.C.2d 400 (1988). Any entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

[2] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987), and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440-48446).

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by February 17, 1989. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275–7316. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, conditions will be imposed, where appropriate, in a subsequent decision.

Decided: February 8, 1989.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89–3420 Filed 2–13–89; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Daryl L. Kingsolver, D.D.S.; Revocation of Registration

On August 23, 1988, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Daryl L. Kingsolver, D.D.S. of 8407 Bryant Street, Westminster, Colorado (Respondent), proposing to revoke DEA Certificate of Registration, AK 5562586, and to deny any pending applications for registration as a practitioner under 21 U.S.C. 823(f). The Order to Show Cause alleged that Respondent's registration would be inconsistent with the public interest.

Respondent, through counsel, filed a timely request for a hearing on the issues raised in the Order to Show Cause and the matter was placed on the docket of Administrative Law Judge Francis L. Young. On September 26, 1988, Judge Young issued an order directing the Government to file a prehearing statement on or before October 24, 1988, and Respondent to file a prehearing statement on or before November 28, 1988. In the Order for Prehearing Statements, Judge Young stated that, "Respondent is cautioned that failure to timely file a prehearing statement as directed above may be considered a waiver of hearing and an implied revocation of a request for hearing." After requesting an extension of one week in which to file, Government counsel filed its prehearing statement on October 31, 1988. Respondent, however, never submitted such a filing.

On November 21, 1988, Government counsel conferred with Respondent's counsel regarding a possible surrender of registration by Respondent. On November 25, 1988, Government counsel advised Respondent's counsel, in writing, of procedures necessary for such surrender. The Government has received no response from Respondent's counsel, but did receive a two page handwritten letter from Respondent dated November 15, 1988, indicating that, "my mother is forwarding to you my drug license renewal application with the remarks that I will be letting it lapse come December 31, 1988." Despite this notification to DEA that Respondent intended to surrender his registration, he never surrendered his renewal application or his Certificate of Registration.

In light of Respondent's failure to file a prehearing statement in the matter, or to surrender his current registration, Judge Young terminated the proceedings before him on December 29, 1988. The Administrator finds that Respondent has waived his right to a hearing by failing to file his prehearing statement and now enters his final order in this matter without a hearing and based on the record before him. 21 CFR 1301.57.

The Administrator finds that Respondent is a dentist licensed to practice in the State of Colorado. On January 22, 1982, Respondent was arrested by the Westminster Colorado Police Department and charged with possession and sale of controlled substances. Controlled buys of psilocybin and marijuana, both Schedule I controlled substances, were made from Respondent through an informant in cooperation with the Westminster Police Department. Quantities of psilocybin and marijuana were seized at Respondent's residence.

Respondent was arraigned on April 14, 1982, and charged with distribution of more than one ounce of marijuana, and distribution of a Schedule I controlled substance, both felonies relating to controlled substances. Just prior to his trial date, Respondent pleaded guilty to possession of more than one ounce of marijuana. His guilty plea was accepted in Adams County District Court and sentencing was scheduled for May 4, 1983. However, between the time that Respondent pleaded guilty and his sentencing, the Colorado law changed the violation from a felony to a misdemeanor. Pursuant to an agreement, Respondent was sentenced as though charged with a misdemeanor. On May 4, 1983, Respondent was sentenced to eighteen months probation; 100 hours of community service; a fine of $750.00; plus other costs of $150.00.

On December 4, 1987, Respondent was arrested and charged with first degree sexual assault on a child. This arrest was initiated when the Adams County Sheriff's Department received information that Respondent had sexually assaulted three male juveniles. Following receipt of this information, three male juveniles were interviewed regarding their relationship with Respondent. The juveniles advised Adams County authorities that Respondent had supplied the juveniles with various controlled substances such as marijuana, LSD, cocaine, mescaline and hexobarbital, a Schedule III depressant controlled substance. On numerous occasions Respondent provided these drugs to the teenagers until they were in a semi-conscious state, at which point Respondent sexually abused the juveniles. After a trial at which two of the three juveniles testified about obtaining controlled substances from Respondent, Respondent was convicted of first and third degree sexual assault. On October 7, 1988, Respondent was sentenced to a total of thirty-two years in prison and is currently incarcerated.

The investigative file reveals that with respect to his arrest on December 4, 1987, Respondent was not charged with distribution of controlled substances because no controlled substances were found at his office at the time a search warrant was served. However, the statements of the three juveniles, documented in the Adams County Sheriff's Department reports, established Respondent as the source of supply for controlled substances for at least those three individuals.

The information obtained from the three juveniles reveals that Respondent frequently, over a protracted period of time, distributed dangerous controlled substances to minors for other than a legitimate medical purpose and outside the course of his professional practice. One juvenile advised Adams County authorities that he had "partied" with Respondent approximately 250 times. Respondent's general practice was to supply the juveniles with alcohol and dangerous controlled substances, to wit: marijuana, LSD, mescaline, cocaine and hexobarbital. This juvenile told authorities that on the least one occasion, Repondent provided the hexobarbital to the juvenile from a locked cabinet in Respondent's dental office. This juvenile also reported having been supplied with nitrous oxide and controlled substances in Respondent's

dental office approximately eight times. The juvenile was never a patient of Respondent, but on two occasions he obtained Percodan, a Schedule II controlled substance, via prescriptions written by Respondent by feigning a toothache.

The Administrator finds that through intentional design, Respondent provided a steady flow of dangerous controlled substances to young men. Respondent's singular goal was to sexually abuse these young men; his method was to provide them with dangerous controlled substance until they were so intoxicated that they could not resist his advances. The victims' statements reveal that many controlled substances were, in fact, provided to the juveniles in Respondent's dental office. A medical professional, because of his training and experience, must be aware of the awful devastation and health consequences associated with drug abuse. By possessing, abusing and aiding in the distribution of controlled substances, Respondent has abandoned the trust placed in him as a dentist as well as his responsibility as a registrant, to safeguard the public from the unlawful use and abuse of controlled substances.

The Administrator may revoke an application for registration if he determines that such registration would be inconsistent with the public interest. The factors which are considered in determining whether the registration would be in the public interest are enumerated in 21 U.S.C. 823(f). Two of the factors to be considered include the registrant's conviction record under Federal or state laws relating to controlled substances, and the registrant's compliance with Federal, state or local laws relating to controlled substances. All factors need not be present for the Administrator to deny an application for registration. Instead, the Administrator may accord each factor the weight he deems appropriate in determining the public interest. See *Paul Stepak, M.D.*, 51 FR 17556 (1986).

The Administrator has considered the factors listed in 21 U.S.C. 823(f) and concludes that Respondent's continued registration is inconsistent with the public interest. In this instance, there is no question that Respondent's felony conviction resulted from illegal activities involving controlled substances. He was the steady source of controlled substances for at least three juveniles. Although most of the illegal activities which resulted in Respondent's conviction fell outside the scope of his professional practice, he did utilize his DEA registration on a few occasions to provide juveniles with controlled substances.

In light of the foregoing facts, Respondent's conviction of misdemeanor possession of marijuana, the seizure of psilocybin and marijuana from his residence, and Respondent's illegal possession and distribution of controlled substances to minors as part of a pattern of sexual abuse, Respondent's DEA Certificate of Registration must be revoked. Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824, and 28 CFR 0.100(b), orders tht DEA Certificate of Registration AK5562586, previously issued to Daryl L. Kingsolver, D.D.S., be, and it hereby is revoked. The Administrator further orders that any pending applications for renewal of Respondent's registration be, and they hereby are, denied.

This order is effective March 16, 1989.

Dated: February 8, 1989.

John C. Lawn,

Administrator.

[FR Doc. 89-3445 Filed 2-13-89; 8:45 am]

BILLING CODE 4410-09-M

Penick Corp.; Importation of Control Substances; Registration

By Notice dated October 3, 1988, and published in the **Federal Register** on October 12, 1988 (53 FR 39814), Penick Corporation, 158 Mount Olivet Avenue, Newark, New Jersey 07114, made application to the Drug Enforcement Administration to be registered as an importer of coca leaves (9040), a basic class of controlled substance listed in Schedule II.

No comments or objections have been received. Therefore, pursuant to section 1008(a) of the Controlled Substances Import and Export Act and in accordance with Title 21, Code of Federal Regulations, § 1311.42, the above firm is granted registration as an importer of the basic class of controlled substance listed above.

Dated: February 6, 1989.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 89-3446 Filed 2-13-89; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[Docket No. M-88-251-C]

Helvetia Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Helvetia Coal Company, Box 729, Indiana, Pennsylvania 15701, has filed a petition to modify the application of 30 CFR 75.11002(b) (quantity and location of firefighting equipment) to its Lucerne No. 8 Mine (I.D. No. 36-04597) located in Indiana County, Pennsylvania. 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-feet intervals along each belt conveyor and at tailpieces. At least 500 feet of firehose with fittings suitable for connection with each belt conveyor waterline is required to be stored at strategic locations along the belt conveyor. Waterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry.

2. During cold weather periods, the waterline used for fire protection along the slope belt freezes and becomes inoperative.

3. As an alternate method, petitioner proposes to use a dry waterline system from October 1 through May 1. The waterline would be kept charged during the remaining months.

4. In support of this request, petitioner states that—

(a) The dry waterline system would be pressurized with water by manually activating a water valve either at the top of the slope (surface) or at the bottom of the slope (underground);

(b) All persons in the vicinity of the slope would be instructed as to the operation of the dry waterline system;

(c) Sufficient water would be available for the dry waterline system at all times;

(d) A pressure gauge would be installed on the surface to indicate that a supply of water under pressure is available to the dry waterline system;

(e) The water supply system on the surface would be protected from freezing and would be easily accessible for manual operation;

(f) A visual means would be provided to indicate that a supply of water, under

pressure, is available to the automatic actuating valve and the manual bypass valve located underground;

(g) The automatic actuating valve and manual bypass valve would be tested weekly during the time the dry-pipe system is in operation, and the results would be recorded;

(h) The dry-pipe system would be purged of any water left in the system as a result of testing or actuation of the system to prevent ice from accumulating in the waterlines and valves;

(i) The valves would be protected from freezing and would be easily accessible for inspection or manual operation; and

(j) In the event the fire warning system is activated on the slope belt, all miners would immediately be withdrawn from underground at the mine in accordance with the provisions of the approved firefighting and evacuation plan.

5. 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 March 16, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: February 7, 1989.

[FR Doc. 89-3449 Filed 2-13-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-2-C]

Manalapan Mining Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

Manalapan Mining Company, Inc., Route 1, Box 374, Evarts, Kentucky 40828 has filed a petition to modify the application of 30 CFR 75.326 (aircourses and belt haulage entries) to its Wallins No. 6 Mine (I.D. No. 15-16318) 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 intake and return aircourses be separated from belt haulage entries, and that belt haulage entries not be used to ventilate active working places.

2. As an alternate method, petitioner proposes to use the intake air which is coursed through the belt haulage and/or track entries to ventilate active working places.

3. In support of this request, petitioner proposes to install an early warning fire detection system utilizing a low-level carbon monoxide (CO) detection system in all belt entries used as intake aircourses and at each belt drive and tailpiece located in intake aircourses. The monitoring devices would be capable of giving warning of a fire for four hours should the power fail; a visual alert signal would be activated when the CO level is 10 parts per million (ppm) above ambient air and an audible signal would sound at 15 ppm above ambient air. All persons would be withdrawn to a safe area at 10 ppm and evacuated at 15 ppm. The fire alarm signal would be activated at an attended surface location where there is two-way communication. The CO system would be capable of identifying any activated sensor, monitoring electrical continuity and detecting electrical malfunctions.

4. The CO system would be visually examined at least once each coal-producing shift and tested weekly to ensure the monitoring system is functioning properly. The monitoring system would be calibrated with known concentrations of CO and air mixtures at least monthly.

5. If the CO monitoring system is deenergized for routine maintenance or for failure of a sensor unit, the belt conveyor would continue to operate and qualified persons would patrol and monitor the belt conveyor using hand-held CO detecting devices.

6. The details for the fire detection system would be included as part of the ventilation system methane and dust control plan.

7. 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 March 16, 1989. Copies of the petition are available for inspection at that address.

Date: February 7, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-3450 Filed 2-13-89; 8:45 am]

BILLING CODE 4510-43-M

Pension and Welfare Benefits Administration

[Application No. D-7387 et al.]

Proposed Exemptions; The Equity Real Estate Account of John Hancock Mutual Life Insurance Company et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Pendency, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption.

ADDRESS: All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Regulations and Interpretations, Room N-5671, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Pendency. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefit Programs, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by

the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of pendency are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

The Equity Real Estate Account (Account) of John Hancock Mutual Life Insurance Company, located in Boston, Massachusetts

(Application No. D–7387)

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(b)(2) of the Act shall not apply, effective December 30, 1988 through December 31, 1990, to the sale and transfer of certain real estate investments by the Account to John Hancock Property Fund, a separate account of John Hancock Mutual Life Insurance Company (the Company), a party in interest with respect to the plans participating in the Account, provided that the terms of sale are not less favorable to the Account than those terms obtainable in an arm's length transaction with an unrelated party at the time of execution of the transaction.

EFFECTIVE DATE: If granted, this exemption will be effective from December 30, 1988 through December 31, 1990.

Summary of Facts and Representations

1. The Account was established by a June 9, 1975, vote of the Committee of Finance of the Company. The Account is maintained as a pooled separate account in accordance with the insurance laws of the State of Massachusetts. There are sixty-three pension plans participating in the Account at this time. As of December 31, 1987, the assets of the Account were valued at approximately $545,350,000. Most of the plans (the Plans) participating in the Account are subject to the general fiduciary provisions of the Act (the remainder of the participating plans are governmental plans which are exempt from Title I of the Act). The Account is composed primarily of equity real estate investments, both commercial and residential. Some of the investments are structured as joint ventures with an unrelated developer or property manager.

2. The group annuity contracts issued with respect to the Account provide the contract holder with the right to request the withdrawal of part or all of its interest in the Account upon 90 days written notice to the Company, subject to sufficient liquidity in the Account to honor the request. In the event that two or more contract holders have withdrawal requests outstanding at the same time, all such contract holders share in the cash flow of the Account available for distribution. Each contract holder's share is based on the total dollar amount of its request relative to the total dollar amount attributable to other contract holder requests.

3. Unfavorable economic conditions exist in several geographical areas represented in the Account portfolio, and real estate located in these areas has not performed well in recent years. The Account owns several properties in these areas and, as a result, recent Account returns have not compared favorably with other investment alternatives. Certain of the participating Plans representing substantial interests in the Account provided the Company with written requests for withdrawal. However, in the normal course of managing the Account, property sales will not raise enough cash to satisfy the pending withdrawal requests for a number of years. In addition, the Company represents that it is unlikely that new investors would invest in the Account in the near future. Therefore, the Company has been faced with a decision how to act in the best interests of the Plans desiring to withdraw completely as well as the Plans that want to continue to participate in certain Account investments.

4. In response to the above situation, the Company has obtained withdrawal requests from the remaining Account contract holders and has proposed to sell by December 31, 1990, all of the Account properties to either unrelated parties or to a new fund established by the Company. The proceeds from such sales will then be distributed to the contract holders on a pro rata basis.

5. The new fund, John Hancock Properties Fund (the Property Fund), was established effective January 1, 1988 by the Company to acquire certain of the Account properties (the Core Portfolio). Existing Account contract holders desiring to continue participation may choose to reinvest their share of distributions from the Account in the Property Fund. The Core Portfolio would provide the Property Fund with properties with a proven track record, which should be attractrive to new investors. The goal of the Property Fund is to outperform the Frank Russell Company Real Estate Index by at least 10% annually. John Hancock Properties, Inc. (Properties, Inc.), a subsidiary of the company, will be charged with managing the Property Fund.

6. Plans participating in the Account were informed in writing of the proposed transfer of Core Portfolio investments and were provided the opportunity to participate in the process of selecting a firm to represent their interests. Representatives of a number of Plans responded affirmatively to the Company's invitation and served on a committee which interviewed several firms and selected Cushman & Wakefield (Cushman) to act as an Independent Fiduciary on behalf of the Plans. Cushman is a nationally-known real estate appraisal and advisory firm. The Company represents that Cushman is not related to or affiliated with the Company. In addition, Cushman has represented in writing that it did not receive more than one percent of its annual gross receipts during the past three years from business with the Company.

7. Properties, Inc. developed a proposal regarding each asset to be transferred from the Core Portfolio. Each transaction would be carried out based on the current market value of the property. This value will be determined each quarter using well established procedures for the appraisal of real estate. Each property is appraised twice annually, once by Properties, Inc. and once by an independent firm.

8. The proposal will then be presented to Cushman to review on behalf of all Plans affected by the transaction.

Cushman will be responsible for reviewing all aspects of the procedures used to determine the value to be paid for such assets by the Property Fund. If deemed necessary, Cushman would be authorized to obtain new outside appraisals of the value of the property in question. In addition, Cushman will review the suitability of each property as an investment for the Property Fund, based on the Statement of Investment Objectives and Constraints (Guidelines) for the Property Fund. The Guidelines require, inter alia, that all properties acquired have at least 3 years of operating history, be located in economically stable markets and have reasonable anticipation of near term appreciation and yield growth. A copy of the Guidelines will be provided to each prospective customer prior to participation in the Property Fund.

9. After reviewing the proposed transaction, Cushman will submit a written report with respect to whether the price to be paid to the Account by the Property Fund for each property being purchased is equal to its fair market value. This investigation will include an analysis of the valuation procedures used and the findings of the appraisers. The report will also state whether in Cushman's opinion the property in question is suitable for the Property Fund, based on the criteria provided in the Guidelines. The ultimate purpose of Cushman's review is to assure that all sales from the Account to the Property Fund are in the best interests of all Plans affected by the transaction.

10. On December 30, 1988, two of the Account's investments were transferred to the Property Fund. These properties were the Gulf Gate Apartments located in Sarasota, Florida and El Mercado Plaza located in Union City, California (the Properties). The sales price for the Properties was $8,725,000 for the Gulf Gate Apartments and $8,500,000 for El Mercado Plaza. Cushman reviewed the proposal to sell the Properties to the Property Fund and in a written report determined that the Properties were appropriately suited for the Property Fund and that the prices to be paid for the Properties was not more than their fair market values.

11. In summary, the applicant represents that the subject transactions satisfy the statutory criteria of section 408(a) of the Act because:

a. The transfer would permit Account investments to be sold to the Property Fund, whose management is already familiar with the history and structure of each investment;

b. Each investment proposed for transfer to the Property Fund will be reviewed by Cushman, an Independent Fiduciary acting on behalf of the Plans affected by the transaction;

c. Each transfer would only be executed if Cushman determines that the price paid for the property is its fair market value and that the property in question is suitable for the Property Fund;

d. The transfer would provide the Account with additional liquidity and help the Company to satisfy the outstanding withdrawal requests; and

e. There is no sales commission or similar consideration accruing to the Company or other related parties from the transfer of investments from the Account.

FOR FURTHER INFORMATION CONTACT: Alan H. Levitas of the Department, telephone (202) 523–8194. (This is not a toll-free number.)

ServiceMaster Profit Sharing, Savings and Retirement Plan (the Plan) Located in Downers Grove, IL

(Application No. D–7416)

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of sections 406 (a), (b)(1) and (b)(2) and 407 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to: (1) The Plan's proposed one-time acquisition from ServiceMaster Limited Partnership (Employer), the sponsor of the Plan, and, as such, a party in interest with respect to the Plan, and holding of the Employer's limited partnership units (the Units) at a price per Unit which is the lower of: (a) $22.50; or (b) the closing price of the Units as publicly traded on the New York Stock Exchange (NYSE) on the date of the purchase; provided that the Plan hold no greater than 25% of its assets in such Units after acquisition thereof from the Employer; (2) the contribution to the Plan by the Employer of an irrevocable put option (the Put Option) which permits the Plan to sell the Units to the Employer at a price per Unit of $22.50; and (3) the holding of said Put Option by the Plan.

Temporary Nature of the Exemption: The exemption will expire ten years from the date the exemption is granted.

Summary of Facts and Representations

1. The Plan is a defined contribution plan which, as of December 31, 1987, held assets of approximately $37,500,000. As of December 31, 1986, the Plan had 3,388 participants. The Plan's trustee is currently the Gary-Wheaton Bank. The Plan is administered by a committee of three (3) or more persons (the Committee) appointed by ServiceMaster Management Corporation (the Corporate General Partner), which may remove any Committee member at any time. Each member of the Committee must be an employee or partner of the Employer or its subsidiaries and may be a Plan participant.

2. The Employer is a partnership which provides management support to customers in the health care, industrial, commercial, residential and educational fields. The Employer succeeds ServiceMaster Industries, Inc. (the Corporation), which was reorganized under the laws of Delaware into partnership form, effective December 30, 1986 (the Reorganization). Under the terms of the Reorganization, one share of the Corporation's common stock (the Common Shares) was exchanged for one Unit.

Prior to the Reorganization, the Plan provided that all amounts contributed therein by the Corporation were to be invested in the Common Shares. Until the Reorganization, the Plan was almost fully invested (i.e. 99.3%) in the Common Shares. Effective December 29, 1986, the Plan was amended to preclude investment in employer securities and, on December 29, 1986, the Plan sold its 1,603,489 Common Shares to the Corporation at $22.50 per share.

3. The Employer now proposes to sell to the Plan the number of Units which would comprise, immediately after acquisition, 25% of the Plan's assets at a Unit price the lower of $22.50 (the Reorganization sales price) or the closing price of the Units as publicly traded on the NYSE on the date of sale. The applicant represents that it has considered the proposed transaction in terms of section 415 of the Code and has stated that it does not see any problems with respect to that Code section. The applicant further represents that voting rights will attach to each Unit and that Plan participants will be entitled to vote their pro rata number of Units.

4. The Units are equity securities entitled to participate pro rata in distributions of Employer funds determined in the sole discretion of the Corporate General Partner. The applicant represents that investment in the Units is very similar to and, in some instances, more advantageous than investment in the Common Shares. The Units, like the Common Shares, have

met the prerequisites to be listed on the NYSE and are publicly traded thereon. As with publicly traded corporations, the Employer is subject to the reporting and disclosure requirements of the Securities Exchange Act of 1934.

The applicant further represents that favorable income tax treatment of the Units enables the Employer to make substantially larger cash contributions to Unit-holders than the Corporation would have been able to pay in dividends on its Common Shares. Moreover, the applicant represents that recent changes in Delaware limited partnership law result in limited partner liability that is essentially the equivalent of a corporate shareholder's liability.

5. The Employer also proposes to contribute to the Plan a Put Option exercisable by an independent fiduciary representing the Plan which would permit the Plan to sell to the Employer the Units acquired from the Employer at a strike price per Unit of $22.50. The applicant represents that the Put Option will be irrevocable for the term of the exemption.

6. The applicant further represents that Continental Capital Management Corporation, a subsidiary of Continental Illinois Bank and Trust Company of Chicago (Continental), has been appointed the independent fiduciary for the Plan concerning the proposed transaction. Continental represents that the Employer's deposits constitute no more than 1% of its loan business and that it and the Employer do not share any common directors. Continental further represents that it is an experienced employee benefits trust fiduciary with approximately $1.6 billion assets under management and a large professional staff.

7. Continental has reviewed the proposed transactions and has determined the following:

(a) The Units have been less volatile than the average equity security and have produced higher than average returns;

(b) The investment of 25% of Plan assets in the Units does not create undue risk to the Plan's portfolio and may, in fact, improve the total portfolio risk/reward balance;

(c) The Units outperformed the average stock during the declining market of October, 1987, and have demonstrated positive investment characteristics;

(d) The Employer's business is varied among several customer segments, which provide for significant diversification and reduce the risk of a large loss in the Plan's proposed acquisition and holding of the Units;

(e) The voting rights characteristic of the Units and Unit-holder liability neither diminish the value of the Units nor do they render them less attractive from an investment standpoint than shares of common stock;

(f) Unit-holder after-tax income has hitherto been greater than the dividends paid to the Common Shareholders prior to the Reorganization; and

(g) The Put Option, with its strike price of $22.50 per Unit, improves greatly the risk/reward ratio associated with the Plan's investment in the Units and is highly beneficial to the Plan.

Continental summarizes its analysis by concluding that an investment up to 25% to the Plan's assets in the Units would be prudent under the Act.

As independent fiduciary, Continental will continue to review and analyze the Plan's holding of the Units and will monitor the Units' performance and the Employer's business outlook. Continental will assume full responsibility for determining whether to exercise the Put Option during the term of the proposed exemption.

8. In summary, the applicant represents that the proposed transactions meet the criteria of section 408(a) of the Act because: (a) The Plan's purchase of the Units will be a one-time transaction; (b) The Plan will hold no greater than 25% of its assets in the Units immediately after acquisition thereof from the Employer; (c) The Plan will pay no greater than fair market value for the Units; (d) The fair market value of the Units at the time of the purchase will be determined by the objective standard of the closing price of the Units on the NYSE; (e) The Plan will receive an additional safeguard in the form of an irrevocable Put Option which will enable the Plan, upon the independent fiduciary's decision, to sell the Units back to the Employer at a price of $22.50; (f) Continental has agreed to serve as the Plan's independent fiduciary in connection with the transactions and has reviewed them and determined that they are in the best interests of the Plan and its participants; and (g) Continental will monitor the performance of the Units after the Plan's acquisition thereof to determine, *inter alia*, whether to exercise the Put Option.

Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value such excess may be considered to be a contribution by the sponsoring employer to the plan and therefore must be examined under applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

For Further Information Contact: Mrs. B.S. Scott of the Department, telephone (202) 523–8194. (This is not a toll-free number.)

Plessey Dynamics Employees Retirement Plan (the Plan) Located in Hillside, New Jersey

[Application No. D–7473]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedures 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of sections 406(a) and 406(b) (1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of 4975(c)(1) (A) through (E) of the Code, shall not apply to the cash sale of certain real property (the Property) from the Plan to Plessey Incorporated (Plessey), a party in interest with respect to the Plan, for the greater of $675,000 or the fair market value for the Property at the time of sale.

Summary of Facts and Representations

1. Plessey Dynamics Corporation (the Employer) is a manufacturer of parts for the aerospace and defense industries. The Employer is a wholly-owned subsidiary of Plessey. The plan is a defined benefit pension plan. As of December 31, 1987, the Plan had approximately 162 participants and total assets (excluding the Property) of around $3.8 million. The Plan is administered by a retirement committee, the members of which are appointed by the board of directors of the Employer.

2. On October 1, 1965, the Plan purchased an approximate one-half acre of improved real property located at 1420 Chestnut Avenue, Hillside, New Jersey (the 1420 Property) from unrelated parties for cash in the amount of $138,000. The improvements to the 1420 Property consisted of a single-story industrial building, about 40 percent of which is finished as office space and the remainder of which was used as a fabrication and laboratory area. On October 2, 1967, the Plan purchased another approximately one-half acre of improved real property adjacent to the 1420 Property (the 1416 Property), also from unrelated parties for cash, in the amount of $118,000. The improvements to the 1416 Property consisted of a

single-story industrial building with a small second-story addition. The area to the rear of the building is paved and used for parking. The 1420 Property and the 1416 Property together are referred to as the Property.

3. The Property has been leased to the Employer pursuant to the terms described in a previous exemption, Prohibited Transaction Exemption (PTE) 86–2 (51 FR 2594, January 17, 1986). PTE 86–2 granted retroactive relief as of December 5, 1984, the effective date of the lease agreement. The lease requires combined rental payments of $6,692 per month. The applicant represents that all terms of the lease under PTE 86–2 have been met and that all related lease payments have been received by the Plan timely and in full. The exempt lease terminated in October 1986. The Employer did not exercise its renewal option on the lease and moved in May 1986 to new rented facilities in Whippany, New Jersey.[1]

4. The Plan obtained an appraisal on the Property from Jon P. Brody (Brody), a real estate appraiser located in Livingston, New Jersey. The applicant represents that Brody is independent of the Plan and the Employer. Utilizing the anticipated rental income and comparable sales approaches to value, Brody estimated that as of May 16, 1988, the fair market value of the 1416 Property was $420,000 and that of the 1420 Property was $250,000, giving a total fair market value for the Property of $670,000.

5. Plessey owns three buildings on Chestnut Avenue and on Montgomery Street in Hillside, New Jersey (the Corporate Premises), which are contiguous to the Property. The Property and the Corporate Premises together comprise the entire Plessey Plant. Integrated Properties, Inc. (IPI), an unrelated third party, wishes to purchase the entire Plessey Plant. The Plan had negotiated with IPI concerning a sale of the Property to IPI. However, the Employer has been required to design and implement an approved cleanup plan for the entire Plessey Plant under the New Jersey Environmental Cleanup Responsibility Act (ECRA) and the Plan has requested that the Employer take responsibility for the cleanup plan. Accordingly, the Plan has determined that it would be preferable to sell the Property to Plessey, who in turn proposes to sell the Property to IPI. Plessey has agreed to purchase the Property from the Plan on terms and conditions that assure that the Plan will not be involved in the cleanup plan or bear any risk or costs associated with the ECRA claims. The Plan has negotiated a contract with the assistance of Leonard D. Furman (Furman), independent fiduciary for the Plan under PTE 86–2, which was entered into on January 9, 1987, for the sale of the Property. The sale will be a one-time transaction for cash at a price of $675,000. The Plan will pay no transaction costs in connection with the sale.

6. In regard to the exemption granted for the lease of the Property under PTE 86–2, Furman was appointed as an independent fiduciary for the Plan. PTE 86–2 noted that Furman is independent of the Employer and is an attorney and certified public accountant practicing mainly in the fields of income taxation, pensions and estate planning. Furman stated that he understands his duties and liabilities as an independent fiduciary under the Act. His duties under PTE 86–2 included reviewing and monitoring the lease of the Property entered into under that exemption between the Plan and the Employer. Furman states that the Property was listed for sale with various brokers but could not be sold because of the costly ECRA problems. Furman says that he has reviewed the contract for the proposed sale of the Property to Plessey and that Plessey will bear any costs resulting from ECRA. Because the Property otherwise has produced no income since lease expiration, the Employer has agreed to make lease payments since October 1986 at the amount then in effect ($6,692 per month) plus interest at the rate of 10 percent per annum for all rent attributable to the retroactive period through the time when the Plan no longer owns the Property. Furman has reviewed the independent appraisal of the Property and believes that the proposed sale to Plessey should be approved. Furman agrees to see that the terms of the sales contract are met on behalf of the Plan. Also, Furman believes that the proposed transaction is in the interests of the Plan and is protective of its participants and beneficiaries.

7. In summary, the applicant represents that the proposed transactions will satisfy the statutory criteria of section 408(a) of the Act because: (1) The sale of the Property will be entirely for cash and the Plan will pay no transaction costs in regard to the sale; (2) the fair market value of the Property will be established by an appraiser who is independent of the Plan and the Employer; (3) all the lease payments due under PTE 86–2 have been received by the Plan timely and in full; (4) according to the terms of the sale, the Plan will not bear any of the costs associated with the ECRA claims; and (5) an independent fiduciary of the Plan believes that the sale would be in the interests of the Plan and agrees to see that the terms of the sales contract are met on behalf of the Plan.

FOR FURTHER INFORMATION CONTACT: Paul Kelty of the Department, Telephone (202) 523–8883. (This is not a toll-free number.)

United Artists Communications, Inc. (Rowley United Division) Retirement Plan (the Plan) Located in Dallas, Texas

[Application No. D–7491]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of sections 406(a) and 406(b) (1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale of certain real property (the Property) from the Plan to United Artists Communications, Inc. (the Employer), a party in interest with respect to the Plan, provided the Plan receives no less than fair market value for the Property at the time of sale.

Summary of Facts and Representations

1. The Employer is a national motion picture exhibitor which operates theatres in numerous locations throughout the country. The Rowley Division of the Employer operates theatres throughout the Southern part of the United States. The Plan is a profit sharing plan having approximately 419 participants. The assets of the Plan totaled $3,271,450 as of December 31, 1986. The Plan has been frozen as to further contributions since September 30, 1987, pending liquidation, distribution of assets and termination.

2. The Property consists of approximately 11.1 acres of land located in the City of Killeen, Bell County, Texas. The Property adjoins a theatre which is currently owned and operated by a wholly-owned subsidiary of the Employer. Of the total land, 2.8 acres are subject to a superior parking easement held by the Employer and benefitting the

[1] The Department expresses no opinion as to whether Plan fiduciaries violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act in allowing the Property to remain unused (and producing no income) since the time of lease expiration in October 1986.

adjacent theatre property. This 2.8 acre parcel is currently used as a parking lot. The remaining 8.3 acres of the Property are undeveloped and unencumbered by the parking easement.

3. The Property is part of an 11.7 acre tract that was purchased by the Plan from an unrelated party in 1969 (prior to passage of the Act) for $90,000 in cash. The Property was purchased as a site for the Plan to build a motion picture theatre. Prior to 1969, the Plan owned a number of motion picture theatres in Killeen which were leased to and operated by the Employer. The Cinema I and II Theatres and a 2.8 acre parking lot adjoining the theatre were constructed by the Plan and included in the lease to the Employer. In June 1971 the Plan sold all eight of its Killeen motion picture properties, including the Cinema I and II Theatres, to Magna Pictures Corporation (Magna) which was then a 30 percent owned subsidiary of the Employer (80 percent after 1981). The eight properties together were sold for a total of $2,560,000. The Property was not included in that sale, except for the 0.5 acre tract containing the theatre building, and the Plan retained title to the Property. As further terms of the transaction, Magna was given a perpetual parking easement, to accommodate the parking needs of the theatre, over a 2.8 acre parking lot which was part of the Property and Magna obligated itself to pay all maintenance expenses and taxes on the parking area.[2] The consideration paid to the Plan for the parking easement was an unspecified portion of the $2,560,000 purchase price paid for the Killeen theatre properties.

4. The Plan obtained an appraisal on the Property from Clemo L. Ray, Jr. (Ray) of the Central Texas Appraisal Company in Temple, Texas. The applicant represents that Ray is independent of the Plan and of the Employer. In Ray's opinion, the existence of the easement on 2.8 acres has somewhat of a detrimental effect on the remaining 8.3 acres of the Property which could be developed. Ray believes that the highest and best use of the Property at the present time would be that of a holding investment but that eventually the Property should be developed for commercial purposes. Ray did not give a premium to the Property due to the existence of the adjacent theatre. Placing emphasis on the comparable sales approach to value and taking into account the easement on the Property, Ray estimated that the fair market value of the Property as of November 16, 1987, was $340,000.[3]

5. In order to further the liquidation of the assets of the Plan, Plan fiduciaries propose to sell the Property to the Employer. The Employer will pay no less than fair market value for the Property at the time of sale, based on an updated independent appraisal. Also, the Employer will reimburse the Plan at the closing for the appraisal fee of $2,100 which was previously paid by the Plan. The transaction will be entirely for cash and the Plan will pay no fees or commissions in regard to the sale.

6. In summary, the applicant represents that the proposed transaction will satisfy the statutory criteria of section 408(a) of the Act because: (1) The sale of the Property will be entirely for cash and the Plan will pay no fees or commissions in connection with the sale; (2) the Employer will pay no less than fair market value for the Property at the time of sale; (3) the fair market value will be based on an independent appraisal of the Property; and (4) the transaction will enable Plan fiduciaries to further the liquidation of the assets of the Plan.

For Further Information Contact: Paul Kelty of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

Mid State Machine Products, Inc. Defined Benefit Plan (the Plan) Located in Winslow, Maine

[Application No. D-7675]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 184712, April 28, 1975). If the exemption is granted the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the proposed sale by the Plan of certain real estate limited partnerships and real estate investment trusts (together, the Interests) to Mid State Machine Products, Inc. (the Employer), the sponsor of the Plan, provided that the price paid is the higher of either the Plan's original purchase price for each of the Interests or the fair market value of each of the Interests on the date of sale.

Summary of Facts and Representations

1. The Plan is a defined benefit pension plan which, as of June 15, 1988, had 92 participants and total assets of approximately $80,720. The trustees of the Plan (the Trustees), and the decision-makers with respect to Plan investments, are Douglas Sukeforth (Mr. Sukeforth) and his wife, Rita Sukeforth (Ms. Sukeforth), and Barry Stewart (Mr. Stewart). The Plan was established in 1979 to provide retirement benefits to employees in addition to those benefits provided under the Employer's profit sharing plan. However, benefit accruals under the Plan were "frozen" as of July 7, 1987. The Plan is in the process of being terminated. By letter dated July 5, 1988, the Internal Revenue Service determined that the Plan was qualified upon termination.

2. The Employer is a Maine corporation which operates a precision machine shop in Winslow, Maine. Mr. Sukeforth is the President and Treasurer of the Employer and owns approximately 60 percent of the stock of the Employer. Ms. Sukeforth is the Corporate Secretary and owns approximately 40 percent of the stock of the Employer. Mr. Steward is an accountant employed by the Employer.

3. The Plan acquired the Interests beginning in 1979 when the Plan was established. The Plan has paid a total of $74,000 for the Interests. The Interests consist of a variety of shares or units in a total of seven real estate limited partnerships (the Partnerships) and real estate investment trusts (the Trusts), which are dispersed as to geographic region and industry investment. The Interests represent over half of the assets of the Plan.[4] The Interests were acquired from unrelated parties either on the open market or as part of the initial offering of the particular Interests by the issuer. Neither the Employer, Mr. Sukeforth nor any of the other Trustees hold any interests in the Partnerships or Trusts.

[2] The applicant represents that, under Texas law, the grant of such an easement is a common practice when conveying a portion of a larger tract. The applicant represents further that Texas law provides that the grant of an easement in circumstances like those described in the application constitutes a sale of an interest in real estate. The grant of the easement was complete and unconditional in 1971 and no rent payments or renewals of contracts are involved in the grant of the easement. The Department is expressing no view herein with respect to the granting of the subject easement and is proposing no exemptive relief in regard to any prohibited transactions which may have arisen as a result thereof.

[3] By letter dated September 6, 1988, Ray estimated that the dollar amount of the effect on the Property due to the easement was $48,000 as of the date of the appraisal.

[4] The Department is expressing no opinion as to whether the acquisition and holding of the Interests violated any of the provisions of Part 4 of Title I of the Act.

The applicant asserts that since each of the Partnerships and Trusts offered the Interests for sale pursuant to a public offering, with the appropriate registrations under the Securities Acts of 1933 and 1934, and since the Interests are freely transferable and widely-held, none of the Partnerships or Trusts are considered to hold "plan assets" as a result of the investment by the Plan, or any other employee benefit plan, in the Partnerships or Trusts. Thus, the applicant represents that the assets of the Plan are considered to consist solely of the Interests held by the Plan and are not considered to extend to any interest in the underlying properties or mortgages held by the Partnerships or the Trusts.

4. The applicant states that in order to complete the termination of the Plan, the Plan must have sufficient cash to pay the accrued benefit balances to the participants and beneficiaries. Since the bulk of the Plan's assets are invested in the Interests, these balances cannot be paid without liquidating the Interests.

In addition, based on the current fair market value of the Plan's assets, the Plan has accrued liabilities which are in excess of its assets. The Employer will be required to make a contribution to the Plan prior to its termination sufficient to fund all accrued benefits. The amount of the Employer's required contribution will be determined, among other things, by the price that the Plan receives on the sale of the Interests.

Most of the Interests are several years away from maturity. The applicant states that the Plan could remain in a "frozen" status until each of the Interests reaches maturity. However, the Trustees believe that termination of the Plan and the distribution of benefits to the participants and beneficiaries now is preferable to waiting until all the Interests reach maturity because termination of the Plan will eliminate the annual costs attendant upon the maintenance of the Plan which are borne, in part, by the Plan. The Trustees state that the intervening costs to the Plan over the next ten to fifteen years of maintaining the Plan in a "frozen" status would likely outweigh any benefit in investment gains on the Interests which may be experienced during that time.

5. The applicant states that while the Interests are publicly-traded securities which are freely transferable and widely-held, almost all of the Interests are traded very thinly and are fairly illiquid investments. The market value of the Interests has declined since the time of the Plan's acquisition of the Interests. The Trustees believe that the Plan could incur substantial losses, as well as commissions and other related expenses, if the Plan attempted to sell the Interests on the open market to unrelated parties. Therefore, the Employer proposes to purchase the Interests from the Plan at a price which will be the higher of either the Plan's original purchase price for each of the Interests or the fair market value of each of the Interests, as established by an independent, qualified appraiser. The Plan would not pay any commissions or other expenses with respect to the sale.

6. A.G. Edwards & Sons, Inc. (Edwards) of Portland, Maine, has provided an independent assessment of the fair market value of the Interests (the Appraisal). Edwards is an investment firm experienced in securities analysis and market research. Edwards states that it has no prior relationship with either the Plan or the Employer. In addition, none of the Interests held by the Plan were purchased through Edwards.

The Appraisal provides a valuation of the Interests according to the most current prices available as of May 12, 1988. Based on the Appraisal, the total fair market value of the Interests was $43,205, as of that date.

By letter dated June 1, 1988, Peter M. Shaw (Mr. Shaw), an investment broker with Edwards, provided a further analysis of the Interests. Mr. Shaw states that the Interests in the Trusts are all traded on the national securities exchanges and that obtaining a current market value for these Interests is not a problem. In addition, the Interests in the Partnerships are limited partnership units which are traded on the National Partnership Exchange (NAPEX). NAPEX is an exchange which provides a secondary market for the trading of publicly-registered limited partnership interests. The Appraisal of the Interests in the Partnerships is based on information obtained from NAPEX.

7. In the proposed transaction, the Plan will receive the higher of either the current fair market value of the particular Interest, as determined by Edwards in accordance with the latest prices on the appropriate securities exchanges of NAPEX, or the Plan's original purchase price for the particular Interest. The applicant states that the Appraisal will be updated by Edwards, as of the date of sale, to obtain the most current market values for the Interests.

8. In summary, the applicant represents that the proposed transaction will satisfy the statutory criteria of section 408(a) of the Act because: (a) The sale will be a one-time transaction for cash; (b) the Plan will receive a price which will be the higher of either the fair market value of each of the Interests, as established by an independent appraiser, or the Plan's original purchase price for each of the Interests; (c) the Plan will not pay any commissions or other expenses with respect to the sale; and (d) the transaction will allow a prompt termination of the Plan and a distribution of the Plan's assets to the participants and beneficiaries.

For Further Information Contact: Mr. E.F. Williams of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

Barber and Lundberg Profit Sharing Plan and Trust (the Plan) Located in Oklahoma City, Oklahoma

[Application No. D-7788]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to a proposed loan not to exceed $300,000 by the Plan to Barber and Lundberg, Inc. (the Employer), the sponsor of the Plan; provided that all terms of such loan are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party.

Summary of Facts and Representations

1. The Plan is a defined contribution pension plan with fourteen participants and total assets of $1,206,733 as of December 31, 1987. The Employer is a closely-held Oklahoma corporation engaged in wholesale marketing of veterinary and animal health supplies in Oklahoma City, Oklahoma. The trustee of the Plan is Van Barber, a shareholder, officer and employee of the Employer.

2. The Employer recently arranged for the construction of a new office and warehouse facility (the Building) on Employer-owned property (the Land) to serve as a new and larger principal place of business. Interim, short-term construction financing was secured by the Employer to enable the construction of the Building. The Employer seeks to retire the short-term construction financing in part by security a loan (the Loan) from the Plan and is requesting an exemption to permit the Loan under the terms and conditions described herein.

3. The Employer proposes to borrow from the Plan the lesser of (1) $300,000 or (2) twenty-five percent of the Plan's assets at the time of the Loan transaction. As security for the Loan, the Employer will grant to the Plan a duly filed and perfected first mortgage on the Building and the Land. The Land is a commercially-zoned 1.5 acre parcel of real property located at 212 Ann Arbor Drive in Oklahoma City and the Building is a concrete panel commercial building with approximately 14,438 square feet of office and warehouse space. As of September 7, 1988 the Land and Building had a fair market value of $450,000, according to Patrick O. Glenn, MAI, an independent professional real estate appraiser in Oklahoma City.

The Loan will be evidenced by a promisory note (the Note) in favor of the Plan which provides for repayment of the Loan over twenty years in equal monthly installments of principal plus interest at an annually-adjusted rate of one percent above the prime commercial rate as announced and charged by Citibank, N.A. of New York City. The Note provides that the entire outstanding principal amount of the Loan, plus accrued interest, shall become due and payable at the Note holder's option in the event any monthly installment due thereunder is not paid when due. The Note further provides that the entire indebtedness due thereunder will be immediately due and payable upon any sale or transfer of the Land or Building by the Employer, unless the Note holder has consented to such sale or transfer in writing. The Note requires the Employer to bear all costs and expenses, including but not limited to reasonable attorney's fees, which are incurred in the event of a lawsuit to collect from the Employer under the Note.

4. The interests of the Plan with respect to the proposed Loan are represented by the Dozier Company (the Fiduciary), an Oklahoma City-based pension services corporation which represents that it has substantial fiduciary experience under the Act. The Fiduciary represents that it is independent of and unrelated to the Employer except as consultant to certain of the Employer's qualified employee benefit plans and that fees received from the Employer for such consultative services represent less than one percent of the total fees received by the Fiduciary. The Fiduciary has agreed to act in a fiduciary capacity on behalf of the Plan with respect to all aspects of the proposed Loan for its duration, to monitor and enforce the Employer's performance of all Loan terms and to initiate remedies, if necessary, on behalf of the Plan in case of any default by the Employer on any Loan obligation. The Fiduciary represents that the proposed Loan will constitute an enhancement of the Plan's investment returns by providing the highest rate of return which can be realized. The Fiduciary states that the proposed Loan's interest rate is no less than the prevailing market rates charges by local commercial lenders for equivalent loans. The Fiduciary states that it will require the Employer to provide proof of insurance and payment of taxes on the Land and Building and that it will ensure that the Employer keeps the Land and Building in adequate condition for the duration of the Loan.

5. David Shaefer (Shaefer), vice president of The Oklahoma Bank (the Bank) in Oklahoma City, offers a statement establishing that the Employer is in good credit standing as a preferred customer of the Bank and that the Employer has a record of successful performance under numerous loan arrangements with the Bank since 1973. Shaefer states that the proposed terms of the Loan constitute terms under which the Bank, subject to committee approval, could extend credit to the Employer under the same circumstances as those of the proposed Loan.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (1) The Loan will be secured by a first mortgage on real property collateral, the Land and Building, having an appraised value of 150 percent of the principal of the Loan; (2) The Loan principal will not exceed twenty-five percent of the Plan's assets at the time of the Loan; (3) The Plan's interests under the proposed Loan are represented by the Fiduciary, which will monitor and enforce the Employer's performance of Loan obligations and will ensure the Employer's adequate maintenance of the Land and Building as collateral; (4) The Plan will earn interest at a rate of one percentage point above the prime rate charged by Citibank, N.A. of New York, a rate of return which the Fiduciary represents to be no less than the applicable market rates charged by local lenders for equivalent loans; and (5) The Note which evidences the Loan enables acceleration of the Loan in the event of any default or any transfer of the Land or Building by the Employer and requires the Employer to bear all expenses incurred in any suit for enforcement of Loan terms.

FOR FURTHER INFORMATION CONTACT: Ronald Willett of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 9th day of February, 1989.

Robert J. Doyle,

Director of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 89-3430 Filed 2-13-89; 8:45 am]

BILLING CODE 4510-29-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-155]

Consumers Power Co.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an extension of exemption from the schedular requirement of 10 CFR 50.71(e)(3)(ii) to the Consumers Power Company (the licensee) for the Big Rock Point Plant located in Charlevoix County, Michigan.

Environmental Assessment

Identification of the Proposed Action

The proposed action would grant an extension of exemption from the requirements of 10 CFR 50.71(e)(3)(ii) to submit an updated Final Hazards Summary Report (FHSR) for the Big Rock Point Plant within 24 months of receipt of a letter notifying the licensee that the Systematic Evaluation Program (SEP) has been completed. Big Rock Point Plant, as one of the plants chosen to be evaluated in the SEP was, therefore, subject to the provisions of 10 CFR 50.71(e)(3)(ii).

The licensee was notified by letter dated August 27, 1984, that the SEP had been completed for the Big Rock Point Plant. The licensee, by application dated August 27, 1986, as supplemented December 3, 1986, requested an exemption from the schedular requirements of 10 CFR 50.71(e)(3)(ii) in order to allow time for the licensee to complete a newly agreed upon dated FHSR. By letter dated March 2, 1987, the Commission issued an exemption to the schedular requirements of 10 CFR 50.71(e)(3)(ii) until December 31, 1988. The further deferral of the submittal of the updated FHSR is the proposed action being considered by the Commission's staff.

The Need for the Proposed Action

The licensee, by letter dated March 13, 1983, requested that the updating of the Big Rock Point FHSR be included in an expanded assessment of outstanding regulatory requirements as part of the SEP. The primary purpose of this request was to allow better management of licensee resources which were to be applied to regulatory and nonregulatory tasks.

The licensee proposed that a method of indexing pertinent documents, which could provide a chronology and identification of design changes to the Big Rock Point Plant, might serve as a workable substitute to an updated FHSR. In NUREG-0828, dated May 1984, transmitted to the licensee by Commission letter dated August 27, 1984, the Commission's staff concluded that this proposal was acceptable, provided the index of documents identified specific SEP topic safety evaluation references.

Although the above referenced evaluations were incorporated into the indexing system, subsequent review by the Commission's staff resulted in the identification of additional concerns such that the proposed substitute did not constitute a completely adequate alternative to an updated FHSR. After telephone discussions with the licensee, an agreement was reached for the licensee to provide an updated FHSR to the Commission by December 31, 1988. However, the originally proposed length of time to accomplish the updating of the 27-year-old FHSR has not been adequate at the agreed upon level of effort of one dedicated professional, plus secretarial and supervisory support. Therefore, an extension of the schedular exemption is required in order to allow time for the licensee to complete an updated FHSR.

Environmental Impact of the Proposed Action

The proposed extension of exemption involves only the required date for submittal of a document describing the as-built condition of the Big Rock Point Plant and does not increase the risk of facility accidents. Thus, the proposed extension of exemption does not involve any increase in the likelihood of the release of radioactive or nonradioactive effluents from those already determined, nor does the proposed action have other environmental impact. Therefore, the Commission concludes that there are no measurable radiological or nonradiological environmental impacts associated with the proposed extension of exemption.

Alternative to the Proposed Action

Since the Commission has concluded there are no measurable environmental impacts associated with the proposed extension of exemption, any alternative with equal or greater environmental impacts need not be evaluated. The principal alternative to the extension of the exemption would be to require an earlier date for the submittal of the updated FHSR. Such an action would not enhance the protection of the environment and would result in unnecessary diversion of licensee engineering resources from other work of higher safety significance.

Alternative Use of Resources

This action does not involve the use of resources beyond the scope of resources used during normal plant operation.

Agencies and Persons Contacted

The Commission's staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of No Signficant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed extension of exemption. Based upon the foregoing assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this proposed action, see (1) the licensee's letter dated August 27, 1986, as supplemented December 3, 1986, and November 22, 1988, and (2) the Exemption granted March 2, 1987. These documents are available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street NW., Washington, DC, and at North Central Michigan College, 1515 Howard Street, Petoskey, Michigan 49770.

Dated at Rockville, Maryland, this 31st day of January 1989.

For the Nuclear Regulatory Commission.

Theodore R. Quay,

Acting Director, Project Directorate III-1, Division of Reactor Projects—III, IV, V & Special Projects.

[FR Doc. 89-3426 Filed 2-13-89; 8:45 am]

BILLING CODE 7590-01-M

Commonwealth Edison Co.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Hearing

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF-72 and NPF-77 issued to Commonwealth Edison Company (the licensee), for operation of Braidwood Station, Units 1 and 2, respectively, located in Will County, Illinois.

The licensee requested the amendment including associated changes in the combined Technical Specifications for Units 1 and 2 in a letter dated January 3, 1989.

The amendment would authorize the licensee to increase the spent fuel pool storage capacity from 1060 to 2870 storage locations in the common pool

shared by both units at Braidwood Station.

The high density spent fuel racks consist of individual cells with 8.85-inch by 8.85-inch (nominal) square cross-section, each of which accommodates a single Westinghouse PWR fuel assembly or equivalent. A total of 2870 cells are arranged in 23 distinct modules of varying sizes in two regions. Region I is designed for storage of new fuel assemblies with enrichments up to 4.2 weight percent U–235. Region I is also designed to store fuel assemblies with enrichments up to 4.2 weight percent U–235 that have not achieved adequate burnup for Region II. The Region II cells are capable of accommodating fuel assemblies with various initial enrichments which have accumulated minimum burnups with an acceptable bound.

The amendment would change Technical Specification Section 5.6 to reflect the decrease in distance between fuel assemblies, and the increase in storage capacity, and incorporate a curve entitled "Minimum Burnup versus Initial Enrichment for Region II Storage."

Prior to issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

By March 16, 1989, the licensee may file a request for hearing with respect to issuance to the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petition for leave to intervene shall be filed in accordance with the Commission's Rules of Practice for Domestic Licensing Proceedings in 10 CFR part 2. If a request for a hearing or petition of leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary of the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularly the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner is required to file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity, pursuant to 10 CFR 2.714(b). Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party. Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120 L Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at (800) 325–6000 (in Missouri (800–342–6700)). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Daniel R. Muller: Petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of the **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Michael Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

Nontimely findings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

The Commission hereby provides notice that this is a proceeding on an application for a license amendment falling within the scope of section 134 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10154. Under section 134 of the NWPA, the Commission, at the request of any party to the proceeding, must use hybrid hearing procedures with respect to "any matter which the Commission determines to be in controversy among the parties." The hybrid procedures in Section 134 provide for oral argument on matters in controversy, preceded by discovery under the Commission's rules, and the designation, following argument, of only those factual issues that involve a genuine and substantial dispute, together with any remaining questions of law, to be resolved in an adjudicatory hearing. Actual adjudicatory hearings are to be held on only those issues found to meet the criteria of section 134 and set for hearing after oral argument.

The Commission's rules implementing Section 134 of the NWPA are found in 10 CFR Part 2, Subpart K, "Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors" (published at 50 FR 41662, October 15, 1985) 10 CFR 2.1101 *et seq.* Under those rules, any party to the proceeding may invoke the hybrid hearing procedures by filing with the presiding officer a written request for oral argument under 10 CFR 2.1109. To be timely, the request must be filed within ten (10) days of an order granting a request for hearing or petition to intervene. (As outlined above, the Commission's rules in 10 CFR Part 2,

Subpart G, and § 2.714 in particular, continue to govern the filing of requests for a hearing or petitions to intervene, as well as the admission of contentions). The presiding officer shall grant a timely request for oral argument. The presiding officer may grant an untimely request for oral argument only upon showing of good cause by the requesting party for the failure to file on time and after providing the other parties an opportunity to respond to the untimely request. If the presiding officer grants a request for oral argument, any hearing held on the application shall be conducted in accordance with the hybrid hearing procedures. In essence, those procedures limit the time available for discovery and require that an oral argument be held to determine whether any contentions must be resolved in an adjudicatory hearing. If no party to the proceeding requests oral argument, or if all untimely requests for oral argument are denied, then the usual procedures in 10 CFR Part 2, Subpart G apply.

For further details with respect to this action, see the application for amendment dated January 3, 1989, that is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC, and at the Wilmington Township Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

Dated at Rockville, Maryland, this 9th day of February 1989.

For the Nuclear Regulatory Commission.

Stephen P. Sands,

Project Manager, Project Directorate III–2, Division of Reactor Projects—III, IV, V and Special Projects.

[FR Doc. 89–3427 Filed 2–13–89; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–498]

Houston Lighting & Power Co.; Consideration of Issuance of Amendment to Facility Operating Licence and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–76, issued to Houston Lighting & Power Company (the licensee), for operation of the South Texas Project, Unit 1, located in Matagorda County, Texas.

The proposed amendment would modifiy the Technical Specifications (TS) by modifying the Fuel Handling Building Exhaust Air subsystem electric heaters to operate at 38 kW instead of the current 50 kW; modifying the Source Range Neutron Monitor calibration requirements to ensure that a new model of preamplifier can be installed for use; and clarifying action statements for the Chemical Detection System and the Control Room Ventilation System.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the request for amendment involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. The three modifications are discussed below.

The Fuel Handling Building (FHB) Exhaust Air Heating Ventilation and Air Conditioning (HVAC) System exhausts air from inside the FHB to the plant main vent stack. The system consists of two 100% capacity exhaust filter trains, three 50% capacity exhaust booster fans, three 50% capacity main exhaust fans, dampers and instrumentation. Each exhaust filter train consists of three 33⅓% capacity filter units which has an electric heating element, prefilters, HEPA filters, and carbon filter. The electric heating element decreases humidity which affects the efficiency of the removal of iodine. A flowswitch turns off the electric heaters if airflow drops below a minimum flowrate. When all three trains are actuated, the flow through the filter units is less than the setpoint, thus deenergizing the heater.

Currently, procedures require operators to shut down one filter train following an Engineering Safety Feature Actuation System (ESFAS) actuation in order to maintain sufficient flow through the other train such that the heaters will operate. The proposed change would reduce the size of the heaters thus allowing the heaters to operate at a lower flowrate while maintaining the 70% or below relative humidity criteria.

The determination of significant hazards is discussed below.

(1) The proposed change to the heaters reflects design requirements to mitigate the consequences of an accident. The air flow is maintained at the present value. Additionally, dose analysis assumptions are maintained using the lower rated heaters. Therefore, there is no increase in the probability or consequences of an accident previously evaluated.

(2) The proposed heaters fulfill design basis requirements as part of an accident mitigating system described in the FSAR. A change in the heater capacity does not create the possibility of a new different kind of accident.

(3) The proposed change reflects a design change which maintains the relative humidity at a level consistent with iodine removal requirements. There is no reduction in the margin of safety.

Prior to issuance of the Unit 2 license, the licensee had to replace the preamplifier for one of the Source Range Neutron Detectors. A new model, "low noise", preamplifier was used as the replacement in Unit 2 because the previous model is no longer manufactured. As a result of the use of the new model of preamplifier, the channel calibration surveillance for the source range detector had to be modified for the Unit 2 TS to address the use of the new model of preamplifier. The proposed change would allow the use of the new model preamplifier in Unit 1.

The determination of significant hazards is discussed below.

(1) The proposed change involves calibration techniques on the new preamplifier which will ensure the source range detector will function as required. There is no increase in the probability or consequences of an accident previously evaluated.

(2) The proposed changes to the calibration requirements will ensure the preamplifer will function as well as the current preamplifier if used in Unit 1. No conditions have been created that could cause a new or different kind of accident.

(3) The proposed changes will ensure the source range detector operates as required which is at least equal to the performance with the old model preamplifier.

The Control Room HVAC System has two emergency modes of operation: (1) toxic gas release, (2) radiological release. The Chemical Detection System has an action statement in the TS which requires the Control Room HVAC System be in the recirculation mode if one or both of the detectors are inoperable. The Control Room HVAC System has action statements in modes 5 and 6 (cold shutdown and refueling) which require the system be placed in the filtered recirculation and make-up modes if any of the three trains are inoperable. Additionally, the ESFAS action statements for modes 5 and 6 would eventually require the Control

Room HVAC System be placed in the filtered recirculation and make-up modes.

The action statement that applies to the Control Room HVAC System for modes 5 and 6 requires that if one train is inoperable, the remaining train be placed in the filtered recirculation and make-up modes. Thus, if the Control Room HVAC System is in the recirculation and make-up status, failure of one of the toxic gas dectectors would require an action which conflicts with one that is already in effect.

The proposed change would add a note to TS 3.3.3.7 (Control Room Ventilation System) that if there is a conflict between the operable mode required by several action statements, then the system is to be placed in filtered recirculation only. This would be considered the safe default condition.

The determination of significant hazards is discussed below.

(1) The proposed changes maintain the plant in the safest possible condition given the postulated situation. The proposed change will not increase the probability or consequences of an accident previously evaluated.

(2) The proposed change only affects actions to be taken as a result of plant conditions in order to maintain control room habitability. It will not create the possibility of a new or different kind of accident.

(3) The proposed change maintains the margin of safety for a toxic gas release by placing the Control Room HVAC System in the filtered recirculation mode.

During a radiological release, the positive pressure of the control room and short period of time of in-leakage would not result in a significant dose to the operators. Further, the make-up mode could be actuated if needed. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on the above, the staff has determined that the proposed changes involve a no siginficant hazards consideration. The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Comments should be addressed to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resource Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room P–216, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 8:15 am to 4:00 pm. Copies of written comments may be examined at the NRC Public Document Room, 2120 L Street NW., Washington, DC 20555. The filings of requests for hearing and petitions for leave to intervene is discussed below.

By March 16, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license, and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene must be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board Panel will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene must set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceedings; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which the petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, the petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the request for amendment involves no significant hazards consideration, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and state comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so

inform the Commission by a toll-free telephone call to Western Union at (800) 325–6000 (in Missouri (800) 342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Jose A. Calvo: Petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel-Rockville, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Jack R. Newman, Esq., Newman & Holtzinger, P.C., 1615 L Street NW., Washington, DC 20036, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated January 25, 1989, which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555, and at the Wharton Junior College Library, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488 and the Austin Public Library, 810 Guadalupe Street, Austin, Texas 78701.

Dated at Rockville, Maryland, this 8th day of February 1989.

For the Nuclear Regulatory Commission.

Jose A. Calvo,

Director, Project Directorate—IV, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 89–3428 Filed 2–13–89; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50–361 and 50–362]

Southern California Edison Co. et al.; Consideration of Issuance of Amendments to Facility Operating Licenses and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF–10 and NPF–15 issued to Southern California Edison Company (SCE), San Diego Gas and Electric Company, the City of Riverside, California and City of Anaheim, California (the licensees), for operation of San Onofre Nuclear Generating Station, Units 2 and 3 located in San Diego County, California. The request for amendments was submitted by letter dated December 29, 1988 and identified as Proposed Change PCN–253.

The proposed change would revise the Technical Specifications (TS) 3/4.8.2.1, "DC Sources." This Specification requires operability of the four 125 VDC battery banks and their associated battery chargers, defines periodic surveillance tests and inspections to verify operability and action to initiate should a battery bank or its associated charger be found to be inoperable. The operability of the DC power sources during operation ensures that sufficient power is available to supply and safety-related equipment required for safe shutdown of the facility and for the mitigation and control of accident conditions within the facility.

The proposed amendments would change the 18 month surveillance requirements to a refueling cycle frequency. Currently, Surveillance Requirements (SR) 4.8.2.1.c and 4.8.2.1.d require visual inspections, resistance measurements, battery charger capacity checks, and battery capacity tests at 18-month intervals; and TS 4.8.2.1.d requires that, once every 18 months during a unit shutdown, the battery capacity be verified to be adequate to supply and maintain, in operable status, all of the actual or simulated emergency loads for the design duty cycle when the battery is subjected to a battery service test. These requirements would change from once per 18 months to once per refueling interval.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By March 16, 1989, the licensees may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses, and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing or petition for leave to intervene. Requests for hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceedings, and how that interest may be affected by the results of the proceeding. The petition shall specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendments under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene shall be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120 L Street NW.,

Washington, DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative of the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–800–325–6000 (in Missouri 1–800–342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to George W. Knighton: Petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. Charles R. Kosher, Esq., Southern California Edison Company, 2244 Walnut Grove Avenue, P.O. Box 800, Rosemead, California 91770 and Orrick, Herrington and Sutcliffe, Attention: David R. Pigott, Esq., 600 Montgomery Street, San Francisco, California 94111, attorneys for licensees.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendments which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555, and at the General Library, University of California at Irvine, Irvine California 92713.

Dated at Rockville, Maryland this 8th day of February, 1989.

For the Nuclear Regulatory Commission.

Terence L. Chan,

Acting Director, Project Directorate V, Division of Reactor Projects III, IV, V and Special Projects.

[FR Doc. 89–3429 Filed 2–13–89; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

Forms Under Review by Office of Management and Budget

Agency Clearance Officer: Kenneth A. Fogash, (202) 272–2142.

Upon Written Request Copy Available From: Securities and Exchange Commission, Office of Consumer Affairs, 450 Fifth Street NW., Washington, DC 20549

New, Rule 15c2–6, File No. 270–325

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission has submitted for clearance proposed Rule 15c2–6, which would require a written customer agreement to, and a documented suitability determination for, certain recommended transactions in equity securities that are not registered on a national securities exchange or authorized for inclusion in the NASDAQ system, and whose issuers do not meet certain minimum financial standards. Nine thousand forty-seven respondents incur an estimated average burden of five minutes to comply with the Rule.

The estimated average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even representative summary or study of the cost of SEC rules and forms.

Direct general comments to Gary Waxman at the address below. Direct any comments concerning the accuracy of the estimated average burdens hours for compliance with SEC rules and forms to Kenneth A. Fogash, Deputy Executive Director, 450 Fifth Street NW., Washington, DC 20549–6004, and Gary Waxman, Clearance Officer, Office of Management and Budget, Paperwork Reduction Project (3235–03zz), Room 3208, New Executive Office Building, Washington, DC 20543.

Jonathan G. Katz,

Secretary.

February 8, 1989.

[FR Doc. 89–3403 Filed 2–13–89; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. 34–26524 ; File No. SR–MSRB–88–4]

Self-Regulatory Organizations, Municipal Securities Rulemaking Board; Order Approving Proposed Rule Change Relating to Books and Records

On November 9, 1988, the Municipal Securities Rulemaking Board ("MSRB") submitted a proposed rule change (File No. SR–MSRB–88–4) pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") to amend MSRB rule G–8 to require the recordkeeping of suitability information for institutional accounts.

Notice of the proposed rule change was given in Securities Exchange Act Release No. 26370 (December 19, 1988), 53 FR 52285. The Commission received no comments on the proposal. This order approves the proposal.

Rule G–19(b) provides that, before making a recommendation to a customer, a securities professional must determine that the securities are a suitable investment for that customer. The rule specifies that a suitability determination shall be based upon, among other things, information furnished by the customer relating to its "financial background, tax status and investment objectives and any other similar information." In 1987, the Board adopted and the SEC approved an amendment to rule G–8(a)(xi) to require the recordkeeping of suitability information for customer accounts required to be obtained by rule G–19.

The MSRB stated, however, that because of a cross-referencing problem in the rule, rule G–8(a) did not require dealers to keep suitability records for institutional accounts, yet dealers are required to comply with rule G–19 when making recommendations to institutional customers. Therefore, the Board proposed the amendment to rule G–8(a)(xi) to require the recordkeeping of suitability information for institutional accounts.

The Commission agrees with the Board that the amendment would provide additional protection by facilitating a dealer's discharge of its suitability responsibilities and would assist municipal securities principals and regulatory examiners in reviewing transactions for compliance with rule G–19. Thus, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB. In particular, the Commission believes that the proposal is consistent with section 15B(b)(2)(C), which requires MSRB rules to, among other things, be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act, that File No. SR–MSRB–88–4, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3 (12).

Jonathan G. Katz,

Secretary.

Dated: February 7, 1989.

[FR Doc. 89–3406 Filed 2–13–89; 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Pacific Stock Exchange, Incorporated

February 8, 1989.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder, for unlisted trading privileges in the following securities:

Genesco, Inc.
Common Stock, $1.00 Par Value (File No. 7–4184)
Shawmut National Corporation
Common Stock, $.01 Par Value (File No. 7–4185)
Service Merchandise Co., Inc.
Common Stock, $.50 Par Value (File No. 7–4186)
Fleming Companies, Inc.
Common Stock, $2.50 Par Value (File No. 7–4187)
Grow Group, Inc.
Common Stock, $.10 Par Value (File No. 7–4188)
Hong Kong Telecommunications, Ltd.
American Depositary Shares (File No. 7–4189)
L.A. Gear, Inc.
Common Stock, No Par Value (File No. 7–4190)
Environmental Treatment & Technologies Corporation
Common Stock, $.10 Par Value (File No. 7–4191)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before March 2, 1989, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Divison of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–3404 Filed 2–13–89; 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Incorporated

February 8, 1989.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder, for unlisted trading privileges in the following securities:

Katema, Inc.
Common Stock, $1.00 Par Value (File No. 7–4192)
Cyprus Minerals Company
Common Stock, No Par Value (File No. 7–4193)
InterTan Inc.
Common Stock, $1 Par Value (File No. 7–4194)
Southwest Gas Corporation
Common Stock, $1 Par Value (File No. 7–4195)
Lyondell Petrochemical Company
Common Stock, $1 Par Value (File No. 7–4196)
Telecom USA, Inc.
Common Stock, $0.01 Par Value (File No. 7–4197)
Premier Industrial Corporation
Common Stock, Without Par Value (File No. 7–4198)
The Shell Transport & Trading Co. PLC
Depositary Receipts (File No. 7–4199)
Illinois Central Transportation Co.
Common Stock, $0.01 Par Value (File No. 7–4200)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before March 2, 1989, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–3405 Filed 2–13–89; 8:45 am]

BILLING CODE 8010–01–M

[Release No. IC–16799; 812–7151]

Aegon, N.V.; Application

February 7, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "1940 Act").

Applicant: Aegon, N.V.

Relevant 1940 Act Sections: Applicant seeks an order under section 6(c) from all provisions of the 1940 Act.

Summary of Application: Applicant seeks an order granting exemption from all provisions of the 1940 Act in connection with the offer and sale of its equity and debt securities in the United States.

Filing Date: The application was filed on October 18, 1988 and amended on February 3, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on March 6, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, c/o Troland S. Link, Esq., Davis Polk & Wardwell, 1 Chase Manhattan Plaza, New York, New York 10005.

FOR FURTHER INFORMATION CONTACT: Barbara Chretien-Dar, Staff Attorney, at (202) 272–3022 or Stephanie Monaco, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the Application; the complete Application is available for a fee from either the SEC's Public Reference Branch in person, or the SEC's commercial copier (800) 231–3282 (in Maryland (301) 258–4300).

Applicant's Representation

1. The Applicant is an insurance holding company engaged through its operating subsidiaries and affiliates in the life, accident and health and general insurance businesses. Applicant is the second largest insurance company in The Netherlands and one of the ten largest insurance companies in the European Economic Community. Applicant engages in insurance operations in the United States through its wholly-owned insurance company subsidiaries. Applicant also engages in life insurance activities in the United Kingdom, Belgium, Spain, the Netherlands Antilles, Aruba and Suriname through insurance brokers. Applicant is also involved in certain related businesses, including mortgage financing, property management and development, and equipment leasing. These non-insurance businesses accounted for approximately ten percent of Applicant's total revenues in 1987.

2. In 1987, total revenues for Applicant were Dfl. 9,162,310,000 (approximately U.S. $4,531,311,000 at the exchange rate in effect on December 31, 1987), of which 60% was earned by its Netherlands operations and 32% by its United States operations.

3. Applicant's shares are listed on the Amsterdam, London, Tokyo, Geneva, Basel and Zurich Stock Exchanges and, since June 27, 1985, have been listed on NASDAQ. As of September 30, 1988, Applicant had 36,547,647 common shares outstanding, of which 251,728 were registered shares on NASDAQ.

4. Applicant, directly or through its subsidiaries, is subject to regulation by The Netherlands' Insurance Control Board which imposes licensing, audits, financial and reporting requirements under the Insurance Supervision Act. The Central Bank of The Netherlands supervises Applicant's mortgage banking activities. Applicant's United States insurance subsidiaries are subject to regulation and supervision in the states in which they transact business. In each of these subsidiaries' domiciliary states, statutes and regulations governing insurance holding companies require periodic disclosure of controlling persons. In addition, Applicant's United States insurance subsidiaries are subject to insurance company regulation and supervision and in all states (except New York) and the District of Columbia.

5. Applicant wishes to offer and sell its debt and equity securities in the United States. Applicant presently contemplates issuing unsecured, prime quality commercial paper notes ("Notes"). The aggregate principal amount currently contemplated is $300,000,000.00. The proceeds from the Notes, which will have a maturity of not more than 270 days from date of issuance, will be used to finance Applicant's current transactions or will be lent to its wholly-owned subsidiaries for the purpose of funding their current transactions. They will be issued and sold in minimum denominations of $100,000 through major United States commercial paper dealers. Applicant will secure an undertaking from each such dealer that the Notes will be sold to institutional investors and other entities and individuals who normally purchase commercial paper notes and that the Notes will not be offered for sale to the general public. The debt obligations will be direct liabilities of Applicant and will rank *pari passu* among themselves and equally with all other unsecured and unsubordinated indebtedness of Applicant and will be superior to rights of shareholders.

6. Applicant will provide any dealer of such Notes with sufficient information to prepare, and undertakes to insure that the dealers will provide each offeree of the Notes with, a memorandum (the "offering memorandum") which describes the respective business of Applicant and contains the most recently available prepared financial statements of the Applicant, audited in accordance with generally accepted accounting principles of The Netherlands. In addition, the offering memorandum will contain a description of any material differences between Dutch accounting standards applicable to Dutch insurance companies and generally accepted accounting principles employed by United States insurance companies. The offering memorandum will be at least as comprehensive as those customarily used in commercial paper offerings in the United States and will be updated periodically to reflect material changes in Applicant's business or financial status.

7. The Applicant will not issue or sell any such Notes until it has received an opinion by its United States counsel that the Notes will qualify for exemption from registration under section 3(a)(3) of the Securities Act of 1933 (the "1933 Act"), as amended.

Applicant's Legal Analysis

Exempting Applicant from all provisions of the 1940 Act in connection with the issuance and sale in the United States of equity or debt securities is necessary or appropriate in the public interest; is consistent with the protection of investors; and is consistent with the purposes fairly intended by the 1940 Act. Absent an exemption, Applicant would be effectively precluded from selling securities in the United States because of the costs and burdens involved in registering as an investment company. Applicant's major competitors are domestic insurance companies which are exempt from the provisions of the 1940 Act. Furthermore, Applicant is subject to significant Dutch and other regulations as an insurance holding company and investors would receive the benefits afforded by such regulation in addition to United States laws relating to investor protection.

Applicant's Conditions

1. Applicant undertakes that any future offering of debt or equity securities, other than the Notes, will only be made if (a) the securities are registered under the 1933 Act, (b) in the opinion of United States counsel for Applicant an exemption from registration is available with respect to such offer and sale, or (c) the staff of the Commission states that it would not recommend that the Commission take any action under the 1933 Act if such securities are not registered. Applicant undertakes to provide to any person to whom it offers the Notes or other such securities in the United States (and undertakes to insure that any underwriter or dealer through whom it offers such securities will provide to any offerees) disclosure documents which are at least as comprehensive in their description of such Applicant and its business as those customarily used in United States offerings of such securities and which will contain the most recently available audited financial statements of the Applicant, including a description of any material differences between the accounting principles applied in the preparation of such financial statements and generally accepted accounting principles utilized in the United States. Such disclosure documents will be updated promptly to reflect any material changes in the financial condition of Applicant.

2. The proposed issue of the Notes and any future issues of any debt

securities shall have received, prior to issuance, one of the three highest investment grade ratings from at least one of the nationally recognized United States investment rating organizations; provided, however, that no such rating shall be required when, in the opinion of Applicant's United States counsel (after taking into account the doctrine of "integration" as referred to in various releases by the Commission), an exemption from registration is available under section 4(2) of the 1933 Act. The United States counsel for the Applicant shall certify the receipt of such investment grade rating.

3. In the event of an offering in the United States of debt securities denominated in a currency other than United States dollars, Applicant undertakes to set forth in the prospectus or memorandum relating to such offering (i) the rate of exchange between currency in which the securities are denominated and United States dollars as of a recent date and (ii) appropriate disclosure of the risks to investors regarding the potential for exchange rate fluctuations.

4. In connection with the Notes or any future offering of securities in the United States by Applicant, Applicant will appoint an agent to accept service of process in any suit, action or proceeding brought on the securities or with respect to any disclosure documents prepared in connection therewith and instituted in any state or Federal court by the holder of any securities. The applicant will expressly submit to the jurisdiction of the New York State and United States Federal courts sitting in The City of New York with respect to any such suit, action or proceeding. Such appointments of an agent to accept service of process and such consents to jurisdiction shall be irrevocable until all amounts due and to become due in respect thereof have been paid. No such submission to jurisdiction or appointment of agent for service of process will affect the right of a holder of any such security to bring suit in any court which shall have jurisdiction over Applicant by virtue of the offer and sale of such securities or otherwise.

5. Applicant, through its subsidiaries, has a significant presence in the United States and presently has no intention either to curtail its insurance operations in the United States or to reduce or otherwise dispose of its ownership interests in its United States insurance company subsidiaries. In the event that Applicant is no longer (directly or through its subsidiaries) regulated as an insurance company in the United States, it will continue to comply with the undertakings set forth in paragraph 4 above concerning its submission to jurisdiction and appointment of an agent for service of process, until such time as there will be no holder in the United States of its debt or equity securities or commercial paper issued in reliance upon any order made pursuant to this Application. Applicant will issue debt or equity securities or commerical paper in the United States only so long as it is supervised and regulated as an insurance company by the Netherlands Insurance Board, and with respect to its United States operations, is regulated (directly or through its subsidiaries) by state insurance authorities having the power of supervision over insurance companies in the United States. Applicant represents that it has no present intention of curtailing its insurance operations in The Netherlands.

6. Applicant will maintain, in one place, all the documents and records relating to this Application and required under the conditions set forth herein.

7. Applicant consents to any Commission order being expressly conditioned on its compliance with the undertakings contained in the preceding paragraphs.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-3407 Filed 2-13-89; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-16800; 811-1484]

Northeastern Capital Corp.; Application

February 8, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for an Order under the Investment Company Act of 1940 (the "1940 Act").

Applicant: Northeastern Capital Corporation.

Relevant 1940 Act Sections: Order requested under section 8(f) of the 1940 Act.

Summary of Application: Applicant seeks an order declaring that it has ceased to be an investment company.

Filing Date: The application was filed on October 25, 1988, and amended on January 19, 1989. Applicant filed a supplemental letter to the application on February 6, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on March 6, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, 209 Church Street, New Haven, Connecticut 06509.

FOR FURTHER INFORMATION CONTACT: Barbara Chretien-Dar, Staff Attorney, at (202) 272-3022 or Stephanie Monaco, Branch Chief, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the Application; the complete Application is available for a fee from either the SEC's Public Reference Branch in person, or the SEC's commercial copier (800) 231-3282 (in Maryland (303) 258-4300).

Applicant's Representation

1. Applicant was incorporated under the laws of the State of Connecticut on January 9, 1961, and was licensed as a small business investment company ("SBIC") on March 8, 1961 by the Small Business Administration ("SBA"). Applicant registered as a closed-end, non-diversified management company under the 1940 Act on March 24, 1967.

2. On October 15, 1986, Applicant's Board of Directors approved an Agreement and Plan of Merger (the "Merger Agreement") between Applicant and a wholly-owned subsidiary of BNH Bancshares, Inc. ("BNH"), a Connecticut corporation and bank holding company, under which Applicant would be the surviving corporation and a wholly-owned subsidiary of BNH. The Merger Agreement was amended on June 16, 1987, and submitted to Applicant's shareholders for approval at a special meeting of shareholders on August 21, 1987. The Merger Agreement was approved by 83 percent of the outstanding shares of Applicant. None of Applicant's shareholders exercised statutory rights of dissenters under Connecticut law.

3. As a registered bank holding company under the Bank Holding Company Act of 1956, BNH is subject to

regulation by the Board of Governors of the Federal Reserve System. Regulations under this law permit the acquisition of all the voting stock of an SBIC; provided, however, that the amount of investment by a bank holding company in an SBIC does not exceed five percent of the capital and surplus of its subsidiary banks.

4. Applicable federal regulations also required the SBA's approval of the transfer of Applicant's SBIC license as a result of the change of control resulting from the merger. By letter dated September 10, 1987, the SBA approved the transfer of Applicant's license on condition that (i) BNH increase Applicant's capital by $175,000 immediately, (ii) thereafter, BNH increase Applicant's capital to $1,000,000 as soon as practicable, and (iii) Applicant not pay any cash dividends until its capital reaches $1,000,000.

5. The Banking Commissioner of the State of Connecticut also approved the Merger pursuant to Connecticut law.

6. Pursuant to the terms of the Merge Agreement, on September 28, 1987, each shareholder of Applicant received .65 shares of BNH Common Stock in exchange for each share of Applicant owned at the time of the merger. An aggregate of 40,015 shares of BNH Common Stock was issued along with cash payments for fractional shares in exchange for all the 61,595 outstanding shares of Applicant. Immediately preceding the merger, the aggregate net asset value of Applicant's shares was $312,163.00, representing a per share net asset value of $5.07, and the agreed-upon market value of BNH Common Stock was $16.32 per share. The terms of the Merger Agreement, including the exchange ratio, were the result of arm's length negotiations between Applicant and BNH. In addition to Applicant's net asset value, factors used to determine the price received for Applicant's shares included existing assets, financial condition and resources, operations, management and earnings over a period of years for each company, as well as judgments regarding earnings potential and future values of Applicant and BNH (separately and as a combined enterprise). Both companies contemplated that BNH's additional capital investment of $175,000 would enable Applicant to qualify for additional SBA loans, which would allow Applicant to expand its investment activity and compete more effectively in the marketplace for small business loans.

7. Expenses incurred in connection with the merger, including legal fees, accounting fees, federal and state filing fees, printing and mailing costs, totalled $148,912.00 and were allocated between Applicant and BNH, with Applicant paying $70,620 of those expenses.

8. Applicant is not a party to any litigation or administrative proceeding.

9. Applicant has made filings required under the act, including all N-SAR filings for each semi-annual period for which such filing was required.

10. Applicant intends to continue its business operations as an SBIC through long-term loans from the SBA and short-term bank debt. Applicant presently has only two securityholders (BNH and SBA) and is not making and does not propose to make a public offering of its securities. Applicant states that under the provisions of section 3(c)(1) of the 1940 Act and Rule 3c-2 thereunder, Applicant no longer is an investment company as defined under the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-3453 Filed 2-13-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC — 16801; 812-7078]

Prudential-Bache Global Fund, Inc., et al.; Application

February 8, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for an order amending a prior order under the Investment Company Act of 1940 ("1940 Act")

Applicants: Prudential-Bache Global Fund, Inc. ("Global Fund"), Prudential-Bache Government Plus Fund, Inc. ("Government Plus Fund"), Prudential-Bache Securities Inc. ("Prudential-Bache"), Prudential Mutual Fund Management, Inc. ("PMF"), and Prudential Mutual Fund Distributors, Inc. ("PMFD").

Relevant 1940 Act Section: Amendment requested to an existing order which granted an exemption under section 6(c) from the provisions of sections 2(a) (32), 2(a) (35), 22(c), and 22(d) and Rule 22c-1 thereunder.

Summary of Application: Applicants seek an order amending an existing order of the SEC dated July 1, 1985 (Investment Company Act Rel. No. 14615), as amended on September 12, 1985 (Investment Company Act Release No. 14718) and on January 11, 1988 (Investment Company Act Rel. No. 16217), which exempted Applicants from the provisions of section 2(a) (32), 2(a) (35), 22(c), and 22(d) of the 1940 Act and Rule 22c-1 thereunder in connection with the imposition and waiver of a contingent deferred sales charge ("CDSC"). The proposed amendment would amend the existing order to the extent necessary to permit the Global Fund, the Government Plus Fund, and any other existing or future registered open-end investment company for which Prudential-Bache or PMF serves as manager or administrator, and for which Prudential-Bache or PMFD serves as distributor and which is sold on substantially the same basis as the Global Fund and the Government Plus Funds (collectively, the "Exempted Funds"), to waive their CDSC under certain circumstances in addition to those allowed by the existing order.

Filing Date: The application was filed on July 21, 1988, and was amended and restated on November 24, 1988 and on January 30, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any request must be received by the SEC by 5:30 p.m., on March 6, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESS: Secretary, SEC, 450 5th Street NW., Washington DC 20549. Applicants, One Seaport Plaza, New York, New York 10292.

FOR FURTHER INFORMATION CONTACT: Jeremy N. Rubenstein, Staff Attorney, at (202) 272-2847, or H.R. Hallock, Jr., Special Counsel, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier, who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

Applicants' Representations

1. The existing order, as amended, exempts the Exempted Funds from the provisions of section 2(a) (32), 2(a) (35),

22(c), and 22(d) of the 1940 Act and Rule 22c-1 thereunder to the extent necessary to permit the assessment (and waiver and reduction in certain cases) of a CDSC on certain redemptions of their shares. Currently, the manager for both the Global Fund and the Government Plus Fund (together, "Funds") is PMF, an affiliate of Prudential-Bache. The distributor of the Funds' shares is Prudential-Bache.

2. As amended to date, the existing order permits an Exempted Fund to waive a CDSC with respect to (i) certain redemptions following the death or disability (as defined in Section 72(m)(7) of the Internal Revenue Code ("Code")) of a stockholder; (ii) redemptions made in connection with certain distributions, transfers and rollovers from Individual Retirement Accounts and other types of retirement plans; (iii) redemptions made in connection with certain profit-sharing or stock bonus plans upon "hardship" of the employee, as determined by the plan, subject to review by the Exempted Fund's administrator or manager; (iv) redemptions of shares purchased through reinvestment of dividends or distributions of other specified Exempted Funds; (v) redemptions following a qualified domestic affairs order, as defined in section 414(p) of the Code; and (vi) redemptions effected by a stockholder of an Exempted Fund who is a client of a Prudential-Bache Account Executive and who purchased shares of the Exempted Fund with the redemption proceeds of shares of a registered investment company sponsored by the Account Executive's previous employer within ninety days of commencement of the Account Executive's employment with Prudential-Bache. The existing order, as amended to date, also permits an Exempted Fund to reduce the CDSC in the case of a redemption by a shareholder who, alone or together with certain other affiliated stockholders, has purchased a specified minimum amount of shares in one or more of the Exempted Funds.

3. Applicants propose that the CDSC be waived, in addition to those waivers permitted by the existing order, with respect to (a) redemptions effected by a stockholder of an Exempted Fund who is an employee of the Prudential Insurance Company of America or one of its affiliates, or a director or trustee of an Exempted Fund at the time of the purchase of shares of an Exempted Fund; and (b) redemptions effected by a stockholder of an Exempted Fund who is a participant in a retirement plan account qualifying under section 401(k) of the Code (a "401(k) Account") who acquired shares of an Exempted Fund with amounts used to repay a loan from the 401(k) Account, and who, in order to make the loan, redeemed shares of an Exempted Fund.

4. Applicants submit that the proposed waivers of the CDSC are consistent with the policies underlying section 22(d), which prohibits a registered investment company from selling its redeemable securities other than at a current public offering price described in the company's prospectus. Applicants also believe that the proposed waivers of the CDSC will not harm Applicants or their shareholders or unfairly discriminate among shareholders or purchasers.

Applicants' Conditions

In addition to the representations and conditions already applicable to the existing order, as amended, Applicants agree that the following conditions may be imposed on any order of the SEC granting the requested relief:

1. The Exempted Funds will comply with the provisions of Rule 12b-1 under the 1940 Act as they are now in effect and as they may be revised in the future.

2. The Exempted Funds will comply with the provisions of Rule 22d-1 under the 1940 Act.

3. The total amount of the CDSC imposed on the redemption of shares of an Exempted Fund, plus the amount of any sales load paid on those shares at the time of purchase, will not exceed, in the aggregate, the maximum sales charge that could have been imposed at the time the shares were purchased under Article III, section 26(d) (or any other applicable section) of the NASD Rules of Fair Practice, as they may be amended from time to time.

4. No person who holds an Exempted Fund out to the public as being "no-load" or who, directly or indirectly, causes an Exempted Fund to be held out to the public as being "no-load" or who uses or directly or indirectly causes the use of terminology that, given the context and presentation, is likely to convey to investors the impression that no charges for sales or promotional expenses are imposed on shares issued by an Exempted Fund, shall be entitled to the exemptions provided by the order requested hereby.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-3454 Filed 2-13-89; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

[Application No. 02/02-5516]

Flushing Capital Corp.; Application for a Small Business Investment Company License

An application for a license to operate a small business investment company under provisions of section 301(d) of the Small Business Investment Act of 1958, as amended, (the Act), (15 U.S.C. 661. et. seq.) has been filed by Flushing Capital Corporation, 137-80 Northern Boulevard, Flushing, New York 11354 (Applicant), with the Small Business Administration (SBA) pursuant to 13 CFR 107.102 (1988).

The officers, directors and sole shareholder of the Applicant are as follows:

Name	Title or relationship	% of ownership
Frank J. Mitchell, 17 Griffith Road, Riverside, CT 06878.	President, CEO, Director.	
Tetsuro Takada, 95-40 112th Street, Richmond Hill, NY 11419.	Secretary, Treasurer, Director.	
Makoto Oyama, 63-112 Queens Boulevard, Apt. B-1, Woodside, NY 11377.	Director	
Nippan Daido U.S.A., Inc., 137-80 Northern Boulevard, Flushing, NY 11354.	Sole Shareholer, Manager.	100
Jentai Tsai, 200 Winston Drive, Apt. 2619, Cliffside Park, NJ 07010.	50% shareholder of Nippan Daido, U.S.A., Inc.	
Nippan Shuppan, 1123 Dominquez St., Carson, CA 90746.	50% shareholder of Nippan Daido, U.S.A., Inc.	

The Applicant, a New York Corporation, will begin operations with $1,000,000 paid-in capital and paid-in surplus. The Applicant will conduct its activities primarily in the State of New York, but will consider investments in businesses other areas in the United States.

As an SBIC licensed to operate under section 301(d) of the Act, Applicant will provide financial and managerial assistance solely to small business concerns which will contribute to a well balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Matters involved in SBA's consideration of the Application include the general business reputation and character of the proposed owner and mangement, and the probability of successful operations of the company under their management, including adequate profitability and financial soundness, in accordance with the Small Business Investment Act of 1958, as amended, and the SBA Rules and Regulations.

Notice is further given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed Applicant. Any such communication should be addressed to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 "L" St., NW., Washington, DC 20416.

A copy of this notice shall be published in a newspaper of general circulation in Flushing, New York.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

Dated. February 2, 1989.

[FR Doc. 89-3437 Filed 2-13-89; 8:45 am]

BILLING CODE 8025-01-M

[Application No. 09/09-5381]

Western General Capital Corp.; Application for License To Operate as Small Business Investment Company

Notice is hereby given that an application has been filed with the Small Business Administration pursuant to section 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1988)) by Western General Capital Corporation, 13701 Riverside Drive, Suite 310, Sherman Oaks, California 91423 for a license to operate as a small business investment company (SBIC) under the provisions of section 301(d) of the Small Business Investment Act of 1958 (the Act), as amended (15 U.S.C. 661 *et seq.*).

The proposed officers, directors, and shareholders of the Applicant are as follows:

Name	Title or relationship	Percentage of shares owned
Yee Phong Thian, 2314 Flintridge Drive, Glendale, CA 91206	President, Director, Shareholder	20
Yee Chin Thian, 2309 Flintridge Drive, Glendale, CA 91206	Director, Shareholder	20
Ting Liu, 19839 Hiawatha Street, Chatsworth, CA 91311	Shareholder [1]	20
Esther Liu, 19839 Hiawatha Street, Chatsworth, CA 91311	Shareholder [1]	
Ping Chih Wu, 567 Peralta Hills Drive, Anaheim, CA 92807	Shareholder	20
Ko Yen Lin, 4231 Balcony Drive, Woodland Hills, CA 91364	Secretary, Treasurer, Director, Shareholder	10
Yukiyo Matsumura, 4215 Balcony Drive, Woodland Hills, CA 91364	Shareholder	10

[1] Shares held jointly as husband and wife.

The Applicant, a California corporation, will begin operations with $1,000,000 of paid-in capital and paid-in surplus. The Applicant will conduct its activities principally in Southern California.

As an SBIC under section 301(d) of the Act, the Applicant has been organized and chartered solely for the purpose of performing the functions and conducting the activities contemplated under the Small Business Investment Act of 1958, as amended, from time to time, and will provide assistance solely to small business concerns which will contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Matters involved in SBA's consideration of the Applicant include the general business reputation and character of the proposed owners and management, and the probability of successful operation of the Applicant under their management, including adequate profitability and financial soundness, in accordance with the Small Business Investment Act and the SBA Rules and Regulations.

Notice is hereby given that any person may, not later than 15 days from the publication of this notice, submit to SBA written comments on the proposed Applicant. Any such communication should be addressed to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 L Street NW., Washington, DC 20416.

A copy of the Notice shall be published in a newspaper of general circulation in the Sherman Oaks, California area.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: Feburary 2, 1989.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 89-3438 Filed 2-13-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF STATE

[Public Notice 1095]

State Department Performance Review Board Members

In accordance with section 4314(c)(4) of the Civil Service Reform Act of 1978 (Pub. L. 95-454), the Executive Resources Board of the Department of State has appointed the following members to the State Department Performance Review Board register.

Joseph H. Linneman, Associate Comptroller, Office of the Comptroller

John P. Boright, Director, Office of Nuclear Technology and Safeguards

Alan J. Kreczko, Deputy Legal Adviser, Office of the Legal Adviser

Mark M. Lowenthal, Office Director, Office of Strategic Forces Analysis, Bureau of Intelligence and Research

Gloria Gaston-Shapiro, Public Member.

Date: February 6, 1989.

George S. Vest,

Director General, Foreign Service and Director of Personnel.

[FR Doc. 89-3415 Filed 2-13-89; 8:45 am]

BILLING CODE 4710-15-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Advisory Circular—Airplane Flight Manual

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed advisory circular and request for comments.

SUMMARY: This notice announces the availability of and requests comments on a proposed advisory circular (AC) concerning the form and content of the approved and unapproved portions of the FAA-approved Airplane Flight Manual (AFM).

DATES: Comments must be received on or before May 15, 1989.

ADDRESS: Send all comments on the proposed AC to the Federal Aviation Administration, Attention: Transport Standards Staff, ANM–110, Transport Airplane Directorate, Aircraft Certification Service, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168. Comments may be inspected at the above address between 7:30 a.m. and 4:00 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Patricia Siegrist, Regulations Branch, ANM–114, at the above address, telephone (206) 431–2126.

SUPPLEMENTARY INFORMATION:

Comments Invited

A copy of the subject AC may be obtained by contacting the person named above under **"FOR FURTHER INFORMATION CONTACT"**. Interested persons are invited to comment on the proposed AC by submitting such written data, views, or arguments as they may desire. Commenters must identify the subject of the AC and submit comments in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Transport Standards Staff before issuing the final AC.

Discussion

The primary purpose of the FAA-approved Airplane Flight Manual is to provide an authoritative source of information considered to be necessary for or likely to promote safe operation of an airplane. The AFM provides a variety of information necessary for safe operation of an airplane under normal and emergency conditions. Operating limitations and procedures, and performance and loading information constitute the normal makeup of the AFM. Historically, the AFM was directed to the needs and convenience of the flightcrew. The language and presentations in the manual were in consideration of the user. As the commercial transport aircraft industry continued to develop, becoming more technologically sophisticated and complex, so did the AFM. Because of this complexity, a number of manufacturers have modified the presentation of data available in the AFM to enhance its utility for the flightcrew. In this case, the AFM, rather than being a document directly used by the flightcrew, has developed into a reference document whose presentation is substantially modified to improve utilization in the format of the flightcrew operations manual.

The purpose of the proposed AC is to define the information required in the AFM by the applicable airworthiness regulations and to provide further guidance as to the form and content of both the approved and unapproved portions of the AFM.

Issued in Seattle, Washington, on January 12, 1989.

Darrell M. Pederson,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–3369 Filed 2–13–89; 8:45 am]

BILLING CODE 4910–13–M

[Summary Notice No. PE–89–5]

Petition for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before March 6, 1989.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC–10), Petition Docket No. _____, 800 Independence Avenue SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on February 7, 1989.

Denise Donohue Hall,

Manager, Program Management Staff, Office of the Chief Counsel.

Petitions for Exemption

Docket No.: 25089
Petitioner: Hawkins & Powers Aviation, Inc.
Regulations Affected: 14 CFR 137.53(c)(2)
Description of Relief Sought: To allow petitioner to conduct aerial applications of insecticide materials from C–118A (DC–6) aircraft, without the aircraft being equipped with a device capable of jettisoning at least one-half of the aircraft's maximum authorized load of agricultural materials within 45 seconds when operated over congested areas.

Docket No.: 25120
Petitioner: Singapore Airlines Limited
Sections of the FAR Affected: 14 CFR 21.197(c)
Description of Relief Sought: To extend Exemption No. 4792 that allows petitioner a special flight permit with a continuing authorization for aircraft that may not meet applicable airworthiness requirements but are capable of safe flight for the purpose of flying such aircraft to a base where maintenance or repairs are to be performed. Exemption No. 4792 will expire on May 31, 1989.

Docket No.: 25750
Petitioner: Troy Air
Sections of the FAR Affected: 14 CFR 43.3(g)
Description of Relief Sought: To allow trained and qualified pilots employed by petitioner to remove and install passenger seats and seat belts of aircraft used in petitioner's Part 135 operations.

Docket No.: 23176
Petitioner: Tenneco Inc.
Sections of the FAR Affected: 14 CFR 91.169(a)

Description of Relief Sought/ Disposition: To extend Exemption No. 3691B that allows the inspection of helicopters owned or operated by petitioner and all its subsidiaries to take place under the provisions of § 91.169(e) and (4).
Grant, January 28, 1989, Exemption No. 3691C

Docket No.: 25080
Petitioner: Aeroservice Aviation Center, Inc.
Regulations Affected: 14 CFR 61.63(d) (2) and (3); 61.157(d) (1) and (2) and (e) (1) and (2); Part 61, Appendix A; and Part 121, Appendix H
Description of Relief Sought/ Disposition: To amend and extend Exemption No. 4745 that allows petitioner and persons who contract for services from petitioner to use the FAA-approved simulators to meet certain training and testing requirements.
Grant, January 31, 1989, Exemption No. 4745A

Docket No.: 25782
Petitioner: Air L.A.
Sections of the FAR Affected: 14 CFR 135.337(a)(2) and 135.339(c)(1)
Description of Relief Sought/ Disposition: To allow petitioner to use certain instructor pilots of British Aerospace Corporation to train petitioner's initial cadre of pilots in the British Aerospace Jetstream 31 (BA–3201) type airplane without holding U.S. certificates and ratings and without meeting all of the applicable training requirements of Subpart H of Part 135.
Grant, January 31, 1989, Exemption No. 5014

[FR Doc. 89–3370 Filed 2–13–89; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: February 8, 1989.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545–0728
Form Number: None
Type of Review: Extension
Title: Special Limitation Period for Federally Registered Partnerships
Description: The information required under the regulation is needed by the IRS to determine the period of limitation for assessing a deficiency with respect to partners whose names or addresses do not appear on the partnership return and to determine the validity of any agreement to extend this period
Respondents: Individuals or households, Businesses or other for-profit, Small businesses or organizations
Estimated Number of Respondents: 120
Estimated Burden Hours Per Response: 30 minutes
Frequency of Response: On occasion
Estimated Total Reporting Burden: 60 hours
Clearance Officer: Garrick Shear, (202) 535–4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf, (202) 395–6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,
Departmental Reports Management Officer.
[FR Doc. 89–3397 Filed 2–13–89; 8:45 am]
BILLING CODE 4810–25–M

Public Information Collection Requirements Submitted to OMB for Review

Date: February 8, 1989.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

Bureau of the Public Debt

OMB Number: New
Form Number: PD 5291
Type of Review: New collection
Title: Subscription for Purchase and Issue of U.S. Treasury Special Zero Interest Securities—State and Local Government Series (plus Schedule 1 for Certificates of Deposit and Schedule 2 for Notes)
Description: The information is necessary to establish the accounts for owners of Special Zero Interest Time Deposit Securities of State and Local Government Series
Respondents: State and local governments
Estimated Number of Respondents: 500
Estimated Burden Hours Per Response: 1 hour
Frequency of Response: On occasion
Estimated Total Reporting Burden: 500 hours

OMB Number: New
Form Number: PD 4144, 4144–1, 4144–2, and 4144–3
Type of Review: New collection
Title: Subscription for Purchase and Issue of U.S. Treasury Time Deposit Securities—State and Local Government Series (Plus Schedule 1 for Certificates of Indebtedness, Schedule 2 for Notes and Schedule 3 for Bonds)
Description: The information collected is necessary to establish the accounts for owners of Time Deposit Securities of State and Local Government Series
Respondents: State and local governments
Estimated Number of Respondents: 5,000
Estimated Burden Hours Per Response: 1
Frequency of Response: On occasion
Estimated Total Reporting Burden: 5,000 hours

OMB Number: 1535–0005
Form Number: PD 3253
Type of Review: Reinstatement
Title: Exchange Subscription for United States Savings Bonds of Series HH
Description: Form used by owners of bonds of Series EE/E or Notes to request exchange for Series HH Savings Bonds
Respondents: Individuals or households
Estimated Number of Respondents: 68,000
Estimated Burden Hours Per Response: 45 minutes
Frequency of Response: On occasion
Estimated Total Reporting Burden: 51,000 hours

OMB Number: 1535–0014
Form Number: PD 1025
Type of Review: Reinstatement
Title: Application for Relief on Account of Loss, Theft or Destruction of United States Registered Securities
Description: The form is needed and required by the Bureau in order to obtain compensation. It is generally

used by parties that have purchased securities or the owner of registered securities when such securities are no longer in their possession legally
Respondents: Individuals or households
Estimated Number of Respondents: 325
Estimated Burden Hours Per Response: 55 minutes
Frequency of Response: On occasion
Estimated Total Reporting Burden: 300 hours

OMB Number: 1535–0023
Form Number: PD 4000
Type of Review: Extension
Title: Request by Owner for Reissue of U.S. Savings Bonds/Notes to Add Beneficiary or Coowner, Eliminate Beneficiary or Decedent, Show Changes of Name, and/or Correct Error in Registration
Description: This form is used by owners to identify securities for which reissue is requested and to indicate the new registration required
Respondents: Individuals or households
Estimated Number of Respondents: 600,000
Estimated Burden Hours Per Response: 30 minutes
Frequency of Response: On occasion
Estimated Total Reporting Burden: 300,000 hours

OMB Number: 1535–0051
Form Number: PD 1001
Type of Review. Reinstatement
Title: Power of Attorney for Individuals Authorizing Disposition of Registered Transferable Securities
Description: Form PD 1001 is used as a request by the owner of a Treasury security. He/she uses the form to lessen the paperwork legally necessary to appoint an attorney-in-fact to handle any transaction involving the registered owner's or co-owner's Treasury securities
Respondents: Individuals or households
Estimated Number of Respondents: 360
Estimated Burden Hours Per Response: 30 minutes
Frequency of Response: On occasion
Estimated Total Reporting Burden: 180 hours

OMB Number: 1535–0067
Form Number: PD 974
Type of Review: Reinstatement
Title: Certificate by Owner of United States Registered Securities Concerning Forged Requests for Payment or Assignments
Description: This form may be used by the owner, coowner or joint owner to certify that the signature was forged to request a payment or an assignment of registered United States securities or registered securities for which the Department of the Treasury acts as transfer agency
Respondents: Individuals or households
Estimated Number of Respondents: 3,000
Estimated Burden Hours Per Response: 15 minutes
Frequency of Response: On occasion
Estimated Total Reporting Burden: 750 hours

OMB Number: 1535–0084
Form Number: PD 5263
Type of Review: Reinstatement
Title: Order for Series EE, U.S. Savings Bonds
Description: Form PD 5263 is needed to indicate registration, number and denomination of Series EE, U.S. Savings Bonds to be purchased. This form is also used to document the request for issuance
Respondents: Individuals of households, State or local governments, Farms, Businesses or other for-profit
Estimated Number of Respondents: 1,000,000
Estimated Burden Hours Per Response: 4 minutes
Frequency of Response: On occasion
Estimated Total Reporting Burden: 74,615 hours
Clearance Officer: Nancy Veret, (202) 376–3902, Bureau of the Public Debt, Room 445, 999 E Street NW., Washington, DC 20226
OMB Reviewer: Milo Sunderhauf, (202) 395–6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503

Dale A. Morgan
Departmental Reports Management Officer.
[FR Doc. 89–3398 Filed 2–13–89; 8:45 am]
BILLING CODE 4810-25-M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit "Seventeenth Century Netherlandish Paintings from Switzerland: Work of the Briner Foundation and the Kuntsmuseum, Winterthur and the Musee D'Art et D'Histoire, Geneva" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. I also determine that the temporary exhibition or display of the listed exhibit objects at the Allen Memorial Art Museum, Oberlin College, Oberlin, Ohio, beginning on or about February 28, 1989 to on or about April 23, 1989, the Allentown Art Museum, Allentown, Pennsylvania, beginning on or about May 28, 1989 to on or about August 6, 1989, the Bass Museum of Art, Miami Beach, Florida, beginning on or about September 1, 1989 to on or about October 29, 1989, the Crocker Art Museum, Sacramento, California, beginning on or about November 18, 1989 to on or about January 7, 1990, the Douglas F. Cooley Memorial Gallery, Reed College, Portland, Oregon, beginning on or about January 26, 1990 to on or about March 25, 1990, and the Meadows Museum, Southern Methodist University, Dallas, Texas, from on or about April 22, 1990 to on or about August 1, 1990, is in the national interest.

Public notice of this determination is ordered to be published in the Federal Register.

Date: February 7, 1989.

R. Wallace Stuart,
Acting General Counsel.
[FR Doc. 89–3396 Filed 2–13–89; 8:45 am]
BILLING CODE 8230-01-M

[1] A copy of this list may be obtained by contacting Ms. Lorie Nierenberg of the Office of the General Counsel, USIA. The telephone number is (202) 485–8827, and the address is Room 700, U.S. Information Agency, 301–4th Street, SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 54, No. 29
Tuesday, February 14, 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).

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 1:00 a.m., Tuesday, February 21, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: February 10, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-3560 Filed 2-10-89; 4:07 pm]

BILLING CODE 6210-01-M

COMMISSION ON MERCHANT MARINE AND DEFENSE

SUMMARY: The Commission on Merchant Marine and Defense was established by Pub. L. 98-525 (as amended), and the Commission was constituted in December 1986. The Commission's mandate is to study and report on problems relating to transportation of cargo and personnel for national defense purposes in time of war or national emergency, the capability of the Merchant Marine to meet the need for such transportation, and the adequacy of the shipbuilding mobilization base to support naval and merchant ship construction. In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the Commission announces the following meeting:

DATES AND TIMES: Thursday, February 16, 1989, Beginning 9:00 a.m.

PLACE: Suite 520, 4401 Ford Avenue, Alexandria, Virginia, 22302-0268.

TYPE OF MEETING: Closed.

CONTACT PERSON: Allan W. Cameron, Executive Director, Commission on Merchant Marine and Defense, Suite 520, 4401 Ford Avenue, Alexandria, Virginia 22302-0268, Telephone (202) 756-0411.

PURPOSE OF MEETING: To discuss the work of the Commission and to deliberate facts and opinions obtained from briefings and public hearings.

SUPPLEMENTARY INFORMATION: The executive meetings of the Commission will be closed to the public pursuant to 5 U.S.C. 552b(c)(1) and 552b(c)(4) in the interests of national security and to protect proprietary information provided to the Commission in confidence.

Allan W. Cameron,

Executive Director, Commission on Merchant Marine and Defense.

[FR Doc. 89-3559 Filed 2-10-89; 4:06 pm]

BILLING CODE 3820-01-M

NATIONAL MEDIATION BOARD

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 54 FR 1470.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 2:00 p.m., Wednesday, February 8, 1989.

CHANGES IN THE MEETING: Meeting date changed to 2:00 p.m., Wednesday, February 15, 1989.

SUPPLEMENTARY INFORMATION: Chairman Walter C. Wallace and Board Member Joshua M. Javits have determined by recorded vote that Agency business required this change and that no earlier announcement of such change was possible.

CONTACT PERSON FOR MORE INFORMATION: Mr. Charles R. Barnes, Executive Director, Tel: (202) 523-5920.

Date of notice: February 7, 1989.

Charles R. Barnes,

Executive Director, National Mediation Board.

[FR Doc. 89-3496 Filed 2-10-89; 11:16 am]

BILLING CODE 7550-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of February, 13, 20, 27, and March 6, 1989.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of February 13

Friday, February 17

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of February 20—Tentative

Tuesday, February 21

2:00 p.m.
Oral Argument on Sanction Issued in Shoreham Proceedings (Public Meeting) (postponed from February 10)

Wednesday, February 22

10:00 a.m.
Briefing on Final Rule on Early Site Permits; Standard Design Certification; and Combined Licenses for Nuclear Power Reactors (Public Meeting)

Thursday, February 23

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of February 27—Tentative

Monday, February 27

10:00 a.m.
Briefing on the Status of NUREG-1150 (Public Meeting)
2:00 p.m.
Briefing on Final Report on BWR Mark I Containment Issues (Public Meeting)

Wednesday, March 1

9:30 a.m.
Briefing on Status of Performance Indicator Development (Public Meeting)

Thursday, March 2

10:00 a.m.
Briefing on Importing and Exporting of Radioactive Waste (Public Meeting)
11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) if needed

Week of March 6—Tentative

Monday, March 6

2:30 p.m.
Briefing on Status of Generic Issues (Public Meeting)

Note.—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING): (301) 492-0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 492–1661.

William M. Hill, Jr.,

Office of the Secretary.

February 9, 1989.

[FR Doc. 89–3539 Filed 2–10–89; 2:34 pm]

BILLING CODE 7590–01–M

UNITED STATES POSTAL SERVICE

Board of Governors

Notice of Vote To Close Meeting

At its meeting on February 6, 1989, the Board of Governors of the United States Postal Service unanimously voted to close to public observation a portion of the meeting. The portion to be closed was to involve discussion concerning the lease of a postal facility in Westchester County, New York.

The Board determined that pursuant to 5 U.S.C. 552b(c)(9)(B), discussion of that portion of the meeting to be closed was exempt from the open meeting requirement of the Government in the Sunshine Act, (5 U.S.C. 552b(b)), on the grounds that the public interest did not require otherwise and that portion to be closed was likely to disclose information whose premature disclosure was likely to significantly frustrate the negotiation of the proposed lease.

Prior to the February 6 meeting, the Board of Governors gave due notice of its intention to hold the meeting, the notice and the proposed agenda for the meeting having been published in the **Federal Register** on January 27, 1989 (54 FR 4108). On February 6, the Board determined by a unanimous vote that an addition to the agenda was required and that no earlier announcement of the new item was possible.

In accordance with 5 U.S.C. 552b(f)(1), the General Counsel of the United States Postal Service certified that in his opinion the portion of the meeting to be closed might properly be closed to public observation pursuant to 5 U.S.C. 552b(c)(9)(B).

The persons who attended this portion of the meeting were Board members: Alvarado, del Junco, Griesemer, Hall, Mackie, Nevin, Ryan and Setrakian; Postmaster General Frank; Deputy Postmaster General Coughlin; Secretary to the Board Harris; and General Counsel Cox.

David F. Harris,

Secretary.

[FR Doc. 89–3562 Filed 2–10–89; 4:07 pm]

BILLING CODE 7710–12–M

Corrections

Federal Register
Vol. 54, No. 29
Tuesday, February 14, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ENVIRONMENTAL PROTECTION AGENCY

[WH-FLR-3509-8]

State and Local Assistance; Grants for Construction of Treatment Works (Title II) and State Water Pollution Control Revolving Funds (Title VI) Under the Clean Water Act

Correction

In notice document 89-1793 beginning on page 3843 in the issue of Thursday, January 26, 1989, make the following correction:

On page 3845, in the table, in the entry for Virgin Islands, FY 89 State allotment, Title VI, "4967,500" should read "496,500".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 107

[Docket No. 87N-0082]

Infant Formula Recall Requirements

Correction

In rule document 89-1719 beginning on page 4006 in the issue of Friday, January 27, 1989, make the following correction:

On page 4007, in the third column, under **Environmental Impact**, in the fourth line, "52 FR 3017" should read "52 FR 30171".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs Not Subject to Certification; Diethylcarbamazine Citrate, Oxibendazole Chewable Tablets

Correction

In rule document 89-1720 beginning on page 3775 in the issue of Thursday, January 26, 1989, make the following correction:

§ 520.623 [Corrected]

On page 3776, in the first column, in § 520.623(c)(2), in the second line, "*Driofilaria*" should read "*Dirofilaria*".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 880

[Docket No. 88N-0044]

Medical Devices; Patient Examination Glove; Revocation of Exemptions From the Premarket Notification Procedures and the Current Good Manufacturing Practice Regulations

Correction

In rule document 89-626 beginning on page 1602 in the issue of Friday, January 13, 1989, make the following corrections:

1. On page 1603, in the first column, in the third complete paragraph, in the fourth line, "as the an in" should read "as an aid in".

2. On the same page, in the same column, in the fourth complete paragraph, in the second line, "an" should read "and".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 892

[Docket Nos. 87P-0214/CP Through 87P-0214/CP0013]

Magnetic Resonance Diagnostic Device; Panel Recommendations and Report on Petitions for Magnetic Resonance Reclassification and Codification of Reclassification

Correction

In rule document 89-2311 beginning on page 5077 in the issue of Wednesday, February 1, 1989, make the following correction:

On page 5078, in the second column, under **PART 892—RADIOLOGY DEVICES**, in the authority citation, in the third line, "522-559" should read "552-559".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 106

[Docket No. 87N-0402]

Infant Formula Microbiological Testing, Consumer Complaints, and Record Retention Requirements

Correction

In proposed rule document 89-1721 beginning on page 3783 in the issue of Thursday, January 26, 1989, make the following corrections:

1. On page 3783, in the second column, under **FOR FURTHER INFORMATION CONTACT**, in the fourth line, "202-245-3177" should read "202-245-3117".

2. On page 3786, in the 2nd column, in the 1st complete paragraph, in the 35th line, "casual" should read "causal".

§ 106.100 [Corrected]

3. On page 3788, in the third column, in § 106.100(j), in the fourth line, "compliants" should read "complaints".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Countrymark, Inc.; Withdrawal of Approval of NADA's

Correction

In notice document 89-1820 appearing on page 3851 in the issue of Thursday, January 26, 1989, make the following correction:

In the third column, above **SUPPLEMENTARY INFORMATION**, insert the following:

EFFECTIVE DATE: February 6, 1989.

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 88P-0424]

Liquid Eggs Deviating From the Standard of Identity; Temporary Permit for Market Testing

Correction

In notice document 89-979 beginning on page 1794 in the issue of Tuesday, January 17, 1989, make the following correction:

On page 1794, in the 3rd column, under **SUPPLEMENTARY INFORMATION**, in the 2nd complete paragraph, in the 12th line, "*Literia Monocytogenes*" should read "*Listeria monocytogenes*".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Request for Nominations for Representatives of Consumer and Industry Interests on Public Advisory Committees or Panels

Correction

In notice document 89-1898 beginning on page 4080 in the issue of Friday, January 27, 1989, make the following correction:

On page 4081, under "*Device Good Manufacturing Practice Advisory Committee and Technical Electronic Product Radiation Safety Standards Committee*", in the third line, "interest" should read "interests".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Request for Nominations for Voting Members on Public Advisory Committees or Panels

Correction

In notice document 89-1899 beginning on page 4032 in the issue of Friday, January 27, 1989, make the following corrections:

1. On page 4083, in the 1st column, under "*Medical Devices Panels*", in the 2nd paragraph, in the 18th line, "change" should read "changed".

2. On the same page, in the 3rd column, under **Nomination Procedures**, in the 14th line, after "candidates", remove the period.

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 82M-0072]

Shiley Infusaid, Inc.; Premarket Approval of the Infusaid 100, 200, 400, and 500 Duel Catheter 400 Implantable Pump, and Intraspinal Catheter Kit

Correction

In notice document 89-2312 beginning on page 5140 in the issue of Wednesday, February 1, 1989, make the following correction:

On page 5141, in the first column, under **Opportunity for Administrative Review**, in the third paragraph, the fourth line should read "U.S.C. 360e(d), 360j(h))) and under".

BILLING CODE 1505-01-D

federal register

Tuesday
February 14, 1989

Part II

Department of Education

Office of Special Education and Rehabilitative Services

34 CFR Part 379

Projects With Industry; Notice of Proposed Rulemaking

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services

34 CFR Part 379

Projects With Industry

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations in Part 379 governing the Projects With Industry (PWI) program by amending existing regulations, and by adding regulations in a new Subpart F to implement requirements in sections 621(f) and 621(h) of the Rehabilitation Act (Act) as added by Pub. L. 99-506, the Rehabilitation Act Amendments of 1986. The amendments require: that indicators of minimum compliance with program evaluation standards approved by the National Council on the Handicapped be published in the **Federal Register**; that, beginning with fiscal year 1989, each PWI grantee report to the Secretary at the end of each project year the extent to which it meets the compliance indicators; that continuation funding be provided only to grantees who are carrying out the provisions of their approved grant application and who meet the compliance indicators; and that the Secretary consider geographical distribution of projects and, beginning in fiscal year 1991, past performance of projects in making new grant awards.

DATE: Comments must be received on or before March 31, 1989.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Ann Weinheimer, Acting Director, Policy and Planning Staff, Rehabilitation Services Administration, Mary E. Switzer Building, Room 3220, 330 C Street SW., Washington, DC 20202-2550.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: Suzanne Choisser, Rehabilitation Services Administration, Mary E. Switzer Building, Room 3216, 330 C Street SW., Washington, DC 20202-2550. Telephone (202) 732-1337.

SUPPLEMENTARY INFORMATION:

Development of Evaluation Standards and Proposed Compliance Indicators

In accordance with section 621(d) (1), (3) and (4) of the Act, PWI evaluation standards, based on statutory provisions and successful project practices, were developed by the Rehabilitation Services Administration (RSA) and approved by the National Council on the Handicapped. The evaluation standards are published for information purposes only as an appendix to the proposed regulations. As required by section 621(d)(2) of the Act, an evaluation of the PWI program, using the approved evaluation standards, was conducted in 1985. A report on the evaluation was forwarded to Congress in February 1986.

In the Rehabilitation Act Amendments of 1986, Congress added the requirement that the Secretary develop indicators of what constitutes minimum compliance with the evaluation standards. Proposed indicators have been developed based on the PWI evaluation standards and the results of the national PWI program evaluation. Compliance indicators were developed only for those standards that were determined to be measurable: standard 2—individuals served; standard 4—provision of services at minimum cost to the Federal government; and standard 7—project results. The remaining standards (standard 1—project objectives and activities, standard 3—provision of appropriate services, standard 5—advisory council, and standard 6—project relationships) are already implemented in program regulations as application requirements and were determined not to be susceptible to quantifiable measurement.

The National Association of PWI Grantees (I-NABIR) conducted an unofficial mailing of draft PWI indicators to all current program grantees in January 1988. As a result of this mailing RSA received 35 comments on the draft indicators and made some modifications to the indicators based on the comments. RSA then field tested the draft indicators on a sample of PWI projects in March 1988 and made additional changes based on the test results.

Following development of the proposed compliance indicators, a Notice of Information Collection Request was published in the **Federal Register** on July 1, 1988 (53 FR 25105). The purpose of the notice was to collect data from the current PWI grantees that would enable RSA to develop a proposed minimum performance level for each compliance indicator. Data, varying in completeness, was received from all 108 PWI grantees. Sixty-two grantees submitted complete data.

A proposed performance level was developed for each compliance indicator based upon analysis of the grantee data, consideration of the data collected in the program evaluation in 1985, and the Department's views as to satisfactory grantee performance. A proposed weight was developed for each compliance indicator based on the Department's assessment of the relative importance of each indicator.

Proposed Compliance Indicators, Performance Levels, and Weights

The purpose of these proposed regulations is to propose compliance indicators, and a weight and minimum level of performance for each indicator, to measure the effectiveness of individual projects in critical performance areas. The proposed indicators would be used to evaluate performance to determine whether a grantee's application for continuation funding should be approved. As a measure of past performance, compliance with the indicators would also be a factor in making new awards beginning in fiscal year 1991.

The principles used by the Department in developing the proposed weights and performance levels for the compliance indicators are:

Principles for Weighting (Assigning Points)

- The most important indicators of a PWI project's success are the placement of individuals in competitive jobs at a reasonable cost to the Federal Government. The proposed regulations therefore allocate the greatest number of points to the four indicators measuring placement and cost.
- The proposed regulations put slightly more emphasis on the placement of persons with severe disabilities than on the placement of recipients of Social Security Insurance or Social Security Disability Insurance (SSI or SSDI) and unemployed persons. While it is recognized that some persons who are receiving SSI or SSDI or who are unemployed for at least six months at the time of project entry will also be counted as persons with severe disabilities, the Secretary believes special and separate emphasis needs to be placed on serving persons from all three of these groups because these individuals are the most difficult to place into competitive employment.
- The actual placement rate and the actual cost per placement achieved by a PWI project are more important than a project meeting the placement and cost projections stated in its grant application; however, sufficient weight is placed on projected performance to discourage applicants from proposing overly meager or ambitious project goals.

• The proposed regulations place less emphasis on compliance indicators involving the number and types of persons with disabilities who are served since the results of the services rendered are considered more important and are measured by the project performance (results) indicators.

Principles for Scoring (Minimum Performance Levels)

• A composite scoring system is proposed. This approach would allow projects with different strengths, the principle upon which the PWI program is based, to continue to receive funding. The maximum possible composite score would be 100 points. A minimum composite score of 60 is proposed. This minimum total passing score would allow projects who perform poorly on a few indicators to be eligible for continuation funding or a new award based on past performance if they have met most of the indicators.

• A minimum performance level would be established for each indicator (for example, serve 60 percent of persons who have severe disabilities). If a project meets the minimum performance level for an indicator, it would receive a specified number of points. If it fails to meet the minimum performance level for an indicator, it would receive no points. Thus, grantees would know exactly what minimum level of performance is expected for each compliance indicator, as well as the relative emphasis placed by the Secretary on each indicator.

• A project's performance would be determined by the data it submits from the most recent complete project year. For those PWI projects that do not meet the minimum passing score on the basis of the previous year's performance, the proposed regulations at §379.46(b) provide an additional opportunity for grantees to meet the compliance indicators, and thus qualify for continuation funding, by submitting data from the first six months of the current project year to demonstrate improved performance.

Application of the Compliance Indicators

• Since grant awards under this program are made near the end of the fiscal year with project periods that run concurrent with the following fiscal year, grantees would receive two years of funding before their performance is measured against the compliance indicators. This is because at the time a grantee receives its second year of funding, or its first continuation award, it will not have available a full project year of data. When a grantee submits its application for its third year of funding, or its second continuation award, it must submit project data from the first year of funding.

• The proposed indicators and minimum performance levels would be first applied to continuation grants funded from fiscal year 1990 appropriations, which will be made by September 30, 1990 and will cover the project year that begins October 1, 1990 and ends September 30, 1991. The awards will be based, in part, on grantee compliance with the indicators. The data used to measure performance will be the twelve months of data from the project year running from October 1, 1988 to September 30, 1989 or, if necessary six months of data from October 1, 1989 through March 31, 1990. Grantees were advised in the July 1, 1988 notice that collection of this data was necessary.

Consideration of Prior Performance and Geographical Location

In making new awards, the proposed regulations provide for giving priority to geographic areas among the States that are currently not served or are underserved by PWI projects and for consideration of past performance, if appropriate. This is consistent with statutory language in sections 621 (h)(3) and (i) of the Act.

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are nonprofit organizations providing services to or conducting activities for persons with disabilities. However, the regulations would not have a significant economic impact on the organizations affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1980

Section 379.46 contains information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of this section to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h))

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, Room 3002, New Executive Office Building, Washington, DC 20503; Attention: James D. Houser.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3220, Switzer Building, 330 C Street SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

List of Subjects in 34 CFR Part 379

Education, Grant programs—education, Grant programs—social programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

Dated: December 27, 1988.

(Catalog of Federal Domestic Assistance Number: 84.128 Projects With Industry)

Lauro F. Cavazos,

Secretary of Education.

The Secretary proposes to amend Part 379 of Title 34 of the Code of Federal Regulations as follows:

PART 379—PROJECTS WITH INDUSTRY

1. The authority citation for Part 379 continues to read as follows:

Authority: 29 U.S.C. 711(c) and 795g, unless otherwise noted.

§ 379.32 [Redesignated from § 379.31]

2. Section 379.31 is redesignated as § 379.32 and a new § 379.31 is added to read as follows:

§ 379.31 What other factors does the Secretary consider in reviewing an application?

In addition to the selection criteria in § 379.30, the Secretary, in making awards under this program, considers—

(a) The geographical distribution of projects among the States and gives priority to geographic areas which are currently not served or are underserved by the Projects With Industry program; and

(b) Beginning with fiscal year 1991, the past performance of the applicant in carrying out a similar Project With Industry under previously awarded grants, as indicated by such factors as compliance with grant conditions, soundness of programmatic and financial management practices, and meeting the requirements of Subpart F of this part.

(Authority: Secs. 621(h)(3) and 621(i) of the Act; 29 U.S.C. 795g(h)(3) and 795g(i))

3. Section § 379.46 is revised to read as follows:

§ 379.46 What are the reporting requirements?

(a) Beginning with fiscal year 1990, each application for continuation funding for the third or any subsequent year of a PWI grant must include data for the most recent complete project year in order for the Secretary to determine if the grantee has met the program compliance indicators established in Subpart F of this part.

(b) If the data for the most recent complete project year provided under paragraph (a) shows that any grantee has failed to achieve the minimum composite score required in § 379.52(e) to meet the program compliance indicators, a grantee may, at its option, submit data from the first six months of the current project year to demonstrate that its project performance has improved sufficiently to meet the minimum composite score.

(Authority: Section 621(f)(2) of the Act; 29 U.S.C. 795g(f)(2))

4. Part 379 is amended by adding a new Subpart F, consisting of §§ 379.50 through 379.53, to read as follows:

Subpart F—What Requirements Must a Grantee Meet to Receive Continuation Funding?

Sec.

Subpart F—What Requirements Must a Grantee Meet to Receive Continuation Funding?

§ 379.50 What are the requirements for continuation funding?

Beginning with fiscal year 1990, in order to receive a continuation award for the third or any subsequent year of a PWI grant a grantee shall adhere to the provisions of its approved application and shall receive a minimum composite score of at least 60 points on the program compliance indicators contained in § 379.53.

(Authority: Section 621(h)(4)(B) of the Act; 29 U.S.C. 795g(h)(4)(B))

§ 379.51 What are the program compliance indicators?

The program compliance indicators implement program evaluation standards, which are contained in an appendix to this part, by establishing minimum performance levels in essential project areas to measure the effectiveness of individual grantees.

(Authority: Secs. 621(d)(1) and 621(f)(1) of the Act; 29 U.S.C. 795g(d)(1) and 795g(f)(1))

§ 379.52 Are the compliance indicators weighted?

(a) Each compliance indicator is assigned a certain number of points.

(b) If a grantee meets the minimum performance level for a compliance indicator, it will receive the assigned number of points.

(c) If a grantee does not meet the minimum performance level for a compliance indicator, it will receive no points.

(d) The maximum possible score for meeting the minimum performance level in every compliance indicator is 100 points.

(e) A grantee must receive a composite score of at least 60 points to qualify for continuation funding.

(Authority: 621(h)(4)(B) of the Act; 29 U.S.C. 795g(h)(4)(B))

§ 379.53 What are the weights and minimum performance levels for each compliance indicator?

(a) *Percent of persons served whose disabilities are severe.* (4 points) A minimum of 60 percent of persons served by the project are persons who have severe disabilities.

(b) *Percent of persons served who have been unemployed for at least six months at time of project entry.* (3 points) A minimum of 60 percent of persons served by the project have been unemployed for at least six months at time of project entry.

(c) *Percent of persons served who received Social Security Insurance (SSI) or Social Security Disability Insurance (SSDI) benefits in the month prior to project entry.* (3 points) A minimum of 25 percent of persons served by the project have received SSI or SSDI benefits in the month prior to project entry.

(d) *Cost per placement.* (20 points) The average cost of placement of individuals served by the project does not exceed $1350.00.

(e) *Projected cost per placement.* (10 points) The actual average cost per placement of persons served by the project does not exceed 125 percent of the projected average cost per placement in the grantee's application.

(f) *Placement rate.* (20 points) A minimum of 60 percent of persons served by the project are placed in competitive employment.

(g) *Projected placement rate.* (10 points) The actual number of persons served by the project that are placed into competitive employment is at least 75 percent of the number of persons that the grantee, in the grant application, projected would be placed.

(h) *Change in earnings.* (10 points) The earnings of persons served by the project who are placed into competitive employment have increased by an average of at least $125.00 a week over earnings at project entry.

(i) *Percent placed who have severe disabilities.* (10 points) At least 60 percent of persons served by the project who are placed into competitive employment are persons who have severe disabilities.

(j) *Percent unemployed placed.* (5 points) At least 60 percent of persons served by the project who are placed into competitive employment are persons who were unemployed for at least six months at time of project entry.

(k) *Percent SSI or SSDI placed.* (5 points) At least 25 percent of persons served by the project who are placed into competitive employment are persons who received SSI or SSDI benefits in the month prior to project entry.

(l) *Composite chart of weights and minimum performance levels.* The weights and performance levels for each compliance indicator are shown on the following composite chart.

Minimum Scores and Performance Levels for Indicators

Indicator	Weight (points)	Performance level
Persons with severe disabilities served	4	60%
Unemployed served	3	60%
SSI or SSDI served	3	25%

Indicator	Weight (points)	Performance level
Cost per placement (maximum average)	20	$1350.00
Projected cost per placement (maximum)	10	125%
Placement rate	20	60%
Projected placement rate	10	75%
Change in earnings	10	$125
Percent with severe disabilities placed	10	60%
Percent unemployed placed	5	60%
Percent SSI or SSDI placed	5	25%

Minimum passing composite score is 60 points.

(Authority: Section 621(f)(1) of the Act; 29 U.S.C. 795g(f)(1))

5. An appendix is added to Part 379 to read as follows:

Appendix to Part 379—Evaluation Standards

Standard 1: The primary objective of the project shall be to assist individuals with disabilities to obtain competitive employment. The activities carried out by the project shall support the accomplishment of this objective.

Standard 2: The project shall serve individuals with disabilities that impair their capacity to obtain competitive employment. In selecting persons to receive services, priority shall be given to individuals with severe disabilities.

Standard 3: The project shall ensure the provision of services that will assist in the placement of persons with disabilities.

Standard 4: Funds shall be used to achieve the project's primary objective at minimum cost to the federal government.

Standard 5: The project's advisory council shall provide policy guidance and assistance in the conduct of the project.

Standard 6: Working relationships, including partnerships, shall be established with agencies and organizations in order to expand the project's capacity to meet its objectives.

Standard 7: The project shall obtain positive results in assisting individuals with disabilities to obtain competitive employment.

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Tuesday
February 14, 1989

Part III

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 338

Nighttime Sleep-Aid Drug Products for Over-the-Counter Human Use; Final Monograph; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 338

[Docket No. 75N-0244]

Nighttime Sleep-Aid Drug Products for Over-the-Counter Human Use; Final Monograph

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule in the form of a final monograph establishing conditions under which over-the-counter (OTC) nighttime sleep-aid drug products are generally recognized as safe and effective and not misbranded. FDA is issuing this final rule after considering public comments on the agency's proposed regulation, which was issued in the form of a tentative final monograph, and all new data and information on nighttime sleep-aid drug products that have come to the agency's attention. This final monograph deals only with single ingredient nighttime sleep-aid drug products and is part of the ongoing review of OTC drug products conducted by FDA.

EFFECTIVE DATE: February 14, 1990.

FOR FURTHER INFORMATION CONTACT: William E. Gilbertson, Center for Drug Evaluation and Research (HFD-210), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8000.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 8, 1975 (40 FR 57292), FDA published, under § 330.10(a)(6) (21 CFR 330.10(a)(6)), an advance notice of proposed rulemaking to establish a monograph for OTC nighttime sleep-aid drug products, together with the recommendations of the Advisory Review panel on OTC Sedative, Tranquilizer, and Sleep-aid Drug Products (Sleep-aid Panel), which was the advisory review Panel responsible for evaluating data on the active ingredients in this drug class. Interested persons were invited to submit comments by March 8, 1976. Reply comments in response to comments filed in the initial comment period could be submitted by April 8, 1976.

In accordance with § 330.10(a)(10), the data and information considered by the Panel were put on public display in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, after deletion of a small amount of trade secret information.

The agency's proposed regulation, in the form of a tentative final monograph, for OTC nighttime sleep-aid drug products was published in the **Federal Register** of June 13, 1978 (43 FR 25544). Interested persons were invited to file by August 14, 1978 written objections and requests for an oral hearing before the Commissioner of Food and Drugs regarding the proposal. Final agency action occurs with the publication of this final monograph, which is a final rule establishing a monograph for OTC nighttime sleep-aid drug products.

In the **Federal Register** of October 26, 1979 (44 FR 61610), the agency published a notice reopening the administrative record for OTC nighttime sleep-aid drug products from October 26, 1979, to March 26, 1980, to permit manufacturers to submit, prior to the establishment of a final monograph, new data demonstrating the safety and effectiveness of those conditions not classified in Category I. Interested persons were invited to submit comments on the new data on or before May 27, 1980. Data and information received after the administrative record was reopened are on display in the Dockets Management Branch.

In a notice published in the **Federal Register** of March 21, 1980 (45 FR 18399), the agency advised that it had also reopened the administrative record for OTC nighttime sleep-aid drug products to allow for consideration of data and information that had been filed in the Dockets Management Branch during the period from August 14, 1978, to October 26, 1979. The agency concluded that any new data and information filed prior to March 21, 1980 should be available to the agency in developing a final monograph.

In the **Federal Register** of April 23, 1982 (47 FR 17740), the agency published a notice announcing an enforcement policy to permit the OTC marketing of diphenhydramine as an ingredient in OTC nighttime sleep-aid drug products pending the establishment of a final monograph on OTC nighttime sleep-aid drug products. In that notice, the Commissioner concluded that there were no unresolved safety or effectiveness issues relating to the use of diphenhydramine as an OTC nighttime sleep-aid and that it would be inappropriate, and not in the public interest, to continue to bar the interim marketing of such products.

The OTC drug procedural regulations (21 CFR 330.10) now provide that any testing necessary to resolve the safety or effectiveness issues that formerly resulted in a Category III classification, and submission to FDA of the results of that testing or any other data, must be done during the OTC drug rulemaking process before the establishment of a final monograph. Accordingly, FDA is no longer using the terms "Category I" (generally recognized as safe and effective and not misbranded), "Category II" (not generally recognized as safe and effective or misbranded), and "Category III" (available data are insufficient to classify as safe and effective, and further testing is required) at the final monograph stage, but is using instead the terms "monograph conditions" (old Category I) and "nonmonograph conditions" (old Categories II and III).

The agency advises that the conditions under which the drug products that are subject to this monograph will be generally recognized as safe and effective and not misbranded (monograph conditions) will be effective 12 months after the date of publication in the **Federal Register**. Therefore, on or after February 14, 1990, no OTC drug product that is subject to the monograph and that contains a nonmonograph condition, i.e., a condition that would cause the drug to be not generally recognized as safe and effective or to be misbranded, may be initially introduced or initially delivered for introduction into interstate commerce unless it is the subject of an approved application. Further, any OTC drug product subject to this monograph that is repackaged or relabeled after the effective date of the monograph must be in compliance with the monograph regardless of the date the product was initially introduced or initially delivered for introduction into interstate commerce. Manufacturers are encouraged to comply voluntarily with the monograph at the earliest possible date.

In the tentative final monograph for OTC nighttime sleep-aid drug products, the agency suggested that the conditions included in the monograph (Category I) be effective 30 days after the date of publication of the final monograph in the **Federal Register** and that the conditions excluded from the monograph (Category II) be eliminated from OTC drug products effective 6 months after the date of publication of the final monograph, regardless of whether further testing was undertaken to justify their future use. Experience has shown that relabeling of products covered by the monograph is necessary in order for manufacturers to comply with the monograph. New labels containing the monograph labeling have to be written, ordered, received, and incorporated into

the manufacturing process. The agency has determined that it is impractical to expect new labeling to be in effect 30 days after the date of publication of the final monograph. Experience has shown also that if the deadline for relabeling is too short, the agency is burdened with extension requests and related paperwork.

In addition, some products may have to be reformulated to comply with the monograph. Reformulation often involves the need to do stability testing on the new product. An accelerated aging process may be used to test a new formulation; however, if the stability testing is not successful, and further reformulation is required, there could be a further delay in having a new product available for manufacture.

The agency wishes to establish a reasonable period of time for relabeling and reformulation in order to avoid an unnecessary disruption of the marketplace, that could not only result in economic loss but also interfere with consumers' access to safe and effective drug products. Therefore, the agency is providing an effective date of 12 months after the date of publication of the final monograph in the **Federal Register**.

In response to the proposed rule on OTC nighttime sleep-aid drug products, four consumers, two consumer groups, six drug manufacturers, one drug manufacturer association, and one consultant representing four different drug manufacturers submitted comments. Requests for oral hearing before the Commissioner were also received on 12 different issues. Copies of the comments and the hearing requests received are on public display in the Dockets Management Branch. Any additional information that has come to the agency's attention since publication of the proposed rule is also on public display in the Dockets Management Branch.

In proceeding with this final monograph, the agency has considered all objections, requests for oral hearings, and the changes in the procedural regulations. In light of the changes in the OTC drug review procedural regulations and the withdrawal of methapyrilene from the marketplace (see below), many of the objections filed in response to the agency's proposed regulation on OTC nighttime sleep-aid drug products are no longer applicable, e.g., comments on testing guidelines and on methapyrilene. In those cases where the agency has agreed with submitted objections and has revised the final monograph accordingly, the Commissioner concludes that any requests for hearing are moot. Therefore, such hearing requests are not discussed in the following responses to comments.

One comment requested hearings on several aspects of the rule if the Commissioner, in making his decisions, relied upon evidence that was not in the public domain. The Commissioner advises that the agency's decisions in this rulemaking have been based entirely on the administrative record, which is publicly available in the Dockets Management Branch. Therefore, the Commissioner concludes that the comment is no longer requesting hearings on those issues. All other requests for hearing are discussed below.

All "OTC Volumes" cited throughout this document refer to the submissions made by interested persons pursuant to the call-for-data notice published in the **Federal Register** of August 9, 1972 (37 FR 16029), or to additional information that has come to the agency's attention since publication of the notice of proposed rulemaking. The volumes are on public display in the Dockets Management Branch.

I. The Agency's Conclusions on the Comments

A. General Comments on OTC Nighttime Sleep-Aid Drug Products

1. One comment requested that the agency not remove nighttime sleep-aid drug products from the OTC market.

The tentative final monograph on nighttime sleep-aid drug products (43 FR 25544) did not propose to remove this entire class of drug products from the OTC market. The agency recognized the usefulness of this class of drugs, but concluded that the data available at that time were not sufficient for FDA to determine that any specific ingredients in this class of drugs were generally recognized as safe and effective. Since that time, additional data have been submitted to the OTC drug review to support the safety and effectiveness of diphenhydramine hydrochloride and diphenhydramine monocitrate (now named diphenhydramine citrate), and these ingredients are included in the final monograph for OTC nighttime sleep-aid drug products. In addition, products containing doxylamine succinate are marketed OTC as a nighttime sleep-aid under approved new drug applications (NDA's).

2. One comment argued that the Commissioner had failed to follow the prescribed procedures in issuing the tentative final monograph on OTC nighttime sleep-aids and that it is without legal authority. The comment also contended that the tentative final monograph is arbitrary, capricious, and not supported by substantial evidence and requested a hearing on this issue.

At the time of publication of the panel's report and recommended monograph in the **Federal Register** of December 8, 1975 (40 FR 57292), § 330.10(a)(6) provided for a comment period of 60 days after publication of a panel's report and recommended monograph, and a period of 30 days from the last day of the comment period for reply comments to be filed. In the report, the agency allowed for a comment period of 90 days, which conforms with current 330.10(a)(6). Section 330.10(a)(7) provided that after reviewing all comments and reply comments, a tentative final monograph would be published in the **Federal Register**. The agency received comments and reviewed them. In the **Federal Register** of June 13, 1978 (40 FR 57292), the agency responded to the comments in the tentative final monograph. Section 330.10(a)(7) has been subsequently expanded to require review of new data prior to publication of a tentative final monograph.

The comment does not specify what procedures it alleges that the Commissioner failed to follow and the agency is not aware of any. Therefore, the agency concludes that it followed the prescribed procedures set forth in 21 CFR 330.10(a)(6) and (7) for publishing a tentative final monograph on OTC nighttime sleep-aid drug products. The agency rejects the comment's contention that the tentative final monograph is without legal authority. The legal authority for this rulemaking process is provided by the Federal Food, Drug, and Cosmetic Act (the act), as cited in the "Authority" paragraph which immediately precedes the monograph. The agency's conclusions reached in the tentative final monograph are supported and well documented with references publicly available in the administrative record for this rulemaking. Therefore, the agency concludes the comment's contention is not valid. The Commissioner also concludes that a hearing on this issue is not warranted.

3. One comment objected to the statement in the tentative final monograph "that OTC drugs should contain only such inactive ingredients as are known to be safe and are necessary for pharmaceutical formulation" (43 FR 25544 at 25590). The comment contended that this statement is without sanction of law and is inconsistent with other FDA regulations. The comment requested revocation of the statement.

The statement in question was part of the preamble and not part of the tentative final monograph; thus, it need

not be "revoked" as the comment requested. The act and the regulations implementing the OTC drug review provide clear authority for requiring that inactive ingredients be safe. The act requires all drugs to be both safe and effective for their intended use. Thus, inactive ingredients that are included in drug products also need to be safe in order for the product to conform to the requirements of the act. The OTC drug review regulations in § 330.1(e) further state that OTC drug products should contain "only suitable inactive ingredients which are safe in the amounts administered and do not interfere with the effectiveness of the preparation * * *." The food ingredient GRAS (generally recognized as safe) list in 21 CFR Part 182 includes most of the common inactive ingredients, including flavors. Color additives are already regulated under section 706 of the act (21 U.S.C. 376) and the implementing regulations in 21 CFR Parts 70 through 82. An ingredient, whether active or inactive, should be included in a drug product only if it provides a benefit and is therefore "necessary." Typically, inactive ingredients are necessary for a drug product's pharmaceutical formulation during the manufacturing process and for making the product acceptable to the user in terms of taste, appearance, and aroma. Such ingredients may be used provided they do not interfere with the product's effectiveness.

4. One comment urged the agency to require long-term carcinogenicity studies on all the ingredients placed in Category III as nighttime sleep-aids before they are given general recognition of safety.

FDA is aware that all of the antihistamine ingredients placed in Category III in the tentative final monograph on OTC nighttime sleep-aid drug products (43 FR 25544 at 25579), except for phenyltoloxamine dihydrogen citrate, have been selected for bioassay testing as part of the National Toxicology Program—Carcinogenicity Testing Program (Ref. 1). The selection of a chemical for bioassay does not necessarily imply that it is a carcinogen. Chemicals are selected on the basis of human exposure, production levels, and chemical structure. Selection of a chemical for carcinogenicity testing is not a sufficient basis for withholding conclusions on its effectiveness and on other aspects of safety in an OTC drug final monograph. The inclusion of an ingredient in a final monograph means that the agency has concluded that it is generally recognized as safe and effective based on the evidence available at that time; it does not preclude the possibility that future evidence may demonstrate an ingredient to be unsafe for OTC use. If future evidence, e.g., results of bioassay testing, demonstrates that an ingredient is unsafe for OTC use, the agency will take immediate steps to remove products containing this ingredient from the marketplace.

The Panel had placed the antihistamine methapyrilene in Category III in its report (40 FR 57292 at 57309). In its proposed regulation for OTC nighttime sleep-aid drug products, the agency proposed to place methapyrilene in Category II because of preliminary studies implicating this drug as a carcinogen, or a carcinogen synergist with nitrates, in rats. However, at that time, the studies were too preliminary to support a definitive finding that methapyrilene was itself a carcinogen and had to be removed immediately from all products in the OTC drug market.

Subsequent to the agency's proposed regulation, a National Cancer Institute (NCI) study, not available to the Panel, provided data from which the agency concluded that methapyrilene is a potent carcinogen in animals and must be considered a potential human carcinogen. These data are on file in the Dockets Management Branch (address above) under Docket No. 75N–0244 and have since been published (Ref. 2).

In 1979, in response to an agency-requested recall, all oral and topical products containing methapyrilene were removed from the market. Products containing methapyrilene are now considered to be misbranded under section 502 of the act (21 U.S.C. 352) and "new drugs" under section 201(p) of the act (21 U.S.C. 321(p)). In this document the agency concludes that methapyrilene fumarate and methapyrilene hydrochloride are nonmonograph ingredients.

References

(1) Copy of a computer printout from the National Toxicology Program—Carcinogenicity Testing Program, OTC Volume 050FM, Docket No. 75N–0244, Dockets Management Branch.

(2) Lijinsky, W., M.D. Reuber, and B.N. Blackwell, "Liver Tumors Induced in Rats by Chronic Oral Administration of the Common Antihistamine Methapyrilene Hydrochloride," *Science*, 209:817–819, 1980.

5. One comment requested that FDA require long-term anticholinergic toxicity studies on the Category III nighttime sleep-aid ingredients that are now restricted to prescription use before allowing them on the OTC market. In addition, the comment requested that pyrilamine be removed from the OTC market until such studies are done. The comment was concerned that even though anticholinergic (drying) side effects have been considered negligible in the past, they may be rooted in irreversible tissue damage and neuropharmacologic damage.

Diphenhydramine is the only ingredient currently included in this monograph, and the anticholinergic effects of this drug are well known (Ref. 1). Because diphenhydramine has been safely used for many years and FDA is not aware of any data that indicate that long-term use of this drug can cause irreversible tissue damage and neuropharmacologic damage, the agency finds no need for long-term anticholinergic toxicity studies as requested by the comment. The agency will assess the need for such studies for other ingredients should any other prescription drugs be considered for inclusion in the monograph.

Pyrilamine maleate, presently marketed OTC in a few products as a nighttime sleep-aid, is not included in this final monograph because of a lack of general recognition of effectiveness. (See comment 21 below.) Upon the effective date of the monograph, OTC drug products containing pyrilamine maleate intended for use as a nighttime sleep-aid may not be initially introduced or initially delivered for introduction into interstate commerce unless they are the subject of an approved NDA or have been included in the final monograph by that date. The agency does not believe that there is a health hazard associated with this drug so as to require its immediate removal from the market. The agency is aware that a number of OTC nighttime sleep-aid drug products that previously contained pyrilamine maleate have been reformulated to contain diphenhydramine and further expects that the remaining drug products containing pyrilamine maleate will be reformulated with diphenhydramine in advance of the effective date of this final monograph.

Reference

(1) Copy of FDA-approved labeling from NDA 5–845, OTC Volume 050FM, Docket No. 75N–0244, Dockets Management Branch.

6. One comment urged FDA to undertake studies on l-tryptophan, a naturally occurring food substance, as a nighttime sleep-aid. The comment stated that, considering that there is no sleep-aid ingredient that is safe and effective and because drug companies will not spend money for testing substances that cannot be patented, FDA should

undertake such studies for the public good.

The agency appreciates the comment's concerns. However, FDA's primary charge is to ensure that drugs in the marketplace are both safe and effective for their intended use, not to conduct original research in the development of new drugs. In addition, this final monograph contains ingredients that are considered safe and effective for use as OTC nighttime sleep-aids.

7. One comment urged the agency to recognize the legal status of the monographs issued under the OTC drug review as being interpretative rather than substantive regulations.

The agency addressed this issue in paragraphs 85 through 91 of the preamble to the procedures for classification of OTC drugs published in the Federal Register of May 11, 1972 (37 FR 9464), and in paragraph 3 of the preamble to the tentative final monograph for OTC antacid drug products published in the Federal Register of November 12, 1973 (38 FR 31260). FDA reaffirms the conclusions stated there. Subsequent court decisions have confirmed the agency's authority to issue substantive regulations by rulemaking. (See, e.g., *National Nutritional Foods Association* v. *Weinberger*, 512 F.2d 688, 696–98 (2d Cir. 1975) and *National Association of Pharmaceutical Manufacturers* v. *FDA*, 487 F. Supp. 412 (S.D.N.Y. 1980), *aff'd*, 637 F.2d 887 (2d Cir. 1981).)

8. One comment disagreed with the agency's statement in the tentative final monograph that the Panel had gone beyond its charter in making statements on advertising (43 FR 25544 at 25545). The comment believed that the agency's statement was in contradiction to a later statement that the OTC advisory review panels "are free to comment, on any scientific or policy issue that they have considered in the course of their review" (43 FR 25558). The comment urged the agency to adopt a formal statement of policy with respect to advertising and include it in the monograph.

The agency disagrees with the comment that the two statements are in contradiction. The OTC advisory review panels were charged to advise the agency on the safety, effectiveness, and labeling of OTC drug products. They were not charged with making recommendations on advertising because the Federal Trade Commission (FTC), not FDA, is the agency that has the primary responsibility for regulating OTC drug advertising. FDA has the authority to regulate OTC drug advertising that constitutes labeling under the Federal Food, Drug, and Cosmetic Act. See, e.g., *United States* v. *Article of Drug * * * B-Complex Cholinos Capsules*, 362 F.2d 923 (3d Cir. 1966); *V.E. Irons, Inc.* v. *United States*, 244 F.2d 34 (10th Cir.); *cert. denied*, 354 U.S. 923 (1957). In addition, for an OTC drug to be generally recognized as safe and effective and not misbranded, the advertising for the drug must satisfy the FDA regulations in § 330.1(d) (21 CFR 330.1(d)), which state that the advertising may prescribe, recommend, or suggest the drug's use only under the conditions stated in the labeling. If advertising for an OTC nighttime sleep-aid drug product offers the product for conditions not included in the final monograph labeling, the drug product may be subject to regulatory action by FDA. Therefore, as stated in the tentative final monograph, advisory review panels are free to comment on any aspect of OTC drug regulation notwithstanding FDA's limited authority to implement their recommendations. Because the agency's jurisdiction over OTC drug advertising is already stated in the act and in existing agency regulations that are applicable to all OTC drug monographs, the comment's request for inclusion of a policy statement on advertising in this particular monograph is not necessary.

9. One comment disagreed with the agency's statements in the tentative final monograph that the Consumer Product Safety Commission (CPSC) and not FDA has the authority to place limitations on package size (43 FR 25544 at 25546). The comment stated that CPSC has authority to require child-resistant closures, but does not have the authority to regulate the quantity available in a product container. The comment expressed the belief that, under the act, FDA has authority to limit the conditions under which a drug is used including the quantity of drug in a container. Because of the Panel's concern for potential harm to children if large quantities of any nighttime sleep-aid are ingested, the comment requested that the agency restrict the quantity of a nighttime sleep-aid packaged per container to a safe level or include a warning that ingestion of large quantities could be lethal. The comment also requested a hearing on this issue.

The agency agrees with the comment that FDA does have authority to place limitations on package size when deemed necessary, e.g., the recommended limitations in the quantity of 1¼ grain (pediatric) aspirin tablets to 36 tablets per container (21 CFR 201.314(c)). Concerning the comment's request that the agency restrict the amount of drug in a nighttime sleep-aid container, however, no evidence has been presented to warrant such a restriction.

CPSC has the authority to require child-resistant closures. FDA is aware that CPSC has reviewed the available data on antihistamines and has determined that child-resistant closures are warranted for OTC drug products, including nighttime sleep-aids, containing more than 66 milligrams (mg) diphenhydramine base in any oral dosage form. (See 16 CFR 1700.14(a)(17).) The comment did not submit any data that indicate a need to limit the package size of OTC nighttime sleep-aid drug products containing diphenhydramine nor did it submit any data that indicate a need to include a warning that ingestion of large quantities could be lethal. Therefore, FDA does not believe that limiting the package size for OTC diphenhydramine-containing nighttime sleep-aids or a warning is necessary at this time. If the agency proposed limiting the package size of such drug products to 66 mg diphenhydramine or less, each package would contain only one adult dose of 50 mg. Limiting the package size to a single dose would be impractical. In view of CPSC's final rule on child-resistant packaging, the impracticality of limiting a package size to a single dose, and the comment's failure to submit data supporting the need for further action, the Commissioner concludes that a hearing by FDA on this issue is not warranted at this time.

10. One comment requested FDA to join with FTC in conducting hearings on the possibilities of deception in labeling and advertising caused by "look-alike/sound-alike" drugs. The comment noted that the agency's response to this issue was that if "look-alike/sound-alike" drugs presented an opportunity for abuse, appropriate action would be initiated under section 502(a) of the act (see comment 19, 43 FR 25544 at 25547). The comment maintained "that enough evidence is present to warrant affirmative action on this issue."

The agency recognizes the potential for deception in the marketing of OTC "look-alike/sound-alike" drugs, including certain OTC nighttime sleep-aids that bear a strong physical resemblance to certain controlled prescription drugs, or have trade names that sound like those of controlled drugs. Since publication of the tentative final monograph, the agency has become aware that there is widespread manufacturing, promotion, and marketing of these OTC "look-alikes." The agency has initiated seizure actions under the counterfeit drug sections of the act (sections 201(g)(2) and 304(a)(2)), separate from the OTC drug review, in

order to remove these products from the market. Moreover, there have been several Congressional hearings on this subject in recent years, and the agency has also discussed this issue in other **Federal Register** documents. (See New Drug Status of OTC Combination Drug Products Containing Caffeine, Phenylpropanolamine, and Ephedrine, published in the **Federal Register** of August 13, 1982 (47 FR 35344); Enforcement Action for Certain OTC Drug Products, published in the **Federal Register** of November 18, 1983 (48 FR 52513); and Enforcement Action Under the New Drug Provisions of the Federal Food, Drug, and Cosmetic Act; Certain OTC Drug Products; Advisory Opinion; Amendment, published in the **Federal Register** of June 29, 1984 (49 FR 26814).) This issue is also discussed with respect to diphenhydramine in comment 22 below. Based on previous agency actions and the Congressional hearings that have already been held, the agency concludes that an additional joint hearing with the FTC to discuss labeling and advertising for such products is not needed.

B. Comments on Labeling of OTC Nighttime Sleep-Aid Drug Products

11. Several comments contended that FDA does not have the authority to legislate the exact wording of OTC labeling claims. The comments contended that such a policy is overly restrictive, lacks supporting evidence, and constitutes a prior restraint on First Amendment rights. The comments concluded that to ban alternative truthful language is unjustified. Two comments also requested a hearing on this issue.

In the **Federal Register** of May 1, 1986 (51 FR 16258), the agency published a final rule changing its labeling policy for stating the indications for use of OTC drug products. Under 21 CFR 330.1(c)(2), the label and labeling of OTC drug products are required to contain in a prominent and conspicuous location, either (1) the specific wording on indications for use established under an OTC drug monograph, which may appear within a boxed area designated "APPROVED USES"; (2) other wording describing such indications for use that meets the statutory prohibitions against false or misleading labeling, which shall neither appear within a boxed area nor be designated "APPROVED USES"; or (3) the approved monograph language on indications, which may appear within a boxed area designated "APPROVED USES," plus alternative language describing indications for use that is not false or misleading, which shall appear elsewhere in the labeling. All other OTC drug labeling required by a monograph or other regulation (e.g., statement of identity, warnings, and directions) must appear in the specific wording established under the OTC drug monograph or other regulation where exact language has been established and identified by quotation marks, e.g., 21 CFR 201.63 or 330.1(g). The final rule in this document is subject to the labeling provisions in § 330.1(c)(2).

12. One comment objected to the agency's conclusion in comment 45 of the tentative final monograph (43 FR 25544 at 25553) that the claim "reduced time to fall asleep" is not synonymous with the Category I claim "helps fall asleep" and contended that the only reason for denying the reduced time claim was that such a phrase would suggest that someone without a sleep disturbance could use a sleep-aid. The comment requested a hearing on this issue.

In the tentative final monograph, the agency determined that the claim "reduced time to fall asleep" was not fully synonymous with the requirements for Category I nighttime sleep-aid ingredients. The agency stated that the use of a nighttime sleep-aid should reduce the time required for a person to get to sleep by providing the means for such sleep in the case of an individual who might otherwise remain awake. The agency concluded that the unqualified claim "reduced time to fall asleep" required further study because it implies that persons without sleep disturbances may benefit from the use of OTC nighttime sleep-aids, and no such data had been presented. However, in patients with insomnia (difficulty falling asleep), such a claim would be reasonable. At the time that the tentative final monograph was proposed (1978), there were no Category I nighttime sleep-aid ingredients. Based on the panel's recommendations (40 FR 57292 at 57328), the agency proposed as one of the suggested phrases the claim "helps fall asleep," but stated that additional studies would be necessary to support such a claim. Subsequently, studies were submitted to upgrade Category III ingredients to monograph status. The studies that were found acceptable (see comment 22 below) were conducted in persons with sleep difficulties. In those studies, sleep latency (time to fall asleep) was a major parameter studied, and those ingredients found to be effective as OTC nighttime sleep-aids were able to reduce the time to fall asleep. Accordingly, the claim "reduced time to fall asleep" has been substantiated, but only in individuals with occasional sleeplessness or who have difficulty falling asleep. Therefore, the agency is adding the claim ("Helps you" or "Reduces time to") "fall asleep if you have difficulty falling asleep" to the indications section of the monograph.

Based upon these studies, the unqualified claims "reduces time to fall asleep" and the previously proposed "helps fall asleep" without the descriptive language relating these claims to the intended target population are not appropriate as specific indications for OTC nighttime sleep-aid drug products. However, because the phrases "helps fall asleep" and "reduces time to fall asleep" are part of the monograph indications for nighttime sleep-aid drug products, the agency would not object to these shortened phrases appearing elsewhere in the labeling (i.e., outside the boxed area), provided that the complete indication statement(s) appears in the appropriate place in the labeling.

Based upon the discussion above, the agency has revised the definition of a nighttime sleep-aid that appears in this final monograph to read as follows: "A drug that is useful for the relief of occasional sleeplessness by individuals who have difficulty falling asleep." Likewise, the indications have been revised to (1) ("Helps you" or "Reduces time to") "fall asleep if you have difficulty falling asleep," (2) "For relief of occasional sleeplessness," and (3) "Helps to reduce difficulty falling asleep." The agency concludes that these changes make it clear that OTC nighttime sleep-aids are intended only for those individuals who have occasional sleeplessness or who have difficulty falling asleep. Based on these changes, the Commissioner concludes that a hearing on this issue is not warranted.

13. One comment objected to the Category II classification of the terms "refreshing sleep" and "sound sleep." The comment argued that the person who uses an OTC nighttime sleep-aid wants to avoid occasional sleeplessness and desires sleep that is refreshing. For this reason, the comment requested that the term "refreshing sleep" as well as the terms "restful sleep" and "good night's sleep" be moved to Category I. Regarding the term "sound sleep," the comment claimed that a person who experiences "sound sleep" experiences a sleep with fewer awakenings. The comment argued that for this reason the "sound sleep" claim and the "fewer awakenings" claim should be placed in the same category. The comment noted that the "fewer awakenings" claim was placed in Category III in the tentative

final monograph, but urged that this claim and the "sound sleep" claim both be included in the monograph. The comment also requested a hearing on this issue.

Another comment objected to the agency's Category II placement of the claim "helps you relax so you can fall asleep." Arguing that the agency conceded that nighttime sleep-aids provide a relaxant action, the comment referred to the agency's statement at 43 FR 25553 that such a "product will make one drowsy, not just relaxed * * *." The comment requested that this claim be moved from Category II to Category I.

The above classifications were made in the tentative final monograph before the agency received the results of any clinical studies that supported monograph status for any OTC nighttime sleep-aid drug. Since that time, the agency has evaluated the results of clinical studies that support the safety and effectiveness of diphenhydramine hydrochloride and diphenhydramine citrate for nighttime sleep-aid use. (See comment 22 below.)

In those studies, a number of efficacy variables related to the claims and terms requested by the comments were evaluated. These included the following: (1) How much did the medication help?, (2) wake time, (3) how rested when awoke?, (4) how sleepy during day?, (5) how energetic during day?, (6) sleep latency, (7) number of awakenings, (8) sleep duration, (9) depth of sleep, and (10) how good was the sleep?

As discussed in comment 22 below, in one study, diphenhydramine hydrochloride was significantly better ($p=.05$) than placebo for sleep latency, degree to which medication helped, depth of sleep, and quality (goodness) of sleep. At the less conservative .10 level of significance, diphenhydramine was better than placebo for the amount of time spent awake in bed. In another study, diphenhydramine was significantly better ($p=.05$) than placebo for sleep latency, degree to which medication helped, depth of sleep, quality (goodness) of sleep, feeling rested upon awakening, and degree of energy during previous day. At the less conservative .10 level of significance, diphenhydramine was better than placebo for the amount of time spent awake in bed. All other variables evaluated in the studies were not significant.

The claim relating to fewer awakenings, which was placed in Category III in the tentative final monograph, reads as follows: "Reduces the number of awakenings in persons who wake frequently during the night" (43 FR 25544 at 25588). The agency concluded that this would be a valid claim for OTC nighttime sleep-aids if supported by evidence in well-controlled studies. However, none of the studies submitted to support the effectiveness of diphenhydramine as an OTC nighttime sleep-aid supports that claim. Therefore, the scientific data are inadequate to allow inclusion of the "fewer awakenings" claim in the monograph.

Based on the results of the diphenhydramine studies, which showed that the nighttime sleep-aid drug improved depth of sleep, quality (goodness) of sleep, feeling rested upon awakening, and degree of energy during previous day, the agency concludes that the data support the terms "sound sleep," "restful sleep," "good night's sleep," and "refreshing sleep" for nighttime sleep-aid drug products. Further, the agency notes that the concept of rest is included in at least two dictionary definitions for "relax" (Refs. 1 and 2); therefore, the term "relaxing" sleep is also acceptable. However, the agency considers these terms to be descriptive statements that do not relate in a significant way to the safe and effective use of nighttime sleep-aid drug products and, therefore, does not consider such information to be necessary as part of the required indications for these products. Because these terms are examples of truthful and nonmisleading language, the agency would allow the terms to be included in labeling provided they are not intermixed with labeling established by the monograph. Based on the above discussion, the Commissioner concludes that a hearing on this issue is not warranted.

Regarding the statement (made by the agency in the tentative final monograph at 43 FR 25544 at 25553) referred to by the comment, the agency was not conceding that OTC nighttime sleep-aids act by relaxing, but rather intended to emphasize that these drugs act by making one drowsy. Regarding the claim "helps you relax so you can fall asleep," the agency considers such a claim as relating to the mechanism of action of the drug. This efficacy variable was not evaluated as part of the diphenhydramine studies. Therefore, because the data are inadequate to support such a claim, it is not being included in the monograph.

References

(1) "Webster's Collegiate Dictionary," G. and C. Merriam Co., Springfield, MA, 1976, s.v. "relaxing."

(2) "The American Heritage Dictionary of the English Language," Houghton Mifflin Co., Boston, 1976, s.v. "relaxing."

14. One comment objected to the warning in proposed § 338.50(c)(2): "If condition persists continuously for more than 2 weeks, consult your physician. Insomnia may be a symptom of serious underlying medical illness." The comment referred to reasoning provided in its earlier comment to the Panel's report that there is insufficient evidence of abuse of OTC nighttime sleep-aid drug products to warrant such a warning.

In addressing this issue in comment 51 of the tentative final monograph (43 FR 25544 at 25554), the agency tentatively concluded that the warning was necessary because it would help the user to determine when the limits of self-treatment have been reached. The present comment offers no basis to alter the agency's conclusions; therefore, the warning is included in the final monograph.

15. Several comments objected to the glaucoma warning proposed in § 338.50(c)(3)(i). One comment stated that incorporation of this warning, based on a recommendation of the Advisory Review Panel on OTC Cold, Cough, Allergy, Bronchodilator, and Antiasthmatic Drug Products, fails to recognize the difference between the dosage and pattern of use of antihistamines in OTC nighttime sleep-aid products and antihistamines in cough/cold products. The comment also cited testimony that a particular sleep-aid drug product containing methapyrilene and scopolamine is safe when administered to patients with glaucoma (Ref. 1).

The agency recognizes that antihistamines used as OTC nighttime sleep-aids are taken only once a day, whereas they may be taken up to six times a day for cough/cold symptoms. However, the nighttime sleep-aid dosage is often higher than the cough/cold dosage. In addition, there is variation between the different antihistamine drugs with respect to the degree of expected side effects, and also marked individual variation in response to antihistamine drugs (Ref. 2). Thus, the agency believes it best to advise consumers with glaucoma to seek the advice of a physician before using antihistamine-containing OTC drug products. The warning, therefore, has been retained in the OTC nighttime sleep-aid final monograph. The comment's cited testimony does not support deleting this warning because neither methapyrilene nor scopolamine

are included in the OTC nighttime sleep-aid final monograph.

References

(1) Comment No. HER003, Docket No. 75N-0244, Dockets Management Branch.

(2) Douglas, W.W., "Histamine and 5-Hydroxytryptamine (Serotonin) and their Antagonists," *in* "The Pharmacological Basis of Therapeutics," 7th Ed., edited by A.G. Gilman, et al., MacMillan Publishing Co., New York, p. 621, 1985.

16. Several comments objected to the proposed alcohol-antihistamine drug interaction warning in § 338.50(c)(3)(ii), which reads "Take this product with caution if alcohol is being consumed." One comment stated that the agency did not provide documentation for a potential hazard, and without such documentation it is inappropriate to require such a warning.

The agency disagrees with the comments. In the tentative final monograph, the agency noted that the Sleep-aid Panel had documentation at 40 FR 57308 of an alcohol-antihistamine interaction in which deepened and prolonged sleep was reported. (See 43 FR 25544 at 25554.) The agency concluded that the depressant effects of antihistamines and alcohol are additive and could create a greater soporific effect than is desirable (43 FR 25566). In addition to the reference cited by the Panel at 40 FR 57308, the agency points out that the additive central nervous system depression occurring from simultaneous ingestion of antihistamines and alcohol is well-documented in the literature (Refs. 1 through 5).

In the tentative final monograph for OTC nighttime sleep-aid drug products, the agency also noted that the Advisory Review Panel on OTC Cold, Cough, Allergy, Bronchodilator, and Antiasthmatic Drug Products had recommended an antihistamine-alcohol drug interaction warning (43 FR 25544 at 25554). In an amendment to the tentative final monograph for OTC antihistamine drug products, published in the **Federal Register** of August 24, 1987 (52 FR 31892), the agency noted that, in addition to alcohol, sedative and tranquilizer drugs are known to have additive effects to the drowsiness effect of antihistamine drug products (52 FR 31911). The agency stated that it felt that consumers should be warned about these additive effects and proposed a revision to the warnings for OTC antihistamine drug products, which read as follows: "May cause marked drowsiness; alcohol, sedatives, and tranquilizers may increase the drowsiness effect. Avoid alcoholic beverages while taking this product. Do not take this product if you are taking sedatives or tranquilizers, without first consulting your doctor. Use caution when driving a motor vehicle or operating machinery." The agency has reviewed the comments received in response to the publication of that proposed warning. No comments in opposition to that revised warning were received.

Besides alcohol, the Sleep-aid Panel also stated that the depressant actions of antihistamines are additive with the effects of other central nervous system depressants and the concomitant use of * * * drugs known to depress the central nervous system should be avoided because such combinations produce deepened and prolonged sleep (40 FR 57292 at 57308) and excessive sedation and confusion (40 FR 57297).

The agency concludes that this important information should appear in the labeling of OTC nighttime sleep-aid drug products to provide for the safe consumer use of these products. However, because of the intended use of a nighttime sleep-aid drug product, the information should be different from that appearing on antihistamine drug products for daytime cold or anti-allergy use. For those products, the drowsiness or marked drowsiness caused by the antihistamine is a side effect that consumers need to be alerted to, and consumers should be informed to use caution when driving a motor vehicle or operating machinery. Because the "Directions" for a nighttime sleep-aid drug product are for use at bedtime, or as directed by a doctor, it is not necessary to include a warning against use while driving a motor vehicle or operating machinery. However, the potential of excessive sedation or confusion (as noted above) exists if the sleep-aid product is taken concomitantly with alcohol, sedatives, or tranquilizers. Therefore, the agency is including the following warning in this final monograph: "Avoid alcoholic beverages while taking this product. Do not take this product if you are taking sedatives or tranquilizers, without first consulting your doctor."

References

(1) Noble, E.P., "Third Special Report to the U.S. Congress on Alcohol and Health," Department of Health, Education, and Welfare, National Institute on Alcohol Abuse and Alcoholism, Rockville, MD, p. 50, June 1978.

(2) "British Pharmaceutical Codex 1963," Council of the Pharmaceutical Society of Great Britain, The Pharmaceutical Press, London, p. 20, 1963.

(3) McIver, A.K., "Drug Incompatibilities," *The Pharmaceutical Journal*, 195:609-612, 1965.

(4) "Interactions of Alcohol with Drugs," *The Medical Letter*, 19:48, 1977.

(5) Coleman, J.H., and W.E. Evans, "Drug Interactions with Alcohol," *Alcohol Health and Research World*, Department of Health, Education, and Welfare, National Institute on Alcohol Abuse and Alcoholism, Rockville, MD, pp. 16-19, 1975.

17. Several comments urged the agency to reconsider the need for inclusion of a warning on the label of OTC nighttime sleep-aid drug products regarding the use of these drugs by pregnant or nursing women. The comments contended that even though there are no data to suggest a potential hazard, there have been no studies to show that these drugs are safe when taken by pregnant or nursing women and that a warning regarding the use of these drugs by pregnant and nursing women should be included in the monograph.

In the **Federal Register** of December 3, 1982 (47 FR 54750), the agency published a final rule requiring that the labeling for all OTC drugs that are intended for systemic absorption, unless specifically exempted, contain a general warning concerning the use of these drugs by pregnant or nursing women. This warning states: "As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product." The regulation provides that if a specific warning relating to use during pregnancy or while nursing has been established for a particular drug product in an NDA or for a product covered by an OTC drug final monograph in Part 330, the specific warning shall be used in place of the general pregnancy-nursing warning unless otherwise stated in the NDA or in the final OTC drug monograph. The agency is not aware of any data at this time that would necessitate a special warning for the active ingredients included in the OTC nighttime sleep-aid final monograph. Therefore, these drug products will be required to bear the general pregnancy-nursing warning in § 201.63, as stated above.

18. One comment objected to the monograph limitation of a single dose of a nighttime sleep-aid at bedtime because there is no factual evidence that would indicate that a repeat dose in 4 hours is not safe and effective. The comment requested that the monograph be amended to include the provision for a repeat dose in 4 hours if necessary.

The agency recognizes that an antihistamine that is marketed OTC for relief of cough/cold symptoms bears directions for use that recommend a repeat dose every 4 hours as needed.

Although the comment is correct that there is no evidence to show that repeating the OTC nighttime sleep-aid dose would not be safe and effective, data on a repeat dose in 4 hours were not submitted to the agency and the comment presented none. In addition, the data that were submitted demonstrated that the antihistamines are an effective sleep-aid after only one dose has been taken. Therefore, the directions for use in this final rule have not been revised to include a repeat dose.

19. One comment recommended that the agency adopt a "Labeling General Statement" in the final monograph to explain FDA's position on the following aspects of OTC drug labeling: Confusing claims, unsupported or misleading claims, claims implying a unique action, statement of quantity of active ingredients, declaration of inactive ingredients, and general warning statements.

The agency believes that the OTC drug regulations in Part 330 explain the agency's policy regarding many of the items outlined by the comment. For example, § 330.1(e) explains the position regarding inactive ingredients in OTC drug products; § 330.1(g) contains general warning statements that should be included on all OTC drug products (see also discussion of the general pregnancy-nursing warning in comment 17 above); § 330.1(j) recommends that the labeling contain the quantitative amounts of active ingredient per dosage unit; and § 330.10(a)(4)(v) states that "labeling shall be clear and truthful in all respects and may not be false or misleading in any particular." Specific labeling claims or problems are adequately discussed in the respective rulemakings. In light of the discussion above, the agency does not believe it is necessary to adopt a general labeling statement as recommended by the comment.

C. Comments on Combination Drug Products

20. One comment disagreed with the agency's conclusions regarding combinations of OTC nighttime sleep-aids with analgesic ingredients. Specifically, the comment objected to the agency's insistence on factorially designed studies to demonstrate a target population that would benefit from such combinations. The comment contended that there is compelling logic for the existence of a target population of individuals with sleeplessness due to pain and that the tension component of pain produces a degree of sleeplessness beyond that produced by the pain itself. Although an analgesic may relieve the pain and indirectly relieve the tension and allow for sleep, the nighttime sleep-aid ingredient will enhance this effect by directly relieving the tension and its resultant sleeplessness. The comment referred to a published article to support this theory (Ref. 1).

The comment further argued that the OTC drug regulations in § 330.10(a)(4)(iv) do not require a showing that each ingredient in a combination product is needed. The comment pointed out that the regulations for prescription drug combination products (21 CFR 300.50) make it mandatory not only that each ingredient make a contribution, "but also that there be a significant patient population requiring such concurrent therapy." The comment stated that the absence of such specific language in the OTC drug regulations makes it clear that, for OTC drug combinations, each ingredient does not have to be shown to be needed.

Several comments submitted results of a number of studies in which nighttime sleep-aid/analgesic combination drug products were evaluated to determine whether such combinations should be generally recognized as safe and effective in the final monograph (Ref. 2). One comment also requested a hearing on this issue.

The article cited by the comment (Ref. 1) does not support the claimed theory that the addition of an antihistamine to an analgesic, for use in individuals with sleeplessness due to pain, provides for relief of the tension component of pain and its resultant sleeplessness. In this randomized, double-blind, crossover study, 206 patients were treated for "simple nervous tension accompanied by headache" using phenyltoloxamine citrate alone, acetaminophen alone, the combination of these two drugs, or placebo. The subjects rated each treatment with respect to degree of relief and time interval until maximum relief was obtained for each of the symptoms of tension, anxiety, irritability, and headache. Sleep was not a measured parameter in this study and, therefore, the study is of little value in assessing the effectiveness of the antihistamine in providing or enhancing a sleep effect.

The agency has also reviewed the clinical studies and information submitted in the other comments (Ref. 2). These studies contain new data on the safety and effectiveness of a combination of two analgesics with diphenhydramine for use as a nighttime pain reliever. These studies, however, "do not provide comparisons between the combinations and their individual antihistamine and analgesic components" (Ref. 3). The agency concludes that the available data remain insufficient to demonstrate whether the addition of a nighttime sleep-aid enhances the effectiveness of the analgesic to allow labeling the product as a "nighttime pain reliever."

Regarding the need to identify a target population that could benefit from an OTC nighttime pain reliever, the agency recognizes the fact that the study design proposed in the OTC nighttime sleep-aid tentative final monograph separated the test population into two groups, i.e., individuals with sleeplessness related to pain and those who suffer from sleeplessness not related to pain. In proposing this latter group, the agency recognized the existence of a suitable target population for the combination of an OTC nighttime sleep-aid and internal analgesic(s). In this patient population are individuals who might on a given night have both sleep problems and mild to moderate pain. In cases where only one symptom occurs, it is more appropriate to select drugs separately for specific symptomatic relief.

Since publication of the Panel's findings and the tentative final monograph, the agency announced on November 28, 1978, the availability of a guideline that states in detail its policy for combining two or more safe and effective OTC active drug ingredients (43 FR 55466). The agency uses this guideline in addition to the existing regulatory requirements for OTC combination drugs in § 330.10(a)(4)(iv). The guideline is currently available for public examination at FDA's Dockets Management Branch (Docket No. 78D–0322). Item (1) of the guidelines states, "Category I active ingredients from different therapeutic categories may be combined to treat different symptoms concurrently only if each ingredient is present within its established safe and effective dosage range and the combination meets the OTC combination policy in all other respects."

In reviewing the information available several years ago, the agency tentatively concluded that the combination of an OTC nighttime sleep-aid and OTC internal analgesic(s) was reasonable, provided the combination was properly labeled for use only when concurrent symptoms exist, e.g., for occasional minor aches, pains, and headache with accompanying sleeplessness. Accordingly, at that time, the agency planned to reclassify the combination of a nighttime sleep-aid and internal analgesic(s) from Category III to Category I.

The agency's detailed comments and evaluation of the data are on file in the Dockets Management Branch (Ref. 4).

Subsequently, the agency reevaluated the existing information and has tentatively concluded that the combination of an OTC nighttime sleep-aid and OTC internal analgesic(s) should not be included in the final monograph at this time. Even though the agency had earlier indicated that one can reasonably conclude that an appropriate patient population exists, i.e., patients with pain with concurrent sleeplessness unrelated to the pain, the agency now believes that a more scientific basis is needed to support this conclusion. The agency believes that it must be shown with valid data that there is a population needing a product identified as an "analgesic/nighttime sleep-aid." The agency also believes that data are needed to show that the sleeplessness is not relieved by the analgesic alone but that both ingredients in the combination product contribute to its claimed effects. A study is needed in which the contribution of both components has been shown to relieve the sleeplessness. The agency believes that the best study population for this purpose would be one in which patients complain of sleeplessness that is not perceived as resulting from the pain they have. If a target population with concomitant pain and sleeplessness that clearly requires both an analgesic and a nighttime sleep-aid can be established, then labeling for such a combination would have to state clearly that it is for use only when both symptoms occur together, not when only one occurs and/or the other is anticipated.

The agency's detailed comments and reevaluation of the data are on file in the Dockets Management Branch (Ref. 5). In response to the agency's letter, additional data containing the results of two factorial design clinical studies were submitted to the agency on December 22, 1986 (Ref. 6). The data are presently under review.

In view of the change in the agency's tentative conclusions on the data (Refs. 4 and 5) and the submission of additional data, and because a hearing was requested on this combination issue, the agency is not issuing a final decision on the appropriateness of a combination of an OTC nighttime sleep-aid and an OTC internal analgesic(s) at this time. A final decision on this issue will be published in a future issue of the **Federal Register**. Prior to any final agency action, an opportunity for a hearing on this issue will be provided unless the comment advises the agency otherwise. An appropriate notice will be published in the **Federal Register**.

The agency has determined that because all issues relating to single-ingredient nighttime sleep-aid drug products have been resolved, a final monograph covering only these products should be issued before the status of the combination is resolved. Accordingly, combinations of a monograph nighttime sleep-aid and an internal analgesic(s) are exempt from the requirements of the final rule until a final decision on such a combination is issued in a future issue of the **Federal Register**.

References

(1) Gilbert, M. M., N. De Sola Pool, and C. Schecter, "Analgesic/Calmative Effects of Acetaminophen and Phenyltoloxamine In Treatment of Simple Nervous Tension Accompanied By Headache," *Current Therapeutic Research*, 20:53–58, 1976.

(2) Comment Nos. OB0018, C00031, and C00032, Docket No. 75N–0244, Dockets Management Branch.

(3) Letter from W. E. Gilbertson, FDA, to B. M. Lanman, Bristol Myers Products, coded LET003, Docket No. 75N–0244, Dockets Management Branch.

(4) Letter from W. E. Gilbertson, FDA, to W. B. Elvers, Bristol Myers Products, coded LET009, Docket No. 75N–0244, Dockets Management Branch.

(5) Letter from W. E. Gilbertson, FDA, to W. B. Elvers, Bristol Myers Products coded LET012, Docket No. 75N–0244, Dockets Management Branch.

(6) Comment No. C00038, Docket No. 75N–0244, Dockets Management Branch.

D. Comments on Pyrilamine

21. Results of several studies were submitted to support general recognition of the safety and effectiveness of pyrilamine maleate as an OTC nighttime sleep-aid ingredient (Refs. 1 through 4). One comment recommended removing pyrilamine from the OTC market as a nighttime sleep-aid ingredient because long-term carcinogenicity studies have not been performed and because anorexia, nausea, and vomiting are commonly encountered when doses of 25 to 50 mg are ingested (43 FR 25544 at 25588).

The data submitted by the comments included a clinical study by Fabre (Ref. 2); a clinical study by Hartmann, Marsh, and Soderland (Ref. 3); and a sleep laboratory study by Vogel (Ref. 4). The agency has reviewed these studies and concludes that they do not support the reclassification of pyrilamine maleate from Category III to Category I as an OTC nighttime sleep-aid.

Fabre study (Ref. 2). This study was a randomized, double-blind, two-treatment, two-period crossover study conducted at two different sites (Houston and Austin) comparing 50 mg pyrilamine maleate to placebo in 100 patients with mild, nonchronic insomnia. Each treatment period lasted 1 week and there was no washout between periods.

Considering the data as analyzed, the accuracy of the signed-rank tests are difficult to verify because the analyses are poorly documented. Instead of presenting the sum of the ranks, the mean of the ranks was used. The test procedure is based on the sum, and the mean is irrelevant and uninformative. Even ignoring the problems with the data analyses, the results are very unusual. Every comparison was highly significant ($p=0.005$) in favor of pyrilamine in the Houston clinic. Only one variable, sleep duration, was significant ($p=0.02$) in favor of pyrilamine in the Austin clinic. For the remaining variables, the smallest significance level was $p=0.12$. There are no apparent reasons for the disparity between the two clinics.

Hartmann, Marsh, and Soderland study (Ref. 3). This study had the same basic design as the Fabre study except that the treatment periods were 6 days long and there was a 2-day washout period between treatments. One-hundred-eight subjects satisfied the selection criteria; one patient was excluded from the analysis. For inclusion into the study, subjects were to have mild, nonchronic difficulties in falling asleep for at least 30 minutes. However, over 50 percent of the subjects reported they usually fell asleep within 15 minutes, thus making efficacy difficult to demonstrate.

Analyses were presented for both the daily sleep questionnaires and the post-treatment questionnaires. However, as with the Fabre study, some analyses were not appropriate for a crossover study, and those that were appropriate were poorly documented. In addition, the roles of the three investigators were not defined. Therefore, the agency is unable to assess whether investigator bias was introduced into the treatment comparisons.

Vogel study (Ref. 4). This was a 10-day, double-blind, sleep laboratory study comparing pyrilamine 50 mg to placebo in 14 subjects with subjective and objective sleep onset insomnia. FDA's nonparametric analyses showed significantly fewer awakenings ($p=0.01$) and significantly shorter wake time after first persistent sleep onset ($p=0.02$) with pyrilamine as compared to baseline. However, there were no significant improvements for total sleep time ($p=0.22$), sleep latency to first sleep ($p=0.13$), and sleep latency to first persistent sleep ($p=0.70$). In fact, the

mean sleep latency to first persistent sleep, the objective variable used as a criterion for entrance into the study, increased with pyrilamine by 18 minutes. Thus, the persistent sleep latency actually worsened with pyrilamine as compared to the placebo baseline nights. For the subjective variables, there were no comparisons that were significant at $p=0.05$.

On April 16, 1982, additional information was submitted to the agency (Ref. 5), including letters from Drs. Fabre, Hartmann, and Vogel addressing the agency's comments and evaluation (Ref. 6) on their studies. In a letter dated April 4, 1983, the agency discussed its review of these letters and concluded that the data provide insufficient evidence of effectiveness for pyrilamine as an OTC nighttime sleep-aid (Ref. 7). In its letter, FDA discussed the following:

(1) There were no analyses of the first period data of the Fabre study (Ref. 2) despite the fact that the lack of such analyses was addressed earlier in the agency's comments and evaluation of June 17, 1981 (Ref. 6). The data submitted are still based on analyses which are not appropriate for crossover studies, and there was no satisfactory explanation for the large disparity between the results of the Austin and Houston clinics. It is difficult to conclude that these differences could be attributed to the demographic differences between the two clinics as suggested by Dr. Fabre.

(2) Of the five efficacy variables (sleep latency, number of awakenings, total time spent awake, sleep duration, and sleep quality) suggested for testing in the Hartmann, Marsh, and Soderland study (Ref. 3), none favor pyrilamine at the 0.05 level of significance. Only two variables (sleep latency and quality of sleep) favor pyrilamine and only at the 0.10 significance level (Ref. 8). The agency has reviewed the new analysis by Dr. Hartmann, which reportedly demonstrates the superiority of pyrilamine compared to placebo at greater statistical significance if subjects with a sleep latency in excess of 15 minutes are analyzed separately. It was necessary to exclude slightly more than half of the patients who could be evaluated in order to show a difference in sleep latency that favored pyrilamine at the 0.05 level of significance. Little weight can be attached to results that were obtained by excluding more than half of the patients on the basis of an apparently arbitrary criterion.

Dr. Hartmann has stated that his patients had mild sleep latency problems, but generally were not suffering from other forms of insomnia. The fact that less than half the patients' usual sleep latency exceeded 15 minutes, and only for 13 percent did it exceed 30 minutes, leads to the conclusion that these patients' sleep latency problems were so mild that the inconclusive results may be attributed to poor patient selection.

(3) The results of the Vogel study (Ref. 4) do not show that pyrilamine reduces sleep latency. Based on the fact that sleep laboratory studies have been able to show an effect on sleep latency for two other OTC nighttime sleep-aids (diphenhydramine and doxylamine), the agency concludes that the results of this study do not support pyrilamine's claim of effectiveness as a nighttime sleep-aid.

Based on the additional information submitted, the agency concludes that the data are still inadequate to include pyrilamine in the monograph (Category I) for use as an OTC nighttime sleep-aid. The agency's detailed comments and evaluation of the additional information are on file in the Dockets Management Branch (Refs. 6, 7, and 8).

References

(1) Comment No. C00031, Docket No. 75N–0244, Dockets Management Branch.

(2) Fabre, L.F., "Double-Blind Controlled Evaluation of Pyrilamine Maleate and Placebo in Insomniac Patients Suffering Primarily From Difficulties Falling Asleep," unpublished study No. I, Comment Nos. C00033 and SUP006, Docket No. 75N–0244, Dockets Management Branch.

(3) Hartmann, E.L., E.B. Marsh, and C.A. Soderland, "The Clinical Evaluation of Pyrilamine Maleate vs. Placebo as a Nighttime Sleep-aid for Patients With Occasional Non-chronic Insomnia," unpublished study No. II, Comment Nos. C00033 and SUP006, Docket No. 75N–0244, Dockets Management Branch.

(4) Vogel, G.W., "The Effects of Pyrilamine Maleate 50 mg on the Sleep Cycle of Healthy Adults with Insomnia," unpublished study No. III, Comment Nos. C00033 and SUP006, Docket No. 75N–0244, Dockets Management Branch.

(5) Letter from A.G. Eckian to W.E. Gilbertson, FDA, coded LET008, Docket No. 75N–0244, Dockets Management Branch.

(6) Letter from W. E. Gilbertson, FDA, to A. G. Eckian, coded LET005, Docket No. 75N–0244, Dockets Management Branch.

(7) Letter from W. E. Gilbertson, FDA, to A. G. Eckian, coded LET011, Docket No. 75N–0244, Dockets Management Branch.

(8) Letter from W. E. Gilbertson, FDA, to A. G. Eckian, coded CR0003, Docket No. 75N–0244, Dockets Management Branch.

E. Comments on Diphenhydramine

22. The results of several studies were submitted to support general recognition of the safety and effectiveness of diphenhydramine hydrochloride and diphenhydramine citrate as OTC nighttime sleep-aid ingredients (Refs. 1 through 12). Diphenhydramine hydrochloride was evaluated in eight studies (Refs. 1 through 8) and diphenhydramine citrate in the other four studies (Refs. 9 through 12).

The agency finds that many of the clinical studies conducted with diphenhydramine hydrochloride (Refs. 1 through 8) were conducted on hospitalized patients and not on the target population, e.g., mild insomniacs, or lacked proper sample size or protocol design and therefore are supportive of effectiveness, but do not alone establish general recognition of OTC safety and effectiveness. For example, one double-blind placebo-controlled study (Ref. 5) compared the effects of 50 mg and 100 mg diphenhydramine hydrochloride in 584 post-ophthalmic surgery patients at the Massachusetts Eye and Ear Infirmary who anticipated having trouble sleeping. The duration of therapy was one night. Side effects were also measured and grouped into eight categories. Both the 50 mg and 100 mg doses of diphenhydramine hydrochloride were significantly superior to placebo. The differences in efficacy between the 50 mg and 100 mg doses were not statistically significant although the incidence of anticholinergic side effects was significantly higher in the 100-mg group. The incidence of other side effects was low with no significant differences between the two drug groups and the placebo group. This study is acceptable as evidence of the hypnotic efficacy and safety of diphenhydramine hydrochloride. The study establishes the optimal dose of diphenhydramine hydrochloride as 50 mg because the 100-mg dose was associated with a significant increase in anticholinergic side effects with no added increase in effectiveness.

The studies by Rickels (Ref. 6) and Finnerty and Goldberg (Ref. 7), conducted in Philadelphia and Boston, support the effectiveness of diphenhydramine as a nighttime sleep-aid. These studies were randomized, double-blind, two-treatment, two-period crossover studies with each period lasting 1 week. Both studies compared 50 mg diphenhydramine hydrochloride to placebo in healthy adults who had mild nonchronic insomnia.

In the Philadelphia study, diphenhydramine hydrochloride was significantly better ($p=0.05$) than placebo for sleep latency, degree to which medication helped, depth of sleep, and quality of sleep. At the less conservative 0.10 level of significance, diphenhydramine was better than placebo for the amount of time spent awake in bed.

In the Boston study, diphenhydramine was significantly better (p=0.05) than placebo for sleep latency, degree to which medication helped, depth of sleep, quality, of sleep, feeling rested upon awakening, and degree of energy during previous day. At the less conservative 0.10 level of significance, diphenhydramine was better than placebo for the amount of time spent awake in bed.

Side effects in both studies were low with expected side effects of drowsiness, dizziness, and grogginess occurring more frequently in the diphenhydramine group. The differences in other side effects between the treatment and placebo groups were not significant. The agency concludes that these studies demonstrate that diphenhydramine hydrochloride in a dose of 50 mg is safe and effective as an OTC nighttime sleep-aid.

The agency's detailed comments and evaluation of the data are on file in the Dockets Management Branch (Refs. 13 and 14).

In a notice published in the **Federal Register** on April 23, 1982 (47 FR 17740), the FDA's former Bureau of Drugs concluded that the studies described above (Refs. 1 through 12) resolved safety and effectiveness issues that had been raised when the advance notice of proposed rulemaking and notice of proposed rulemaking were published in the **Federal Register**. The Bureau determined, after reviewing all of the submitted data, that 50 mg diphenhydramine hydrochloride and 76 mg diphenhydramine citrate were appropriate dosage levels in drug products intended for use as OTC nighttime sleep-aids. The Bureau concluded that the citrate salt could be considered identical to the hydrochloride salt because the citrate salt is rapidly converted in the stomach to the hydrochloride salt. However, a dose of 76 mg diphenhydramine citrate is necessary to supply a diphenhydramine content equivalent to 50 mg diphenhydramine hydrochloride.

The notice also announced an enforcement policy to permit the OTC marketing of diphenhydramine as an ingredient in nighttime sleep-aid drug products. The enforcement policy permits the OTC marketing of such drug products pending establishment under the OTC drug review of a final monograph under which drug products containing diphenhydramine that are intended for use as OTC nighttime sleep-aids will be generally recognized as safe and effective and not misbranded.

The notice provided interested persons an opportunity to submit written comments for determining whether further amendments to, or revisions of, this policy are warranted. In response to the notice, the Drug Enforcement Administration, U.S. Department of Justice and one individual submitted comments. The comment from the Drug Enforcement Administration was concerned with the drug abuse potential of diphenhydramine and is addressed in comment 23 below.

The other comment requested clarification as to which of the 12 unpublished studies was the basis for the conclusion that safety and effectiveness issues previously raised were resolved. The comment further stated that such information is needed because information obtained by the commentor under the Freedom of Information Act reveals that at least two of the 12 studies (Refs. 6 and 7) were found to be grossly deficient and unacceptable during establishment inspections by the FDA.

In 1980, FDA investigators did visit the researchers of the unpublished studies (Refs. 6 and 7) to evaluate the clinical trials with diphenhydramine hydrochloride as an OTC nighttime sleep-aid. The agency agrees that some violations in the protocol were found. However, the agency has determined that these violations, for the most part, were minor, and the agency feels that it is unlikely that they could have had a significant impact on the results.

In summary, the agency concludes that the submitted data provide sufficient evidence to demonstrate general recognition of the safety and effectiveness of diphenhydramine hydrochloride in a dose of 50 mg and diphenhydramine citrate in a dose of 76 mg for use as an OTC nighttime sleep-aid, and these ingredients are included in the final monograph.

References

(1) Sunshine, A., and E. Laska, "A Comparative Study of Diphenhydramine 50 mg and Placebo," unpublished study No. S-2162A, Comment Nos. 0B0018, SUP002, and C00035, Docket No. 75N-0244, Dockets Management Branch.

(2) Sunshine, A., and E. Laska, "A Comparative Study of Diphenhydramine 50 mg and Placebo," unpublished study No. S-2162B, Comment Nos. 0B0018, SUP002, and C00035, Docket No. 75N-0244, Dockets Management Branch.

(3) Sunshine, A., I. Zighelboim, and E. Laska, "Hypnotic Activity of Diphenhydramine, Methapyrilene, and Placebo," unpublished study No. W-2080, Comment Nos. 0B0018, SUP002, and C00035, Docket No. 75N-0244, Dockets Management Branch.

(4) Glassman, S., and E.W. Packman, "Subjective Evaluation of the Incidence of Side Effects Produced by 50 mg and 100 mg Doses of Diphenhydramine HCl Versus Placebo," unpublished study No. S-2519, Comment No. SUP002, Docket No. 75N-0244, Dockets Management Branch.

(5) Smith, P. H., "Pain/Sedative Study," unpublished study No. S-2512, Comment Nos. SUP003 and C00035, Docket No. 75N-0244, Dockets Management Branch.

(6) Rickels, K., "Double-Blind, Controlled Evaluation of Diphenhydramine and Placebo in Insomniac General Practice Patients," unpublished study, Comment Nos. C00030, SUP004, and SUP005, Docket No. 75N-0244, Dockets Management Branch.

(7) Finnerty, R., and H. Goldberg, "Double-Blind, Controlled Evaluation of Diphenhydramine and Placebo in Insomniac General Practice Patients," unpublished study, Comment Nos. C00030, SUP004, and SUP005, Docket No. 75N-0244, Dockets Management Branch.

(8) Holder, A., and K.J. Kohlhof, "Assessment of the Sleep Prolongation Properties of Two Analgesic/Sedative Tablets Versus Placebo in Healthy Adults," unpublished study No. S-2593, Comment Nos. C00032 and C00035, Docket No. 75N-0244, Dockets Management Branch.

(9) Sunshine, A., and E. Laska, unpublished study No. S-2127, Comment Nos. 0B0018, SUP002, and C00035, Docket No. 75N-0244, Dockets Management Branch.

(10) Sunshine, A., and I. Zighelboim, "Subjective Clinical Evaluation of the Relative Analgesic/Sedative Effects of an Analgesic/Sedative Tablet vs. Placebo," unpublished study No. S-2469, Comment Nos. C00032 and C00035, Docket No. 75N-0244, Dockets Management Branch.

(11) Sunshine, A., and C. Roure, "Subjective Clinical Evaluation of the Analgesic/Sedative Effects of an Analgesic/Sedative Tablet vs. Placebo," unpublished study No. S-2591, Comment Nos. C00032 and C00035, Docket No. 75N-0244, Dockets Management Branch.

(12) Furst, D., and L. Winter, "Subjective Clinical Evaluation of the Sedative Effects of Two Analgesic/Sedative Tablets vs. Placebo," unpublished study No. S-2605, Comment Nos. C00032 and C00035, Docket No. 75N-0244, Dockets Management Branch.

(13) Letter from W. E. Gilbertson, FDA, to B. M. Lanman, Bristol Myers Products, coded LET004, Docket No. 75N-0244, Dockets Management Branch.

(14) Letter from W. E. Gilbertson,. FDA, to R. A. Schultz, The J. B. Williams Company, Inc., coded LET006, Docket No. 75N-0244, Dockets Management Branch.

23. One comment was concerned with the drug abuse potential of diphenhydramine. The comment submitted data from the Drug Enforcement Administration's (DEA) System to Retrieve Information from Drug Evidence (STRIDE) and argued that the data show significant current problems relating to abuse and trafficking of diphenhydramine that may pose a serious risk to the public health (Ref. 1). The comment added that diphenhydramine was involved in 36

criminal investigations between 1975 and 1982, but because diphenhydramine is not scheduled in the Controlled Substances Act, it is not a primary object of those criminal investigations in which it is encountered.

The comment noted that data from the Drug Abuse Warning Network (DAWN) compiled by the National Institute on Drug Abuse (NIDA) have ranked diphenhydramine in the "Top 50" list of drugs mentioned in overdose cases seen in hospital emergency rooms and that for the period from January to July of 1981, diphenhydramine ranked 27th on the list, higher than many controlled substances, including methadone, LSD, barbiturates, ethchlorvynol, codeine, meprobamate, meperidine, amphetamine, oxazepam, and hydromorphone (Ref. 2). The comment added that, in 1981, 29 percent (396) of the overdose victims included in the DAWN data used diphenhydramine alone, and the remaining 71 percent (961) used diphenhydramine in various combinations. The comment stated that the motivation for taking diphenhydramine was attributed to psychic effects or dependence in 25 percent, or 333 cases, and suicide attempts in 58 percent, or 781 cases. The comment pointed out that the main source of diphenhydramine for an overdose victim was through legal prescription, but that between 1979 and 1981, a significant and increasing source of the drug was from illicit sources—thefts and "street buys."

The comment urged FDA to consider the STRIDE and DAWN data prior to issuing rules that would make diphenhydramine more available to the drug abuse community, i.e., through OTC marketing. The comment argued that, in addition to STRIDE and DAWN data, the diphenhydramine abuse portrait includes diversion from foreign drug manufacturers, transportation to clandestine laboratories in South America, illicit formulation into methaqualone "look-alikes," smuggling into the United States, and domestic pharmacy theft.

The agency has reviewed the data submitted by the comment and concludes that these data do not present a clear picture of deliberate misuse and abuse of diphenhydramine, nor do they show that diphenhydramine marketed OTC as a nighttime sleep-aid at a recommended dose of 50 mg of diphenhydramine hydrochloride or 76 mg of diphenhydramine monocitrate is likely to become a serious risk to public health through abuse.

The STRIDE data illustrate that diphenhydramine had been used to produce counterfeit methaqualone tablet's, but do not show that diphenhydramine was in demand for itself. An illicit international trade in both the commercially manufactured and the clandestinely manufactured counterfeit methaqualone tablets used to exist with a wide geographic distribution. However, FDA has removed methaqualone from the United States market. (See the **Federal Register** of September 17, 1984; 49 FR 36441.) Therefore, the agency does not believe that the counterfeiting program that previously existed is a sufficient basis to keep diphenhydramine off the OTC market.

An overdose per se does not necessarily mean that the drug in question is a drug of abuse. Certainly, so far as the trafficking and diversion data are concerned, it appears that diphenhydramine was primarily a drug of deceit and only secondarily a drug of abuse. With reference to the listing of diphenhydramine in the DAWN "Top 50" list, the agency questions whether the overdose victims were knowingly taking diphenhydramine or whether they were taking diphenhydramine manufactured to resemble a prescription drug product containing methaqualone and represented to them as methaqualone. A number of OTC drugs have been involved in the illicit look-alike drug market, and the agency is convinced of the seriousness of the situation. However, misuse of a drug such as diphenhydramine that occurs because the drug is represented as a more potent substance does not necessarily mean that the drug itself is a drug of abuse. (See also comment 10 above.)

The agency is concerned about the possibility of any adverse effects resulting from the use of OTC drug products, but it also recognizes that a number of substances in the marketplace have the potential for misuse by some individuals. However, this is not sufficient reason for withholding such drugs from legitimate OTC uses for which they are safe and effective. The reports of diphenhydramine abuse cited by the comment do not indicate a widespread problem, nor do they show any correlation between this abuse and OTC marketing of the drug. Therefore, at this time the agency finds no reason why diphenhydramine should not be available OTC as a nighttime sleep-aid. Nevertheless, the agency will continue to monitor this situation carefully and will take appropriate action if additional information should become available concerning diphenhydramine abuse as a result of OTC marketing.

References

(1) Trafficking Information on Diphenhydramine Retrieved from STRIDE, January 1975 to April 1982, OTC Volume 050FM, Docket No. 75N-0244, Dockets Management Branch.

(2) Top Fifty Estimates of Specific Drug Mentions, OTC Volume 050FM, Docket No. 75N-0244, Dockets Management Branch.

F. Comments on Scopolamine

24. One comment requested the agency to reconsider the Category II classification of scopolamine compounds and reclassify these ingredients in Category III for use in combination with other OTC nighttime sleep-aid ingredients.

The agency's conclusions on scopolamine compounds as nighttime sleep-aid ingredients were previously set forth in the tentative final monograph on OTC nighttime sleep-aid drug products (43 FR 25544 at 25548 and 25575–25578). The comment has provided no reason to alter these conclusions, nor have any new data been submitted to the agency since publication of the tentative final monograph. Therefore, scopolamine compounds will not be included in the OTC nighttime sleep-aid final monograph.

II. Summary of Significant Changes to the Proposed Rule

1. The agency has redesignated proposed Subpart D as Subpart C and has placed the labeling sections of the monograph in Subpart C.

2. The claim "reduces time to fall asleep if you have difficulty falling asleep" has been added to the indications section of the monograph. The indication "helps fall asleep" has been revised to read "helps you fall asleep if you have difficulty falling asleep." (See comment 12 above.)

3. The definition of a nighttime sleep-aid has been revised slightly. (See comment 12 above.)

4. The warning in § 338.50(c)(3) has been expanded to be consistent with the warning proposed in the tentative final monograph for OTC antihistamine drug products to read "Do not take this product if you have asthma, glaucoma, emphysema, chronic pulmonary disease, shortness of breath, difficulty in breathing, or difficulty in urination due to enlargement of the prostate gland unless directed by a doctor." (For discussion of the need to expand the warning, see the **Federal Register** of January 15, 1985; 50 FR 2200 at 2215.) The previously proposed requirement that this warning be in type at least twice the size as other warnings is not

being included in the final monograph because the agency believes that all warnings for OTC nighttime sleep-aids are important and should be displayed with equal prominence on the label.

5. The warning in § 338.50(c)(4) has been expanded and revised to read "Avoid alcoholic beverages while taking this product. Do not take this product if you are taking sedatives or tranquilizers, without first consulting your doctor." (See comment 16 above.)

6. The directions for nighttime sleep-aids in the proposed and tentative final monographs stated "* * * once daily at bedtime * * *." The agency believes that the phrase "once daily" implies that these products are to be taken every day, when in fact they should be taken only if the user has difficulty in falling asleep. Therefore, the directions in the final monograph have been revised to state that the dose is to be taken "* * * at bedtime if needed * * *" instead of "* * * once daily at bedtime * * *."

7. In an effort to simplify OTC drug labeling, the agency proposed in a number of tentative final monographs to substitute the word "doctor" for "physician" in OTC drug monographs on the basis that the word "doctor" is more commonly used and better understood by consumers. Based on comments received to these proposals, the agency has determined that final monographs and other applicable OTC drug regulations will give manufacturers the option of using either the word "physician" or the word "doctor." This final monograph includes that option. (See § 338.50(e).)

8. The agency's final decision on the appropriateness of a combination of a nighttime sleep-aid and an internal analgesic(s) is not being addressed at this time, but will be addressed in a future issue of the **Federal Register**. (See comment 20 above.)

9. The ingredients doxylamine succinate, phenyltoloxamine dihydrogen citrate, and pyrilamine maleate were listed in the tentative final monograph as Category III ingredients (43 FR 25579). Because no additional data were submitted that establish the general recognition of safety and effectiveness of these ingredients as OTC nighttime sleep aids, they are not included in the final monograph. (See also comment 21 above.) However, OTC nighttime sleep-aid drug products containing doxylamine succinate are presently being marketed under approved NDA's. The agency advises that the marketing status of those products is unaffected by this final monograph.

10. Diphenhydramine hydrochloride and diphenhydramine citrate are included in the monograph for use as OTC nighttime sleep-aids. (See comment 22 above.)

III. The Agency's Final Conclusions on OTC Nighttime Sleep-Aid Drug Products

Based on the available evidence, the agency is issuing a final monograph establishing conditions under which OTC nighttime sleep-aid drug products are generally recognized as safe and effective and not misbranded. Specifically, the agency has determined that the only ingredients that have been determined to be monograph conditions are diphenhydramine hydrochloride and diphenhydramine citrate. All other ingredients considered in this rulemaking have been determined to be nonmonograph conditions for use as a nighttime sleep-aid: doxylamine succinate, methapyrilene fumarate, methapyrilene hydrochloride, phenyltoloxamine dihydrogen citrate, pyrilamine maleate, ammonium bromide, potassium bromide, sodium bromide, scopolamine aminoxide hydrobromide, scopolamine hydrobromide, acetaminophen, aspirin, salicylamide, thiamine hydrochloride, and passion flower extract. Any drug product marketed for use as an OTC nighttime sleep-aid that is not in conformance with the monograph (21 CFR Part 338) may be considered a new drug within the meaning of section 201(p) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(P)) and misbranded under section 502 of the act (21 U.S.C. 352) and may not be marketed for this use unless it is the subject of an approved NDA. There are several nighttime sleep-aid drug products containing doxylamine succinate that are presently being marketed OTC under approved NDA's. The agency advises that the marketing status of those products is unaffected by this final monograph. If any drug manufacturer believes that there are adequate data establishing general recognition of the safety and effectiveness of doxylamine succinate as an OTC nighttime sleep-aid, such data may be submitted in an appropriate citizen petition to amend the monograph. (See 21 CFR 10.30.)

The agency has examined the economic consequences of this final rule in conjunction with other rules resulting from the OTC drug review. In a notice published in the **Federal Register** of February 8, 1983 (48 FR 5806), the agency announced the availability of an assessment of these economic impacts. The assessment determined that the combined impacts of all the rules resulting from the OTC drug review do not constitute a major rule according to the criteria established by Executive Order 12291. The agency therefore concludes that no one of these rules, including this final rule for OTC nighttime sleep-aid drug products, is a major rule.

The economic assessment also concluded that the overall OTC drug review was not likely to have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (Pub. L. 96-354). That assessment included a discretionary Regulatory Flexibility Analysis in the event that an individual rule might impose an unusual or disproportionate impact on small entities. However, the requirement for a Regulatory Flexibility Analysis under the Regulatory Flexibility Act does not apply to this final rule for OTC nighttime sleep-aid drug products because the proposed rule was issued prior to January 1, 1981, and is therefore exempt.

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 21 CFR Part 338

Labeling, Nighttime sleep-aid drug products, Over-the-counter drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and the Administrative Procedure Act, Subchapter D of Chapter I of Title 21 of the Code of Federal Regulations is amended by adding new Part 338, to read as follows:

PART 338—NIGHTTIME SLEEP-AID DRUG PRODUCTS FOR OVER-THE-COUNTER HUMAN USE

Subpart A—General Provisions

Subpart B—Active Ingredients

Subpart C—Labeling

Authority: Secs. 201(p), 502, 505, 701, 52 Stat. 1041–1042 as amended, 1050–1053 as amended, 1055–1056 as a...ended by 70 Stat. 919 and 72 Stat. 948 (21 U.S.C. 321(p), 352, 355, 371); 5 U.S.C. 553; 21 CFR 5.10 and 5.11.

Subpart A—General Provisions

§ 338.1 Scope.

(a) An over-the-counter nighttime sleep-aid drug product in a form suitable

for oral administration is generally recognized as safe and effective and is not misbranded if it meets each condition in this part and each general condition established in § 330.1 of this chapter.

(b) References in this part to regulatory sections of the Code of Federal Regulations are to Chapter I of Title 21 unless otherwise noted.

§ 338.3 Definition.

As used in this part:

Nighttime sleep-aid. A drug that is useful for the relief of occasional sleeplessness by individuals who have difficulty falling asleep.

Subpart B—Active Ingredients

§ 338.10 Nighttime sleep-aid active ingredients.

The active ingredient of the product consists of any of the following when used within the dosage limits established for each ingredient in § 338.50(d):

(a) Diphenhydramine hydrochloride.

(b) Diphenhydramine citrate.

Subpart C—Labeling

§ 338.50 Labeling of nighttime sleep-aid drug products.

(a) *Statement of identity.* The labeling of the product contains the established name of the drug, if any, and identifies the product as a "nighttime sleep-aid."

(b) *Indications.* The labeling of the product states, under the heading "Indications," one or more of the phrases listed in this paragraph. Other truthful and nonmisleading statements, describing only the indications for use that have been established and listed in this paragraph (b), may also be used, as provided in § 330.1(c)(2) of this chapter, subject to the provisions of section 502 of the act relating to misbranding and the prohibition in section 301(d) of the act against the introduction or delivery for introduction into interstate commerce of unapproved new drugs in violation of section 505(a) of the act.

(1) ("Helps you" or "Reduces time to") "fall asleep if you have difficulty falling asleep."

(2) "For relief of occasional sleeplessness."

(3) "Helps to reduce difficulty falling asleep."

(c) *Warnings.* The labeling of the product contains the following warnings under the heading "Warnings":

(1) "Do not give to children under 12 years of age."

(2) "If sleeplessness persists continuously for more than 2 weeks, consult your doctor. Insomnia may be a symptom of serious underlying medical illness."

(3) "Do not take this product if you have asthma, glaucoma, emphysema, chronic pulmonary disease, shortness of breath, difficulty in breathing, or difficulty in urination due to enlargement of the prostate gland unless directed by a doctor."

(4) "Avoid alcoholic beverages while taking this product. Do not take this product if you are taking sedatives or tranquilizers, without first consulting your doctor."

(d) *Directions.* The labeling of the product contains the following information under the heading "Directions":

(1) *For products containing diphenhydramine hydrochloride identified in § 338.10(a).* Adults and children 12 years of age and over: Oral dosage is 50 milligrams at bedtime if needed, or as directed by a doctor.

(2) *For products containing diphenhydramine citrate identified in § 338.10(b).* Adults and children 12 years of age and over: Oral dosage is 76 milligrams at bedtime if needed, or as directed by a doctor.

(e) The word "physician" may be substituted for the word "doctor" in any of the labeling statements in this section.

Dated: January 17, 1989.

Frank E. Young,

Commissioner of Food and Drugs.

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federal register

Tuesday
February 14, 1989

Part IV

Department of Health and Human Services

Public Health Service

Availability of Grants for Adolescent Family Life Demonstration Projects; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Availability of Grants for Adolescent Family Life Demonstration Projects

AGENCY: Office of Adolescent Pregnancy Programs, Office of Population Affairs, PHS, HHS.

ACTION: Notice.

SUMMARY: The Office of Adolescent Pregnancy Programs (OAPP) requests applications for grants under the Adolescent Family Life (AFL) Demonstration Grants Program. These grants are for community-based and community-supported demonstration projects to find effective means of encouraging abstinence from adolescent premarital sexual activity, promoting adoption as an alternative to adolescent parenting, and establishing innovative, comprehensive and integrated approaches to the delivery of services to pregnant adolescents, adolescent parents and their children. Funds are available for approximately 16 projects, which may be located in any State, the territories of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Republic of Palau, Republic of the Marshall Islands and the Federated States of Micronesia.

ADDRESS: Application kits may be obtained from and applications must be submitted to: Grants Management Office, Office of Adolescent Pregnancy Programs, OPA, Room 736E, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

DATE: To receive consideration grant applications must be received by the Grants Management Officer by April 17, 1989. Applications shall be considered as meeting the deadline if they are either (1) received on or before the deadline date, or (2) postmarked on or before the deadline date and received in time for submission to the review committee. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be accepted as proof of timely mailing. Applications which do not meet the deadline will be considered late applications and will be returned to the applicant.

FOR FURTHER INFORMATION CONTACT: Grants Management Office at 202–245–0146 or Program Office at 202–245–7473. Staff are available to answer questions and provide limited technical assistance in the preparation of grant applications.

SUPPLEMENTARY INFORMATION: Title XX of the Public Health Service Act, 42 U.S.C. 300z, *et seq.*, authorizes the Secretary of Health and Human Services to award grants for demonstration projects to provide services to pregnant and nonpregnant adolescents, adolescent parents and their families. (Catalog of Federal Domestic Assistance Number 13.995) Title XX authorizes grants for two types of demonstration projects: (1) Projects which provide "care services" only (*i.e.*, services for the provision of care to pregnant adolescents, adolescent parents and their families); and (2) projects which provide "prevention services" only (*i.e.*, services to prevent adolescent premarital sexual relations).

The Office of Adolescent Pregnancy Programs intends to make available approximately $2 million to be expended by grantees to support an estimated 16 AFL demonstration projects. Two categories of projects will be supported: (1) Traditional demonstration projects with evaluation components as described and limited by the statute; and (2) evaluation-intensive projects specifically designed to produce research quality information bearing on the effectiveness of the demonstration intervention. An applicant may submit a proposal for a local care or local prevention project or a national multi-site prevention project with at least two sites in different States. The average award for a local prevention project will be $80,000, with a range between $40,000 and $150,000, and between $100,000 and $250,000 for a national multi-site prevention project. The average award for a local care project will be $150,000, with a range between $50,000 and $200,000. In the case of evaluation-intensive proposals, awards may range up to 20 percent higher than the levels indicated above. The award levels for evaluation-intensive projects will include both intervention and evaluation funding, and evaluation activities may account for up to 30 percent of the total award.

Grants may be approved for project periods of up to 3 years. Grantees who receive 3 years of funding may then apply for an additional 2 years of funding through a competitive process. Competing grant renewal applications will be accepted from current AFL grantees whose grants will end on August 31, 1989 or September 30, 1989 and who will have received fewer than 5 years of funding.

Grants are funded in annual increments (budget periods). Funding for all approved budget periods beyond the first year of a grant is contingent upon the availability of funds, satisfactory progress of the project and adequate stewardship of Federal funds. A grant award may not exceed 70 percent of the total cost of the project for the first and second years, and 60 percent for the third year. For those grantees who are then funded for an additional 2 years, the grant award may not exceed 50 percent for the fourth year and 40 percent for the fifth and final year. The non-Federal share of the project costs may be provided in cash expenditures or fairly evaluated in-kind contributions, including plant, equipment and services.

The specific services which may be funded under Title XX are listed below under care programs and prevention programs.

Eligible Applicants

Any public or private nonprofit organization or agency is eligible to apply for a grant. Grants are awarded only to those organizations or agencies which demonstrate the capability of providing the proposed services and which meet the statutory requirements.

Care Programs

Under this announcement, funds are available for local care demonstrations only and not for multi-site national projects. The project site must be identified in the application rather than selected after the grant is awarded.

Under the statute the purpose of care programs is to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents and adolescent parents under 19 years of age at program entry, with primary emphasis on unmarried adolescents who are 17 years old or younger and for their families. This includes young fathers and their families. The Office encourages the submission of care applications which propose innovative ways of involving families, of promoting adoption as a positive option, and of stressing self-sufficiency skills such as school completion (in mainstream or alternative schools and GED programs) and/or job training and preparation that will assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life. Applicants should propose sound approaches to strengthening family commitment and addressing the underlying problems that lead adolescents into out-of-wedlock pregnancy as well as offering innovative approaches to presenting adoption as an option for adolescent parents. Applicants should base their approaches upon an assessment of existing programs and, where appropriate, upon

efforts to establish better coordination, integration and linkages among such existing programs.

Applicants for care programs are required to provide, either directly or by referral, the following 10 core services:

(1) Pregnancy testing and maternity counseling;

(2) Adoption counseling and referral services which present adoption as an option for pregnant adolescents, including referral to licensed adoption agencies in the community if the eligible grant recipient is not a licensed adoption agency;

(3) Primary and preventive health services, including prenatal and postnatal care;

(4) Nutrition information and counseling;

(5) Referral for screening and treatment of venereal disease;

(6) Referral to appropriate pediatric care;

(7) Educational services relating to family life and problems associated with adolescent premarital sexual relations including:

(a) Information about adoption,

(b) Education on the responsibilities of sexuality and parenting,

(c) The development of material to support the role of parents as the providers of sex education, and

(d) Assistance to parents, schools, youth agencies and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(8) Appropriate educational and vocational services;

(9) Mental health services and referral to mental health services and to other appropriate physical health services;

(10) Counseling and referral for family planning services.

Note.—No funds provided under Title XX may be used for the provision of family planning services other than counseling and referral services unless appropriate family planning services are not otherwise available in the community.

In addition to the 10 required core services listed above, applicants for care projects may provide any of the following supplemental services:

(1) Referral to licensed residential care or maternity home services;

(2) Child care sufficient to enable the adolescent parent to continue education or to enter into employment;

(3) Consumer education and homemaking;

(4) Counseling for the immediate and extended family members of the eligible person;

(5) Transportation; and

(6) Outreach services to families of adolescents to discourage sexual relations among unemancipated minors.

Within the context of providing the required core plus any supplemental services and developing evaluation strategies, applicants should pay particular attention to the following aspects of Title XX:

- Enablement of pregnant adolescents to obtain proper care and to assist pregnant adolescents and adolescent parents to become productive contributors to family and community life. This usually entails follow-up for 2 years post-partum.
- Involvement of the families of pregnant adolescents and adolescent parents, including the father of the baby, and assisting families and adolescents to understand and resolve the societal causes which are associated with adolescent pregnancy.
- The promotion of adoption as an alternative for adolescent parents.
- Provision of services after the delivery of the baby. This is the continuation of services to clients until adolescent parents have become or are well on their way to becoming "productive independent contributors to family and community life" and their children are developing normally physically, intellectually and emotionally. This is usually about 2 years after delivery.
- Provision of support by family members, voluntary associations, religious and charitable organizations and other groups in the private sector in order to help adolescents and their families deal with the complex issues surrounding adolescent pregnancy.

Prevention Programs

Under this announcement, funds are available for both local and multi-site national projects. A multi-site national project must have at least two sites in different States.

The purpose of prevention programs is to find effective means within the context of the family of reaching adolescents, both male and female, before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family members in promoting abstinence from adolescent premarital sexual relations. OAPP is soliciting applications for grants to provide innovative approaches to family life educational services that clearly and unequivocally promote abstinence unmarried adolescents. Applicants for prevention programs are not required to provide any specific number of services; a proposal may include any one or more of the following services as appropriate:

(1) Educational services relating to family life and problems associated with adolescent premarital sexual relations including:

(a) Information about adoption,

(b) Education on the responsibilities of sexuality and parenting,

(c) The development of material to support the role of parents as the providers of sex education, and

(d) Assistance to parents, schools, youth agencies and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(2) Appropriate educational and vocational services;

(3) Counseling for the immediate and extended family members of the eligible person;

(4) Transportation;

(5) Outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

(6) Pregnancy testing and maternity counseling;

(7) Nutrition information and counseling; and

(8) Referral for screening and treatment of venereal disease.

The following application requirements contain information collections subject to OMB approval under the Paperwork Reduction Act of 1980 (Pub. L. 96–511). These information collections have been approved by OMB under control number 0937–0189.

Applications requesting support for prevention projects should propose innovative, value-based, family-centered approaches to promoting adolescent abstinence, affirming sexual relations in the context of marriage. Applicants should promote parents as primary sex educators of their children and emphasize the provision of support by other family members, voluntary associations, religious and charitable organizations and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations. Prevention applicants are encouraged to propose innovative, value-based approaches which will improve our understanding of effective strategies, as opposed to duplicating approaches which focus merely on improving knowledge, communication and assertiveness skills.

Evaluation

Section 2006(b)(1) of Title XX requires each grantee to expend at least one percent but not more than five percent of the funds received under Title XX on evaluation of the project. In some cases, waivers of the five percent limit on

evaluation (see section 2006(b)(1)) may be granted.

As this is a demonstration program, all applications are required to have an evaluation component of high quality consistent with the scope of the proposed project and the funding. In this round of competition, the Office will consider waiving the five percent limit up to a maximum of 30 percent for applications which propose to compete as *Evaluation-Intensive* projects. Applicants who wish to compete under this category must propose a project with a strong evaluation design which focuses on outcome variables consistent with the key purposes of Title XX, including but not limited to family involvement, adoption and adolescent abstinence. All project evaluations should monitor program processes to determine whether the program has been carried out as planned. In addition, these evaluations should address questions pertaining to program impact, *i.e.*, is the program effective, for whom is it effective and under what conditions is it effective? The evaluation design may measure any of the following: (1) What effect variations in service delivery have on client outcomes; (2) how service delivery and corresponding client outcomes are influenced by variations in client population characteristics; or (3) the extent to which particular institutional settings, linkages with other provider agencies or other organizational characteristics affect the capacity of a project to provide the services in an effective manner. Emphasis must be placed on measuring variables which are integral to the project's proposed intervention and which are central to the purposes of the AFL program. Proposals must show serious attention to problems of data collection and verification, must demonstrate sample size sufficiency (emphasizing techniques for controlling for attrition) and must utilize a strong research design, using randomized control or matched-comparison groups for measurement where possible. Applications for Evaluation-Intensive awards will be reviewed with like applications.

Section 2006(b)(2) requires that an organization or an entity independent of the grantee providing services assist the grantee in evaluating the project. Particularly in the case of Evaluation-Intensive proposals, the OAPP strongly recommends extensive collaboration between the applicant organization and the proposed evaluator in the development of the intervention, development of the research hypothesis(es), identification of the variables to be measured and timetable for initiation of the intervention, baseline measurement, and ongoing evaluation data collection and analysis. Failure to integrate the intervention and evaluation components to the satisfaction of reviewers will result in rejection of the proposal.

Application Requirements

Applications must be submitted on the forms supplied and in the manner prescribed in the application kits provided by the OAPP. Applicants are required to submit an application signed by an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award.

It should be noted that grantees may not teach or promote religion in their AFL project. Each grant project must be accessible to the public generally, not just to those of a particular religious affiliation.

Under sec. 2011(a) of the Act, grantees may not provide abortions or abortion counseling or referral and may not advocate, promote or encourage abortion. Only if both the adolescent and her parents request abortion counseling may a grantee provide referral for abortion counseling to a pregnant adolescent.

Additional Requirements

Applicants for grants must also meet the following requirements:

(1) *Requirements for Review of an Application by the Governor.* Section 2006(e) of Title XX requires that each applicant shall provide the Governor of the State in which the applicant is located a copy of each application submitted to OAPP for a grant for a demonstration project for services under this Title. The Governor has 60 days from the receipt date in which to provide comments to the applicant.

An applicant may comply with this requirement by submitting a copy of the application to the Governor of the State in which the applicant is located at the same time the application is submitted to OAPP. To inform the Governor's office of the reason for the submission, a copy of this notice should be attached to the application.

(2) *Review Under Executive Order 12372.* Applications under this announcement are subject to the review requirements of Executive Order 12372 (Intergovernmental Review of Federal Programs) as implemented by 45 CFR Part 100 (Intergovernmental Review of DHHS Programs and Activities) which established a process for consulting with State and local elected officials on proposed Federal financial assistance.

The application kit contains information to guide applicants in fulfilling the above requirements.

Application Consideration and Assessment

Applications which are judged to be late or which do not conform to the requirements of this program announcement will not be accepted for review. Applicants will be so notified, and the applications will be returned. All other applications will be reviewed and assessed according to the following criteria:

(1) The capacity of the proposed applicant organization to provide the rapid and effective use of resources needed to conduct the project, collect data and evaluate it. This includes personnel, time and facilities. (15 points)

(2) The applicant's presentation of an appropriate project methodology, including a clear statement of goals and objectives consistent with Title XX, reasonable methods for achieving the objectives, a reasonable workplan and timetable and a clear statement of results or benefits expected. (20 points)

(3) The applicant's provision for complying with the legislation's requirements to involve families in the delivery of services; in the case of care programs to promote adoption as a positive alternative; and in the case of prevention programs to clearly and unequivocally promote abstinence from adolescent premarital sexual activity, affirming sexuality in the context of marriage. (20 points)

(4) The applicant s documentation of the innovativeness of the program approach and its worth for testing and replication. (15 points)

(5) The applicant s presentation of a detailed evaluation plan, indicating an understanding of program evaluation methods and reflecting a practical, technically sound approach to assessing the project's achievement of program objectives. (20 points).

Note.—Applications will be reviewed in two separate categories according to whether they are standard demonstration proposals with limited evaluations or Evaluation-Intensive proposals.

(6) The applicant's provision for the requirements set forth in Section 2006(a) of Title XX of the Public Health Service Act. (10 points)

In making grant award decisions, the Deputy Assistant Secretary for Population Affairs will take into account the extent to which grants approved for funding will provide an appropriate distribution of resources throughout the

country, the priorities in section 2005(a) and the factors in section 2005(b) of Title XX of the Public Health Service Act and other factors, focusing on:

(1) The reasonableness of the estimated cost to the government considering the anticipated results;

(2) The incidence of adolescent pregnancy and the availability of services in the geographic area to be served;

(3) The community commitment to and involvement in planning and implementation of the demonstration project;

(4) The nature of the organization applying;

(5) The population to be served;

(6) The organizational model(s) for delivery of service;

(7) The usefulness for policymakers and service providers of the proposed project and its potential for complementing existing AFL demonstration models;

(8) The applicant s proposed plans to access continued community funding as Federal funds decrease and end; and

(9) The applicant s capacity to administer funds responsibly.

OAPP does not release information about individual applications during the review process until final funding decisions have been made. When these decisions have been made, applicants will be notified by letter of the outcome of their applications. The official document notifying an applicant that an application has been approved for funding is the Notice of Grant Award, which specifies to the grantee the amount of money awarded, the purpose of the grant, the terms and conditions of the grant award, and the amount of funding to be contributed by the grantee to project costs.

Dated: January 4, 1989.

Nabers Cabaniss,

Deputy Assistant Secretary for Population Affairs.

[FR Doc. 89-3399 Filed 2-13-89; 8:45 am]

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federal register

Tuesday
February 14, 1989

Part V

Environmental Protection Agency

40 CFR Part 149

Criteria for Identifying Critical Aquifer Protection Areas; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 149

[FRL-3373-2]

Criteria for Identifying Critical Aquifer Protection Areas

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is issuing a final rule which revises the Agency's existing regulations for identifying a Critical Aquifer Protection Area (CAPA). In general, a CAPA is an area which is particularly vulnerable to contamination, in which contamination is reasonably foreseeable unless a control program is implemented, in which contamination would cause significant economic, environmental or social costs, and which is all or part of a Sole Source Aquifer. CAPA designation is a requirement for an area to be eligible to receive grants under section 1427 of the Safe Drinking Water Act (SDWA) pertaining to the Sole Source Aquifer Demonstration Program.

DATE: The rule is effective on March 16, 1989. In accordance with 40 CFR 23.7, this regulation shall be considered final Agency action for purposes of judicial review at 1:00 p.m., Eastern Standard Time on February 28, 1989.

ADDRESS: The docket for this rule is available for public inspection at: Public Reference Unit, U.S. Environmental Protection Agency, Room M2404, 401 M Street, SW., Washington, DC 20460, and all ten of the EPA Regional Office Libraries during operating hours.

FOR FURTHER INFORMATION CONTACT: Charles Job, Office of Ground-Water Protection, (WH-550G), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-7077.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 1427 of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300h-6, establishes a program to demonstrate techniques for protecting Critical Aquifer Protection Areas (CAPA) within sole or principal source aquifers (SSA) and authorizes grant funds through a grant application procedure for this purpose.

SDWA section 1427 also requires that demonstration projects must meet certain criteria to be eligible for funding. EPA promulgated regulations in 1987 establishing such criteria pursuant to section 1427(d). Today's rulemaking action amends those regulations based on public comments received in response to the publication of the rules in 1987.

A. Legal Background

To be eligible for a grant under SDWA section 1427, the statute requires that a demonstration program must be located in a CAPA of a sole or principal source aquifer. The term, sole or principal source aquifer, means an aquifer which the Agency has determined under SDWA section 1424(e) "is the sole or principal drinking water source for [an] area and which, if contaminated, would create a significant hazard to public health." In February 1987, the Agency issued a document entitled the "Sole Source Aquifer Designation Petitioners Guidance" which describes the procedures and criteria that EPA will use in determining whether to designate an aquifer as a sole or principal source aquifer.

Section 1427(b) of the SDWA defines the term Critical Aquifer Protection Area to mean either of the following:

(1) All or part of an area located within an area for which an application or designation as a sole or principal source aquifer pursuant to section 1424(e), has been submitted and approved by the Administrator not later than 24 months after June 19, 1986, and which satisfies the criteria established by the Administrator under subsection (d) of this section.

(2) All or part of an area which is within an aquifer designated as a sole source aquifer as of June 19, 1986, and for which an areawide ground-water quality protection plan has been approved under section 208 of the Clean Water Act prior to June 19, 1986.

Section 1427(d) states that not later than June 19, 1987, the Administrator shall, by rule, establish criteria for identifying CAPAs. Such criteria would be used in identifying CAPAs under section 1427(b)(1). Section 1427(d) further provides that in establishing such criteria, the Administrator shall consider each of the following:

(1) The vulnerability of the aquifer to contamination due to hydrogeologic characteristics.

(2) The number of persons or the proportion of population using the ground water as a drinking water source.

(3) The economic, social and environmental benefits that would result to the area from maintenance of ground water of high quality.

(4) The economic, social and environmental costs that would result from degradation of the quality of the ground water.

The Agency has determined that this regulation is not subject to the notice and comment rulemaking requirements of section 553 of the Administrative Procedure Act (APA). In enacting SDWA section 1427 Congress did not intend to establish a Federal regulatory program. Rather, the legislative history demonstrates that Congress intended to authorize EPA to provide grant funding for demonstration programs to protect CAPAs. As stated by Senator Durenberger in consideration of the Conference Report of the 1986 Safe Drinking Water Act amendments, the Sole Source Aquifer Demonstration Program is "[a] grant program. It authorizes assistance to State and local governments to plan and implement programs that will protect sole source aquifers." 132 CONG. REC. S6289 (Daily ed. May 21, 1986) Accordingly, since the purpose for determining whether an area is a critical aquifer protection area is to establish eligibility for the awarding of sole source aquifer demonstration grants, this regulation falls within the scope of APA section 553(a)(2). That provision exempts rules from notice and comment requirements "to the extent there is involved * * * a matter relating to * * * public property, loans, grants, benefits or contracts." Further, there are no independent procedural requirements contained in SDWA section 1427 which would supersede the section 553(a)(2) grants exemption and require the Agency to go through notice and comment rulemaking. Finally, the Agency notes that it has, in effect, conducted notice and comment rulemaking by issuing this final regulation after taking public comment on the June 26, 1987, interim final rule.

B. Procedural Background

On June 26, 1987, EPA issued an interim final rule which established criteria for determining whether to designate an area as a CAPA under SDWA section 1427. 52 FR 23982 (Codified at 40 CFR 149.1-.3 and referred to hereafter as the 1987 CAPA rule.) Although the Agency's 1987 CAPA rule was final and became effective immediately upon publication, the Agency solicited public comments. During the 90-day comment period, the Agency received comments from 11 groups, including four environmental organizations, two professional societies, and two companies.

In addition, on August 10, 1987, the Natural Resources Defense Council, Inc., the Environmental Defense Fund, and the Environmental Policy Institute filed a petition for review of the 1987 CAPA rule in the U.S. Court of Appeals for the Second Circuit, *Natural Resources Defense Council, Inc., et.al.* v. *EPA*, No. 87-4100. The petitioners identified three issues for judicial review: (1) Whether issuance of the CAPA rule as an

"interim final" rule violated the procedural requirements of the APA and SDWA; (2) whether consideration of the cost of replacement of a drinking water supply was appropriate under the SDWA in making CAPA determinations; and (3) whether EPA established an appropriate formula of assessing the percentage of a population dependent on the CAPA as a source of drinking water. These issues were identical to concerns expressed by the petitioners in their comments on the rule. By stipulation dated September 9, 1987, the parties agreed to withdrawal of the petition for review.

The Agency has re-examined the positions taken in the 1987 CAPA rule in light of the public comments. For reasons explained in section II of this preamble, EPA has decided to make certain changes in the criteria for determining whether to designate an area as a CAPA and is amending its regulations accordingly. The Agency, however, does not agree with all of the comments it received and has declined to make certain suggested modifications. The reasons for the Agency's positions are discussed more fully in section III of the preamble. Section IV of the preamble discusses EPA's plans for implementing the grant program when funds are made available for demonstration projects.

II. Summary of the 1987 CAPA Rule and Explanation of Modifications made in the 1989 Rule

A. Summary of the 1987 CAPA Rule

The 1987 CAPA rule describes a CAPA to be, in general, a major vulnerable recharge area to a sole or principal source aquifer (SSA) of particularly high value. The 1987 rule also established a set of minimum criteria for identifying a CAPA which required that the proposed aquifer or segment of an aquifer be more valuable and more vulnerable to contamination than is required for SSA designation. The 1987 rule established the following requirements for CAPA designation:

(1) The sole source aquifer is particularly vulnerable to contamination due to the hydrogeologic characteristics of the unsaturated or saturated zone;

(2) The sole source aquifer is the source of drinking water for at least 75% of the persons in the aquifer service area; and

(3) The cost of replacing the water supply from the sole source aquifer would cause water supply cost to exceed 0.7 percent of mean annual household income.

See 40 CFR 149.3(a) (1)–(3) (1987).

In addition, the 1987 CAPA rule provided for consideration of "evidence that ground water in the suggested CAPA discharges into an area containing valuable ecological systems, ecological areas protected by Federal or State laws, which are dependent on ground water, or that there would be significant environmental or social costs, or health risks, if the area were contaminated * * *." This evidence, however, would not be sufficient to support a CAPA determination by itself. See *id.*

The preamble to the 1987 rule contained descriptions of areas which EPA would generally consider to be vulnerable to contamination. See 52 FR 23984 (June 26, 1987). The preamble also described the kinds of information such as maps and hydrogeologic data (See id. at 23985), that would be useful for assisting EPA in the evaluation of the application. This preamble discussion continues to be valid for the purposes of the 1989 rule.

Finally, the 1987 CAPA rule codified the provision of SDWA section 1427(b)(2). Under this provision of the statute, EPA must automatically determine that an area is a CAPA if the applicant can show that the proposed area is all or part of an area designated as a sole or principal source aquifer pursuant to section 1424(e) by June 19, 1986, and that an areawide ground-water quality protection plan was approved for the area under section 208 of the Clean Water Act by that date.

B. Modifications to the 1987 CAPA Rule

EPA has made four significant changes in the CAPA rule being promulgated today:

(1) EPA deleted the requirement that 75% of the persons in the aquifer service area be supplied with drinking water from the sole source aquifer.

(2) EPA deleted the requirement that the cost of replacing the water supply from the sole source aquifer would cause water supply costs to exceed 0.7 percent of mean annual household income.

(3) EPA revised the rule to allow for the consideration of social and environmental costs, as well as economic costs, in the assessment of the cost of contamination of an SSA. The Agency's major emphasis, however, will remain on the protection of drinking water sources; and

(4) EPA incorporated into the rule a consideration of the likelihood of contamination of the proposed CAPA.

The reasons for these changes are set forth below.

1. Population Requirement

The purpose of the 75% criterion was to limit CAPAs only to those aquifers for which a substantial portion of the population was dependent upon ground water. It also was another tool in deciding which CAPAs are potentially more valuable. The Agency has subsequently analyzed data on populations served by SSAs and has found that most of the SSAs serve 100% of the population in the aquifer service area. In fact, this 75% criterion would have excluded only three of the current SSAs from eligibility for CAPA designation. The Agency therefore believes, for the purposes of this rule, this criterion need not be more stringent than that required for sole source aquifer designation (i.e., the aquifer must serve at least 50% of the population). Although the practical result of this change is to enlarge the number of areas potentially eligible for CAPA grants, we note that a proposed CAPA must still constitute part of or all of an SSA. Since the SSA criteria require that an aquifer serve at least 50% of the population in the aquifer service area, the change does not eliminate entirely the consideration of the extent of dependence on the aquifer as a source of drinking water.

2. Economic Replaceability

The purpose of the specific income test, which required that the cost of replacing the water supplies from the sole source aquifer exceed 0.7 percent of mean annual household income, was to exclude areas from being CAPAs if the local population had the ability easily to pay for an alternative source of drinking water in the event the aquifer should become contaminated. The greater the expense of replacing the drinking water provided by the aquifer, the higher the value for a demonstration project. The 0.7 threshold was chosen to represent a slightly higher figure than what might be considered to be representative of the average (i.e., 0.4 to 0.6 percent of mean annual household income) paid for water in the U.S. The Agency intended to use this slightly more restrictive figure as another means of identifying potential CAPAs as a special subset of SSAs.

The Agency studied more recent data compiled on household costs and future replacement costs compiled as a part of Regulatory Impact Analyses being performed for ongoing rulemaking activities related to the Safe Drinking Water Act Amendments of 1986. These data indicate that water supply costs will increase in the future as the result of additional regulatory requirements and that the future costs of water supply are likely to exceed 0.7 percent of mean annual household income in many public water systems. Because the 0.7

percent threshold may not identify areas that are particularly valuable under such new criteria, the Agency is dropping the specific 0.7 percent threshold in the revised final rule. In its place, EPA is including a criterion that the costs resulting from foreseeable contamination would be "significant." By using the term "significant," EPA intends to allow itself some discretion in deciding which areas should be designated as CAPAs. EPA expects to consider a variety of ways of evaluating the significance of replacement costs, such as the increase in the absolute cost of supplying drinking water if water were obtained from a replacement source, the cost of replacement water relative to the cost of supplying water elsewhere in the region, and the increased cost expressed as a percentage of mean annual household income.

3. Consideration of Economic, Social and Environmental Costs

The Agency has also revised the way in which it considers economic, social, and environmental costs. Rather than treat environmental and social costs as a factor that is considered only when the replaceability cost criterion is inconclusive, EPA has decided to review all potential types of costs resulting from contamination of a proposed CAPA. This analysis may include consideration of health risks and social costs related to contamination incidents. This change is being made to recognize the multiple uses of ground water and thus the possibility that contamination may have important impacts without affecting a drinking water supply significantly. Moreover, the statute implies in SDWA section 1427(d) that EPA should consider each of the different kinds of costs that may result from contamination.

Thus, EPA will determine whether, taken together, the economic, environmental, and social costs resulting from foreseeable contamination are significant. In making this judgment, EPA will continue to place its primary emphasis on the protection of valuable drinking water supplies. Consistent with this emphasis, the Agency anticipates that only in very unusual situations will the environmental or social costs of contamination be sufficiently great, by themselves, to support determination that an area is a CAPA.

4. Likelihood of Contamination

Finally, EPA has clarified in the revised CAPA rule that only those costs that are reasonably foreseeable will be considered in determining whether an area is a CAPA. This rule was revised to make clear the Agency's intention to limit eligibility for CAPA designation and eventual grants to areas which face some realistic threat of contamination. In addition to being responsive to a public comment, this revision is a logical outgrowth of using the CAPA determination as an eligibility criterion for a demonstration grant. Obviously, a demonstration program is most useful when it addresses a real, immediate contamination threat; conversely, the effectiveness of a ground-water protection project which is designed to prevent contamination by a source that does not exist will be open to question, since the adequacy of the control measures in the protection program will not have been tested.

Therefore, the Agency wishes to stress that extremely improbable threats will not be sufficient to justify CAPA designation. For example, if the area were located in a rural setting tens of miles from the nearest population centers, the Agency might agree that contamination of relatively clean ground water by urban hazardous waste might cause significant economic, social or environmental costs. Nevertheless, the likelihood of such contamination would be quite low, and probably would not be considered as a reasonable ground for determining that the area is a CAPA.

III. Public Comments on the 1987 CAPA Rule and EPA's Responses

A. Introduction

This section of the preamble will describe in detail the public comments that the Agency received on the 1987 CAPA rule during the comment period from June 26, 1987, through September 24, 1987. Also included in this section are EPA's responses to the comments.

EPA received 12 sets of comments. Although most comments suggested changes and deletions to the 1987 CAPA rule, several comments supported the rule. Commenters particularly expressed support for the 75% population threshold and the discussion contained in the preamble of different hydrogeological conditions which are vulnerable and therefore conducive to leaching.

B. Criteria for CAPA Designation

Comment: One commenter recommended that EPA establish an additional criterion for CAPA designation which considered whether the water sources that would be used for replacing an existing ground-water supply are affected by droughts.

EPA Response: The Agency believes that the criteria in both the 1987 CAPA rule and this rule are adequate to address this concern. The preamble to the 1987 rule explains the criteria that the Agency considers for evaluating the adequacy of alternative water sources. See 52 FR 23985. As implied in the preamble, EPA expects that alternative sources must be at least as reliable as the original source. Therefore an applicant for a grant under the Safe Drinking Water Act section 1427 may exclude from consideration as a possible source of replacement water any source which is known to be significantly less reliable than the original source of supply.

Comment: A commenter said that coordination of "controls" over CAPA areas may be difficult because of overlapping jurisdictions.

EPA Response: EPA agrees that a particular CAPA may be geographically defined in a way that crosses political boundaries (e.g., city limits, county lines) and that there may be greater difficulty in coordinating a program to protect ground water than if the CAPA lay entirely within a single jurisdiction.

The statute, however, indicates that an application for a CAPA demonstration grant must be submitted by a governmental entity or group of entities which have the legal authority to implement a proposed protection plan in a CAPA. See SDWA sections 1427 (c) and (f)(1)(E). Thus, before EPA approves any grants for CAPA demonstration programs, the Agency will require the applicant or applicants to have the necessary legal authority and jurisdiction for coordinating activities to make the program effective. In some cases, it may be necessary that two or more governmental entities join in one application.

Comment: One commenter, who apparently believed that EPA had (or would establish) a fixed limit on the size of a CAPA, objected to such a position because it failed to recognize the impact of hydrogeologic factors on the extent of ground-water contamination.

EPA Response: EPA does not have a policy on the maximum size of a CAPA. EPA agrees that establishing a fixed limit on the size of a CAPA would be inappropriate because of the variability of hydrogeologic conditions that can affect the nature of ground-water contamination. EPA expects that some CAPAs could be small and others could be quite large, perhaps as big as the SSA itself. Under both the 1987 and 1989 rules, the size of the CAPA will be determined by hydrogeologic characteristics relating to the recharge characteristics of the particular area. Therefore, EPA will not specify any particular type or amount of data

necessary to demonstrate that an area is hydrogeologically vulnerable or to define the boundaries of a recharge area. Once EPA establishes its grants application procedures, EPA will judge these matters on a case-by-case basis in the review of applications.

Comment: One commenter questioned the definition of an aquifer and particularly the minimum yield criteria.

EPA Response: Section 149.2 of the 1987 CAPA rule defined an aquifer as a geologic formation, group of formations or part of a formation that is capable of yielding a significant amount of water to a well or spring. The SSA Designation Guidance used the same terminology to define an aquifer and offered guidance on how EPA would interpret the phrase "yielding a significant amount of water." Specifically, the SSA Designation Guidance indicated that EPA would consider a yield of 150 gal/day as enough to satisfy the yield criterion for SSA designation. This commenter also suggested that the Agency should set a minimum production level for water-bearing zones to qualify as an aquifer and recommended a sustainable yield of a gallon per minute over a year.

The SDWA requires that an area proposed for a CAPA designation must be all or part of an SSA. In other words, before the Agency is ever called upon to determine whether an area satisfies the criteria for a designation, EPA will have decided that the geological formation involved has sufficient yield to be an SSA. Therefore, the CAPA grant program does not raise the issue of how sufficient yield is evaluated, and the comment is, strictly speaking, irrelevant to the 1987 CAPA rule. Nonetheless, EPA has considered the commenter's suggestion to replace the 150 gal/day with sustainable yield of a gal/min over a year guideline and concludes that it would be inappropriate. A yield of 1 gal/min is equivalent to a yield of 1,440 gal/day, almost ten times the value in EPA's SSA Designation Guidance. EPA believes that an aquifer which yields 150 gal/day—enough to satisfy the average daily needs of a family of three, would satisfy the yield requirements, and be eligible for designation under the SSA program, if other criteria are met. There is no compelling reason to exclude such low yield aquifers from grants under SDWA section 1427.

Comment: A commenter questioned EPA's explanation of the relationship between an SSA and CAPA designation. Specifically, the commenter referred to EPA's explanation in the preamble that "the CAPA criteria would generally require that the sole source aquifer in question be more valuable and vulnerable that is minimally required for SSA designation." See 52 FR 23983.

EPA Response: EPA meant that to be designated as a CAPA an area must meet stricter criteria than those needed to receive SSA status. As a result, CAPAs would consist of areas that are a subset of SSAs.

In the 1989 CAPA rule, the Agency has made the criteria for CAPA determination more flexible; EPA believes, nonetheless, that CAPAs should still constitute a special subset of SSAs, and emphasizes that CAPAs will be the areas that are most vulnerable and most susceptible to contamination as well as being most "useful" for a demonstration.

C. Vulnerability To Contamination

Comment: Two commenters requested clarification of some terminology in the preamble to the 1987 CAPA rule referring to the vulnerability of aquifers. Specifically, the commenters asked EPA to explain the phrases—"particularly valuable," "particularly vulnerable to contamination," and "highly permeable unsaturated soils." See 52 FR 23984. The commenters suggested using standard geologic definitions with acceptable/unacceptable ranges of permeability.

EPA Response: These comments are directed to the preamble of the rule and not the rule itself. EPA intended that the wording of the rule and the preamble allow the Agency flexibility in determining whether an area is vulnerable, without giving specific numbers to adhere to. This approach is based on the suggestions of a technical workgroup which was established during the interim final rulemaking process. The group, which also provided suggestions on the wellhead protection program, consisted of representatives from EPA's Headquarters and Regional offices, the U.S. Geological Survey, and five State geological and environmental protection organizations. Members of the group had expertise in both technical and programmatic aspects of hydrogeology and ground-water protection. The group was asked to evaluate whether specific values should be placed on vulnerability. The group suggested that for the purposes of this rule, specific numbers need not be placed on parameters, in recognition of both the wide range in hydrogeologic factors affecting the vulnerability of sole source aquifers, as well as the wide range in possible contamination threats to be addressed by a Comprehensive Management Plan. The Agency accepted these suggestions.

Comment: One commenter said that consideration of vulnerability should also include discussion of land use factors and development pressure. As an example, the commenter pointed out that an industrial park would be more likely to cause contamination of an aquifer than a national or State park.

EPA Response: EPA generally agrees with the commenter. As explained in Section II of this preamble, the Agency has revised the 1987 CAPA rule to require consideration of the likelihood of contamination of a proposed CAPA. Thus, an applicant will be expected to demonstrate that contamination of an aquifer is a foreseeable possibility and to explain how such contamination would result in economic, environmental and social costs.

Comment: One commenter expressed concern about how the presence of a limited area, characterized by soil of high permeability, within a larger, generally less vulnerable area might affect EPA's decision to designate the larger area as a CAPA.

EPA Response: The commenter was apparently concerned that EPA would base its evaluation of vulnerability of a proposed CAPA on the permeability of the most vulnerable part of the proposed CAPA. EPA recognized that there are wide variations in hydrogeological characteristics within a small geographical area. As a result, some portions of a proposed CAPA may be significantly more vulnerable to contamination than other parts. Although the Agency is interested in the degree of variability, it does not see the benefit from specifying exact relative ratios of "more vulnerable" to "less vulnerable" areas, because the Agency is interested in the overall vulnerability of the proposed CAPA. If a proposed CAPA includes some areas that are not highly vulnerable, the Agency may decide to exclude those areas from a CAPA designation.

D. Population Served

Comment: Three commenters found the terminology that was used in referring to population served, specifically, the words "population," "persons," and "aquifer service area," to be confusing. See 52 FR 23986. These commenters requested clarification of these terms because of their concern that a particular recharge area, which would otherwise qualify for CAPA designation, might not qualify because that area failed to meet the population criterion.

EPA Response: As a point of clarification, it should be noted that the population dependence criterion (50% in this rule or 75% in the 1987 rule) refers to the population dependency of the SSA itself rather than to population

dependence within a CAPA or subset of CAPA. The terms "persons" and "aquifer service area" are defined and explained in the SSA Designation Guidance. The "population criterion" in the 1987 rule referred to the proportion of "persons" dependent on ground water within both the "aquifer service area" and the area above the SSA itself. The term "person" is defined in the SSA Designation Guidance as: individual, corporation, company, association, partnership, State, municipality or Federal Agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal Agency). The term "aquifer service area" is also defined in the SSA Designation Guidance as the area above the aquifer and including the area where the entire population served by the aquifer lives. The population criterion is not applied within the CAPA or a component of the CAPA such as a part of the recharge area, but rather to the entire aquifer service area and area above the SSA. Further information on performing these calculations appears in the SSA Designation Guidance. It should be noted, however, that the 75% population criterion has been deleted from this rule.

Comment: Two commenters said that there is no statutory basis for requiring that a CAPA serve 75% of the population.

EPA Response: As explained earlier, EPA has deleted the 75% criterion in the final rule. EPA, however, disagrees with the contention that it does not have statutory authority to establish such a criterion, since section 1427(d) of the SDWA specifically directs the Administrator to consider "the proportion of population using the ground water [aquifer] as a drinking water source."

Comment: Two commenters said that the determination of "population served" needs to incorporate projected population growth.

EPA Response: Since EPA has eliminated the 75% population criterion in the final rule, future population growth would become relevant under the CAPA rule only in the following ways: (a) Whether future population growth would increase the threat of contamination to the SSA and (b) whether existing threats to the SSA would possibly affect future growth. In either case, the applicant for a demonstration grant has the responsibility of providing information which is sufficient to support predicted changes in future population levels and to show how such changes are related to the threat of contamination. A variety of types of information could satisfy the applicable criteria. For example, an applicant could show that a public rail system is scheduled to open a new station and that new housing development plans have been filed and will likely be approved. If the aquifer were to become contaminated due to proposed septic tank fields, the resulting impacts could cause significant economic and social costs to the existing and future residents.

E. Economic Replaceability

Comment: Four commenters objected strongly to the economic replaceability criterion in the 1987 CAPA rule, arguing both that there was not statutory basis for the criterion and that it was inconsistent with the statutory purpose. Specifically, one commenter argued that SDWA section 1427(d) listed the only criteria which EPA could consider in deciding whether an area was a CAPA and that the cost of replacing a drinking water supply could not be used as a criterion because it was not listed in the statute. Other commenters made similar arguments and also claimed that the use of the replacement cost criterion conflicted with the basic purpose of SDWA section 1427, which they described as "protecting vulnerable ground water against contamination" and "prevent[ing] degradation" of "high quality ground water."

EPA Response: EPA is deleting the requirement in the 1987 CAPA rule that replacement costs must exceed 0.7% of mean annual household income. EPA will consider whether the cost of replacing a contaminated drinking water supply, together with other economic, environmental, and social costs, would be significant. See 40 CFR 149.3(a)(3). EPA believes that both the replacement cost criterion in the 1987 CAPA rule and the revised criterion are consistent with the statute. The statute provides that, in establishing criteria for identifying CAPAs, the Administrator shall consider "the economic costs * * * that would result from degradation of the quality of the drinking water." See SDWA section 1427(d)(4). The cost of supplying alternate water is clearly a possible economic cost that could result from contamination of an SSA. Obviously, there would be little or no point in considering various costs unless the Agency distinguished between areas proposed as CAPAs based on the magnitude of such costs. Thus, it is consistent with the statute for the Agency to establish a criterion which identifies an area as a CAPA only if contamination would cause "significant" costs. EPA thinks that the replacement cost criterion in the 1987 CAPA rule was similarly consistent with the statutory scheme.

EPA disagrees with the commenter who argued that the replacement cost criterion was illegal because it was not listed in SDWA section 1427(d). Even if it were not, the Agency is not limited to the four factors listed in SDWA section 1427(d) in establishing criteria for identifying CAPAs. SDWA section 1427(d) provides in part that "[i]n establishing * * * criteria (for identifying CAPAs), the Administrator shall consider each of the following" factors. The statute does not restrict the Administrator to consideration of these factors alone, nor does it prohibit consideration of other factors. Moreover, the statute only requires the Administrator to "consider" these factors, but it does not mandate their use in establishing the CAPA criteria. Thus, the Agency believes that SDWA section 1427(d) gives EPA authority to establish and use any additional reasonable criteria in determining which areas are CAPAs.

Finally, EPA disagrees with the commenter's characterization of the purpose of SDWA section 1427, and rejects the view that the criteria are inappropriate in light of the statutory purpose. As noted in section IIB, the only purpose of determining that an area is a CAPA is to establish eligibility for a grant program. The grant program is for the purpose of demonstrating how to protect human health, the environment, and ground-water resources. See SDWA section 1427 (a) and (f)(1). As demonstration projects, the activities funded under SDWA section 1427 are merely examples of programs that could be implemented elsewhere in the country. Indeed, by setting a ceiling on the funds that may be spent annually on an aquifer or under the entire program, the statute makes clear that the grants program is limited in scope. See SDWA section 1427 (j) and (k). In short, it is clear from the statute that Congress did not intend to create a comprehensive grant program to fund protection projects at each SSA. Rather, Congress' goal was more modest—to encourage the development of measures that effectively protect vulnerable SSAs and to promote their application in other areas. See SDWA section 1427(l).

The criteria in today's rule, like the criteria in the 1987 CAPA rule, are fully consistent with the statutory purpose. The criteria aid EPA in identifying the areas which should be CAPAs and should, therefore, be eligible for one of a limited number of demonstration grants. It is entirely appropriate therefore that the criteria operate selectively, leading

to the identification of a special subset of SSAs as CAPAs in which demonstration programs will be carried out most productively.

Comment: One commenter suggested that, in some cases, the distance to alternative water sources is so great that economic infeasibility is obvious without further analysis. The commenter requested that the Agency should specify a maximum distance beyond which consideration of alternatives would not be required.

EPA Response: EPA is changing the economic cost criterion in the rule so that the applicants are free to provide any evidence that shows "significant" economic damages that would result from contamination of the aquifer. Unusually long distance to alternative sources of water supply (i.e., via pipelines) could be used as evidence of irreplaceability. EPA does not want to restrict the allowable analysis by specifying particular maximum distances on a national level because a fixed distance number would not apply uniformly nationwide (e.g., a pipeline distance of ten miles in certain Eastern States might be considered unreasonable, whereas the same distance might be considered reasonable for pipelines in certain Western States.)

Comment: One commenter objected that the 1987 CAPA rule failed to specify any level for the quality of the water used to replace drinking water from a contaminated SSA.

EPA Response: EPA has decided not to revise the rule to specify a certain quality for the replacement of the water. EPA intends, at a minimum, that replacement water be potable at the time of delivery to the consumer and that this water meet all applicable water quality requirements under the Safe Drinking Water Act.

EPA recognizes that contamination of an SSA could force users to rely on a potable replacement source which may be of lower quality than water from the SSA. In such a situation, the loss of quality would represent environmental, social or economic cost resulting from the contamination. Such a potential loss would be considered by EPA in deciding whether costs of contamination are sufficiently "significant" that the area should be determined to be a CAPA.

Comment: One commenter objected to the economic replaceability test because it could fail to adequately recognize economic impacts on populations supplied by regional ground-water systems. In such systems, the costs of replacing water are distributed among a large number of users and thus replacement costs would be less likely to exceed the 0.7% threshold than in smaller supply systems.

EPA Response: The commenter's concern is addressed in the 1989 rule with the deletion of the 0.7% criterion. The new language in the final rule requires that replacement costs be "significant." Evaluation of whether the cost would be considered significant would take such local factors into account. In such situations EPA would be willing to consider other ways of evaluating the cost, such as the absolute cost of replacing the water supply.

Comment: One commenter said the economic replaceability criterion may not always be an appropriate test of value, particularly if the CAPA comprises the entire SSA. Provisions should be made for a more flexible cost test in this regard.

EPA Response: EPA agrees that, for the purpose of the CAPA rule, the test should be made more flexible and as mentioned in earlier responses to comments, the Agency will be deleting the 0.7% criterion and will be allowing for a more flexible test in the language in this final rule.

F. Ecological and Social Value

Comment: One commenter recommended that the rule be revised so that ecological and social values should be weighed on an equal basis with economic costs.

EPA Response: As explained earlier, EPA has revised the 1987 CAPA rule to provide greater flexibility by consideration of not only economic replacement costs but also other economic costs and environmental and social costs of reasonably foreseeable contamination in every application for a demonstration grant (see Section II of this preamble). EPA intends to be most concerned with the protection of aquifers as sources of drinking water, the primary goal of the Safe Drinking Water Act.

Comment: One commenter said an SSA of unusual ecological or social value should be eligible for designation as a CAPA, even if other criteria are not met.

EPA Response: In light of the revisions made to the 1987 CAPA rule, EPA will consider all potential types of costs that could result from contamination: economic, environmental and social costs. EPA agrees that, in the absence of any economic impacts, if contamination would cause an unusual or particularly severe social or environmental cost CAPA designation may be justified. For instance, a CAPA could be designated based in part on a showing that (1) ground water recharged in the CAPA discharges to a national park or wetland, or the habitat of an endangered species, (2) there are demonstrable contamination threats, and (3) if such contamination were to result, a vital natural resource or species could be destroyed.

Comment: One commenter recommended that the criteria for determining that an area is a CAPA should include consideration of impacts that the CAPA determination may have on farmers.

EPA Response: EPA does not accept the recommendation. The commenter apparently is concerned that a CAPA designation might impede farming activities or affect property owners engaged in productive enterprise on land designated as a CAPA.

EPA believes that a CAPA determination, by itself, would have no impact on farmers. A protection program carried out under a CAPA grant might affect farmers either by limiting allowable land use or by providing increased protection of their ground water or both. Until EPA receives applications for such grants, it is impossible to predict whether any protection programs would affect farmers adversely. At this time it does not seem appropriate to consider possible future effects of a program on farmers in deciding whether an area is a CAPA.

G. Information Requests

Comment: One commenter said hydrogeologic assessment information in addition to that suggested may benefit the CAPA review process.

EPA Response: EPA agrees with this comment, and an applicant may choose to submit any additional hydrogeologic data that will enhance the understanding of the vulnerability and recharge characteristics of the proposed CAPA.

Comment: A commenter said clarification is needed regarding the identification of potential pollution sources; specifically, with respect to the ability of the soils and the unsaturated zone to moderate contamination from potential pollution sources and whether landowners, competent agricultural specialists and soil scientists would have input into such analysis.

EPA Response: EPA does not expect submission of data regarding potential pollution sources, except as necessary for assessing the likelihood of contamination. Regarding the hydrogeologic criteria, an applicant is free to submit any data that could enhance the Agency's understanding of the vulnerability and recharge characteristics of the proposed CAPA.

EPA encourages competent scientific data to be made a part of an application and that this information come from appropriate specialists.

H. Procedural Requirements

Comment: Three commenters said that EPA's view that the CAPA criteria are interim final rules and exempted from the requirements of the APA because they are "grant related" is wrong.

EPA Response: EPA disagrees with commenters who argued that EPA should have gone through the APA notice and comment rulemaking when it issued its June 26, 1987 interim final rule. As explained earlier, Congress enacted SDWA section 1427 to establish a Sole Source Aquifer Demonstration Grant Program. Therefore, the purpose of determining whether an area is a critical aquifer protection area is to establish eligibility for awarding demonstration grants. Accordingly, EPA believes that the June 26, 1987 interim final rule falls within the scope of the grants exception to APA notice and comment rulemaking found in APA section 553(a)(2). Additionally, although SDWA section 1427(d) directs the Agency to establish criteria for identifying CAPAs by rule, it contains no independent requirement for notice and comment rulemaking in establishing such criteria.

I. Definition of "Major Recharge Area"

Comment: A commenter suggested a revision to the definition of "recharge area" in 40 CFR 149.2; specifically, to change the second "the" to "a" in the sentence explaining what constitutes a major recharge area.

EPA Response: The definition presented in the 1987 CAPA rule describes a major recharge area as "the area where the major part of the recharge to an aquifer occurs through infiltration of precipitation or surface water." EPA agrees that the change recommended by the commenter is technically valid and has made the suggested correction in the 1989 final rule. The reason for this change is to recognize that an SSA may contain more than one distinct area through which a significant share of the recharge moves into the sole source aquifer.

J. Background

Comment: One commenter said that in order to encourage local government participation, the CAPA program needs to have minimal red tape and informational requirements.

EPA Response: EPA agrees that unnecessary information requirements should be avoided. If and when funding becomes available, EPA plans to issue guidance on how to prepare applications. The Agency will attempt to provide clear and simple instructions, concentrating on the items necessary for a complete application.

Comment: One commenter said to stimulate CAPA program effectiveness and to benefit as many jurisdictions as possible, grants should be provided to fund a wide variety of aquifer protection management techniques.

EPA Response: EPA believes this comment has merit and will address this issue when the Agency issues grants guidance. The comment, however, does not require any revision in the 1987 CAPA rule.

Comment: One commenter asked to equate the CAPA criteria to such concepts as ground-water classification, zones of contribution and sensitive areas.

EPA Response: EPA believes that they are related but different. EPA believes that the statute is clear in the definition and purpose of a CAPA. Such definition and purpose do not necessarily replace, equate, or overlap with definitions and purposes of the other ground-water protection terms mentioned by the commenter. Some wellhead protection programs of the States, including those developed pursuant to section 1428 of the SDWA, do include portions of "zones of contribution." The designation of specific classes of ground water by the States often considers hydrogeologic and water use concepts quite different than those of either CAPAs or wellhead protection areas. State classification systems may consider different ground-water quality and other beneficial use characteristics. EPA emphasizes however, that an applicant is free to submit information on such relationships between these ground-water protection concepts and demonstrate how these concepts would support the technical information in a demonstration application.

Comment: One commenter said that the role of the State in the CAPA petition process needs to be included in the criteria.

EPA Response: The statute is clear about the role of States in the process of applying for demonstration grants. SDWA section 1427(c) indicates that if a jurisdiction other than a State applies for a grant, the applicant must have the Governor as a co-applicant when applying for SSA demonstration grant funds. In view of the clear statutory provisions, EPA does not believe any additional guidance in the CAPA rule is needed.

IV. Implementation

The SSA Demonstration Program is a limited one, which may entitle successful applicants to receive matching grants. The total amount of the grant cannot exceed $4 million per aquifer per year. As part of the demonstration program, any State, municipal or local government, or political subdivision thereof or any planning entity (including any interstate regional planning entity) that identified a CAPA over which it has authority or jurisdiction within an already designated SSA, may apply for the demonstration program. For fiscal years 1988 and 1989, Congress has not appropriated funds for demonstration program grants. Detailed information on applying for demonstration grant funds including procedures, application materials, and review criteria will be released by EPA if funds are appropriated for demonstration program grants in the future. A notice of availability of these application materials would be published in the Federal Register.

The Sole Source Aquifer Demonstration Program will not affect or inhibit Agency regulatory programs. The Agency does not intend to establish an administrative program strictly to define and delineate CAPAs, but only as one "screening" step in the context of the demonstration program. The actual selection process will be addressed by the Agency when it issues CAPA grants guidance.

V. Regulatory Impact Analysis

Under Executive Order 12291 [46 FR 13193, February 9, 1981], EPA must judge whether a regulation is "major" and, therefore, subject to the requirement of a Regulatory Impact Analysis.

A major rule is defined as a regulation which is likely to 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, and local government agencies; or geographic regions; or

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

This rule to define critical aquifer protection areas is not major since it has no effect on the overall cost and economic impact of EPA's sole source aquifer regulations. Therefore, the Agency has not conducted a regulatory impact analysis. The draft of this rule

was cleared by the Office of Management and Budget (OMB) pursuant to Executive Order 12291. A summary of comments from OMB to EPA and EPA's response to these comments will be available for viewing at the Environmental Protection Agency, Room 801 East Tower, 401 M Street, SW., Washington, DC 20460.

VI. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 through 612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities. This regulation will impose no significant costs on any small entities. The overall economic impact, therefore, on small entities is small. Accordingly, I hereby certify that this regulation will not have a significant impact on a substantial number of small entities. The regulation, therefore, does not require a regulatory flexibility analysis.

VII. Paperwork Reduction Act

The Information Collection Requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* These requirements are not effective until OMB approves them and a technical amendment to that effect is published in the **Federal Register.**

This rule in and of itself does not create any public reporting burden. Should funds be appropriated for the SSA Demonstration Program, EPA will issue Grants Guidance. As part of their application package pursuant to such Grant Guidance, it is anticipated that applicants will need to assert that all CAPA criteria established in this rule are met. The public burden associated with asserting CAPA criteria are believed to represent perhaps 10 to 25 percent of the 1040 hours of total burden associated with completing an SSA Demonstration Program application. These estimates are considered preliminary in nature (pending Grant Guidance issuance), and include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

An Information Collection Request document (ICR No. 1431) has been prepared by EPA and a copy may be obtained from: Carla Levesque, Information Policy Branch, EPA, 401 M Street, SW. (PM–223), Washington, DC 20460 or by calling (202) 382–2740.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch, PM–223, U.S. 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, "Attention: Timothy Hunt."

List of Subjects in 40 CFR Part 149

Critical aquifer protection areas, Reservoirs, Water pollution control.

Date: February 7, 1989.

Jack Moore,

Acting Administrator.

Accordingly, Part 149 is amended as follows:

PART 149—SOLE SOURCE AQUIFERS

1. The authority citation for Part 149 continues to read:

Authority: Sec. 1424(e), Safe Drinking Water Act (42 U.S.C. 300h–3(e); sec. 1427 of the Safe Drinking Water Act (42 U.S.C. 300h–6)).

2. Section 149.2 is revised to read as follows:

§ 149.2 Definitions.

(a) *Aquifer* means a geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(b) *Recharge* means a process, natural or artificial, by which water is added to the saturated zone of an aquifer.

(c) *Recharge Area* means an area in which water reaches the zone of saturation (ground water) by surface infiltration; in addition, a "*major recharge area*" is an area where a major part of the recharge to an aquifer occurs.

(d) *Sole or Principal Source Aquifer* (SSA) means an aquifer which is designated as an SSA under section 1424(e) of the SDWA.

3. Section 149.3 is revised to read as follows:

§ 149.3 Critical Aquifer Protection Areas.

A Critical Aquifer Protection Area is either:

(a) All or part of an area which was designated as a sole or principal source aquifer prior to June 19, 1986, and for which an areawide ground-water quality protection plan was approved, under section 208 of the Clean Water Act, prior to that date; or

(b) All or part of a major recharge area of a sole or principal source aquifer, designated before June 19, 1988, for which:

(1) The sole or principal source aquifer is particularly vulnerable to contamination due to the hydrogeologic characteristics of the unsaturated or saturated zone within the suggested critical aquifer protection area; and

(2) Contamination of the sole or principal source aquifer is reasonably likely to occur, unless a program to reduce or prevent such contamination is implemented; and

(3) In the absence of any program to reduce or prevent contamination, reasonably foreseeable contamination would result in significant cost, taking into account:

(i) The cost of replacing the drinking water supply from the sole or principal source aquifer, and

(ii) Other economic costs and environmental and social costs resulting from such contamination.

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federal register

Tuesday
February 14, 1989

Part VI

Department of Education

Office of Vocational and Adult Education

Cooperative Demonstration Program; Notice of Proposed Priority, Required Activities, and Selection Criteria for Fiscal Year 1989; Notice

DEPARTMENT OF EDUCATION

Office of Vocational and Adult Education

Cooperative Demonstration Program

AGENCY: Department of Education.

ACTION: Notice of proposed priority, required activities, and selection criteria for fiscal year 1989.

SUMMARY: The Secretary of Education proposes to establish an absolute priority for a fiscal year 1989 grant competition under the Cooperative Demonstration Program. Under the priority, funds would be reserved for applications proposing to conduct high technology training projects in vocational education that involve cooperation between the private sector and public agencies in vocational education. The Secretary also proposes to require applicants to submit certain written assurances, as described under the Activities section of this priority, as part of their applications for this program and to prohibit the use of Federal funds to cover the costs of equipment used for project activities. Lastly, the Secretary proposes to use new selection criteria in evaluating applications submitted for this competition only.

DATE: Comments must be received on or before March 16, 1989.

ADDRESS: Comments should be addressed to Richard F. DiCola or Robert L. Miller, Program Improvement Branch, Division of National Programs, Office of Vocational and Adult Education (Room 4512, Switzer Building), 400 Maryland Avenue SW., Washington, DC 20202-7242. Telephone (202) 732-2362 or 732-2428.

SUPPLEMENTARY INFORMATION:

Program Information

Recent data compiled by the Bureau of Labor Statistics indicate faster than average growth in the demand for skilled technicians in high technology fields through the year 2000. The data also indicate that these emerging technologies will have a significant impact on the efficiency and flexibility of a well-trained work force.

High technology training can be conducted most effectively with the active involvement and cooperation of the private sector. Effective partnerships between the private sector and public agencies in vocational education are an important aspect of the Cooperative Demonstration Program which is designed, in part, to demonstrate ways in which public agencies in vocational education and the private sector can work together to assist students to attain the advanced level of skills needed to make the transition from school to work.

Priority

In accordance with Department of Education General Administrative Regulations at 34 CFR 75.105(c)(3), the Secretary proposes to establish an absolute priority for the fiscal year 1989 grant competition under the Cooperative Demonstration Program for projects that focus on high technology training efforts that are also models of cooperation between the private sector and public agencies in vocational education. In order to maximize the use of Federal funds for the direct training of students, the Secretary proposes that no Federal funds be used to purchase or lease equipment to conduct project activities. Any necessary equipment costs may be counted toward the cost-sharing requirement for this program.

Specifically, the Secretary proposes to support projects that—

(1) Train persons to become skilled workers or technicians in high technology occupations (including providing related instruction to individuals undergoing apprenticeship training) or to become skilled workers or technicians involved in the production, installation, operation, and maintenance of high technology equipment, systems, and processes;

(2) Are examples of successful cooperation between the private sector (including employers, consortia of employers, labor organizations, building trade councils, and other private agencies, organizations, and institutions) and public agencies in vocational education (including State and local educational agencies, postsecondary educational institutions, institutions of higher education, and other public agencies, organizations, and institutions). For the purpose of this competition the military and publicly funded laboratories are considered employers that could be used as private sector partners in a proposed project; *and*

(3) Expend no Federal funds for equipment, as defined in 34 CFR 74.132.

Activities

In support of this priority, an applicant would be required to submit, as part of its application, a written assurance that it will cooperate, if selected, with a planned national evaluation study of projects funded under this competition.

An applicant would also be required to submit, as part of its application, written assurances from each public agency in vocational education and each private sector entity that they will participate in the planning and operation of the proposed project as described in the application.

Criteria for Evaluating Applications

For the Fiscal Year 1989 grant competition under the Cooperative Demonstration Program, the Secretary proposes to use the following selection criteria and to assign points to the selection criteria as indicated:

(a) *Need.* (15 points)

(1) The Secretary reviews each application for information that shows the need for and the soundness of the rationale for the project.

(2) The Secretary looks for information that shows—

(i) A clear description of the need for the proposed project;

(ii) Specific evidence of the need for the project;

(iii) A description of any ongoing and planned activities in the community relative to the need, including, if appropriate, the relationship of any local, regional or State economic development plan;

(iv) Evidence that demonstrates the vocational training to be provided is designed to meet current and projected occupational needs;

(v) A clear statement of what the project seeks to demonstrate; and

(vi) Evidence that the project is likely to serve as a model in the future.

(b) *Plan of Operation.* (25 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the project;

(ii) An effective plan of management that ensures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective; and

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(c) *Quality of Key Personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (c)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(d) *Budget and Cost Effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(e) *Evaluation Plan.* (10 points)

The Secretary reviews each application to determine the quality of the project's evaluation plan for the project, including the extent to which—

(1) The plan includes activities during the formative stages of the project to help to guide and improve the project, as well as a final evaluation that includes summary data and recommendations; and

(2) The plan includes, at a minimum, a description of the participant data to be collected based on the project objectives; tracking and follow-up of progress by all project participants throughout the project period; and outcome measures to be used for each objective.

(f) *Adequacy of Resources.* (5 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies the applicant plans to use are adequate.

(g) *Private Sector Involvment.* (10 points)

(1) The Secretary reviews each application for information that shows the involvement of the private sector.

(2) The Secretary looks for information that shows—

(i) Private sector involvement in the planning of the project; and

(ii) Private sector involvement in the operation of the project.

(h) *Employment Opportunities.* (5 points)

The Secretary looks for information and documentation to the extent to which trainees, upon completion of their training, will be either employed in jobs related to their training or enrolled in postsecondary vocational education programs related to the training received during the project. Acceptable documentation includes letters of commitment from employers to hire training completers or descriptions of postsecondary vocational education programs that would be appropriate for subsequent training.

(i) *Dissemination.* (10 points)

(1) The Secretary reviews each application for information that shows that the applicant has an effective and efficient plan for disseminating information about the demonstration project, including the results of the project and any specialized materials developed by the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the dissemination plan and procedures for evaluating the effectiveness of the dissemination plan;

(ii) A description of the types of materials the applicant plans to make available and the methods for making the materials available;

(iii) Provisions for demonstrating the methods and techniques used by the project;

(iv) Provisions for assisting others to adopt and successfully implement the project or methods and techniques used by the project; and

(v) Provisions for publicizing the findings of the project at the local, State or national level.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding (a) the proposed priority for high technology projects that involve cooperation with the private sector and prohibit the expenditure of Federal funds for equipment and related requirements; and (b) the proposed selection criteria.

All comments submitted in response to this notice will be available for public inspection during and after the comment period in Room 4512 Switzer Building, 330 C Street SW., Washington, DC, between the hours of 9:30 a.m. and 3:00 p.m., Monday through Friday of each week except Federal holidays.

Authority: 20 U.S.C. 2411

Dated: February 2, 1989.

Lauro F. Cavazos,

Secretary of Education.

[FR Doc. 89-3470 Filed 2-13-89; 8:45 am]

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federal register

Tuesday
February 14, 1989

Part VII

Environmental Protection Agency

40 CFR Part 60

Standards of Performance for New Stationary Sources; Revisions to Rubber Tire Manufacturing Industry; Proposed Rule and Public Hearing; Petition for Reconsideration

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3437-2]

Standards of Performance for New Stationary Sources; Revisions to Rubber Tire Manufacturing Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and public hearing; petition for reconsideration.

SUMMARY: On September 15, 1987 (52 FR 34868), EPA promulgated standards of performance for the rubber tire manufacturing industry. Subsequently, the Rubber Manufacturers Association (RMA) filed a petition for reconsideration with EPA, both RMA and Firestone Tire and Rubber Company filed petitions for review of the Administration's decision with the D.C. Circuit, and Michelin Tire Corporation filed a motion for leave to intervene in the review of the promulgated standards. The petitioners requested review of: (1) Changes in cutoffs between proposal and promulgation; (2) potential expansion in the coverage of the regulation; (3) requirements for determining capture efficiency using a temporary enclosure; and (4) requirements for monthly tests for green tire sprays containing low quantities of volatile organic compounds (VOC). The EPA has evaluated the petition, and the Administrator grants the petitioners' requests for revision of the existing new source performance standard (NSPS) for the rubber tire manufacturing industry with regard to items (1), (3), and (4), but denies petitioners' requests for revision of the NSPS relating to coverage of the NSPS, item (2). This action provides EPA's responses to petitioners' requests, and the resulting minor proposed revisions to the NSPS are set forth in this notice.

A public hearing will be held to provide interested parties an opportunity for oral presentations of data, views, or arguments concerning the proposed revisions.

DATES: *Comments.* Comments must be received on or before April 21, 1989.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by March 14, 1989, a public hearing will be held on March 21, 1989, beginning at 10:00 a.m. Persons interested in attending the hearing should call Ann Eleanor at (919) 541–5578 to verify that a hearing will be held.

Request to Speak at Hearing. Persons wishing to present oral testimony must contact EPA by March 14, 1989.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate if possible) to: Central Docket Section (LE–131), Attention: Docket No. A–80–9, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Public Hearing. If anyone contacts EPA requesting a public hearing, it will be held at EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Ms. Ann Eleanor, Standards Development Branch (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–5578.

Docket. A docket, number A–80–9, containing information considered by EPA in the development of the promulgated standards and the Petition for Reconsideration to which this notice is responding, is available for public inspection between 8:00 a.m. and 3:30 p.m., Monday through Friday, at EPA's Central Docket Section, South Conference Center, Room 4, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information and interpretations of applicability, compliance requirements, and reporting aspects of the revised standards, contact the appropriate Regional, State, or local office contact as listed in 40 CFR 60.4. For further information on the background for the proposed revised standards, contact Ms. Dianne Byrne, Standards Development Branch, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–5266.

SUPPLEMENTARY INFORMATION:

I. Background

Standards of performance for the rubber tire manufacturing industry were promulgated in the **Federal Register** on September 15, 1987 (52 FR 34868). The promulgated standards limit VOC emissions from new, modified, or reconstructed facilities. The VOC emissions from the rubber tire industry are caused primarily by application of materials which contain VOC to different components of a tire during the manufacturing process. The affected facilities are each undertread cementing operation, each sidewall cementing operation, each tread end cementing operation, each bead cementing operation, each green tire spraying operation, each Michelin-A operation, each Michelin-B operation, and each Michelin-C automatic operation.

Facilities affected by these standards are those where components for agricultural, airplane, industrial, mobile home, light-duty truck, or passenger vehicle tires have a bead diameter up to and including 0.325 m (12.8 in) and are mass produced in assembly-line fashion.

The control technology for these facilities consists of low solvent usage or an emission reduction system.

II. Summary of RMA Petition for Reconsideration and EPA's Response

On November 12, 1987, the RMA (an association representing several tire manufacturers) filed with EPA a petition for reconsideration of the Standards of Performance for New Stationary Sources in the Rubber Tire Manufacturing Industry. On November 12 and 13, 1987, the RMA and the Firestone Tire and Rubber Company, respectively, filed with the U.S. Court of Appeals for the District of Columbia Circuit petitions for review of the Standards of Performance for New Stationary Sources in the Rubber Tire Manufacturing Industry under section 307(b) of the Clean Air Act. Additionally, on December 10, 1987, Michelin Tire Corporation filed a Motion for Leave to Intervene in the review of the final standards. Michelin filed the motion pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure. Although Michelin is a member of the RMA, which also filed a petition for review of the standards, the corporation did not feel that its interest would be adequately represented or protected by RMA because Michelin utilizes processes and facilities that are unique in the industry.

The issues presented in the petitions for review are virtually identical to those raised in the petition for reconsideration.

The following discussion summarizes and represents the arguments made by all the petitioners with regard to the final standards. Likewise, EPA's response to each issue is made with regard to the arguments of all of the petitioners.

A. The petitioners stated that the VOC use cutoffs established in the final standard are inappropriate and unlawful, having been changed after proposal to incorporate arbitrary assumptions. They claim the final cutoffs also retroactively expanded coverage without the opportunity to comment and should be revised. At

proposal, the VOC cutoff was expressed in terms of grams per tire (grams/tire) and included only VOC applied to "tire" components, as that term was defined in the regulation. (Outsized tires (larger truck, implement, or industrial tires) and nonassembly-line tires were excluded from the definition of "tire" used to establish the 25 grams/tire cutoff at proposal). At promulgation, the cutoff was changed to a kilograms per month format and included all VOC used at the facility, including VOC used for tire types other than those defined in the regulation. Thus, the petitioners argued that this change resulted in retroactively expanding the NSPS coverage to include tire types not included in the proposed standards because the final standard applies to facilities constructed or modified between January 20, 1983, and September 15, 1987, that produced outsized tires. The petitioners maintained that it was not proper for EPA to include in the monthly VOC use cutoff calculations the VOC used for tire types and sizes other than those defined in the standard.

The petitioners also maintained that the assumptions regarding days of operation and production rates included in the monthly VOC cutoffs reflect limited data which did not represent typical operations either on the applicability date (January 20, 1983) or on the effective date (September 15, 1987). Specifically, the use of an inappropriate number for the days of operation and the production rate per facility resulted in an arbitrarily low cutoff value. The petitioners believed that the rulemaking record should have been reopened to enable interested parties to comment on these assumptions. According to the petitioners, owners or operators of facilities constructed or modified after the applicability date will be adversely affected by the change in the format of the final cutoff to kilograms VOC per month, including VOC used for tire types other than those defined in the regulation.

The Administrator believes that the form of the final cutoff and associated definitions are appropriate and should not be revised. The basis for these is fully consistent with the proposed standard. The final format and definitions, which were revised in response to public comment, merely make the standard more equitable and eliminate potential ambiguities in the proposed definitions and format. At proposal, the gram per tire VOC use cutoffs were provided to exempt from the emission reduction requirements facilities that would incur control costs which the Administrator judged to be too high for the emission reduction achieved. The EPA selected the 25 g/tire format for undertread cementing or sidewall cementing operations based on the belief that, although the amount of VOC may vary from tire-to-tire, all tires received an application of cement. After proposal, one industry commenter presented a situation where a large portion of the tire production did not receive undertread cement, but VOC use was greater than 25 g/tire for the portion of production receiving cement, the only tires that would be counted under the proposed format. In this case, it was argued that the cost of control would be unreasonable. With this situation in mind, EPA revised the format of the VOC cutoff for undertread cementing and sidewall cementing operations from 25 g/tire to total (uncontrolled) monthly VOC usage at each facility. The total (uncontrolled) monthly VOC use cutoff is equivalent to the proposed 25 g/tire cutoff, since it was developed using the same basis (production rate and days of operation, etc.) that was used to determine the proposed 25 g/tire cutoff. This format eliminates the requirement of having to reduce emissions by 75 percent where total VOC use could be relatively small, but the amount of VOC applied per tire could exceed the proposed 25 g/tire cutoff. In addition, total VOC use data, which are independent of tire size and use, were used to develop the percent emission reduction requirements and monthly VOC use cutoffs. Therefore, for these reasons, EPA denies the petitioners' requests to revise completely the form of the final cutoff and associated definitions.

Nevertheless, the Agency acknowledges that because of the long time period between proposal and promulgation (more than 4 years), in this instance it may not be reasonable to impose the final form of the cutoff on facilities that commenced construction, modification, or reconstruction prior to promulgation and that are using (or will use) low solvent technology to comply with the proposed gram per tire form of the standard. Therefore, EPA is granting the petitioners' requests with respect to affected facilities that commenced construction, modification, or reconstruction between proposal and promulgation. Specifically, EPA has revised the standard to allow affected facilities (each undertread cementing operation and each sidewall cementing operation) that commenced construction, modification, or reconstruction prior to the promulgation date (September 15, 1987) the option of complying with either the proposed or final cutoff. Owners or operators of affected facilities eligible for this option will be allowed 2 months following promulgation of this revision to elect to comply with the proposed or the final form of the cutoff. Provisions for notifying the Administrator of the election to be subject to the alternate standard are contained in §60.546(i) of the regulation. Othewise, no notification is necessary. Once the decision is made, it cannot be reversed.

Except as previously discussed, the form of the final cutoff and associated definitions have not been revised. Undertread and sidewall cementing operations that commenced construction, modification, or reconstruction after the date of promulgation (September 15, 1987) may only use the final form of the cutoff (i.e., total kilograms of VOC per month, regardless of the type of tire processed at the affected facility).

B. Section 60.543(f)(2)(i) of the regulation requires an owner or operator of an affected facility that uses an incinerator as the control device to use a temporary total enclosure around the application and drying areas of the facility to determine the overall capture efficiency of the enclosure during performance tests. The temporary enclosure must be maintained at a negative pressure to ensure that all evaporated VOC are measurable. The petitioners assert that the requirement for a temporary enclosure maintained at a negative pressure is impractical because: (1) Significant openings would have to be provided to allow the entrance and exit of the tire components being processed; (2) operation at negative pressure would change the air flow at the unit and produce unrepresentative conditions; and (3) access must be provided for the operator of the equipment to carry out the normal functions associated with the operation.

The Agency does not necessarily agree with RMA's position. However, the regulation has been revised to provide an alternative procedure for demonstration of capture efficiency through the use of a liquid-to-gas materials balance in cases when only a single VOC (solvent) is used (see §60.543(f)(2)(iv)).

The liquid-to-gas materials balance involves the measurement of mass of liquid VOC that is used and the mass of gaseous VOC that is captured and routed to the incinerator. Capture efficiency is determined by dividing VOC captured by the VOC used. This is theoretically a sound procedure.

However, the results of the liquid-to-gas materials balance depend more heavily upon the accuracy and precision of the measurement methods than do the results of a gas-to-gas materials balance. Achieving high accuracy and precision of VOC measurements in systems that contain mixtures of VOC is particularly demanding. The alternative procedure is therefore applicable only to single solvent systems.

Either Method 25 or Method 25A may be used for the gas phase measurement in the liquid-to-gas materials balance. If Method 25A (flame ionization detector (FID)) is used, the FID must be calibrated with the solvent that is used in the system. A different calibration gas may be used if the results are corrected using an experimentally determined response factor comparing the alternative calibration gas to the single VOC used in the process. The gas phase testing with Method 25A is simpler than with Method 25 and the results are more immediately available. In cases where incinerator destruction efficiency is also being tested, however, the owner or operator may prefer to use the same Method 25 inlet data collected to demonstrate destruction efficiency for the gas phase portion of the liquid-to-gas materials balance.

C. The petitioners stated that the owner or operator of an affected water-based green tire spraying operation that uses a water-based spray containing minimal or no organic solvent should not be subject to the monthly performance test requirements of the regulation. They contend that if the owner or operator of the affected facility can show by way of spray formulation data or through analysis using Method 24 that the spray contains no organic solvent, then he should not be required to conduct a monthly performance test on a continuous basis.

The Administrator agrees that owners or operators of green tire spraying operations, using little or no organic solvent, should not be required to conduct monthly performance tests. Therefore, EPA is granting the petitioners' requests and has revised the regulation to allow the owner or operator of each green tire spraying operation using only water-based sprays (inside and/or outside) containing less than 1.0 percent by weight of VOC to submit annually formulation data or the results of Method 24 analysis to verify the VOC content of the spray in lieu of conducting monthly performance tests. After the initial results of the VOC content are reported, the owner or operator of the affected facility must continue to verify the VOC content of the spray on an annual basis unless the spray formulation changes, in which case the VOC content of the revised spray formulation must be analyzed and reported within 1 month of the formulation change.

III. Administrative Requirements

A. Docket

The docket is an organized and complete file of all the information submitted to or otherwise considered in the development of this proposed rulemaking. The principal purposes of the docket are: (1) To allow interested parties to identify readily and locate documents so that they can effectively participate in the rulemaking process; and (2) to serve as the record in case of judicial review, except for interagency review materials (section 307(d)(7)(A)).

B. Public Hearing

A public hearing will be held, if requested, to discuss the proposed rulemaking in accordance with section 307(d)(5) of the Clean Air Act. Persons wishing to make oral presentations should contact EPA at the address given in the **ADDRESSES** section of this preamble. Oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement with EPA before, during, or within 30 days after the hearing. Written statements should be addressed to the Central Docket Section address given in the **ADDRESSES** section of this preamble.

A verbatim transcript of the hearing and written statements will be available for public inspection and copying during normal working hours at EPA's Central Docket Section in Washington, DC (see **ADDRESSES** section of this preamble).

C. Office of Management and Budget Reviews

Paperwork Reduction Act

Changes to the information requirements as proposed in today's notice have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* An Information Collection Request document has been prepared by EPA (ICR No. 1158) and a copy may be obtained by writing Carla Levesque, Information Policy Branch; EPA; 401 M Street SW. (PM–223); Washington, DC 20460 or by calling (202) 382–2468.

Public reporting burden for this collection of information is estimated to decrease 15 to 30 hours annually for manufacturers employing green tire spray operations using water-based sprays containing less than 1.0 percent by weight of VOC.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM–223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Paperwork Reduction Project (2060–0156), Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

This rulemaking was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB to EPA and any EPA response to those comments are included in Docket No. A–80–9. This docket is available for public inspection at EPA's Central Docket Section that is listed under the **ADDRESSES** section of this notice.

D. Regulatory Flexibility Act Compliance

The Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)) requires that adverse effects of all Federal regulations upon small businesses be identified. As stated in the preamble to the final NSPS (52 FR 34874), it is unlikely that any new plant would be considered a small entity. Therefore, it is unlikely that this rulemaking, which proposes minor revisions to the NSPS, would adversely affect any small businesses.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that these proposed revisions to the NSPS will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 60

Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping, Rubber tire manufacturing.

Date: February 7, 1989.

Jack Moore,

Acting Administrator.

For reasons set out in the preamble, it is proposed to amend 40 CFR Part 60, Subpart BBB, as follows:

PART 60—[AMENDED]

1. The authority citation for Part 60 continues to read as follows:

Authority: Sec. 101, 111, 114, 116, 301 of the Clean Air Act as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601).

2. Section 60.540 is amended by revising paragraphs (a) and (b) to read as follows:

§ 60.540 Applicability and designation of affected facilities.

(a) The provisions of this subpart, except as provided in paragraph (b) of this section, apply to each of the following affected facilities in rubber tire manufacturing plants that commence construction, modification, or reconstruction after January 20, 1983: each undertread cementing operation, each sidewall cementing operation, each tread and cementing operation, each bead cementing operation, each green tire spraying operation, each Michelin-A operation, each Michelin-B operation, and each Michelin-C automatic operation.

(b) The owner or operator of each undertread cementing operation, and sidewall cementing operation in rubber tire manufacturing plants that commenced construction, modification, or reconstruction after January 20, 1983, and before September 15, 1987, shall have the option of complying with the alternate provisions in § 60.542a. This election shall be irreversible. The alternate provisions in § 60.542a do not apply to any undertread cementing operation or sidewall cementing operation that is modified or reconstructed after September 15, 1987. The affected facilities in this paragraph are subject to all applicable provisions of this subpart.

* * * * *

3. Section 60.542a is added to read as follow:

§ 60.542a Alternative standard for volatile organic compounds.

(a) On and after the date on which the initial performance test, required by § 60.8, is completed, but no later than 180 days after (promulgation of this revision), each owner or operator subject to the provisions in § 60.540(b) shall not cause to be discharged into the atmosphere more than: 25 grams of VOC per tire processed for each month if the operation uses 25 grams or less of VOC per tire processed and does not employ a VOC emission reduction system.

(b) [Reserved]

4. In § 60.543, the second sentences of paragraphs (b)(1) and (b)(2) are revised; paragraphs (b)(4), (f)(2)(iv), and (n) are added; and paragraphs (d) and (f)(2) introductory text are revised to read as follows:

§ 60.543 Performance test and compliance provisions.

* * * * *

(b) * * *

(1) * * * The owner or operator of an affected facility shall thereafter conduct a performance test each month, except as described under paragraphs (b)(4), (g)(1), and (j) of this section. * * *

(2) * * * The performance test shall be conducted in accordance with the procedures described under paragraphs (f)(2) (i) through (iv) of this section.

* * * * *

(4) The owner or operator of each green tire spraying operation using only water-based sprays (inside and/or outside) containing less than 1.0 percent, by weight, of VOC is not required to conduct a monthly performance test as described in paragraph (d) of this section. In lieu of conducting a monthly performance test, the owner or operator of each green tire spraying operation shall submit formulation data or the results of Method 24 analysis annually to verify the VOC content of each green tire spray material, provided the spraying formulation has not changed during the previous 12 months. If the green tire spray material formulation changes, formulation data or Method 24 analysis of the new spray shall be conducted to determine the VOC content of the spray and reported within 30 days as required under § 60.546(j).

* * * * *

(d) For each tread end cementing operation and each green tire spraying operation where water-based sprays containing 1.0 percent, by weight, of VOC or more are used (inside and/or outside) that do not use a VOC emission reduction system, the owner or operator shall use the following procedure to determine compliance with the g/tire limit specified under § 60.542(a)(3), (5)(i), 5(ii), 7(i), and (7)(ii).

* * * * *

(f) * * *

(2) Calculate the mass of VOC emitted per tire cemented at the affected facility for the month (N) or mass of VOC emitted per bead cemented for the affected facility for the month (N_b):

$$N = G\,(1-R)$$
$$N_b = G_b\,(1-R)$$

For the initial performace test, the overall reduction efficiency (R) shall be determined as prescribed under paragraphs (f)(2) (i) through (iv) of this section. After the initial performance test, the owner or operator may use the most recently determined overall reduction efficiency (R) for the performance test. No monthly performance tests are required. The performance test shall be repeated during conditions described under paragraph (b)(2) of this section.

* * * * *

(iv) The owner or operator of an affected facility shall have the option of substituting the following procedure as an acceptable alternative to the requirements prescribed under paragraph (f)(2)(i) of this section. This alternative procedure is acceptable only in cases where a single VOC is used and is present in the capture system. The average capture efficiency value derived from a minimum of three runs shall constitute a test.

(A) For each run, "i," measure the mass of the material containing a single VOC used. This measurement shall be made using a scale that has both a calibration and a readability to within 1 percent of the mass used during the run. This measurement may be made by filling the direct supply reservoir (e.g., trough, tray, or drum that is integral to the operation) and related application equipment (e.g., rollers, pumps, hoses) to a marked level at the start of the run and then refilling to the same mark from a more easily weighed container (e.g., separate supply drum) at the end of the run. The change in mass of the supply drum would equal the mass of material used from the direct supply reservoir. Alternatively, this measurement may be made by weighing the direct supply reservoir that the start and end of the run or by weighing the direct supply reservoir and related application equipment at the start and end of the run. The change in mass would equal the mass of the material used in the run. If only the direct supply reservoir is weighed, the amount of material in or on the related application equipment must be the same at the start and end of the run.

(B) For each run, "i," measure the mass of the material containing a single VOC which is present in the direct supply reservoir and related application equipment at the start of the run, unless the ending weight fraction VOC in the material is greater than or equal to 98.5 percent of the starting weight fraction VOC in the material, in which case this measurement is not required. This measurement may be made directly by emptying the direct supply reservoir and related application equipment and then filling them to a marked level from an easily weighed container (e.g., separate supply drum). The change in mass of the supply drum would equal the mass of material in the filled direct supply reservoir and related application equipment. Alternatively, this measurement may be made by weighing

the direct supply reservoir and related application equipment at the start of the run and subtracting the mass of the empty direct supply reservoir and related application equipment (tare weight).

(C) For each run, "i," the starting weight fraction VOC in the material shall be determined by Method 24 analysis of a sample taken from the direct supply reservoir at the beginning of the run.

(D) For each run, "i," the ending weight fraction VOC in the material shall be determined by Method 24 analysis of a sample taken from the direct supply reservoir at the end of the run.

(E) For each run, "i," in which the ending weight fraction VOC in the material is greater than or equal to 98.5 percent of the starting weight fraction VOC in the material, calculate the mass of the single VOC used (M_i) by multiplying the mass of the material used in the run by the starting weight fraction VOC of the material used in the run.

(F) For each run, "i," in which the ending weight fraction VOC in the material is less than 98.5 percent of the starting weight fraction VOC in the material, calculate the mass of the single VOC used (M_i) as follows:

(*1*) Calculate the mass of VOC present in the direct supply reservoir and related application equipment at the start of the run by multiplying the mass of material in the direct supply reservoir and related application equipment at the start of the run by the starting weight fraction VOC in the material for that run.

(*2*) Calculate the mass of VOC present in the direct supply reservoir and related application equipment at the end of the run by multiplying the mass of material in the direct supply reservoir and related application equipment at the end of the run by the ending weight fraction VOC in the material for that run. The mass of material in the direct supply reservoir and related application equipment at the end of the run shall be calculated by subtracting the mass of material used in the run from the mass of material in the direct supply reservoir and related application equipment at the start of the run.

(*3*) The mass of the single VOC used (M_i) equals the mass of VOC present in the direct supply reservoir and related application equipment at the start of the run minus the mass of VOC present in the direct supply reservoir and related application equipment at the end of the run.

(G) If Method 25A is used to determine the concentration of the single VOC in the capture system, then calculate the capture efficiency (FC_i) for each run, "i," as follows:

$$FC_i = \frac{C_i \frac{W}{V} Q_i}{(M_i)\ (10^6)}$$

where:

C_i = Average concentration of the single VOC in the capture system during run "i" (parts per million by volume) corrected for background VOC (see § 60.547(a)(5)).

W = Molecular weight of the single VOC, expressed as mg per mg-mole.

$V = 2.405 \times 10^{-5}$ m^3/mg-mole. This is the volume occupied by one mg-mole of ideal gas at standard conditions (20°C, 1 atmosphere) on a wet basis.

Q_i = Volumetric flow in m^3 in the capture system during run "i" adjusted to standard conditions (20°C, 1 atmosphere) on a wet basis (see § 60.547(a)(5)).

10^6 = ppm per unity.

M_i = Mass in mg of the single VOC used during run "i."

(H) If Method 25 is used to determine the concentration of the single VOC in the capture system, then calculate the capture efficiency (FC_i) for each run, "i," as follows:

$$FC_i = \frac{\frac{C_i}{(NC)(10^6)} \frac{(W)(Q_i)}{(V)}}{M_i}$$

Where:

C_i = Average concentration of the single VOC in the capture system during run "i" (parts per million, as carbon, by volume) corrected for background VOC (see § 60.547(a)(5)).

W = Molecular weight of the single VOC, expressed as mg per mg-mole.

$V = 2.405 \times 10^{-5}$ m^3/mg-mole. This is the volume occupied by one mg-mole of ideal gas at standard conditions (20°C, 1 atmosphere) on a wet basis.

Q_i = Volumetric flow in m^3 in the capture system during run "i," adjusted to standard conditions (20°C, 1 atmosphere) on a dry basis (see § 60.547(a)(5)).

10^6 = ppm per unity.

M_i = Mass in mg of the single VOC used during run "i."

NC = Number of carbon atoms in one molecule of the single VOC.

(I) Calculate the average capture efficiency value, F_c as follows:

$$F_c = \frac{\sum_{i=1}^{n} FC_i}{n}$$

Where: "n" equals the number of runs made in the test (n >3). In cases where an alternative procedure in this paragraph is used, the requirements in (f)(2)(ii) and (iii) remain unchanged.

* * * * *

(n) For each undertread cementing operation and each sidewall cementing operation that does not use a VOC emission reduction system, the owner or operator shall use the following procedure to determine compliance with the 25 g/tire limit specified in § 60.542a:

(1) Calculate the total mass of VOC (M_o) used at the affected facility for the month by the following procedure.

(i) For each affected facility for which cement is delivered in batch or via a distribution system which serves only that affected facility:

$$M_o = \sum_{i=1}^{n} L_{ci} D_{ci} W_{oi}$$

where: "n" equals the number of different cements or sprays used during the month.

(ii) For each affected facility for which cement is delivered via a common distribution system which also serves other affected or existing facilities.

(A) Calculate the total mass (M) of VOC used for all of the facilities served by the common distribution system for the month:

$$M = \sum_{i=1}^{n} L_{ci} D_{ci} W_{oi}$$

Where: "n" equals the number of different cements or sprays used during the month.

(B) Determine the fraction (F_o) of "M" used by the affected facility by comparing the production records and process specifications for the material cemented at the affected facility for the month to the production records and process specifications for the material cemented at all other facilities served by the common distribution system for the month or by another procedure acceptable to the Administrator.

(C) Calculate the total monthly mass of VOC(M_o) used at the affected facility:

$$M_o = MF_o$$

(2) Determine the total number of tires (T_o) processed at the affected facility for the month by the following procedure.

(i) For undertread cementing, T_o equals the number of tread or combined tread/sidewall components which receive an application of undertread cement.

(ii) For sidewall cementing, T_o equals the number of sidewall components which receive an application of sidewall cement, divided by 2.

(3) Calculate the mass of VOC used per tire processed (G) by the affected facility for the month:

$$G = \frac{M_o}{T_o}$$

(4) Calculate the mass of VOC emitted per tire processed (N) for the affected facility for the month:

$$N = G$$

(5) Where the value of the mass of VOC emitted per tire processed (N) is less than or equal to the 25 g/tire limit specified under § 60.542a, the affected facility is in compliance.

* * * * *

5. Section 60.545 is amended by adding paragraph (f) to read as follows:

§ 60.545 Recordkeeping requirements.

* * * * *

(f) Each owner or operator of a green tire spraying operation using waterbased sprays containing less than 1.0 percent by weight of VOC, as specified under § 60.543(b)(4), shall maintain records of formulation data or the results of Method 24 analysis conducted to verify the VOC content of the spray.

6. Section 60.546 is amended by adding paragraphs (c)(7), (i), and (j) to read as follows:

§ 60.546 Reporting requirements.

* * * * *

(c) * * *

(7) For each affected facility that elects to comply with the alternate limit specified under § 60.542a: the mass of VOC used (M_o), the number of tires processed (T_o), and the mass of VOC emitted per tire processed (N).

* * * * *

(i) The owner or operator of each undertread cementing operation and each sidewall cementing operation who qualifies for the alternate provisions as described in § 60.540(b) and elects to be subject to the alternate provisions for VOC under § 60.542a, shall furnish the Administrator written notification of the election no less than 60 days after (promulgation of this revision).

(j) The owner or operator of each green tire spraying (inside and/or outside) operation using water-based sprays containing less than 1.0 percent, by weight, of VOC as described in § 60.543(b)(1) shall furnish the Administrator, within 60 days initially and annually thereafter, formulation data or Method 24 results to verify the VOC content of the water-based sprays in use. If the spray formulation changes before the end of the 12-month period, formulation data or Method 24 results to verify the VOC content of the spray shall be reported within 30 days.

* * * * *

7. Section 60.547 is amended by adding paragraph (a)(5) to read as follows:

§ 60.547 Test methods and procedures.

(a) * * *

(5) Method 25 or Method 25A for determination of the VOC concentration in a capture system prior to a control device when only a single VOC is present (see § 60.543(f)(2)(iv)(G) and (f)(2)(iv)(H)). The owner or operator shall notify the Administrator 30 days in advance of any test by either Method 25 or Method 25A. Method 1 shall be used to select the sampling site and the sampling point shall be the centroid of the duct or at a point no closer to the walls than 1 meter. Method 2, 2A, 2C, or 2D, as appropriate, shall be used as the test method for the concurrent determination of gas flow rate in the capture system.

(i) For Method 25, the sampling time for each run shall be at least 1 hour. For each run, a concurrent sample shall be taken immediately upwind of the application area to determine the background VOC concentration of air drawn into the capture system. Subtract this reading from the reading obtained in the capture system for that run. The minimum sample volume shall be 0.003 dry standard cubic meter (dscm) except that shorter sampling times or smaller volumes, when necessitated by process variables or other factors, may be approved by the Administrator. Use Method 3 to determine the moisture content of the stack gas.

(ii) For Method 25A, the sampling time for each run shall be at least 1 hour. Instrument calibration shall be performed by the procedure given in Method 25A using the single VOC present in the capture system. A different calibration gas may be used if the results are corrected using an experimentally determined response factor comparing the alternative calibration gas to the single VOC used in the process. After the instrument has been calibrated, determine the background VOC concentration of the air drawn into the capture system immediately upwind of the application area for each run. The instrument does not need to be recalibrated for the background measurement. Subtract this reading from the reading obtained in the capture system for that run. The Method 25A results shall only be used in the alternative procedure for determination of capture efficiency described under § 60.543(f)(2)(iv)(G).

* * * * *

[FR Doc. 89-3388 Filed 2-13-89; 8:45 am]

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federal register

Tuesday
February 14, 1989

Part VIII

Department of Education

Office of Elementary and Secondary Education

34 CFR Part 222

Assistance for Local Educational Agencies in Areas Affected by Federal Activities and Arrangements for Education of Children Where Local Educational Agencies Cannot Provide Suitable Free Public Education; Final Rule

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education

34 CFR Part 222

Assistance for Local Educational Agencies in Areas Affected by Federal Activities and Arrangements for Education of Children Where Local Educational Agencies Cannot Provide Suitable Free Public Education

AGENCY: Department of Education.

ACTION: Final Regulations.

SUMMARY: The Secretary removes a regulatory provision, 34 CFR 222.95(d)(2) (53 FR 5556, February 24, 1988), promulgated under the Impact Aid law, Pub. L. 81–874 (the Act). That regulatory provision denies eligibility for funds under section 2 of the Act to a local educational agency (LEA) in a State with an equalized program of State aid meeting the requirements of section 5(d)(2) of the Act if that State, in allocating State aid, takes into consideration payments received by the LEA under section 2 of the Act. The Secretary removes this provision because of changes to the Impact Aid law made by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (the Hawkins-Stafford Amendments), enacted April 28, 1988. The removal is effective beginning with payments to be made from fiscal year (FY) 1988 Impact Aid funds.

EFFECTIVE DATE: This regulatory change takes place either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these final regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Hansen, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., Room 2079, Washington, DC 20202–6272. Telephone: (202) 732–3637.

SUPPLEMENTARY INFORMATION:

Background

Final Regulations governing eligibility and entitlement determinations under section 2 of the Impact Aid program (Pub. L. 81–874) were published in the **Federal Register** on February 24, 1988 (53 FR 5552). Section 222.95(d)(2) of the regulations provides, in effect, that an LEA in a State that has an equalized program of State aid qualifying under section 5(d)(2) of the Act is not eligible for section 2 assistance if the State takes into consideration the LEA's section 2 payments in determining that LEA's eligibility for or amount of State aid. (53 FR 5556). Prior to the publication of those regulations, a State certified under section 5(d)(2) could take into consideration any Impact Aid funds (except the additional funds paid for certain handicapped children, heavily-impacted school districts, or school districts with unusual geographical factors) with no penalty to either the State or its LEAs.

The Secretary now removes § 222.95(d)(2) of the regulations, because the Secretary interprets provisions in the Hawkins-Stafford Amendments as effectively nullifying the policy underlying that regulatory provision. First, in the Hawkins-Stafford Amendments, Congress overturned a policy embodied in a regulatory provision to which § 222.95(d)(2) was tied. Under the related provision, 34 CFR 222.100 (53 FR 5552, 5557–58) (February 24, 1988), the computation of the maximum section 2 payment was to be changed so that, beginning with FY 1988 payments, it would be based upon only the "unequalized" portion of an LEA's local real property tax rate.

Many states "equalize" part or all of the local real property tax rate, so that an LEA receives from the State the difference between a guaranteed State aid amount and its local real property tax revenues generated from a mandated tax levy. To the extent such equalization exists, when the Department uses the LEA's full tax rate to compute the section 2 maximum entitlement, the LEA arguably does not experience a revenue loss attributable to the Federal property because State aid compensates for any lack of property tax revenues. In that situation, a State's deduction of section 2 revenues under section 5(d)(2) of the Act justifiably would further the State's equalization efforts.

In order not to pay section 2 funds where State aid already compensates for a lack of property tax revenues, beginning with FY 1988 under the Department's regulations the section 2 maximum payment was to be based only on the unequalized portion of the LEA's tax rate, *i.e.*, the portion producing revenues not deducted from the State guarantee because they are raised voluntarily in addition to the required amount. The State's consideration of the section 2 funds, when thus calculated, would prevent those funds from compensating a true loss. The Department therefore provided in § 222.95(d)(2) of the regulations that if a State did consider the section 2 revenues in allocating State aid, the LEAs in that State would not be eligible for further section 2 payments. See 53 FR 552, 5562 (February 24, 1988).

In the Hawkins-Stafford Amendments, however, Congress specifically overturned the policy in § 222.100 regarding the calculation of the maximum section 2 payments, effective beginning with FY 1989 Impact Aid payments (Pub. L. 100–297, section 2013). Section 222.100 was effective beginning with FY 1988 funds and would therefore have been effective for only one fiscal year. As a result of the anticipated burden on States and LEAs of a one-year implementation, the Department suspended the use of the unequalized tax rate methodology for FY 1988. 53 FR 26772 (July 15, 1988). With the suspension of § 222.100, which provided the major rationale for § 222.95(d)(2), the basis for § 222.95(d)(2) is effectively eliminated.

Further, in the Hawkins-Stafford Amendments, Congress prohibited States certified under section 5(d)(2) of the Act from taking into consideration certain *other* Impact Aid payments. (Pub. L. 100–297, section 2015(f), amending section 5(d)(2) of Pub. L. 81–874). The omission of "section 2 payments" from the list of prohibited State deductions in the Hawkins-Stafford Amendments can be seen as evidence that Congress intended that "section 5(d)(2)" States be permitted to continue their consideration of section 2 funds.

Because the Hawkins-Stafford Amendments are effective for FY 1989 payments (see Pub. L. 100–351 (June 27, 1988)), while the regulations published on February 24, 1988, were effective for FY 1988, § 222.95(d)(2) could be implemented for FY 1988 payments. However, the Secretary is removing § 222.95(d)(2) of the regulations effective for payments from FY 1988 appropriations that have not been made as of the effective date of these final regulations. The application of this provision for only one year would cause fiscal disruption to LEAs and their States, as well as an administrative burden to States should they seek to avoid the penalty to their LEAs by readjusting their FY 1988 State aid payments so as not to consider section 2 funds. If, however, a State has already taken that action, the removal of the regulatory provision does not penalize the State or LEAs, but preserves for the State the choice of whether to consider section 2 funds in allocating State aid in any fiscal year.

The Department has not yet made any FY 1988 section 2 payments to LEAs in

States certified under section 5(d)(2) of the Act that would be affected by the provision. The removal of the provision for FY 1988 will therefore preserve the pre-existing status quo, under which "section 5(d)(2)" States are able to consider section 2 funds in allocating State aid.

Waiver of Notice of Proposed Rulemaking

In accordance with section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)), and the Administrative Procedure Act, 5 U.S.C. 553, it is the Secretary's practice to offer interested parties the opportunity to comment on proposed regulations. In this case, however, the Secretary interprets recent legislation (the Hawkins-Stafford Amendments) as overturning the policy in 34 CFR 222.95(d)(2), effective beginning with FY 1989 funding. The Secretary has determined that it would be administratively burdensome and fiscally disruptive to applicants and States to apply that regulatory provision for only one year, *i.e.*, to FY 1988 payments. It is important that the removal of the regulatory provision take effect immediately to enable the Secretary to make FY 1988 section 2 payments to the LEAs in affected States.

Removing the regulatory provision effective for FY 1988 payments would have the effect of allowing "section 5(d)(2)" States to continue deducting section 2 payments in allocating State aid and permitting eligible LEAs in those States to continue receiving their section 2 payments. The Secretary therefore anticipates that the removal of the provision will have no adverse impact on States or LEAs. Because this action is in accordance with the public comment received when this provision was published as a proposed regulation in 1987 (52 FR 16144, 16152 (May 1, 1987)), and is beneficial to applicants, the Secretary does not anticipate that any further comment period would provide the Department with additional information or new comments.

Therefore, the Secretary has determined that publication of a proposed rule is impracticable, unnecessary, and contrary to the public interest under 5 U.S.C. 553(b)(B).

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Regulatory Flexibility Act Certification

The Secretary has determined that these regulations will not have the type of impact on a sufficient number of small entities that would require analysis under the Regulatory Flexibility Act. The small entities that would be affected by these final regulations are small LEAs receiving Federal funds under this program. However, only those LEAs entitled to section 2 funds would be affected, and of those, LEAs in no more than three States would be affected, and only for FY 1988 payments.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

List of Subjects in 34 CFR Part 222

Education, Elementary and secondary education, Federally affected areas, Grant programs—education.

Dated: February 6, 1989.

Lauro F. Cavazos,

Secretary of Education.

(Catalog of Federal Domestic Assistance No. 84.041, School Assistance in Federally Affected Areas—Maintenance and Operations.)

The Secretary amends Part 222 of Title 34 of the Code of Federal Regulations as follows:

PART 222—ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES AND ARRANGEMENTS FOR EDUCATION OF CHILDREN WHERE LOCAL EDUCATIONAL AGENCIES CANNOT PROVIDE SUITABLE FREE PUBLIC EDUCATION

1. The authority citation for Part 222 continues to read as follows:

Authority: 20 U.S.C. 236–241–1 and 242–244, unless otherwise noted.

2. Section 222.95 is amended by revising paragraph (d) and the authority citation to read as follows:

§ 222.95 What constitutes a substantial and continuing financial burden?

* * * * *

(d) The Secretary determines that a substantial and continuing burden does not exist if the amount obtained in paragraph (b) of this section is zero or less.

(Authority; 20 U.S.C. 237(a)(2).)

[FR Doc. 89–3468 Filed 2–13–89; 8:45 am]

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INFORMATION AND ASSISTANCE

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LIST OF PUBLIC LAWS

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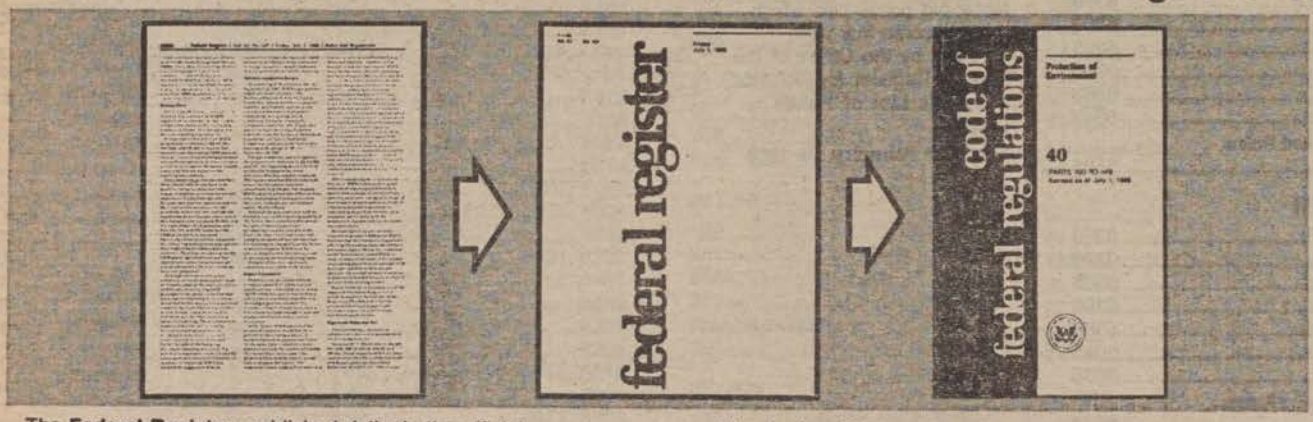

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