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

WHO: The Office of the Federal Register.

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

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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.

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

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WHEN: January 11, at 9:00 a.m.
WHERE: Centers for Disease Control
1600 Clifton Rd., NE.
Auditorium A
Atlanta, GA (Parking available)
RESERVATIONS: 1–800–347–1997.

WASHINGTON, DC

WHEN: January 24, at 9:00 a.m.
WHERE: Office of the Federal Register,
First Floor Conference Room,
1100 L Street NW., Washington, DC
RESERVATIONS: 202–523–5240

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Presidential Documents

Title 3—

The President

Presidential Determination No. 91–10 of December 27, 1990

Presidential Determination on Egyptian Foreign Military Sales (FMS) Debt

Memorandum for the Secretary of the Treasury and the Secretary of Defense

Section 592(d)(1) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991 (Public Law 101–513) (the "Act") authorizes me, notwithstanding any other provision of law, in the context of certain multilateral debt negotiations, to reduce to zero certain notes related to Egypt's FMS debt if other major holders of Egyptian military debt agree to equal or comparable reductions. I have concluded that such other creditors do not agree to comparable reductions in their military debt.

By virtue of the authority vested in me by section 592 of the Act, I hereby determine that it is essential to the national security interests of the United States to unilaterally cancel the requirement of Egypt to repay the United States for such Egyptian military debt; and that it is essential to the success of Desert Shield and to enhance peace and stability in the Middle East to reduce to zero the amounts described in section 592(e)(2) of the Act.

By virtue of the authority vested in me by the Constitution and laws of the United States of America, including section 592 of the Act, and section 301 of title 3 of the United States Code, I hereby delegate to the Secretary of Defense the functions under section 592(e)(2) of the Act, provided that the functions conferred by subparagraph (B) thereof shall be exercised by the Secretary of Defense in consultation with the Secretary of the Treasury.

The Secretary of the Treasury is authorized and directed to publish this determination in the **Federal Register**.

THE WHITE HOUSE,
Washington, December 27, 1990.

[FR Doc. 90–30632
Filed 12–31–90; 11:36 am]
Billing code 3195–01–M

Rules and Regulations

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 213, 317, 359, and 842

Senior Executive Service Recertification

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations on procedures governing the recertification of career appointees in the Senior Executive Service. These procedures implement section 506 of the Ethics Reform Act of 1989, which requires recertification every third year. The regulations are intended to assure consistency and fairness in the recertification process.

EFFECTIVE DATE: February 4, 1991.

FOR FURTHER INFORMATION CONTACT: Neal Harwood at 202–606–1610 (FTS 266–1610).

SUPPLEMENTARY INFORMATION: Under section 506 of the Ethics Reform Act of 1989 (Pub. L. 101–194, November 30, 1989), Senior Executive Service (SES) career appointees are subject to recertification by their agencies every third year, beginning in calendar year 1991. The Act adds a new section 3393a to title 5 of the U.S.C. The section states that recertification is intended "to ensure that the performance of career appointees demonstrates the excellence needed to meet the goals of the Senior Executive Service * * *."

On July 12, 1990, OPM published proposed regulations (55 FR 28632) to implement the provisions of the Act. The comment period, which was 30 days from the date of publication, ended on August 13, 1990. Comments were received from 29 agencies, the Small Agency Council, 42 individual executives or groups of executives, and the Senior Executives Association (SEA). The comments are summarized below, along with any changes in, or clarifications of, the proposed regulations. In acting on the comments, we took into account 5 U.S.C. 3393a(f), which provides that OPM "shall prescribe standards and procedures to ensure consistency and fairness for the process of recertification * * *."

Before addressing the comments on specific provisions of the regulations, we would like to take note of a number of comments requesting clarification of the relationship between the triennial recertification process and the annual performance appraisal process. We view the two processes as complementary. The annual appraisal looks at how well the executive has met the specific standards for his or her position for the year. The recertification process looks at the executive's performance over a period of several years. At the highest levels of Government management occupied by SES members, it often is not possible to fully judge the performance of an individual in as short a time span as one year since the impact of an executive's activities may not show up until a later time.

Comments on specific provisions of the proposed regulations follow.

(1) *Coverage.* Under proposed § 317.504(b)(1), recertification applied to any individual who was a career SES appointee as of the end of the recertification period and had been continuously employed in the SES for the preceding 156 weeks, including any service as an SES noncareer or limited appointee. Breaks in service totaling 6 months or less were not considered to interrupt the continuous service.

(a) One commentor recommended covering noncareer as well as career appointees. Such coverage is not provided in the law, and therefore noncareer appointees are not covered under the regulations. It should be noted, however, that noncareer appointees serve at the pleasure of the appointing authority and thus may be removed at any time if their performance does not show the excellence expected of SES appointees.

(b) Several commentors requested clarification of the status of career SES appointees who are on extended assignment or absence from their positions at the time of recertification (e.g., individuals on Presidential Executive Exchange Program or Intergovernmental Personnel Act assignments, extended sick leave, or leave without pay). Generally, as long as an individual is officially occupying an SES position as of the end of the recertification period as a career appointee and meets the length of service requirement, the individual is subject to recertification. Specific provisions on coverage will be included in the Federal Personnel Manual.

(c) One commentor wanted to know how the recertification process would be handled for former career SES appointees who elect to retain SES benefits while serving under Presidential appointments when they are reinstated as career SES appointees. Section 317.504(b)(2) provides that these individuals are not subject to recertification if they are on their Presidential appointments at the time of recertification. We will address this question in the coverage provisions in the Federal Personnel Manual.

(2) *When recertification takes place.* Under proposed § 317.504(c), the initial recertification determination could take place any time in CY 1991 as determined by the agency head. Future recertifications were to take place every third calendar year thereafter. If an individual transferred to another agency during CY 1991 before a recertification determination was made, a determination had to be made in the new agency.

(a) Under the proposed regulations, it was possible that some agencies would be considering performance ratings for the 1988, 1989, and 1990 appraisal periods, while other agencies would be considering the 1989, 1990, and 1991 periods, depending on whether the agency decided to make the recertification determination before or after the 1991 appraisal period ended. Several commentors recommended that all agencies be required to set their recertification periods so as to include the 1991 appraisal period. One commentor pointed out that using the appraisal period ending in 1988 would cover performance back to 1987 and argued that it would be inappropriate to reach that far back, particularly if the determination is to conditionally recertify or to not recertify an executive. It also argued that the most important appraisal will be the one in 1991 since it

"is the first opportunity of the employee to have some idea of any new expectations which are set forth in either OPM's or his/her agency's (procedures) on the recertification process." One of the factors that OPM is required to consider under the law in issuing regulations on the recertification process is consistency in agency actions, and we agree that in this instance agencies should be considering the same rating periods. Therefore, we have amended the regulations to require that agencies in setting their recertification periods provide for consideration of the 1991 performance ratings of their executives. An exception may be provided by OPM if necessary, e.g., if the agency's performance appraisal period ends on December 31, 1991.

(b) One commentor wanted to know whether the recertification process is delayed by the appointment of a new agency head or noncareer supervisor. The answer is no, except that under 5 U.S.C. 3592 and 5 CFR 359.303, the effective date of a removal action from the SES of someone who failed to be recertified could not be within 120 days of the appointment of the new agency head or a noncareer supervisor who has the authority to remove the individual.

(c) Several commentors suggested that a minimum period (e.g., 3 or 6 months) be set before a new agency could make the recertification determination of an individual who transferred from another agency. We have not established a specific period since the law requires that the determination be made during CY 1991, and a specific waiting period could defer the determination to the next year. If the agency has sufficient information to make a decision on hiring the individual, it also should have sufficient information to make the decision on whether to recertify the individual. The old agency should provide the new agency with all necessary relevant information on the executive's performance during the recertification period, in addition to performance ratings completed by the agency.

(d) Several commentors asked what happens to individuals who are not subject to recertification in CY 1991 because they do not have 156 weeks of continuous SES service, i.e., whether recertification occurs after 156 weeks or not until the next triennial process. Under the law, recertification offers only every third calendar year. Therefore, the individuals would not be subject to recertification until CY 1994.

(3) *Conducting the recertification process.* As we indicated in the Supplementary Information to the proposed regulations, an agency may wait until the 1991 annual appraisal process is completed (i.e., the appointing authority has given the final summary rating for the appraisal year ending in 1991) before beginning the recertification process, or the agency may conduct the two processes concurrently. The Supplementary Information noted:

> In the latter case, the supervising official could recommend a 1991 annual rating and recommend whether the executive should be recertified at the same time; and the same Performance Review Board could consider both recommendations. The appointing authority would then give the final summary rating for 1991 and recommend to the agency head whether the executive should be recertified.
>
> Concurrent consideration is being permitted because the appraisal period for many agencies will end on September 30, 1991, which will leave only 3 months to complete both the appraisal and recertification processes. Agencies will need to make clear in their procedures, however, that the two processes are separate and that different factors are considered in each of the processes. To help make this clear, recertification recommendations and determinations should be separately documented from the documentation used for the performance appraisals.

(4) *Standard for recertification.* Proposed § 317.504(d) listed four specific criteria under the standard for determining "excellence" of performance and stated that agencies were allowed to add further criteria on their own.

(a) A number of commentors recommended that it be made clear that (1) the term "excellence" in the regulations has no direct relationship to the annual performance rating level of "excellent" used in some agencies (otherwise, as one commentor pointed out, there could be increased pressure put on officials to inflate performance ratings), and (2) an individual does not necessarily have had to receive annual ratings above Fully Successful to be recertified. We agree with these comments and will include the clarifications in our Federal Personnel Manual instructions.

(b) Some commentors suggested eliminating the criteria entirely and letting each agency establish its own standard. Two commentors suggested substituting the criteria in 5 U.S.C. 3131(2), e.g., timeliness of performance. We believe there is a need for some Governmentwide criteria so that there is a degree of consistency across agency lines in the recertification process. We have not adopted the suggestion to use the 5 U.S.C. 3131(2) criteria, however, because those criteria are the same as the criteria in 5 U.S.C. 4313 for the annual performance appraisal; and we want to show the separate nature of the recertification process.

(c) Several commentors suggested that other criteria be added to the four in the proposed regulation, such as managing programs within reduced budget levels and making significant technical contributions. Other commentors recommended clarifying the relationship between the four criteria under the standard and the six criteria under "Other relevant factors" in proposed § 317.504(e)(1)(iv) for determining whether the standard is met. They noted, for example, that delivering services and advancing the development of staff members appeared as criteria under both sections. We have expanded the criteria in the final regulations by adding appropriate criteria from "Other relevant factors" in proposed § 317.504(e)(1)(iv) and other appropriate criteria suggested by commentors, so that there are now seven criteria.

(d) A number of commentors raised the question whether the criteria under the standard were mandatory, i.e., whether an executive had to meet each of the criteria to demonstrate the excellence needed to satisfy the standard. They expressed concern that all the criteria may not necessarily be pertinent to each SES job. In the final regulations, the first four criteria under the standard are mandatory, i.e., in determining whether an executive has demonstrated excellence under the standard, the agency will have to consider each of these criteria. We believe the four criteria are broad enough so that they should be applicable to all SES positions. (For example, the second criterion on taking specific initiatives that advanced a "major policy" could also include specific initiatives that advanced a major program or project implementing the policy.) The other three criteria are to be applied, as appropriate, if they relate to the executive's position.

(e) Agencies still may include additional criteria of their own based on their unique missions and relevancy to the work performed by their executives, if provided in the agency's written recertification procedures.

(5) *Factors considered and recommendation of the supervising official.* Proposed § 317.504(e)(1) stated that the recommendation of the supervising official whether to recertify an executive was to be based on the following four factors: performance ratings in the SES for the 3 preceding years, awards and other recognition, developmental activities, and other relevant factors. It is not the intent that

the executive must meet all four factors to be recertified. Rather, all four factors should be considered to the extent they are related to the executive's overall performance during the 3 preceding years. It is also not intended that all four factors must receive equal weight. It is up to the agency to determine how to weigh the factors.

(a) The following clarifications of the individual factors are made in response to the comments received:

(i) The appointee's performance ratings in the SES for the 3 preceding years. As with annual performance appraisals, there is no specific length of time established in law or regulation that an official must serve as an executive's supervisor before making a recertification determination. The official, however, should try to be fully cognizant of the executive's record. In addition to the executive's summary performance ratings, the full appraisal may also be reviewed if necessary to make an informed judgment on the executive.

(ii) *Awards and recognition.* Presidential rank awards and other awards recognizing performance over a period of years (e.g., election to the National Academy of Sciences, Engineering, or Medicine) that are received during the recertification period may be considered even though some of the achievements recognized may have occurred before the recertification period. On the other hand, a performance award received in CY 1991 after the end of the recertification period may also be considered if it recognizes performance that took place during the period.

(iii) *Developmental activities.* These could include professional, educational, or self-developmental activities. Several commentors pointed out that the extent to which an executive participates in developmental activities depends in part on the stage of the executive's career. A long-time executive may have participated in many developmental activities in the past and thus during the period under consideration will have a need for a lesser degree of participation than a relatively new executive. This should be taken into account by the agency. The agency should also take into account the funding that was available for training and developmental purposes during the period.

(iv) *Other relevant factors.* Six specific criteria were listed under this factor in the proposed regulations. Some commentors stated that not all of the criteria were related to each SES job. Some suggested additional criteria, such as whether there were extenuating circumstances affecting an executive's performance (e.g., extended sick leave or programs being curtailed because of budgetary restrictions). Some pointed out an overlap between the criteria under other relevant factors and the criteria under the standard for recertification. As discussed in paragraph 4(c) above, because of this overlap, we have combined certain of the criteria under other relevant factors with the criteria under the standard for recertification. The other criteria have been deleted, so that agencies may determine on their own what other relevant factors to use based on their missions and the nature of their SES positions. The factors the agency plans to use must be included in the agency's written recertification procedures and must be qualitative in nature.

(b) Several commentors noted that the recertification law at 5 U.S.C. 3393a(b) states that the determination of excellence is to be made "in relation to the written performance requirements for the career appointee's senior executive position as established under section 4312(b)." We have revised the regulations to note this relationship.

(6) *Prohibition on automatic recertification.* The Supplementary Information to the proposed regulations stated that since the recertification determination was to consider overall performance for the executive for a 3-year period and was to be based on a number of different factors, an agency's procedures could not provide that an executive would be automatically recertified or not recertified based on a single factor. Several commentors suggested that agencies be allowed to provide automatic recertification based on varying combinations of performance ratings, e.g., if all ratings at Fully Successful or higher, or if all ratings above Fully Successful. We still believe, however, that the recertification decision should be based on whether the executive has affirmatively demonstrated during the preceding 3 years the excellence expected of a senior executive based on all the factors under consideration; and therefore automatic determinations are not permitted under the regulations.

(7) *Recommendation by the Performance Review Board.* (a) Proposed § 317.504(f)(1) stated that more than one-half of the members of the Board had to be SES career appointees, unless OPM determined that there exists an insufficient number of career appointees available to comply with this requirement. A number of commentors recommended eliminating the exception. The recertification law at 5 U.S.C. 3393a(b) states that the supervising official of an executive "shall submit to a performance review board established by the agency under section 4314" a recommendation whether to recertify the executive. 5 U.S.C. 4314 provides for the establishment of PRBs for the review of annual performance ratings of SES members and contains the same exception as in the regulation. OPM has not to this time granted an exception under 5 U.S.C. 4314 since generally there are means, as noted by the commentors, to assure a career majority on boards even in small agencies (e.g., by borrowing career members from another agency or using an interagency board); and we do not anticipate approval of any exception for boards acting on recertification recommendations. In view of the statutory provision in 5 U.S.C. 4314, however, we are maintaining the authority for the exception in the regulation.

(b) Several commentors recommended that Board members be required to be at the same SES level or higher than the executives being evaluated. We do not have a similar requirement when Boards are acting on annual performance ratings and have not provided such a requirement for recertification. As with annual performance ratings, however, we have provided that Board members may not participate in discussions or act on their own recertification recommendation.

(c) There were several recommendations to spell out what the procedures for appearance before the Board would involve, such as the time the executive should have to prepare for his or her appearance and the use of secret ballots in Board actions. We believe that these matters are best left to each agency's determination in its written recertification procedures.

(8) *Recertification determination.* (a) Two commentors recommended that the regulations explicitly state that agencies may not establish quotas as to the number of individuals to be conditionally recertified or not recertified. We agree, since the recertification determination is to be based on each executive's own performance, and have put such a statement in § 317.504(h)(1).

(b) One commentor raised the question whether the agency head was bound by the recommendation of the Performance Review Board. As indicated in § 317.504(h), the final decision on the recertification determination is that of the agency head or his or her designee, although it is expected that the recommendation of the Board will be give due consideration.

(9) *Determinations in CY 1991.* (a) Several commentors expressed concern about judging individuals in CY 1991 on standards that were not in effect during the full three-year recertification period. One said, "the executive did not know [during the period] that he was expected to do these particular things or achieve these particular objectives." Another said, "If a fully successful appraisal was the minimum requirement to remain in the SES in 1988 and 1989 then we cannot retroactively change it."

(b) It must be kept in mind that the annual appraisal and recertification are two separate processes. Congress in passing the recertification law decided law decided that retention in the SES would be dependent not just on the annual rating of the executive, but also on whether the executive's overall performance for a 3-year period "demonstrates the excellence needed to meet the goals of the Senior Executive Service." Congress also decided that the first determination would be made in CY 1991. Within that context, we have adopted standards in § 317.504(d) that we believe are broad enough to encompass the activities of all executives. Further, the regulations provide in § 317.504(e)(2) that the supervising official shall apply these standards in relation to the written performance requirements for the executive's position; and these requirements have been known to the executive. Finally, there is an appeal right to the Merit Systems Protection Board if an executive believes the law or the regulations are being improperly applied.

(10) *Decision to recertify.* (a) Two commentors objected to the provision in proposed § 317.504(h)(2) that an executive's rate of basic pay may not be reduced at the time of recertification if the executive is recertified. That restriction is in 5 U.S.C. 3393a(e)(1).

(b) Two commentors asked about increasing pay. Under § 317.504(f)(4), if a Performance Review Board recommends that an executive be recertified, it may also recommend an increase basic pay. The decision whether to grant the pay increase is made by the appointing authority in accordance with the procedures for adjusting SES pay in § 534.401(c).

(11) *Decision to conditionally recertify.* (a) Under 5 U.S.C. 3393a(e)(2), the agency head may reduce the pay of an executive who is conditionally recertified to the next lower rate (e.g., from ES–5 to ES–4). If the executive is later recertified, the executive's pay is restored to the former rate on a prospective basis. Proposed § 317.504(h)(3) provided that any pay reduction or restoration could take place only after the executive has been at the current rate of pay for 12 months. One commentor suggested that pay reduction be permitted immediately upon conditional recertification, and another commentor suggested that pay restoration be permitted immediately upon a recertification determination, irrespective of how long the executive had been at his current pay rate. However, under 5 U.S.C. 5383(c), which contains the general rules for setting individual senior executive pay, an executive's pay may be adjusted only once every 12 months; and since there is no specific exception in the recertification law to this provision, we have retained the 12-month requirement in the proposed regulation.

(b) Several commentors recommended that there be an appeal right to the Merit Systems Protection Board for someone who is conditionally recertified. The law does not provide such a right. If the individual after the one-year improvement period is denied recertification, an appeal right would exist at that time.

(c) Several commentors raised questions about the nature of the performance improvement plan that is to be approved by the Executive Resources Board. One commentor recommended that the Performance Review Board also be allowed to review and approve the plan. This is allowed if provided in the agency's recertification procedures. One commentor suggested that the plan should be similar to that for PMRS employees, i.e., a description of the deficiencies in the executive's performance and what constitutes satisfactory completion of the plan. Another commentor recommended that executives be provided support and assistance by their supervisor and agency in meeting the requirements of the plan, that the executive be given periodic progress reviews, and that the plan conform with the performance standards which the individual is required to attain during the period. We believe these are all good suggestions and will incorporate them in the Federal Personnel Manual instructions.

(d) A question was raised in the comments whether an executive could be conditionally recertified a second time after the one-year improvement period. The answer is no. 5 U.S.C. 3393a(e)(2)(D) explicitly states that an individual "shall be removed from the Senior Executive Service if * * * not recertified as a senior executive at the end of the 12-month period following the conditional recertification."

(12) *Decision to not recertify.* (a) Several commentors suggested that the regulations provide a stay of the removal action for an individual who is not recertified and appeals to the Merit Systems Protection Board until the Board acts. Provision for a stay is not in the law and is not applicable to other removal actions affecting SES members, whether for conduct or for performance reasons. Therefore, the regulations have not been changed.

(b) Under revised 5 CFR part 359, subpart G, an individual removed from the SES for failure to be recertified is guaranteed fallback to no lower than GS–15, or equivalent, with no loss in pay. The Schedule B appointing authority in 5 CFR 213.3202(m) has been amended to include individuals entitled to recertification fallback who do not have reinstatement eligibility in the competitive service, as is currently provided in the section for career appointees removed from the SES for performance reasons or because of a reduction in force.

(c) Under 5 U.S.C. 8336(h)(1) for CSRS and 5 U.S.C. 8414(a)(1) for FERS, an individual removed for failure to be recertified may elect discontinued service retirement (DSR) in lieu of fallback if otherwise eligible, i.e., is age 50 with 20 years of service or is any age with 25 years of service. If the individual is subject to CSRS, under 5 U.S.C. 8339(h) there is no annuity reduction based on age. If the individual is subject to FERS, under 5 U.S.C. 8421(a)(2) and 5 CFR 842.503(b)(4) the individual is eligible for an annuity supplement regardless of age. Several commentors questioned the different retirement treatment for individuals who are not recertified, compared with individuals otherwise eligible for DSR; but this difference is provided in section 506(b) of Public Law 101–194.

(d) Under proposed § 317.702(a), an individual formally removed from the SES for failure to be recertified did not have SES reinstatement eligibility and thus had to compete to obtain another SES career appointment. One commentor recommended allowing reinstatement, but that is prohibited by 5 U.S.C. 3593(a)(2), as amended by Public Law 101–194. Another commentor asked whether reinstatement would be permitted if there was a recommendation not to recertify the executive, but the executive resigned before the final determination was made. In that case, the law and regulation do not prohibit reinstatement eligibility.

(e) One commentor opposed the requirement under proposed § 317.502(e) that an individual's qualifications must be reapproved by a Qualifications

Review Board (QRB) before the individual may receive a new SES career appointment following removal from the SES for failure to be recertified. The proposed regulation provided that any individual who completed an SES probationary period and was removed for a reason that made the individual ineligible for reinstatement to the SES as a career appointee, including removal for failure to be recertified, must be reapproved by a QRB before receiving a new SES career appointment. We believe that this is an appropriate requirement to assure that the individual now has the qualifications to achieve excellence in performance in the SES and have retained it. Specific instructions to agencies for submitting these cases to the QRB will be provided in the Federal Personnel Manual.

(13) *Deciding official.* Proposed § 317.504(h)(6) stated that the decision to conditionally recertify, or to not recertify, an executive must be made by the agency head, the deputy agency head, or the head of a major operating unit within a department. (Note that the provision on head of a major operating unit applies only to a cabinet or military department.) Comments were received to define "major operating unit;" to allow the agency head to designate some other official to make the decision when the head of a major operating unit reports to another official, such as an Assistant Secretary; and to require that the decision not to recertify be made only by the agency head or deputy agency head. A major operating unit is a bureau, major command, directorate, or other major subdivision of a department. We believe these delegations retain the decision at a high enough level so we are not requiring in the regulation that the decision be made by the agency head or deputy agency head, although departments in their own procedures may so require. We are providing that departments may designate an official between the head of a major operating unit and the head of the department to make the decision. We are also providing, however, that a determination to conditionally recertify, or to not recertify, an executive may be made by the head of a major operating unit or other official only if that official is the appointing authority or an official at a higher level than the appointing authority.

(14) *Procedural aspects.* (a) Under proposed § 317.504(i), a written reason had to be provided for any recommendation or decision to conditionally recertify or to not recertify an executive. If such a reason was already in the recertification record (e.g., it was prepared by the supervising official when making his or her recommendation), later reviewers could concur without providing additional written reasons. A variety of comments were received on how specific the reasons should be and whether a higher level reviewer should indicate which reasons he agrees with and which he does not. The reasons should be specific enough so that the executive will be able to understand why the action was taken and adequate to support an agency's case if the executive appeals a removal action. If a higher level reviewer disagrees with any reasons already on the record, or has additional reasons, it is expected that the reviewer will so indicate.

(b) One commentor suggested that if the supervising official and Performance Review Board both recommend recertification, but the appointing authority or agency head is considering conditionally recertifying or not recertifying the executive, the executive should have an opportunity to make a personal presentation to the official since the executive would not have had an opportunity to appear before the Board. The only personal appearance provided in the law is that before the Board. Agencies may provide in their recertification procedures, however, that in this type of situation an executive will be given an opportunity to make a presentation in writing and/or in person, as prescribed in the procedures, before action is taken by the official.

(15) *Issuance of agency procedures.* (a) Proposed § 317.504(j)(1) provided that agencies had to issue their recertification procedures in the **Federal Register** first as proposed regulations with a comment period and then as final regulations. As with other regulations, both the proposed and final recertification regulations would require review and clearance by the Office of Management and Budget prior to issuance. All 17 agencies commenting on this provision, as well as the Small Agency Council, opposed **Federal Register** publication as imposing an unnecessary administrative and financial burden on agencies, especially small ones; delaying the issuance of procedures and thus shortening the time available for training and implementation (the law requires all recertification actions to take place in CY 1991); and making future modifications in the procedures, even minor ones, more difficult. The agencies pointed out that such publication is not required for any of their other SES procedures.

(b) We have revised the regulations to provide, as several agencies suggested, that in lieu of **Federal Register** publication, OPM will review and approve the recertification procedures before implementation as it currently does for performance appraisal procedures. Since the recertification procedures will not be published as proposed regulations for comment, agencies should provide copies of draft procedures to all their SES members, hold workshops with a representative sample of members to draft and/or review the procedures, or use other appropriate means to assure that there is member input before the final procedures are issued. Proposed agency procedures should be submitted to OPM within 90 days of publication of the final regulations for review and approval unless OPM provides for a longer period. Copies of the final procedures still must be provided OPM and all agency executives.

(16) *Training on the recertification process.* Proposed § 317.504(j)(2) provided that under guidelines issued by OPM, each agency had to provide for a program to train executives who supervise SES career personnel. The purpose of this training is to make clear the objectives and procedures of the recertification process. A number of commentors suggested that the regulations require training for all SES members. We agree that all executives should be informed and oriented about the recertification process. The regulation, however, is concerned about the more formal training needed for those who are responsible for actually making recertification recommendations or determinations. We have amended the regulations, however, to require, as suggested by one commentor, training for Performance Review Board members.

In addition to regulations, OPM will also provide guidance for implementation of the recertification process through the Federal Personnel Manual system.

E.O. 12291, Federal Regulation

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

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will only affect Government employees who are members of the Senior Executive Service.

List of Subjects

5 CFR Part 213

Government employees.

5 CFR Part 317

Government employees.

5 CFR Part 359

Administrative practice and procedure, Government employees.

5 CFR Part 842

Administrative practice and procedure, Government employees, Retirement.

U.S. Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM is amending 5 CFR part 213, 5 CFR part 317, 5 CFR part 359, and 5 CFR part 842 as follows:

PART 213—EXCEPTED SERVICE

1. The authority for part 213 continues to read as follows:

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; § 213.101 also issued under 5 U.S.C. 2103; § 213.102 also issued under 5 U.S.C. 1104. Pub. L. 94–454, sec. 3(5); § 213.3102 also issued under 5 U.S.C. 3301, 3302 (E.O. 12364, 47 FR 22931), 3307, 8337(h), and 8457.

2. In section 213.3202, paragraph (m) introductory text, paragraph (m)(1) introductory text, and paragraphs (m)(1)(i) and (iii) are republished; and paragraph (m)(1)(ii) is revised to read as follows:

§ 213.3202 Entire executive civil service.

* * * * *

(m) Positions when filed under any of the following conditions:

(1) Appointment at grades GS–15 and above, or equivalent, in the same or a different agency without a break in service from a career appointment in the Senior Executive Service (SES) of an individual who:

(i) Has completed the SES probationary period;

(ii) Has been removed from the SES because of less than fully successful executive performance, failure to be recertified, or a reduction in force; and

(iii) Is entitled to be placed in another civil service position under 5 U.S.C. 3594(b).

* * * * *

PART 317—APPOINTMENT, REASSIGNMENT, TRANSFER, AND REINSTATEMENT IN THE SENIOR EXECUTIVE SERVICE

3. The authority for part 317 is revised to read as follows:

Authority: 5 U.S.C. 3392, 3393, 3393a, 3395, 3397, 3593, and 3595.

4. Under subpart E, paragraph (e) is added to § 317.502 and § 317.504 is added to read as follows:

Subpart E—Career Appointments

§ 317.502 Qualifications Review Board certification.

* * * * *

(e) A new QRB certification is required for an individual to be reappointed as an SES career appointee following separation of the individual from an SES career appointment if:

(1) The individual was removed during the SES probationary period for performance or disciplinary reasons; or

(2) The individual completed an SES probationary period, or did not have to serve one, and was removed for a reason that made the individual ineligible for reinstatement to the SES under subpart G of this part.

* * * * *

§ 317.504 Agency recertification.

(a) *General.* (1) Section 3393a of title 5, U.S.C., provides that each career SES appointee shall be subject to recertification by his or her employing agency "to ensure that the performance of career appointees demonstrates the excellence needed to meet the goals of the Senior Executive Service as set forth in section 3131 * * *."

(2) For purposes of this section, "agency" is an executive agency as defined in 5 U.S.C. 105 or a military department as defined in 5 U.S.C. 102.

(b) *Coverage.* (1) This section covers SES career appointees who have been continuously employed in the SES for the 156 weeks preceding the end of the recertification period. One or more breaks in SES service of a total of 6 months or less do not interrupt the 156 weeks of continuous employment.

(2) This section does not apply to SES noncareer, limited emergency, or limited term appointees. It also does not apply to former SES career appointees who took Presidential appointments with Senate confirmation and elected to retain SES benefits under subpart H of this part.

(c) *When recertification takes place.* (1) The initial recertification shall take place in calendar year 1991. Future recertifications shall take place every 3rd calendar year thereafter.

(2) The agency head shall determine when in the calendar year recertification shall take place and shall establish a date for calculating the 156-week employment period. Recertification may take place at different times during the calendar year for different components within the agency. For recertification actions in calendar year 1991, agencies must consider performance during the annual performance appraisal period ending in calendar year 1991 unless an exception is granted by OPM.

(3) If an individual is recertified in one agency and then transfers to another agency during the calendar year, the individual is not subject to recertification in the new agency. If an individual transfers to another agency during the calendar year and no recertification decision was made in the old agency, a recertification decision must be made in the new agency.

(d) *Standard for recertification.* (1) To be recertified, the career appointee must perform at the level of excellence expected of a senior executive. Excellence means that the executive has demonstrated over the recertification period that he or she has achieved excellence in:

(i) Planning for, substantially advancing, and attaining Presidential, agency, or organizational goals and objectives that required a sustained superior effort;

(ii) Taking specific initiatives that advanced a major policy and/or significantly improved delivery of services;

(iii) Taking the necessary actions to ensure the achievement of a quality product in a timely manner;

(iv) Making significant technical, scientific, or professional contributions; and, as appropriate

(v) Achieving substantial savings in the execution of programs under his or her direction;

(vi) Maintaining the high quality and effectiveness of a program under his or her direction with reduced resources; and/or

(vii) Providing strong leadership to enhance the development, utilization and achievements of subordinate personnel, including achievement of equal employment opportunity goals.

(2) Agencies may add other criteria, as appropriate, in their written recertification procedures.

(e) *Recommendation by the supervising official.* (1) The supervising official of the career appointee shall submit to an agency Performance Review Board established under 5 U.S.C. 4314 a written recommendation whether the career appointee's performance justifies recertification as a senior executive. The recommendation shall be based on the executive's overall performance over the 3 preceding years in relation to the standard for recertification in paragraph (d), including consideration of such factors

as the career appointee's performance ratings, any award or other recognition received by the appointee, any developmental activities of the appointee, or other relevant qualitative factors.

(2) The recommendation shall reflect the official's view whether the appointee's overall performance for the preceding 3 years has demonstrated the excellence expected of a senior executive as defined in paragraph (d) of this section in relation to the written performance requirements for the career appointee's senior executive position.

(3) The appointee shall be given a copy of the recommendation and advised of the right to submit to the Performance Review Board a statement of accomplishments and other documentation giving evidence of the quality of the appointee's performance in relation to the standards set forth in paragraph (d) of this section.

(f) *Recommendation by the Performance Review Board.* (1) More than one-half of the members of the Board shall consist of SES career appointees, unless OPM determines that there exists an insufficient number of career appointees available to comply with this requirement. Board members may not take part in any deliberations or actions regarding recommendations on their own recertification.

(2) After receiving the recommendation of the supervising official and any information provided by the career appointee under paragraph (e)(3) of this section, the Board shall submit to the appointing authority a recommendation whether the appointee should be recertified, conditionally recertified, or not recertified for continued employment as a senior executive in the SES.

(3) If the Board proposes to recommend conditional recertification or non-recertification, the appointee shall be notified in writing and shall have the opportunity to appear before the Board prior to the forwarding of the recommendation to the appointing authority.

(4) If the Board recommends recertification, it may also recommend that the appointee's rate of basic pay be increased to a higher rate under 5 U.S.C. 5382. If the Board recommends conditional recertification, it may also recommend that the appointee's rate of basic pay be reduced to the next lower rate under 5 U.S.C. 5382.

(5) In addition to its recommendation, the Board shall also provide the appointing authority the recommendation from the supervising official and any information received from the appointee under paragraph (e)(3) or paragraph (f)(3) of this section.

(6) If the appointing authority is also the agency head, the recommendation of the Board shall go directly to the individual as the agency head.

(g) *Recommendation by the appointing authority.* (1) If the appointing authority determines that the appointee's performance during the 3 preceding years demonstrates the excellence expected of a senior executive, the appointing authority shall recommend to the agency head that the appointee be recertified as a senior executive.

(2) If the appointing authority determines that the appointee's performance has not demonstrated the excellence expected of a senior executive, the appointing authority shall recommend to the agency head that the appointee be conditionally recertified or not be recertified.

(h) *Determination by the agency head.* (1) The agency head shall determine whether the appointee shall be recertified, conditionally recertified, or not recertified as a senior executive. An agency may not prescribe a distribution of how many or what percentage of executives will be recertified, conditionally recertified, or not recertified.

(2) If the agency head determines that the appointee's performance warrants recertification, the appointee shall continue in the SES. Further, the appointee's rate of basic pay may not be reduced at the time of recertification.

(3) If the agency head determines that the appointee's performance warrants conditional recertification, the appointee:

(i) Shall remain a career appointee in the SES;

(ii) Shall be subject to continuing close review of the appointee's performance by the supervising official in coordination with an Executive Resources Board established under 5 U.S.C. 3393, in accordance with a performance improvement plan developed by the supervising official and subject to the approval of the Executive Resources Board;

(iii) May, if the agency head so determines, be reduced to the next lower rate of basic pay established under 5 U.S.C. 5382, once 12 months have elapsed since the appointee's last pay adjustment, in accordance with § 534.401(c) of this chapter;

(iv) Shall be removed from the SES if not recertified at the end of the 12-month period following the conditional recertification; and

(v) Shall be retained in the SES if recertified at the end of the 12-month period following the conditional recertification and shall have any reduction in basic pay made under paragraph (h)(3)(iii) of this section restored as of the beginning of the first pay period following recertification when 12 months have elapsed since the pay reduction.

(4) The process for determining whether to recertify at the end of the 12-month period an individual who has been conditionally recertified shall be the same as for the initial recertification decision, including review and recommendation by a Performance Review Board.

(5) If the agency head determines that the appointee's performance does not warrant recertification or conditional recertification, the appointee shall be removed from the SES in accordance with 5 U.S.C. 3592 and part 359, subpart C, of this chapter.

(6) The decision to recertify a senior executive may be delegated by the agency head, but no lower than the appointing authority. The decision to conditionally recertify, or to not recertify, a senior executive must be made by the agency head, the deputy agency head, or the head of a major operating unit within a department; but the individual designated may not be at a lower level than the appointing authority. The agency's written recertification procedures must indicate who is to make the decision.

(i) *Procedures.* Written reasons must be provided for any recommendation or decision to conditionally recertify or to not recertify a career appointee.

(j) *Agency responsibilities.* Each agency that has career appointees subject to recertification:

(1) Shall develop written recertification procedures in consultation with its career appointees, shall have the procedures reviewed and approved by OPM before the recertification process is initiated, and shall provide its senior executives and OPM a copy of the final procedures upon issuance and upon any change;

(2) Shall provide for a program, under guidelines issued by OPM, to train its executives who supervise SES career personnel, and members of Performance Review Boards who will be making recertification recommendations, in the objectives and procedures of the recertification process;

(3) Shall maintain such records as OPM may require;

(4) Shall report to OPM such information as OPM may request relating to recertification actions or the training of SES supervisors; and

(5) Shall take such corrective action as may be directed by OPM if OPM finds that the agency's written procedures, or any actions taken by the agency, are contrary to law or regulation.

5. In § 317.702 of subpart G, paragraph (a) introductory text and paragraph (a)(1) are republished, and the first sentence of paragraph (a)(2) up to the first semi-colon is revised to read as follows:

Subpart G—SES Career Appointment by Reinstatement

§ 317.702 General reinstatement: SES career appointees.

(a) *Eligibility for general reinstatement.* A former SES career appointee who meets the following conditions is eligible for reinstatement under this section:

(1) The individual completed an SES probationary period under a previous SES career appointment or was exempted from that requirement; and

(2) The individual's separation from his or her last SES career appointment was not a removal under subpart C of part 359 of this chapter for failure to be recertified as a senior executive; or a removal under subpart E of part 359 of this chapter for less than fully successful executive performance; * * *

* * * * *

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT IN OTHER PERSONNEL SYSTEMS

6. The authority citation for part 359 continues to read as follows:

Authority: 5 U.S.C. 1302 and 3596, unless otherwise noted.

7. Subpart C, which was formerly reserved, is added to read as follows:

Subpart C—Removal of Career Appointees for Failure To Be Recertified

Sec.

359.301 Coverage.
359.302 Notice requirements.
359.303 Restrictions.
359.304 Appeals.

Subpart C—Removal of Career Appointees for Failure To Be Recertified

§ 359.301 Coverage.

(a) This subpart covers a career appointee who has failed to be recertified under § 317.504 of this chapter.

(b) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

§ 359.302 Notice requirements.

(a) The agency shall notify the career appointee in writing before the effective date of the action. If the appointee has completed the SES probationary period, or was not required to serve a probationary period, the notice shall be at least 30 calendar days before the effective date of the removal.

(b) The notice shall advise the appointee of:

(1) The basis for the action;

(2) The appointee's placement rights under subpart G of this part—the position to which the appointee will be assigned shall be identified either in the advance notice or in a supplementary notice issued no later than 10 calendar days before the effective date of the action;

(3) The appointee's right to appeal to the Merit Systems Protection Board, including the time limit for appeal and the office to which an appeal should be sent;

(4) The effective date of the removal; and

(5) When applicable, the appointee's eligibility for immediate retirement under 5 U.S.C. 8336(h) or 8414(a).

§ 359.303 Restrictions.

(a) Removal from the SES under this subpart may not be made effective within 120 days after—

(1) The appointment of a new agency head; or

(2) The appointment in the agency of the career appointee's most immediate supervisor who—

(i) Is noncareer appointee; and

(ii) Has the authority to remove the career appointee.

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, and appointee in a position filled by Schedule C or noncareer executive assignment, or an appointee in Executive Schedule or equivalent position other than a career Executive Schedule or equivalent postition.

§ 359.304 Appeals.

Removal under this subpart is appealable to the Merit Systems Protection Board under 5 U.S.C. 7701. Under 5 U.S.C. 7701(c)(1)(A), the decision of the agency shall be sustained if it is supported by substantial evidence, which is defined in the Board's regulations at 5 CFR 1201.56(c). The burden is on the agency to show that there is substantial evidence to support its action. Once such substantial evidence is demonstrated, the burden shifts to the appellant to refute the agency's case that there was substantial evidence or to make a demonstration under 5 U.S.C. 7701(c)(2).

8. In subpart D, § 359.401 is revised to read as follows:

Subpart D—Removal of Career Appointees During Probation

§ 359.401 General exclusions.

This subpart does not apply to the removal of a career appointee during probation when—

(a) The action is initiated under 5 U.S.C. 1206(g) or 5 U.S.C. 7542;

(b) The removal is effected under subpart C of this part for failure to be recertified; or

(c) The appointee is a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

9. In § 359.701 subpart G, the introductory text is republished, paragraph (a) introductory text and paragraph (b) are revised, and paragraph (c) is removed to read as follows:

Subpart G—Guaranteed Placement

§ 359.701 Coverage.

This subpart covers career appointees, other than reemployed annuitants, who are removed from the SES under any of the following conditions:

(a) Removal during the probationary period under subpart C of this part or under subpart D of this part for other than misconduct, neglect of duty, malfeasance, or other disciplinary reasons under § 359.403, § 359.404, or part 752, subpart F, of this chapter, if at the time of appointment to the SES the individual held a career or career-conditional appointment or an appointment of equivalent tenure, as determined by OPM. An appointment of equivalent tenure is considered to be an appointment in the excepted service other than an appointment—

* * * * *

(b) Removal as the result of:

(1) Failure to be recertified under subpart C of this part;

(2) Less than fully successful executive performance under subpart E of this part; or

(3) A reduction in force under subpart F of this part. The appointee must have completed the required probationary period under the SES or was not required to serve a probationary period.

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

10. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461; § 842.105 also issued under 5 U.S.C. 8402(c)(1); § 842.106 also issued under 5 U.S.C. 8402(c)(1).

11. In § 842.211 of subpart B, paragraph (a) is revised, paragraph (c) is redesignated as paragraph (d) and is republished, and new paragraph (c) is added to read as follows:

Subpart B—Eligibility

§ 842.211 Senior Executive Service, Defense Intelligence Senior Executive Service, and Senior Cryptologic Executive Service.

(a) A member of the Senior Executive Service, the Defense Intelligence Senior Executive Service, or the Senior Cryptologic Senior Executive Service who is removed or who resigns after receipt of written notice of proposed removal for less than fully successful executive performance, or for failure to be recertified as a senior executive, is entitled to an annuity—

(1) After completing 25 years of service; or

(2) After becoming age 50 and completing 20 years of service.

* * * * *

(c) *Removed for failure to be recertified as a senior executive* means (1) With respect to a member of the Senior Executive Service, removal in accordance with the procedures in subpart C of part 359 of this chapter, and (2) with respect to a member of the Defense Intelligence Senior Executive Service or the Senior Cryptologic Executive Service, a certification by the head of the Defense Intelligence Agency or National Security Agency (or their designees) that the employee has been removed for failure to be recertified under 10 U.S.C. 1601(a) or section 12(a)(1) of the National Security Agency Act, respectively.

(d) An annuity payable under paragraph (a) of this section commences on the day after separation from service.

12. In § 842.503 of subpart E, paragraph (b) introductory text and paragraph (b)(4) are revised to read as follows:

Subpart E—Annuity Supplement

§ 842.503 Eligibility for annuity supplement.

* * * * *

(b) An employee or Member who retires under any of the following sections before attaining the minimum retirement age is not entitled to receive an annuity supplement until he or she attains that age:

* * * * *

(4) Section 842.211, except that an individual entitled to an annuity under 5 U.S.C. 8414(a) for failure to be recertified as a senior executive shall be entitled to an annuity supplement without regard to the minimum retirement age.

* * * * *

[FR Doc. 91-38 Filed 1-2-91; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 47

[Docket No. FV-91-352]

General Provisions, Rules of Practice Applicable to Reparation Proceedings, and Rules Applicable to the Determination as to Whether a Person Is Responsibly Connected With a Licensee Under the Perishable Agricultural Commodities Act

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This is an amendment to the existing rules of practice for reparation proceedings, and for the determination whether a person is responsibly connected with a licensee. It concerns the method of service of documents or papers in such proceedings, and reflects a belief that ordinary mail is sufficient for all but a few of such items. It reduces requirements for use of certified or registered mail to what is necessary. It also provides that documents and papers served by ordinary mail will be deemed to be served at the time of mailing. It also extends times for filing certain documents and papers since such times will be computed from the date of mailing, rather than the date of receipt, of the documents and papers to which they must respond.

EFFECTIVE DATE: January 3, 1991, except that these amendments shall not apply to any document or paper to be filed, for which a filing date has been set by order of a presiding officer or the Judicial Officer prior to such effective date, or for which a filing date has been specified in a written notice issued prior to such effective date and served, in a proceeding pending on such effective date.

FOR FURTHER INFORMATION CONTACT: John J. Casey, Office of the General Counsel, 2446 South Building, USDA, Washington, DC 20250-1400, 202/447-7357.

SUPPLEMENTARY INFORMATION: This is an amendment to the existing rules of practice for reparation proceedings, and for a determination whether a person is responsibly connected with a licensee. It concerns the method of service of documents or papers in such proceedings, and reflects a belief that ordinary mail is sufficient for all but a few of such items.

Requirements for use of certified or registered mail currently apply to all documents or papers served in such proceedings; such requirements are now being limited to a few such items:

1. A complaint or other document initially served on a person to make that person a party respondent in a proceeding;

2. A final order; and

3. Any other document specifically ordered by a presiding officer or the Judicial Officer to be served by certified mail.

The amendment also provides that all other documents and papers served by ordinary mail will be deemed to be served at the time of mailing.

The amendment also extends times for filing certain documents and papers, from 10 days to 20, since such times will be computed from the date of mailing, rather than the date of receipt, of the documents and papers to which they must respond. No change is made in the method of filing, and filing of documents with the Division or the Hearing Clerk will be considered made when the documents are received by such office.

Recent decisions supporting the changed method of service are *Atkins* v. *Parker*, 472 U.S. 115(1985); *U.S. Fire Ins. Co.* v. *Producciones Padosa, Inc.*, 835 F.2d 950 (1st Cir. 1987); *Old Ben Coal Co.* v. *Luker*, 826 F.2d 688 (7th Cir. 1987); and *U.S.* v. *Bolton*, 781 F.2d 528 (6th Cir. 1985), *cert. den.*, 476 U.S. 1158(1986).

Notice of proposed rulemaking is not required by law for this amendment on the basis that it constitutes "rules of agency * * * procedure, or practice" under 5 U.S.C. 553(b)(A).

Executive Order 12291 and Regulatory Flexibility Act

This final rule is exempt from Executive Order 12291 since it relates to internal agency management concerning rules of procedure or practice in formal adjudicatory proceedings. Also, this action is exempt from the provisions of the Regulatory Flexibility Act since it is not a rule as defined by that Act.

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 does not apply to this final rule since it does not seek answers to identical questions or reporting or recordkeeping requirements imposed on ten or more persons, and the information collected is not used for general statistical purposes.

List of Subjects in 7 CFR Part 47

Agriculture, Administrative practice and procedure, Reparation proceedings, Responsibly connected determinations.

Accordingly, 7 CFR part 47 is amended as set forth below.

1. The authority citation for 7 CFR part 47 is revised to read as follows:

Authority: 7 U.S.C. 499o; 7 CFR 2.17(a)(3)(xiii), 2.50(a)(3)(xiii).

2. Section 47.2 is amended by adding new paragraphs (s) and (t) to read as follows:

§ 47.2 Definitions.

* * * * *

(s) *Mail* means to deposit an item in the United States Mail with postage affixed and addressed as necessary to cause it to be delivered to the address shown by ordinary mail, or by certified or registered mail if specified.

(t) *Re-mail* means to mail by ordinary mail to an address an item that has been returned after being sent to the same address by certified or registered mail.

3. The third sentence of § 47.3(a)(1) is revised to read as follows:

§ 47.3 Institution of proceedings.

(a) *Informal complaints.* (1) * * * If the informal complaint is to be made the basis of a claim for damages, it must be received by the Director within 9 months after the cause of action accrues; if the informal complaint is not to be made the basis of a claim for damages, it may be filed at any time within 2 years after the violation of the act occurred: *Provided,* That the 2-year limitation herein prescribed shall not apply to complaints charging flagrant or repeated violations of the act.

* * * * *

4. Section 47.4 is revised to read as follows:

§ 47.4 Filing; service; extensions of time; and computation of time.

(a) *Who shall make service.* Copies of all documents or papers required or authorized by the rules in this part to be filed with the Division shall be served on the parties by the Division, and copies of all documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served on the parties by the Hearing Clerk, unless any such document or paper is served by some other employee of the Department, or by a U.S. Marshal or deputy marshal, or as otherwise provided herein, or as otherwise directed by the presiding officer or Judicial Officer.

(b) *Service on party.* (1) Any complaint or other document initially served on a person to make that person a person was responsibly connected with a licensee, a final order, or other document specifically ordered by the presiding officer or Judicial Officer to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual: *Provided,* That, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of re-mailing by ordinary mail to the same address.

(2) Any document or paper, other than one specified in paragraph (b)(1) of this section or written questions for a deposition as provided in § 47.16(d)(2) of this part, shall be deemed to be received by any party to a proceeding on the date of mailing by ordinary mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual.

(3) Any document or paper served other than by mail on any party to a proceeding shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, or

(ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

(c) *Service on another.* Any subpoena or other document or paper served on any person other than a party to a proceeding shall be deemed to be received by such person on the date of:

(1) Delivery by certified mail or registered mail to the last known principal place of business of such person, last known principal place of business of the attorney or representative of record of such person, or last known residence of such person if an individual;

(2) Delivery other than by mail to any responsible individual at, or leaving in a conspicuous place at, any such location; or

(3) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

(d) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

(1) A certified or registered mail receipt returned by the postal service with a signature;

(2) An official record of the postal service;

(3) An entry on a docket record or a copy placed in a docket filed by the Hearing Clerk of the Department or by an employee of the Hearing Clerk in the ordinary course of business;

(4) A certificate of service, which need not be separate from and may be incorporated in the document or paper of which it certifies service, showing the method, place and date of service in writing and signed by an individual with personal knowledge thereof, *Provided,* That such certificate must be verified by oath or declaration under penalty of perjury if the individual certifying service is not a party to the proceeding in which such document or paper is served, an attorney or representative of record for such a party, or an official or employee of the United States or of a State or political subdivision thereof.

5. The first sentence of § 47.9(a) is revised to read as follows:

§ 47.9 The reply.

(a) *Filing and service.* If the answer asserts a counterclaim or a set-off, the complaining party, within 20 days after service of the answer, may file a reply with the Division. * * *

* * * * *

6. In Section 47.16, paragraph (a)(3) is amended by removing the number "15" and inserting in lieu thereof the number "30," paragraph (b)(1) is amended by removing the number "7" and inserting in lieu thereof the number "20," and the third sentence of paragraph (d)(2) is revised to read as follows:

§ 47.16 Depositions.

* * * * *

(d) *Procedure on examination.* * * *

(2) * * * If the examination is conducted by means of written

questions, copies of the applicant's questions must be received by the other party to the proceeding and the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and any cross questions of a party other than the applicant must be received by the applicant and the officer at any time prior to the time of the examination.

* * * * *

7. Section 47.17(c) is revised to read as follows:

§ 47.17 Subpoenas.

* * * * *

(c) *Service of subpoenas.* Subponeas may be served by any person not less than 18 years of age. The party at whose instance a subpoena is issued shall be responsible for service thereof. Subponeas shall be served as provided in § 47.4 of this part.

§ 47.19 [Amended]

8. Sections 47.19(d) (5) and (6), 47.20 (e) and (g), 47.24 (a) and (c), and 47.25(e) are each amended by removing the number "10" and inserting in lieu thereof the number "20."

§ 47.51 [Amended]

9. Section 47.51(b) is amended by removing the number "15" and inserting in lieu thereof the number "20."

§ 47.66 [Amended]

10. In § 47.66, all after the first sentence is removed.

Dated: December 26, 1990.

Daniel Haley,
Administrator.

[FR Doc. 91-31 Filed 1-2-91; 8:45 am]
BILLING CODE 3410-02-M

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7 CFR Part 47

[Docket Number (FV-89-205)]

Amendment to the Rules of Practice Under the Perishable Agricultural Commodities Act (PACA)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This action amends § 47.6(b) of the Rules of Practice under the Perishable Agricultural Commodities Act (PACA). This amendment will modify the exemption for nonresident complainants in reparation actions to make it clear that the Secretary has discretionary authority under 7 U.S.C. 499f(e) to waive the furnishing of a bond by a foreign complainant. The amendment provides that the Secretary will exercise his discretion to waive the bond only in those instances when the complainant's country provides an administrative forum similar to that available under PACA to receive produce related claims by residents of the United States and when otherwise appropriate.

EFFECTIVE DATE: February 4, 1991.

FOR FURTHER INFORMATION CONTACT: James R. Frazier, Assistant Chief, PACA Branch, room 2095 So., Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Washington, DC 20090-6456 (202) 447-3212.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been designated as "non major" under the criteria therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Administrator of Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be disproportionately burdened. This amendment will affect only nonresident businesses in the manner set forth below. Therefore, the Administrator of AMS has determined that this action will not have a significant economic impact on a substantial number of small entities. This revision of the rules of practices under the PACA will not impose substantial direct economic cost, recordkeeping, or personal workload changes on small entities, and will not alter the market share or competitive position of these entities relative to large businesses.

Discussion of Comments

On October 9, 1990, the U.S. Department of Agriculture (USDA) proposed regulations that would amend 7 CFR part 47 of the Rules of Practice under the Perishable Agricultural Commodities Act (PACA). This proposal was published on the above date in the **Federal Register** (55 FR 41094-41095). The 30-day period for comments on the proposal expired November 8, 1990.

During the comment period, the USDA received three letters. Two commenters stated that they favored the amendment and one commenter viewed the amendment as being too restrictive and suggested changes. This commenter suggested that the double bond requirement be eliminated and that the Secretary only require the amount of the counterclaim plus attorney fees. This suggestion cannot be accepted. The law mandates that any required bond be in double the amount of the claim. As an alternative, this commenter suggested that we broadly interpret the word "Complaint" and expand its meaning to any kind of forum involving produce disputes where nonresidents can be sued in their own country. However, this suggestion cannot be accepted because it fails to take into consideration the filing requirements of other countries, the necessity of a reparation-like forum, and the equitable treatment of U.S. citizens.

Explanation of Regulations

This amendment will modify the regulatory exemption for nonresident complainants in reparation proceedings to make it consistent with 7 U.S.C. 499f(e) which provides that the Secretary has discretionary authority to waive the furnishing of a bond. The law provides:

> In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counterclaim by respondent: *Provided*, That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

The authority to waive the bond requirement was added in 1937 in response to complaints by Canadian interests. Ch. 719, § 9, 50 Stat. 728, August 20, 1937. It was recognized at that time that Canada provided an administrative forum in which residents of the United States could sue without posting a bond. The law was amended, therefore, to provide the Secretary the discretion to waive the bond requirement when a complainant's country provided a comparable, e.g., administrative, forum to consider claims by citizens of the United States.

7 CFR 47.6(b) of the "Rules of Practice Under the Perishable Agricultural

Commodities Act, 1930" states:

(b) Bond required if complainant is nonresident. If formal complaint for reparation is filed by a nonresident of the United States, complainant shall first file a bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States as surety or with two personal sureties, each of whom shall be citizen of the United States and shall qualify as financially responsible for the entire amount of the bond. The bond shall run to the respondent and be conditioned upon the payment of costs, including reasonable attorney's fee, for the respondent if the respondent shall prevail, and of any reparation award that may be issued by the Secretary against the complainant on any counterclaim asserted by respondent: *Provided,* That the furnishing of a bond shall be waived if the complainant is a resident of a country which permits filing of a complaint by a resident of the United States against a citizen of that country without the furnishing of a bond.

The regulation makes no mention of the criterion that there must exist a comparable administrative forum in the complainant's country. Rather, without specifying the type of forum, it permits a waiver if the country of a nonresident who files a complain permits citizens of the United States to file complaints without furnishing a bond.

Since the publication of section 47.6(6) in its current form, commerce involving perishable agricultural commodities has changed dramatically. Businesses in many countries now buy from and sell produce to the United States. If a foreign complainant is not required to post a bond, a citizen of the United States who prevails in a PACA reparation proceeding may not be able to collect any judgment to which he or she is entitled since there would be no protective bond. Thus a prevailing party could be forced to bring another lawsuit in a judicial forum in the country of the non-citizen, where it might be necessary to incur the expense of employing foreign legal counsel and encounter significant delays. This would be inequitable and contrary to the intent of the PACA.

The PACA provides an administrative forum which allows the resolution of disputes without the necessity of a formal hearing or hiring counsel, utilizes relaxed rules of evidence, and provides for suspension of the license of the offending party for noncompliance with an award. Under the terms of the proposed amendment, residents of countries which have administrative forums or their equivalent which are substantially similar to that provided under PACA may apply to the Secretary for a waiver of the bond requirement.

List of Subjects in 7 CFR Part 47

Administrative practices and procedure, Agricultural Commodities, and Brokers.

For the reasons set forth in the preamble, 7 CFR part 47 is to be amended as follows.

PART 47—[AMENDED]

1. The authority citation for part 47 continues to read as follows:

Authority: 7 U.S.C. 4990; 7 CFR 2.17(a)(3)(xiii), 2.50(a)(3)(xiii).

2. Section 47.6 paragraph (b) is revised to read as follows:

§ 47.6 Formal complaints.

* * * * *

(b) *Bond Required if Complainant is Nonresident.* If formal complaint for reparation is filed by a nonresident of the United States, complainant shall first file a bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States as surety or with two personal sureties, each of whom shall be a citizen of the United States and shall qualify as financially responsible for the entire amount of the bond. The bond shall run to the respondent and be conditioned upon the payment of costs, including reasonable attorney's fees, for the respondent if the respondent shall prevail, and of any reparation award that may be issued by the Secretary against the complainant on any counterclaim asserted by respondent: *Provided,* That the furnishing of a bond may be waived at the discretion of the Secretary if the complainant is a resident of a country which permits the filing of a complaint in an administrative forum or its equivalent which is substantially similar to that provided under the Perishable Agricultural Commodities Act by a resident of the United States against a citizen of that country without the furnishing of a bond. Nothing in this section shall limit the discretion of the Secretary to deny such a waiver in order to effectuate the purposes of the Act or to protect the interests of the businesses concerned.

* * * * *

Dated: December 26, 1990.

Daniel Haley,

Administrator.

[FR Doc. 91-30554 Filed 1-2-91; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF COMMERCE

United States Travel and Tourism Administration

15 CFR Part 1201

[Docket No. 901237-0337]

RIN 0644-AA01

United States Travel and Tourism Administration Facilitation Fee

AGENCY: Department of Commerce, United States Travel and Tourism Administration.

ACTION: Final rule; imposition of United States Travel and Tourism Administration Facilitation Fee.

SUMMARY: As required by section 306(a) of the International Travel Act of 1961, as added by section 10301 of the Omnibus Budget Reconciliation Act of 1990, Public Law No. 101-508, the Under Secretary of Commerce for Travel and Tourism issues regulations assessing each commercial airline and passenger cruise ship line transporting passengers to the United States, a quarterly United States Travel and Tourism Administration (USTTA) Facilitation Fee. For each calendar quarter in 1991, such fee (which the Under Secretary is required to deposit in the general fund of the Treasury) is the amount of one dollar multiplied by the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B)) arriving at any port within the United States aboard a commercial aircraft or cruise ship of the commercial airline or passenger cruise ship line during that calendar quarter. Early in the first quarter of 1991, the Under Secretary will issue a notice of proposed rulemaking proposing detailed regulations governing determinations of the amount owed for each calendar quarter, methods and place of remittance, adjustment of the per alien multiplier in 1992 and in subsequent years, collection actions, the imposition of civil penalties and enforcement, and procedures for determining whether assessment of a fee with respect to a particular commercial airline or passenger cruise ship line is inconsistent with a specific treaty or international agreement entered into by the United States. The purpose of the final rule issued today is to provide notification to commercial airlines and passenger cruise ship lines beyond that already provided by section 10301 of the Omnibus Budget Reconciliation Act of 1990 of the imposition of the fee so that they may adjust their business practices, if they wish, to ensure that funds will be available to pay the fee.

EFFECTIVE DATE: January 1, 1991.

ADDRESSES: Hon. Rockwell A. Schnabel, Under Secretary of Commerce for Travel and Tourism, room 1863, HCHB, United States Department of Commerce, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Lee J. Wells, Director, Office of Strategic Planning and Administration, U.S. Travel and Tourism Administration, HCHB Room 1524, United States Department of Commerce, Washington, DC 20230 (202) 377–3811.

SUPPLEMENTARY INFORMATION: Sections 306 of the International Travel Act of 1961, as added by section 10301 of the Omnibus Budget Reconciliation Act of 1990, Public Law No. 101–508, states:

(a) To the extent not inconsistent with treaties or international agreements entered into by the United States, the Secretary, on a calendar quarterly basis beginning January 1, 1991, shall charge and collect from each commercial airline and passenger cruise ship line transporting passengers to the United States, a United States Travel and Tourism Administration Facilitation Fee, in a amount determined under subsection (b).

(b)(1) During the period from January 1, 1991, through December 31, 1991, the Secretary shall charge each commercial airline and passenger cruise ship line an amount equal to one dollar multiplied by the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B)) arriving at any port within the United States aboard a commercial aircraft or cruise ship of such airline or passenger cruise ship line during that calendar quarter.

(2) Commencing in 1991, the Secretary shall each year determine and publish the amount of the fee described in subsection (a) for the 12-month period commencing on January 1 of the succeeding calendar year, as follows:

(A) The Secretary (in consultation with the Attorney General and the Secretary of State) shall estimate the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B)) expected to enter the United States during such succeeding calendar year, based upon the number of such aliens who entered the United States during the previous calendar year (as reported or estimated by the Attorney General) and such other available information as the Secretary deems reliable.

(B) The Secretary shall divide the amount appropriated to the United States Travel and Tourism Administration for the fiscal year during which such determination is made by the number of aliens described in subparagraph (A) expected by the Secretary to enter the United States during the calendar year described in such subparagraph, as estimated by the Secretary under such subparagraph, and shall round the result up to the nearest quarter-dollar.

(C) The Secretary shall publish in the **Federal Register** the estimate required by subparagraph (A), together with a description of the information supporting such estimate, and the amount of the fee determined under subparagraph (B) which shall be applicable during the 12-month period commencing on January 1 of the succeeding calendar year.

(D) For each calendar quarter beginning after December 31, 1991, the Secretary shall charge each commercial airline and passenger cruise ship line an amount equal to the fee amount determined under subparagraph (B) and applicable under subparagraph (C) multiplied by the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B)) arriving at any port within the United States abroad a commercial aircraft or cruise ship of such airline or passenger cruise ship line during that calendar quarter.

(3) Neither the estimate of the Secretary under paragraph (2)(A) nor the amount determined by the Secretary under paragraph (2)(B) shall be subject to judicial review.

(c) Each commercial airline and passenger cruise ship line shall remit the fee charged by the Secretary under subsection (b), in United States dollars, no later than 31 days after the close of the calendar quarter of the arrival of the aliens on which the calculation of the fee is based.

(d) The Secretary shall deposit the fees received pursuant to subsection (c) in the general fund of the Treasury as offsetting receipts and ascribed to the travel and tourism activities of the Secretary.

(e) Beginning on October 1, 1992, the aggregate amounts collected for the fee charged under this section shall at least equal the appropriations made for the travel and tourism activities of the Secretary under this Act, but at no time shall the aggregate of amounts collected for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

(f) The Secretary may prescribe such rules and regulations as may be necessary to carry out the provisions of this section.

Sec. 307 of Public Law No. 101–508 states:

(a) Any commercial airline or commercial cruise ship line which is found by the Secretary or the Secretary's designee, after notice and an opportunity for a hearing, to have failed to pay to the Secretary, by the due date, the fee charged by the Secretary under section 306(a), may be ordered by the Secretary or the Secretary's designee to pay any fee amount outstanding plus interest on any late payment and, in addition, to pay a civil penalty not to exceed $5,000 for each day payment to the Secretary is not made or was made late. The amount of such civil penalty shall be assessed by the Secretary or the Secretary's designee by written notice. In determining the amount of such penalty, the Secretary or the Secretary's designee shall take into account the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of the culpability, and history of prior offenses, ability to pay, and such other matters as justice may require. Each day a payment to the Secretary required by this Act is late shall constitute a separate violation of this Act.

(b) If any commercial airline or cruise ship line fails to pay as ordered by the Secretary or the Secretary's designee, the Attorney General may, upon request of the Secretary, bring a civil action in any appropriate United States district court for the recovery of the amount ordered to be paid.

(c) Before requesting the Attorney General to bring a civil action, the Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under subsection (a).

(d) For the purpose of conducting any hearing under subsection (a), the Secretary or the Secretary's designee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contempt or refusal to obey a subpoena served upon any person pursuant to this subsection, the United States district court for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or the Secretary's designee or to appear and produce papers, books, and documents before the Secretary or the Secretary's

designee, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The regulations issued today merely repeat the language of section 306(a) and (b)(1) so as to assess each commercial airline and passenger cruise ship line transporting passengers to the United States, a quarterly USTTA Facilitation Fee. For each calendar quarter in 1991, such fee is the amount of one dollar multiplied by the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B)) arriving at any port within the United States aboard a commercial aircraft or cruise ship of the commercial airline or passenger cruise ship line during that calendar quarter. The Under Secretary of Commerce for Travel and Tourism is required to deposit fees received in the general fund of the United States Treasury.

Early in the first quarter of 1991, the Under Secretary will issue a notice of proposed rulemaking proposing detailed regulations governing determinations of the amount owed for each quarter, methods and place of remittance, adjustment of the per alien multiplier in 1992 and in subsequent years, collection actions, the imposition of civil penalties and enforcement, and procedures for determining whether assessment of a fee with respect to a particular commercial airline or passenger cruise ship line is inconsistent with a specific treaty or international agreement entered into by the United States. The Department of Commerce is working closely with the Department of Transportation to minimize the administrative burden on carriers. Section 306(b)(2) and (e) requires adjustment of the per alien multiplier in 1992 and in subsequent years so that the total fees collected for each fiscal year starting with fiscal year 1993 are at least equal to but do not exceed by more than 5 percent the amount appropriated for that fiscal year for the activities of USTTA. The purpose of the final rule issued today is to provide notification to commercial airlines and passenger cruise ship lines beyond that already provided by section 10301 of the Omnibus Budget Reconciliation Act of 1990 of the imposition of the fee so that they may adjust their business practices, if they wish, to ensure that funds will be available to pay the fee.

As presently envisioned, the Department of Commerce late in each calendar quarter will present each commercial airline and passenger cruise ship line with an estimate of the actual fee required to be remitted within 31 days after the end of that quarter. This estimate will be based on the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(15)(B)) that arrived at any port within the United States aboard a commercial aircraft or cruise ship of such airline or passenger cruise ship line during that same calendar quarter one year earlier based, where available, on specific carrier figures supplied by the United States Immigration and Naturalization Service (INS) from its INS Form I–94 surveys of arriving aliens by carrier. The reason for the use of figures from one year earlier is that INS is not able to supply figures until approximately three months after the end of a calendar quarter. Given the seasonal nature of travel, the Department of Commerce intends to use the same quarter one year earlier for purposes of estimation. When accurate figures become available, the estimated charge will be adjusted for each carrier and the carrier debited or credited without penalty or interest for the amount of the adjustment. For countries for which INS does not conduct a Form I–94 survey the proposed rules will proposes using the best statistics available and appropriate assumptions and interpolations.

The USTTA Facilitation Fee is assessed against carriers based on the number of section 101(a)(15)(B) aliens carried by them and is not a fee or tax placed or to be placed on such aliens themselves. Unlike customs inspection fees, which carriers collect on behalf of the United States Customs Service from persons arriving in the United States, no carrier should collect a USTTA Facilitation Fee from an alien as a tax or fee or indicate on a ticket or elsewhere that it is doing so.

Any carrier which believes that assessment of the USTTA Facilitation Fee against it is inconsistent with a specific treaty or international agreement entered into by the United States should write the Under Secretary of Commerce for Travel and Tourism enclosing a copy of the applicable treaty or international agreement and outlining the reasons for its belief.

Miscellaneous Rulemaking Requirements

Executive Order 12291

Under Executive Order 12291, the Department of Commerce must judge whether the regulation proposed in this notice is "major" within the meaning of section 1 of the Order, and therefore subject to the requirement that a Regulatory Impact Analysis be prepared. The Under Secretary of Commerce for Travel and Tourism has determined that the regulation issued in this notice is not major because it is not 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 or local government agencies, or geographic regions; or,

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

Therefore, preparation of a Regulatory Impact Analysis is not required and neither a preliminary nor final Regulatory Impact Analysis has been or will be prepared.

Administrative Procedure Act

The Under Secretary of Commerce for Travel and Tourism, pursuant to sections 553(b)(B) and (d)(3) of the Administrative Procedure Act, finds that because this rule merely imposes a statutorily-specified fee on a statutorily-specified group (commercial airlines and passenger cruise ship lines transporting passengers to the United States) as of the date specified in the statute (Jan. 1, 1991), and in the amount specified in the statute (one dollar multiplied by the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B)) arriving at any port within the United States aboard a commercial aircraft or cruise ship of such airline or passenger cruise ship line during that calendar quarter), that notice and public procedure thereon are impracticable and contrary to the public interest and that, because the fee must be imposed as of January 1, 1991, good cause exists for making the fee effective on the statutorily-required date. As to the initial imposition of the fee, the amount, and the date, there is no discretion vested in the Under Secretary. Details of certain determinations (the amount owed for each quarter, methods and place of remittance, adjustment of the per alien multiplier in 1992 and in subsequent years so that the total fees collected for a fiscal year starting with the fiscal year beginning on October 1, 1992, at least equal but do not exceed by more than 5 percent the amount appropriated for that fiscal year for the activities of the USTTA, collection actions, the imposition of civil penalties and enforcement, and procedures for determining whether assessment of a fee with respect to a particular commercial

airline or passenger cruise ship line is inconsistent with a specific treaty or international agreement entered into by the United States) will be the subject of a notice-and-comment rulemaking.

Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because the rule was not required to be promulgated as a proposed rule by section 553 of the Administrative Procedure Act or by any other law. Accordingly, neither an initial nor final Regulatory Flexibility Analysis has been or will be prepared.

Paperwork Reduction Act

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

Executive Order 12612

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

Executive Order 12630

This final rule does not have takings implications within the meaning of Executive Order 12630 because it would not appear to have an effect on private property sufficiently severe as effectively to deny economically viable use of any distinct legally potential property interest to its owner or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation.

List of Subjects in 15 CFR Part 1201

Administrative practice and procedure, Air carriers, Passenger vessels, Travel.

Dated: December 27, 1990.

Wylie H. Whisonant, Jr.,

Acting Under Secretary for Travel and Tourism.

Accordingly, for the reasons set forth above, 15 CFR chapter XII is amended as set forth below:

A new part 1201 is added to 15 CFR chapter XII to read as follows:

PART 1201—UNITED STATES TRAVEL AND TOURISM ADMINISTRATION FACILITATION FEE

Authority: Sections 306 and 307 of the International Travel Act of 1961, as added by section 10301 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101–508.

§ 1201.1 United States Travel and Tourism Administration Facilitation Fee.

Beginning with the calendar quarter starting January 1, 1991, each commercial airline and passenger cruise ship line transporting passengers to the United States is assessed a quarterly United States Travel and Tourism Administration Facilitation Fee, in the amount of one dollar multiplied by the number of aliens described in section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B)) arriving at any port within the United States aboard a commercial aircraft or cruise ship of such airline or passenger cruise ship line during that calendar quarter.

[FR Doc. 90–30623 Filed 12–28–90; 12:24 pm]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 40, 43, 44, 45, 46, 48, 49, 52, 138, 142, 145, 146, 147, 148, and 154

[T.D. 8328]

RIN 1545–A096

Procedural Rules for Excise Taxes Currently Reportable on Form 720

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations and removal of obsolete regulations.

SUMMARY: This document contains temporary regulations relating to requirements for returns, payments, and deposits of tax for excise taxes currently reportable on Form 720. Existing procedural regulations under 26 CFR parts 43, 46, 48, 49, 52, and 154 are amended and consolidated in a new part 40. This document also removes various excise tax regulations under 26 CFR parts 45, 46, 49, 138, 142, 145, 146, 147, and 154 that are obsolete. These temporary regulations reflect changes to the law made by the Omnibus Budget Reconciliation Act of 1989 and affect persons required to report liability for excise taxes currently reportable on Form 720. The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations for the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

EFFECTIVE DATES: These regulations are effective April 1, 1991, for returns that relate to calendar quarters beginning after December 31, 1990, and are filed after March 31, 1991, and for deposits relating to calendar quarters beginning after March 31, 1991. In addition, the removal of obsolete regulations is effective April 1, 1991.

FOR FURTHER INFORMATION CONTACT: Ruth Hoffman, 202–566–4475 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the regulations under 26 CFR chapter I, subchapter D (relating to miscellaneous excise taxes). Sections 6011 (relating to requiring returns), 6071 (relating to time for filing returns), and 6302(c) (relating to use of Government depositaries) of the Internal Revenue Code authorize the Secretary to prescribe regulations imposing rules for filing returns and making deposits of tax.

Regulations relating to returns, payments, and deposits of taxes imposed by chapters 31, 32 (except for the firearms tax imposed by section 4181), 33, 34, 36 (except for the harbor maintenance tax imposed by section 4461, the vehicle use tax imposed by section 4481, and the deep seabed mineral removal tax imposed by section 4495), 38, and 39 of the Code have been revised and consolidated in new 26 CFR part 40.

Parts 43, 46, 48, 49, and 52 will be amended to remove the procedural provisions now included in part 40 and by cross-referencing those parts to the regulations in part 40.

In addition, obsolete regulations under 26 CFR chapter I, subchapter D are removed.

Need for Temporary Regulations

Immediate guidance is needed on the new requirements for filing Form 720 and making deposits of taxes reportable on Form 720. Therefore, good cause is found to dispense with the public notice requirement of 5 U.S.C. 553(b) and the delayed effective date requirement of 5 U.S.C. 553(d).

Explanation of Provisions

Requirements for Filing Returns

Section 40.6011(a)–1T(a) requires the quarterly filing of a return on Form 720 to report liability for excise taxes imposed by chapters 31, 32, 33, 34, 36, 38, and 39 of the Code (except for the chapter 32 tax imposed by section 4181 (firearms tax) and the chapter 36 taxes imposed by sections 4461 (harbor maintenance tax), 4481 (vehicle use tax), and 4495 (deep seabed mineral removal tax)). Generally, under § 40.6071(a)–1T(a)(1) the return must be filed by the

last day of the first month following the end of a calendar quarter. However, under § 40.6071(a)–2T(a), returns reporting air transportation, communications, and ozone-depleting chemicals taxes must be filed by the last day of the second month following the end of a calendar quarter (even if other taxes also are reported on such returns). An additional month is provided for filing a return reporting these taxes because of their relative complexity.

Under § 40.6071(a)–1T(a)(2), only one quarterly Form 720 is filed for each quarter. Persons required to file on more than one filing date for a quarter do not file two Forms 720 reporting the taxes due on each date but instead file a single Form 720 by the later of the required filing dates. The single Form 720 must include all excise taxes reportable on Form 720. This rule allows persons filing a Form 720 on which they are reporting air transportation, communications, or ozone-depleting chemicals taxes to defer filing their Form 720 until two months after the end of the calendar quarter, even if such persons must also report excise taxes for which the Form 720 must otherwise be filed one month after the end of the calendar quarter. However, this rule does not extend the time for making deposits or paying any excise tax. Thus, a person that must make an additional deposit to pay any balance due for a quarter must make the required deposit by the date the Form 720 for such excise taxes would otherwise be filed for that quarter; the payment is due at that time even though the Form 720 may, under the above rule, be filed a month later.

Prior regulations allowed some return filers to file a return ten days after the end of the month following the end of the quarter. This rule has been eliminated so that all returns are due either one month or two months after the end of the quarter.

Requirements for Using Government Depositaries

Prior regulations relating to excise taxes currently reportable on Form 720 did not require any deposits if the amount of tax reportable was less than $100. In addition, the regulations did not require semimonthly deposits unless at least $2,000 was due in any month in the prior quarter. These dollar thresholds have been eliminated in order to have a single deposit rule apply to all persons required to make deposits of tax.

Section 40.6302(c)–1T(b)(1) provides that all persons required to make deposits must make semimonthly deposits of tax. Section 40.6302(c)–1T(b)(2) provides that the amount of tax deposited for a semimonthly period generally must equal the amount of tax liability incurred during that period. For communications and air transportation taxes, however, the amount deposited generally equals the tax collected during the semimonthly period.

Under § 40.6302(c)–1T(b)(3), the deposit for a semimonthly period is due by the ninth day of the following semimonthly period (the 9-day rule). These regulations provide two exceptions to this rule, however: (1) section 40.6302(c)–2T(a)(1) provides that the deposit of ozone-depleting chemicals tax for each semimonthly period during which liability for the tax was incurred is due by the last day of the second following semimonthly period (the 30-day rule) and (2) § 40.6302(c)–4T(a) provides that, if a qualified person makes a deposit of gasoline tax by means of a transfer between accounts in a Government depositary, the deposit for a semimonthly period is due by the fourteenth day of the following semimonthly period (the 14-day rule).

In addition, existing regulations under 26 CFR part 49 provide a special rule for deposits of tax made by persons required to collect and pay over tax under chapter 33. Under § 49.6302(c)–1(a)(1)(iii), the amount of the deposits of tax under chapter 33 for communications and air transportation taxes for each semimonthly period may be computed based on amounts billed for communications services or tickets sold for air transportation during each semimonthly period. These temporary regulations do not replace this provision. Instead, § 49.6302(c)–1(a)(1)(iii) is retained and further guidance relating to deposits of tax based on amounts billed will be provided under § 40.6302(c)–3T in January of 1991.

Safe Harbor Rules for Semimonthly Deposits

Deposits of tax for a semimonthly period generally must equal the amount of tax liability incurred (or in the case of collected taxes, the amount of tax collected) during that semimonthly period. Prior regulations provided four exceptions to this rule to be used in computing the amount required to be deposited. The details of the exceptions varied according to the tax involved. The exceptions are eliminated by these regulations which instead provide one general safe harbor rule and one special safe harbor rule for new filers. Section 40.6302(c)–1T(c) sets forth these safe harbor rules. Safe harbor rules are provided so that taxpayers and persons required to collect and pay over tax will not be required to determine their actual tax liability for a semimonthly period during the semimonthly period in which the deposit is due in order to avoid failure-to-deposit penalties, as would otherwise be the case. All taxpayers and persons required to collect and pay over tax that are required to make deposits and that use the safe harbor rule must determine their net tax liability for each semimonthly period at the close of each calendar quarter.

The general safe harbor rule applies to persons that have filed a Form 720 reporting tax for the second calendar quarter preceding the current calendar quarter (the look-back quarter). Such persons are considered to have met the semimonthly deposit requirement for the current quarter if the deposit for each semimonthly period in the current quarter is not less than ⅙ of the total net tax liability reported on Form 720 for the look-back quarter, the deposit is timely made at an authorized Government depositary, and any underpayment for the current quarter is paid by the due date of the return on which the tax would ordinarily be reported. All three requirements must be satisfied in order for the safe harbor rule to apply.

The special safe harbor rule applies to persons (generally new return filers) that did not file a Form 720 reporting tax for the look-back quarter. Such persons are considered to have met the semimonthly deposit requirement for the current quarter if the deposit for each semimonthly period in the current quarter is not less than 90 percent of the net tax liability incurred during the semimonthly period, the deposit is timely made at an authorized Government depositary, and any underpayment for the current quarter is paid by the due date of the return on which the tax would ordinarily be reported.

The above safe harbor rules do not apply on a tax-by-tax basis. Instead, under the general safe harbor rule, a person uses the net tax liability for all the taxes with the same deposit due date in the look-back quarter to determine the amount of deposits. If a person also is required to report taxes that are deposited on a different due date schedule, such taxes are not included in the determination of net tax liability for the first deposit due date; separate safe harbor computations are made with respect to those taxes. A person uses the special safe harbor rule only if a return of tax was not required to report any tax with the same deposit due date as the tax the person is required to report in the current quarter.

In addition, under § 40.6302(c)–2T(a)(2)(ii), the general safe harbor rule described above is modified in the case

of ozone-depleting chemicals taxes to take into account predictable increases in tax liability due to increases in the base tax amount or due to the phase-in of tax on Halons and ozone-depleting chemicals used in the manufacture of rigid foam insulation. For example, for the first two calendar quarters of 1991, the amount to deposit under the general safe harbor rule will be based on the taxpayer's tax liability under section 4681 for the look-back quarter, but calculated as if Halons and ozone-depleting chemicals used in the manufacture of rigid foam insulation had been subject to tax for such preceding calendar quarters.

Special Rules for One-time Filings

Special rules are provided in the case of one-time filings of returns. A person may make a one-time filing reporting liability with respect to taxable transactions in a calendar quarter if the person (1) Did not engage in the taxable transactions in the course of a trade or business; (2) does not engage in similar taxable transactions in the course of a trade or business; and (3) is not otherwise required to file a return reporting excise taxes for the calendar quarter.

A return that is a one-time filing serves both as the return for the calendar quarter and as the final return, so that no return need be filed in subsequent quarters unless tax liability is actually incurred in the subsequent quarter.

In addition, no deposit is required in the case of tax reported on a one-time filing. Instead, the tax reported on a one-time filing is paid with the return.

Procedures Relating to Filing Returns and Making Deposits

Generally, rules describing procedures relating to the mechanics of filing returns, paying tax, and making deposits that were included in prior regulations are not included in these regulations. Instead, those procedures are provided in the instructions to the applicable forms. Where this is the case, the regulations refer to the form instructions. These procedures are often modified and such modifications are more easily reflected in revised form instructions than in revised regulations.

Deletion of Obsolete Regulations

The following parts are removed as obsolete: part 45 (relating to taxes on coin-operated devices, oleomargarine, white phosphorus matches, adulterated or renovated butter, filled cheese, and cotton futures); subparts B and D of part 46 (relating to taxes on sugar and on circulation other than of national banks); subparts B and E of part 49 (relating to taxes on club dues and fees and on safe deposit boxes); part 138 (relating to temporary rules under the 1978 Energy Tax Act); part 142 (relating to temporary rules under the 1971 Revenue Act); §§ 145.1–1 through 145.4–6 of part 145 (relating to temporary rules under the 1982 Highway Revenue Act); part 146 (relating to rebuilt parts and accessories); part 147 (relating to temporary rules under the Interest Equalization Tax Act); § 148.1–6 of part 148 (relating to temporary rules under the Excise Tax Technical Changes Act of 1958); and part 154 (relating to temporary rules under the Airport and Airway Revenue Act of 1970).

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking that cross-references to these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Ruth Hoffman, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects

26 CFR Part 40

Administrative practice and procedure, Excise taxes, Filing requirements, Payment of tax, Tax depositaries.

26 CFR Part 43

Excise taxes, Gambling, Transportation by water, Vessels.

26 CFR Part 44

Excise taxes, Gambling.

26 CFR Part 45

Butter, Cheese, Coin operated machines, Cotton, Excise taxes, Margarine, Matches.

26 CFR Part 46

Banks and banking, Excise taxes, Insurance.

26 CFR Part 48

Agriculture, Coal, Excise taxes, Gasohol, Gasoline, Motor vehicles, Petroleum, Sporting Goods, Tires.

26 CFR Part 49

Excise taxes, Telegraph, Telephone, Transportation.

26 CFR Part 52

Excise taxes, Petroleum, Chemicals.

26 CFR Part 138

Buses, Excise taxes, Motor vehicles, Energy Tax Act of 1978.

26 CFR Part 142

Excise taxes, Motor vehicles, Revenue Act of 1971.

26 CFR Part 145

Excise taxes, Excise Tax Reduction Act of 1965.

26 CFR Part 146

Excise taxes, Motor vehicles.

26 CFR Part 147

Banks and banking, Excise taxes, Interest equalization tax, United States investments abroad.

26 CFR Part 148

Excise taxes, Excise Tax Technical Changes Act of 1958.

26 CFR Part 154

Aircraft, Airports, Excise taxes, Airway Revenue Act of 1970.

Adoption of Amendments to the Regulations

Accordingly, title 26 of the Code of Federal Regulations is amended as follows:

Paragraph 1. Part 40 is added to read as follows:

PART 40—EXCISE TAX PROCEDURAL REGULATIONS

Sec.

40.0–1T Introduction (temporary).
40.6011(a)–1T Returns (temporary).
40.6011(a)–2T Final returns (temporary).
40.6071(a)–1T Time for filing returns (temporary).
40.6071(a)–2T Time for filing quarterly returns under chapter 33 and section 4681 (temporary).
40.6091–1T Place for filing returns (temporary).
40.6101–1T Period covered by returns (temporary).
40.6109(a)–1T Identifying numbers (temporary).

Sec.

40.6151(a)–1T Time and place for paying tax shown on return (temporary).
40.6302(c)–1T Use of Government depositaries (temporary).
40.6302(c)–2T Use of Government depositaries under section 4681 (temporary).
40.6302(c)–3T Special rule for use of Government depositaries under chapter 33 (temporary). [Reserved]
40.6302(c)–4T Special rule for use of Government depositaries under section 4081 (temporary).
40.9999–1T Examples (temporary).

Authority: 26 U.S.C. 7805. Sections 40.6011(a)–1T and 40.6011(a)–2T also issued under 26 U.S.C. 6011(a); §§ 40.6071(a)–1T and 40.6071(a)–2T also issued under 26 U.S.C. 6071(a); § 40.6091–1T also issued under 26 U.S.C. 6091; § 40.6101–1T also issued under 26 U.S.C. 6101; § 40.6109(a)–1T also issued under 26 U.S.C. 6109(a); §§ 40.6302(c)–1T, 40.6302(c)–2T, 40.6302(c)–3T, and 40.6302(c)–4T also issued under 26 U.S.C. 6302(a).

§ 40.0–1T Introduction (temporary).

(a) *In general.* The regulations in this part 40 are designated "Excise Tax Procedural Regulations." The regulations set forth administrative provisions relating to the excise taxes imposed by chapters 31, 32, 33, 34, 36, 38, and 39 (except for the chapter 32 tax imposed by section 4181 (firearms tax) and the chapter 36 taxes imposed by sections 4461 (harbor maintenance tax), 4481 (vehicle use tax), and 4495 (deep seabed mineral removal tax)). See parts 43, 46, 48, 49, and 52 of this subchapter for regulations relating to the imposition of tax.

(b) *Effective date.* This part is effective April 1, 1991, for returns that relate to calendar quarters beginning after December 31, 1990, and are filed after March 31, 1991, and for deposits relating to calendar quarters beginning after March 31, 1991.

§ 40.6011(a)–1T Returns (temporary).

(a) *In general.* The return of any tax imposed by chapter 31, 32 (except for the firearms tax imposed by section 4181), 33, 34, 36 (except for the harbor maintenance tax imposed by section 4461, the vehicle use tax imposed by section 4481, and the deep seabed mineral removal tax imposed by section 4495), 38, or 39 shall be made on Form 720, Quarterly Federal Excise Tax Return (or any other form designated by the Commissioner after publication of these regulations for reporting such taxes). Except as provided in paragraph (b) of this section, the return shall be made for a period of one calendar quarter. Except in the case of a tax required to be collected and paid over, the person incurring liability for tax shall file the return. In the case of a tax required to be collected and paid over, the person required to collect the tax (and not the person incurring liability) shall file the return. A person shall file a return for the first calendar quarter in which liability for tax is incurred (or in which tax must be collected and paid over), and for each subsequent calendar quarter, whether or not liability was incurred (or tax collected) during such quarter, until the person has filed a final return in accordance with § 40.6011(a)–2T. In the case of one-time filings under § 40.6011(a)–2T(c), the first return is also a final return.

(b) *Monthly and semimonthly returns.* If the district director determines that any person that is required under the provisions of this part 40 to make deposits of taxes has failed to make those deposits, that person shall be required, if so notified in writing by the district director, to make a return on Form 720 (or other form furnished by the district director for use in lieu of Form 720) for a monthly or semimonthly period. Each person so notified by the district director shall make a return for the calendar month or semimonthly period (as defined in § 40.6302(c)–1T(d)) in which the notice is received and for each calendar month or semimonthly period thereafter until the person has filed a final return (as defined in § 40.6011(a)–2T) or until the person is notified by the district director to resume making quarterly returns.

(c) *Cross references.* For provisions relating to the time to file returns, see §§ 40.6071(a)–1T and 40.6071(a)–2T. For provisions relating to the place for filing returns, see § 40.6091–1T. For provisions relating to use of Government depositaries, see §§ 40.6302(c)–1T, , 40.6302(c)–2T, 40.6302(c)–3T, and 40.6302(c)–4T. For provisions relating to floor stocks tax on ozone-depleting chemicals imposed under section 4682(h), see § 52.6071–3T.

(d) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6011(a)–2T Final returns (temporary).

(a) *In general.* Any person that is required under § 40.6011(a)–1T to make returns and that permanently ceases all operations with respect to which liability for tax was incurred (or with respect to which tax must be collected and paid over) shall make a final return in accordance with the instructions applicable to the form on which the return is made. A person shall not make a final return in any case in which only a temporary or partial cessation of such operations occurs and shall continue to file returns in accordance with § 40.6011(a)–1T.

(b) *Special rule for one-time filings*—(1) *In general.* A first return is also a final return if it is a one-time filing. A return is a one-time filing if the person reporting tax—

(i) Did not engage in the transactions with respect to which tax is reportable on the return in the course of a trade or business;

(ii) Does not engage in similar taxable transactions in the course of a trade or business; and

(iii) Is not otherwise required under this part 40 to file a return reporting excise taxes for the calendar quarter.

(2) *Deposits not required.* See § 40.6302(c)–1T(f)(2) for a rule providing that no deposit of tax reported on a one-time filing is required.

(c) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6071(a)–1T Time for filing returns (temporary).

(a) *Quarterly returns*—(1) *In general.* Except as otherwise provided in paragraph (a)(2) of this section and in § 40.6071(a)–2T (relating to quarterly returns under chapter 33 and section 4681), each quarterly return required under § 40.6011(a)–1T shall be filed by the last day of the first calendar month following the quarter for which it is made.

(2) *Special rule.* A person shall file only one Form 720 for a quarter. If under § 40.6071(a)–2T a person is required to file a Form 720 for a quarter by a date that is later than the date provided in paragraph (a)(1) of this section, the person shall file a single Form 720 for the quarter by the filing date provided under § 40.6071(a)–2T. This rule does not extend the time for making deposits or paying any excise tax.

(b) *Monthly and semimonthly returns*—(1) *Monthly returns.* Each monthly return required under § 40.6011(a)–1T(b) shall be filed by the fifteenth day of the month following the month for which it is made.

(2) *Semimonthly returns.* Each semimonthly return required under § 40.6011(a)–1T(b) shall be filed by the ninth day of the semimonthly period following the semimonthly period for which it is made.

(c) *Cross references.* For provisions relating to timely mailing treated as timely filing and paying, see section 7502. For provisions relating to time for performance of acts where last day for performance falls on Saturday, Sunday, or a legal holiday, see section 7503. For

provisions relating to time and place for paying tax shown on the return, see § 40.6151(a)–1T. For provisions relating to floor stocks tax on ozone-depleting chemicals imposed under section 4682(h), see § 52.6071(a)–3T.

(d) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6071(a)–2T Time for filing quarterly returns under chapter 33 and section 4681 (temporary).

(a) *In general.* In the case of returns of tax imposed by chapter 33 or section 4681, each quarterly return required under § 40.6011(a)–1T(a) shall be filed by the last day of the second calendar month following the quarter for which it is made.

(b) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6091–1T Place for filing returns (temporary).

(a) *Quarterly returns.* Except as otherwise provided in paragraph (b) of this section, quarterly returns shall be filed in accordance with the instructions applicable to the form on which the return is made.

(b) *Hand-carried returns—*

(1) *Persons other than corporations.* Returns of persons other than corporations that are filed by hand carrying shall be filed with the district director for the internal revenue district in which is located the principal place of business or legal residence of the person.

(2) *Corporations.* Returns of corporations that are filed by hand carrying shall be filed with the district director for the district in which is located the principal place of business or principal office or agency of the corporation.

(c) *Monthly and semimonthly returns.* Monthly and semimonthly returns required under § 40.6011(a)–1T(b) shall be filed in accordance with the instructions of the district director requiring such filing.

(d) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6101–1T Period covered by returns (temporary).

(a) *In general.* See § 40.6011(a)–1T for the rules relating to the period covered by the return.

(b) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6109(a)–1T Identifying numbers (temporary)

(a) *In general.* Every person required under § 40.6011(a)–1T to make a return shall provide the identifying number as required by the instructions applicable to the form on which the return is made.

(b) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6151(a)–1T Time and place for paying tax shown on return (temporary).

(a) *In general.* Except as otherwise provided by statute, the tax shall be paid at the time prescribed in §§ 40.6071(a)–1T and 40.6071(a)–2T for filing the return, and at the place prescribed in § 40.6091(a)–1T for filing the return.

(b) *Cross reference.* For provisions relating to use of Government depositaries, see §§ 40.6302(c)–1T, 40.6302(c)–2T, 40.6302(c)–3T, and 40.6302(c)–4T.

(c) *Effective date.* This section is effective April 1, 1991, for returns relating to calendar quarters beginning after December 31, 1990.

§ 40.6302(c)–1T Use of Government depositaries (temporary).

(a) *Overview.* This section sets forth the general rule that any person required to file a quarterly return must make deposits of taxes reported on the return and provides rules relating to the time for making a deposit and its amount. Exceptions to these rules are set forth in other sections. Section 40.6302(c)–2T (relating to ozone-depleting chemicals) provides the rules for making deposits of section 4681 taxes and a safe harbor rule for computing the amount of deposits for those taxes. Section 40.6302(c)–4T provides additional time for qualified persons to make deposits of section 4081 taxes (relating to gasoline).

(b) *In general—*(1) *Semimonthly deposits required.* Except as otherwise provided by statute or by paragraph (f) of this section, each person required under § 40.6011(a)–1T(a) to file a quarterly return shall make semimonthly deposits of the tax required to be reported on the return.

(2) *Amount of deposit.* Except as otherwise provided in paragraph (c) of this section (relating to safe harbor rules) or in § 40.6302(c)–2T(a)(2) (relating to safe harbor rules for section 4681 taxes), the deposit of tax for any semimonthly period (as defined in paragraph (d) of this section) shall equal the amount of net tax liability incurred during that semimonthly period.

(3) *Time to deposit.* Except as provided in §§ 40.6302(c)–2T (relating to deposits of section 4681 taxes) and 40.6302(c)–4T (relating to deposits by qualified persons of section 4081 taxes), the deposit of tax for any semimonthly period shall be made by the ninth day of the semimonthly period following the semimonthly period in which the tax liability is incurred (the "9-day rule"). Thus, under the 9-day rule generally, the deposit of tax for the first semimonthly period in a month is due by the 24th of that month and the deposit of tax for the second semimonthly period in a month is due by the 9th of the following month.

(4) *Treatment of taxes imposed by chapter 33.* For purposes of this section, a tax imposed by chapter 33 shall be treated as a tax liability incurred during the semimonthly period in which such tax is collected.

(5) *Timeliness of deposits.* Failure-to-deposit penalties under section 6656 may apply if required deposits are not timely made in the correct amount at an authorized Government depositary. Deposits for a calendar quarter will be applied in date-made order against deposits due for the quarter in due-date order. In determining the timeliness of a deposit, any overpayment from a prior quarter is not credited to the return filer's account until the due date of the return showing the overpayment or the date that return is filed, whichever is later.

(c) *Amount of deposit; safe harbor rules—*(1) *Applicability.* This paragraph (c) provides the safe harbor rules for deposits of taxes made under the 9-day rule. Thus, for purposes of this paragraph (c), the term "net tax liability" does not include section 4681 taxes and section 4081 taxes to which § 40.6302(c)–4T (relating to timely deposits by qualified persons) applies.

(2) *Persons that made a return of tax for the look-back quarter—*(i) *In general.* Any person that made a return of tax reporting taxes to which this paragraph (c) applies for the second preceding calendar quarter (the "look-back quarter") will be considered to have complied for the current calendar quarter with the requirement of this section for semimonthly deposit of such taxes if—

(A) The deposit of such taxes for each semimonthly period in the current calendar quarter is not less than ⅙ (16.67 percent) of the net tax liability reported for the look-back quarter;

(B) Each deposit is made on time; and

(C) The amount of any underpayment of such taxes for the current calendar quarter is paid by the last day of the first calendar month following the end of the quarter.

(ii) *Deposit of underpayment if return due date extended.* In any case in which the due date of the return is extended under § 40.6071(a)–1T(a)(2) (relating to filing a single Form 720), the amount of any underpayment shall be paid by deposit under the provisions of paragraph (e) of this section.

(3) *Persons that did not make a return of tax for the look-back quarter*—(i) *In general.* Any person that did not make a return of tax reporting taxes to which this paragraph (c) applies for the look-back quarter will be considered to have complied for the current calendar quarter with the requirement of this section for semimonthly deposit of such taxes if—

(A) The deposit of such taxes for each semimonthly period in the current calendar quarter is at least 90 percent of the net tax liability incurred during that semimonthly period;

(B) Each deposit is made on time; and

(C) The amount of any underpayment of such taxes for the current calendar quarter is paid by the last day of the first calendar month following the end of the quarter.

(ii) *Deposit of underpayment if return due date extended.* In any case in which the due date of the return is extended under § 40.6071(a)–1T(a)(2) (relating to filing a single Form 720), the amount of any underpayment shall be paid by deposit under the provisions of paragraph (e) of this section.

(d) *Semimonthly period.* The term "semimonthly period" means the first 15 days of a calendar month or the portion of a calendar month following the 15th day of the month.

(e) *Remittance of deposits.* A completed Form 8109, Federal Tax Deposit Coupon (or any other form designated by the Commissioner for making deposits) must accompany each deposit. The deposit must be remitted, in accordance with the instructions applicable to the form, to a financial institution authorized as a depositary for federal taxes (as provided in 31 part 214) or to a Federal Reserve bank.

(f) *Exceptions*—(1) *Taxes excluded.* No deposit is required of the taxes imposed under section 4042 (relating to fuel used on inland waterways) and section 4161 (relating to sport fishing equipment and bows and arrows).

(2) *One-time filings.* No deposit is required of any taxes reportable on a one-time filing (as defined in § 40.6011(a)–2T(c)).

(g) *Cross references.* For provisions relating to the penalty for failure to make deposit of taxes, see section 6656. For provisions relating to timely mailing treated as timely depositing, see section 7502. For provisions relating to time for performance of acts where last day for performance falls on Saturday, Sunday, or legal holiday, see section 7503.

(h) *Effective date.* This section is effective April 1, 1991, for deposits relating to calendar quarters beginning after March 31, 1991.

§ 40.6302(c)–2T Use of Government depositaries under section 4681 (temporary).

(a) *In general*—(1) *Time to deposit.* The deposit of tax imposed by section 4681 shall be made by the last day of the second semimonthly period following the semimonthly period in which the tax liability is incurred (the "30-day rule"). Thus, under the 30-day rule generally, the deposit of tax for the first semimonthly period in a month is due by the 15th of the following month and the deposit of tax for the second semimonthly period in a month is due by the end of the following month.

(2) *Amount of deposit; safe harbor rule applicable to persons that made a return of tax for the look-back quarter*—(i) *In general.* Except as otherwise provided in paragraph (a)(2)(ii) of this section, any person that made a return of tax reporting taxes imposed by section 4681 for the second preceding calendar quarter (the "look-back quarter") will be considered to have complied for the current calendar quarter with the requirement of § 40.6302(c)–1T(b)(1) for semimonthly deposit of such tax if—

(A) The deposit of such tax for each semimonthly period in the current calendar quarter is not less than ⅙ (16.67 percent) of the net tax liability under section 4681 reported for the look-back quarter;

(B) Each deposit is made on time; and

(C) The amount of any underpayment of such tax for the current calendar quarter is paid by the last day of the second calendar month following the end of the quarter.

(ii) *Special rule*—(A) *Applicability.* The safe harbor rule of paragraph (a)(2)(i) of this section is modified for the first and second calendar quarters following the effective date of—

(*1*) An increase in the base tax amount under section 4681(b); or

(*2*) A change in the treatment of ozone-depleting chemicals that are described in section 4682(g)(1).

(B) *Rule.* The safe harbor rule in paragraph (a)(2)(i) of this section shall not apply for such calendar quarters unless the deposit for each semimonthly period in the calendar quarter is not less than ⅙ (16.67 percent) of the tax liability the person would have had under section 4681 for the look-back quarter if the increased base tax amount or the change in treatment has been in effect for such look-back quarter.

(3) *Amount of deposit; safe harbor rule applicable to persons that did not make a return of tax for the look-back quarter.* Any person that did not make a return of tax imposed by section 4681 for the look-back quarter will be considered to have complied for the current calendar quarter with the requirement of § 40.6302(c)–1T(b)(1) for semimonthly deposit of such tax if—

(i) The deposit of such tax for each semimonthly period in the current calendar quarter is not less than 90 percent of the net tax liability incurred under section 4681 during that semimonthly period;

(ii) Each deposit is made on time; and

(iii) The amount of any underpayment of such tax for the current calendar quarter is paid by the last day of the second calendar month following the end of the quarter.

(b) *Cross reference.* For general provisions relating to use of Government depositaries, see § 40.6302(c)–1T.

(c) *Effective date.* This section is effective April 1, 1991, for deposits relating to calendar quarters beginning after March 31, 1991.

§ 40.6302(c)–3T Special rule for use of Government depositaries under chapter 33 (temporary). [Reserved]

§ 40.6302(c)–4T Special rule for use of Government depositaries under section 4081 (temporary).

(a) *Time to deposit under the 14-day rule*—(1) Each qualified person (as defined in paragraph (b) of this section) may make deposits of the tax imposed by section 4081 (relating to gasoline) by the fourteenth day of the semimonthly period following the semimonthly period in which the tax liability is incurred if the deposit is made by transfer between accounts in the same Government depositary (the "14-day rule"). Thus, under the 14-day rule generally, the deposit of tax for the first semimonthly period in a month is due by the 29th of that month and the deposit of tax for the second semimonthly period in a month is due by the 14th of the following month.

(2) If the due date under paragraph (a)(1) of this section falls on a Saturday, Sunday, or legal holiday in the District of Columbia, the due date of the deposit shall be the immediately preceding day which is not a Saturday, Sunday, or legal holiday in the District of Columbia.

(b) *Qualified person defined*—(1) *In general.* The term "qualified person" means—

(i) Any person whose average daily production of crude oil for the preceding

calendar quarter did not exceed 1,000 barrels; and

(ii) Any independent refiner (within the meaning of section 4995(b)(4) (as in effect on January 6, 1983)).

(2) *Aggregation rules.* In determining for purposes of paragraph (b)(1) of this section, whether a person's production exceeds 1,000 barrels per day, the rules of section 4992(e) (as in effect on January 6, 1983) relating to allocation within related groups shall apply. Thus, for persons who are members of the same related group (within the meaning of such section 4992(e)(2)) at any time during the preceding calendar quarter, the 1,000 barrel amount will be reduced for each person by allocating such amount among all such persons in accordance with rules of section 4992(e).

(c) *Cross reference.* For general provisions relating to use of Government depositaries, see § 40.6302(c)–1T.

(d) *Effective date.* This section is effective April 1, 1991, for deposits relating to calendar quarters beginning after March 31, 1991.

§ 40.9999–1T Examples (temporary).

The following examples illustrate the rules of this part 40.

(a) *Examples relating to luxury tax; one-time filing.*

Example 1. (1) *Facts.* On March 20, 1991, A, an individual, purchases a new car outside the United States for $102,000. In April, A imports the car into the U.S. and uses it for personal use. At the time of importation, the car's retail value is $100,000. Thus, A is liable for the luxury tax imposed by section 4001. The amount of A's section 4001 tax liability is $7,000, 10% of the amount by which the $100,000 retail value exceeds $30,000. The liability is incurred in the second calendar quarter of 1991, the quarter during which the car is imported and used. The fuel economy of the car's model type is at least 22.5 miles per gallon, so that A is not liable for the gas guzzler tax imposed by section 4064. A did not import the car in the course of its trade or business, does not import cars subject to luxury tax in the course of its trade or business, and is not otherwise required to file a Form 720 for the calendar quarter.

(2) *Filing requirement.* A must file a return of the luxury tax on Form 720 (§ 40.6011(a)–1T) for the second calendar quarter of 1991 reporting A's $7,000 luxury tax liability. The Form 720 is due by July 31, 1991, the last day of the first month following the calendar quarter (§ 40.6071(a)–1T). Because A did not import the car in the course of its trade or business, does not import cars subject to luxury tax in the course of its trade or business, and is not otherwise required to file a Form 720 for the calendar quarter, A's Form 720 for the second calendar quarter of 1991 is a one-time filing (§ 40.6011(a)–2T(c)). As a one-time filing, A's Form 720 also constitutes a final return.

(3) *Deposit and payment requirement.* Because A's Form 720 is a one-time filing, A is not required to make deposits of tax (§ 40.6302(c)–1T(f)(2)). Instead, A pays the $7,000 of tax with the return.

Example 2. (1) *Facts.* The facts are the same as in Example 1. In addition, on September 30, 1991, A imports and uses for A's personal use two pieces of new jewelry each with a retail value at the time of importation of $40,000 and a new fur coat with a retail value at the time of importation of $50,000. A is liable for $3,000 of luxury tax on each piece of jewelry and $4,000 of luxury tax on the fur coat, for a total luxury tax liability of $10,000 in the third calendar quarter of 1991. A did not import the jewelry and fur in the course of its trade or business, does not import jewelry or furs subject to luxury tax in the course of its trade or business, and is not otherwise required to file a Form 720 for the calendar quarter.

(2) *Filing requirement.* A must file a return of the luxury tax on Form 720 (§ 40.6011(a)–1T) for the third calendar quarter of 1991 reporting A's $10,000 luxury tax liability. The Form 720 is due by October 31, 1991, the last day of the first month following the calendar quarter (§ 40.6071(a)–1T). Because A did not import the taxed items in the course of its business, does not import similar taxed items in the course of its business, and is not otherwise required to file a Form 720 for the 3rd calendar quarter of 1991, A's Form 720 for the third calendar quarter of 1991 is a one-time filing, even though A already make a one-time filing for the second calendar quarter of 1991 (§ 40.6011(a)–2T(c)). As a one-time filing, A's Form 720 also constitutes a final return.

(3) *Deposit and payment requirement.* Because A's Form 720 is a one-time filing, A is not required to made deposits of tax (§ 40.6302(c)–1T(f)(2)). Instead, A pays the $10,000 of tax with the return.

(b) *Example relating to luxury tax; not a one-time filing; special safe harbor rule for deposits by new filers.*

Example 3. (1) *Facts.* On May 16, 1991, B, an individual in the business of car dealing, sells a new car for $150,000. Because the price of the car sold by B is more than $30,000, B is liable for the luxury tax imposed by section 4001. The amount of B's section 4001 tax liability is $12,000, 10% of the amount by which the $150,000 price exceeds $30,000. The sale of the car is in the course of B's business, but B does not ordinarily sell cars for more than $30,000. B is not required to file a Form 720 for the second calendar quarter of 1991 by reason of any other transaction or activity, and has not in the past filed a Form 720.

(2) *Filing requirement.* B must file a return of the luxury tax (§ 40.6011(a)–1T) on Form 720 for the second calendar quarter of 1991 reporting B's $12,000 luxury tax liability. The Form 720 is due by July 31, 1991, the last day of the first month following the calendar quarter (§ 40.6071(a)–1T). Because the tax is due with respect to a transaction engaged in by B in the course of a trade or business, even though B does not ordinarily engage in transactions giving rise to a luxury tax liability in B's business, the return is not a one-time filing under § 40.6011(a)–2T(c). Because the return is not a one-time filing, B must file a Form 720 for each subsequent calendar quarter until B files a final return in accordance with § 40.6011(a)–2T.

(3) *Deposit and payment requirement*—(i) *Semimonthly deposit rule.* Because the return is not a one-time filing, B is required to make semimonthly deposits of tax (§ 40.6302(c)–1T(b)(1)). B must deposit the $12,000 tax by Monday, June 10, 1991. The tax would ordinarily have to be deposited by June 9, 1991 (the 9th day of the semimonthly period following the semimonthly period in which B incurred liability for the tax), but because June 9, 1991 is a Sunday, B has until that Monday to make the required deposit.

(ii) *Safe harbor.* B may also meet the semimonthly deposit requirement by using the special safe harbor rule applicable to persons that did not file a return in the look-back quarter. Under § 40.6302(c)–1T(c)(3), B meets this safe harbor by depositing $10,800 (90% of $12,000) by June 10, 1991, and by paying the $1,200 balance of tax due with the return by July 31, 1991.

(c) *Example relating to ozone-depleting chemicals tax; general safe harbor rule for deposits.*

Example 4. (1) *Facts.* During the second calendar quarter of 1991, C, an individual who is an electronics dealer, imports into the U.S. electronic products identified in the table of taxable products published in § 52.4682–3T(f). C imports electronics products as part of C's business, and C has elected to treat the importation of these products as the use of such products under § 52.4682–3T(c)(2). C files a Form 720 each quarter to report liability for the ozone-depleting chemicals tax imposed by section 4681. The ozone-depleting chemicals tax liability incurred by C during each semimonthly period in the second calendar quarter of 1991 is as follows:

April 1st–15th	$400
April 16th–30th	20
May 1st–15th	1,150
May 16th–31st	300
June 1st–15th	0
June 16th–30th	2,140
Total	$4,010

C's ozone-depleting chemicals tax liability in the fourth quarter of 1990 (the look-back quarter under § 40.6302(c)–2T(a)(2)) was $1,800. C's liability during the look-back quarter would not have increased by reason of increased base amounts or changes of treatment of chemicals described in section 4682(g)(1) had such increases or changes been in effect.

(2) *Filing requirement.* Under § 40.6011(a)–1T(a), C must continue to file a Form 720 for each calendar quarter until C files a final return in accordance with § 40.6011(a)–2T. C's Form 720 for the second calendar quarter of 1991 is due by Tuesday, September 3, 1991. C's Form 720 would ordinarily be due by August 31, 1991 (the last day of the second month after the end of the calendar quarter (§ 40.6071(a)–2T(a)), but because August 31, 1991 is a Saturday, and Monday, September 2, 1991, is Labor Day, a legal holiday, C has until that Tuesday to file).

(3) *Deposit and payment requirement*—(i) *Semimonthly deposit rule.* C is required to make semimonthly deposits of tax (§ 40.6302(c)–1T(b)(1)). Deposits of ozone-

depleting chemicals tax for a semimonthly period are due by the last day of the second following semimonthly period (the 30-day rule under § 40.6302(c)–2T(a)(1)). Accordingly, C meets the semimonthly deposit requirement if C makes the following deposits:

By May 15th	$400
By May 31st	20
By June 17th	1,150
By July 1st	300
By July 15th	0
By July 32st	2,140

The deposit due on Monday, June 17th would ordinarily be due on June 15th, but because June 15, 1991 is a Saturday, C has until that Monday to make the deposit. The deposit due on Monday, July 1st would ordinarily be due on June 30th, but because June 30, 1991 is a Sunday, C has until that Monday to make the deposit.

(ii) *Safe harbor.* C may also meet the semimonthly deposit requirement by using the safe harbor rule applicable to persons that filed a return reporting section 4681 taxes for the look-back qnarter (§ 40.6203(c)–2T(a)(2)(i)), in this case the fourth calendar quarter of 1990. C meets this safe harbor by:

(A) Depositing $300 (1/6 of C's ozone-depleting chemicals tax liability for the fourth calendar quarter of 1990) by the last day of the second semimonthly period following each semimonthly period in the second calendar quarter of 1991 (*i.e.*, by each of May 15th, May 31st, June 17th, July 1st, July 15th, and July 31st); and

(B) Paying $2,210 (the balance of tax due for the second calendar quarter of 1991) by September 3, 1991. C is not required to increase its safe harbor deposit amounts to take into account predictable increases in ozone-depleting chemicals tax liability by reason of increased base amounts or changes of treatment of chemicals described in section 4682(g)(1) (§ 40.6302(c)–2T(a)(2)(ii)).

(d) *Example relating to diesel fuel tax; general safe harbor rule for deposits; crediting of overpayments.*

Example 5. (1) *Facts.* M, a corporation, is a wholesale distributor of diesel fuel registered under section 4101 with respect to the tax imposed by section 4091, and is therefore treated as a producer for purposes of the section 4091 tax on the sale of diesel fuel by its producer. M files Form 720 on a quarterly basis to report its liability for the diesel fuel tax. During each semimonthly period in the second calendar quarter of 1991, M incurs liability for the diesel fuel tax as follows:

April 1st-15th	$5,000
April 16th-30th	4,500
May 1st-15th	5,000
May 16h-31st	3,200
June 1st-15th	2,000
June 16ht-30th	1,500
Total	21,200

M incurred a diesel fuel tax liability of $36,000 in the fourth quarter of 1990 (the look-back quarter under (§ 40.6302(c)-1T(c)(2)(i)).

(2) *Filing requirement.* M must file a Form 720 for the second calendar quarter of 1991 reporting its $21,200 liability for diesel fuel tax (§ 40.6011(a)–1T(a)). M must continue to file a Form 720 for each calendar quarter until M files a final return in accordance with § 40.6011(a)–2T. Under § 40.6071(a)–1T(a), M's Form 720 for the second calendar quarter of 1991 is due by July 31, 1991.

(3) *Deposit and payment requirements*—(i) *Semimonthly deposit rule.* Under § 40.6302(c)–1T(b)(1), M is required to deposit the diesel fuel tax on a semimonthly basis. Diesel fuel tax must be deposited under the 9-day rule of § 40.6302(c)–1T(b)(3), so M's deposits of tax incurred during a semimonthly period are due by the 9th day of the following semimonthly period. Accordingly, M meets the semimonthly deposit requirement if M makes the following deposits:

By April 24th:	$5,000
By May 9th:	4,500
By May 24th:	5,000
By June 10th:	3,200
By June 24th:	2,000
By July 9th:	1,500

The deposit due on Monday, June 10th would ordinarily be due on June 9th, but because June 9, 1991, is a Sunday, M has until that Monday to make the required deposit.

(ii) *Safe harbor.* Under § 40.6302(c)–1T(c)(2), M may also meet the semimonthly deposit requirement by using the safe harbor rule applicable to persons that filed a return of this tax for the look-back quarter, in this case the fourth calendar quarter of 1990. M meets this safe harbor by:

(A) depositing $6,000 (⅙ of M's diesel fuel tax liability for the fourth calendar quarter of 1990) by the 9th day of the semimonthly period following each semimonthly period in the second calendar quarter of 1991 at an authorized Government depositary; and

(B) paying $0 (the balance of diesel fuel tax due for the second calendar quarter of 1991) by July 31, 1991. M may request that the overpayment of $14,800 (the difference between M's second-quarter deposits of $36,000 and M's second-quarter liability of $21,200) shown on its Form 720 for the second quarter of 1991 be credited towards any tax liability for the third quarter of 1991. Under § 40.6302(c)–1T(b)(1), this overpayment will be credited to M's account on July 31, 1991, the due date of the return showing the overpayment, or the filing date, if later. Thus, the $14,800 cannot be used to satisfy any deposit for the third quarter of 1991 required to be made before July 31, 1991.

(e) *Example relating to diesel fuel tax; failure-to-deposit penalties.*

Example 6. (1) *Facts.* N, a corporation, is a wholesale distributor of diesel fuel registered under section 4101 with respect to the tax imposed by section 4091, and is therefore treated as a producer for purposes of the section 4091 tax on the sale of diesel fuel by its producer. N files Form 720 on a quarterly basis to report its liability for the diesel fuel tax. During each semimonthly period in the second calendar quarter of 1991, N incurs liability for the diesel fuel tax as follows:

April 1st–15th:	$3,000
April 16th–30th:	3,500
May 1st–15th:	1,300
May 16th–31st:	2,000
June 1st–15th:	1,200
June 16th–30th:	1,400
Total:	$12,400

N incurred a diesel fuel tax liability of $12,000 in the fourth quarter of 1990 (the look-back quarter). With respect to its second quarter 1991 liability, N makes deposits to an authorized Government depositary as follows:

On April 24th:	$2,000
On May 9th:	2,000
On May 24th:	2,000
On June 11th:	2,000
On June 24th:	2,000
On July 9th:	2,000

N also deposits $400 on July 31, 1991. N did not make any overpayment of tax for the first calendar quarter of 1991.

(2) *Filing requirement.* N must file a Form 720 for the second calendar quarter of 1991 reporting its $12,400 liability for diesel fuel tax (§ 40.6011(a)–1T(a)). N must continue to file a Form 720 for each calendar quarter until N files a final return in accordance with § 40.6011(a)–2T. Under § 40.6071(a)–1T(a), N's Form 720 for the second calendar quarter of 1991 is due by July 31, 1991.

(3) *Deposit and payment requirement*—(i) *Semimonthly deposit rule.* Under § 40.6302(c)–1T(b)(1), N is required to deposit the diesel fuel tax on a semimonthly basis. Diesel fuel tax must be deposited under the 9-day rule of § 40.6302(c)–1T(b)(3), so N's deposits of tax incurred during a semimonthly period are due by the ninth day of the following semimonthly period. N chooses to use the safe harbor rule under § 40.6302(c)–1T(c)(2) to compute the amount of deposit for each semimonthly period in the quarter because N filed a return of diesel fuel tax for the look-back quarter, the fourth calendar quarter of 1990.

(ii) *Safe harbor.* In this case, N has not met the requirements of the safe harbor of § 40.6302(c)–1T(c)(2). In order to meet the semimonthly deposit requirement under the safe harbor rule, N must make six timely deposits at an authorized Government depositary, each in the correct amount, and pay any underpayment by the due date of the return. The deposit made on June 11th was due by June 10th.

(iii) *Result of failure to satisfy deposit requirements.* Under section 6656, failure-to-deposit penalties apply if deposits are not timely made, in the correct amount, to an authorized Government depositary. Deposits made are applied in date-made order against deposits due in due-date order. The penalty rate is 2 percent of the deposit underpayment ("underdeposit") if the failure is for not more than 5 days, 5 percent if the failure is for more than 5 days but not more than 15 days, and 10 percent if the failure is for more than 15 days. The penalty rate may thereafter

increase to more than 15 percent. N does not calculate the penalty itself. Instead, N files the Form 720 for the second calendar quarter reporting the $12,400 tax liability incurred during the quarter. N will be notified by the IRS of the amount of the penalty. Because N did not satisfy the safe harbor rule, N is subject to penalty based on N's failure to comply with the semimonthly deposit requirements (not the safe harbor rule). N incurs failure-to-deposit penalties as follows:

(A) The deposit due by April 24th was $3,000. The underdeposit is $1,000 for more than 5 but not more than 15 days. Thus, the penalty for this semimonthly period is $50, 5% of $1,000.

(B) The deposit due by May 9th was $3,500. The underdeposit is $2,000 for more than 5 days but not more than 15 days *and* $500 for more than 15 days. Thus, the penalty for this semimonthly period is $275, 5% of $2,000 plus 10% of $500.

(C) The deposit due by May 24th was $1,300. The underdeposit is $1,300 for more than 15 days. Thus, the penalty for this semimonthly period is $130, 10% of $1,300.

(D) The deposit due by June 11th was $2,000. The underdeposit is $1,800 for more than 5 days but not more than 15 days. Thus, the penalty for this semimonthly period is $180, 5% of $1,800.

(E) The deposit due by June 24th was $1,200. The underdeposit is $1,000 for more than 5 days but not more than 15 days. Thus, the penalty for this semimonthly period is $100, 5% of $1,000.

(F) The deposit due by July 9th was $1,400. The underdeposit is $400 for more than 15 days. Thus, the penalty is $40, 10% of $400.

(G) The total failure-to-deposit penalty is $775.

(f) *Example relating to air transportation and diesel fuel taxes; general safe harbor rule for deposits.*

Example 7. (1) *Facts.* O is a corporation engaged in providing air transportation to passengers and importing diesel fuel for retail sale. O is responsible for collecting the air transportation tax imposed by section 4261, and incurs liability for the diesel fuel tax imposed by section 4091. O files Form 720 on a quarterly basis to report these taxes. O does not compute its deposits of air transportation tax on the basis of amounts billed during each semimonthly period of the quarter. During each semimonthly period in the second calendar quarter of 1991, O collects air transportation tax as follows:

April 1st–15th:	$3,000
April 16th–30th:	2,500
May 1st–15th:	1,000
May 16th–31st:	4,000
June 1st–15th:	1,500
June 16th–30th:	2,000
Total:	$14,000

Also, during each semimonthly period in the second calendar quarter of 1991, O incurs liability for diesel fuel tax as follows:

April 1st–15th:	$500
April 16th–30th:	800
May 1st–15th:	1,200
May 16th–31st:	300
June 1st–15th:	400
June 16th–30th:	1,100
Total:	$4,300

O collected $12,000 of air transportation tax and incurred a diesel fuel tax liability of $3,000 in the look-back quarter, in this case the fourth quarter of 1990, for a combined total liability in that quarter of $15,000.

(2) *Filing requirement.* O must continue to file a Form 720 for each calendar quarter (§ 40.6011(a)–1T(a)) until O files a final return in accordance with § 40.6011(a)–2T. Because O must report air transportation tax for the second calendar quarter of 1991, O's Form 720 for that quarter is due by Tuesday, September 3, 1991 (§ 40.6071(a)–2T(a)). The Form 720 would ordinarily be due by August 31st (the last day of the second month after the end of the calendar quarter), but because August 31, 1991 is a Saturday, and Monday, September 2, 1991, is Labor Day, a legal holiday, O has until that Tuesday to file. If O had reported only diesel fuel tax liability on O's Form 720 for the second calendar quarter of 1991, the Form 720 would have been due by July 31, 1991, the last day of the month after the end of the calendar quarter (§ 40.6071(a)–1T(a)). However, only one Form 720 may be filed for a calendar quarter. Thus, O's responsibility for reporting air transportation tax allows O to delay the filing of the Form 720 (§ 40.6071(a)–1T(a)(2)).

(3) *Deposit and payment requirement*—(i) *Semimonthly deposit rule.* O is required to deposit both the air transportation tax and the diesel fuel tax on a semimonthly basis (§ 40.6302(c)–1T(b)(1)). Deposits of air transportation tax collected during a semimonthly period and of diesel fuel tax incurred during a semimonthly period are due by the 9th day of the following semimonthly period (§ 40.6302(c)–1T(b)(3)). Accordingly, O meets the semimonthly deposit requirement if O makes the following deposits:

By April 24th:	$3,500
By May 9th	3,300
By May 24th	2,200
By June 10th	4,300
By June 24th	1,900
By July 9th	3,100

The deposit due on Monday, June 10th would ordinarily be due on June 9th, but because June 9, 1991 is a Sunday, O has until that Monday to make the required deposit.

(ii) *Safe harbor.* O filed a Form 720 reporting air transportation and diesel fuel tax in the look-back quarter, in this case the fourth calendar quarter of 1990. Therefore, O may also meet the semimonthly deposit requirements using the safe harbor rule under § 40.6302(c)–1T(c)(2). Because the deposits of air transportation tax and diesel fuel tax O must make are due on the same schedule (i.e., by the 9th day of the semimonthly period following the semimonthly period in which the tax liability is incurred), O computes the safe harbor amount of deposit based on O's combined liability for these taxes in the look-back quarter. Accordingly, O meets the safe harbor by:

(A) Depositing $2,500 (⅙ of O's combined air transportation tax liability and diesel fuel tax liability for the fourth calendar quarter of 1990) by the 9th day of the semimonthly period following each semimonthly period in the first calendar quarter of 1991;

(B) Depositing $1,300 (the balance of diesel fuel tax due for the second calendar quarter of 1991) by July 31, 1991; and

(C) Paying $2,000 (the balance of air transportation tax due for the second calendar quarter of 1991) with the return by September 3, 1991. Note that although O may delay the filing of its Form 720 for the second calendar quarter of 1991 until two months after the quarter ends, O must pay the full amount of diesel fuel tax due for the quarter by the date the return of diesel fuel tax would ordinarily be due (i.e., the last day of the month after the end of the calendar quarter) (§ 40.6302(c)–1T(c)(2)(ii)).

(g) [Reserved]

(h) *Examples relating to luxury tax and foreign insurer policy tax; general safe harbor rule for deposits.*

Example 9. (1) *Facts.* Q is a corporation engaged in the retail sale of jewelry. Because the price of some of the pieces of jewelry sold by Q in the first and second calendar quarters of 1991 exceeds $10,000, Q is liable in each quarter for the luxury tax imposed by section 4006. Q's total luxury tax liability for the first calendar quarter of 1991 was $60,000. Q's luxury tax liability for each semimonthly period in the second calendar quarter of 1991 is as follows:

April 1st–15th	$20,000
April 16th–30th	25,000
May 1st–15th	2,000
May 16th–31st	8,000
June 1st–15th	4,500
June 16th–30th	12,000
Total	71,500

Q also purchases insurance from a foreign insurer, thereby incurring liability for the tax imposed by section 4371 on policies issued by a foreign insurer. Prior to 1991, Q filed Form 720 on a quarterly basis to report its section 4371 liability. Q filed Form 720 for the first calendar quarter of 1991 to report both its luxury tax liability and its section 4371 liability for that quarter. During each semimonthly period in the second calendar quarter of 1991, Q's section 4371 liability is as follows:

April 1st–15th	$0
April 16th–30th	0
May 1st–15th	2,500
May 16th–31st	0
June 1st–15th	0
June 16th–30th	2,500
Total	5,000

Q paid section 4371 tax of $6,000 in the safe harbor look-back quarter, the fourth quarter of 1990. Because the luxury tax was not in

effect in 1990, Q was not liable for luxury tax in that quarter.

(2) *Filing requirement.* Q must file a Form 720 reporting the $71,500 luxury tax liability and the $5,000 section 4371 tax liability for the second calendar quarter of 1991 (§ 40.6011(a)–1T(a)). The Form 720 is due by July 31, 1991, the last day of the first month following the calendar quarter (§ 40.6071(a)–1T(a)). Q must continue to file a Form 720 for each subsequent calendar quarter until Q files a final return in accordance with § 40.6011(a)–2T.

(3) *Deposit and payment requirement*—(i) *Semimonthly deposit rule.* Q is required to deposit both the luxury tax and the section 4371 tax on a semimonthly basis (§ 40.6302(c)–1T(b)(1)). Deposits of these taxes for each semimonthly period are due by the 9th day of the following semimonthly period (§ 40.6302(c)–1T(b)(3)). Accordingly, Q meets the semimonthly deposit requirement if Q makes the following deposits:

By April 24th	$20,000
By May 9th	25,000
By May 24th	4,500
By June 10th	8,000
By June 24th	4,500
By July 9th	14,500

The deposit due on Monday, June 10th would ordinarily be due on June 9th, but because June 9, 1991 is a Sunday, Q has until that Monday to make the required deposit.

(ii) *Safe harbor.* Deposits of the luxury tax and the section 4371 tax are due on the same schedule. Accordingly, Q may also meet the semimonthly deposit requirements for both taxes using the safe harbor applicable to persons that filed a return during the safe harbor look-back quarter, in this case the fourth calendar quarter of 1990, even though Q did not pay luxury tax in that quarter. Q would meet this safe harbor by:

(A) Depositing $1,000 (⅛ of Q's section 4371 tax liability in the fourth calendar quarter of 1990) by the 9th day of the semimonthly period following each semimonthly period in the second calendar quarter of 1991; and

(B) Paying $70,500 (the balance of luxury tax and section 4371 tax due for the second calendar quarter of 1991) by July 31, 1991.

Example 10. (1) *Facts.* The facts are the same as in Example 9. In addition, Q's luxury tax liability for the fourth calendar quarter of 1991 is as follows:

October 1st–15th	$ 5,000
October 16th–31st	10,000
November 1st–15th	25,000
November 16th–30th	10,500
December 1st–15th	25,000
December 16th–31st	22,500
Total	$98,000

Q continues to purchase insurance from a foreign insurer, incurring liability for the tax imposed by section 4371 on policies issued by a foreign insurer. During the fourth quarter of 1991, Q's section 4371 is as follows:

October 1st–15th	$ 0
October 16th–31st	0
November 1st–15th	2,500
November 16th–30th	0
December 1st–15th	0
December 16th–31st	2,000
Total	$4,500

Q filed a Form 720 reporting luxury tax and section 4371 tax for the third calendar quarter of 1991.

(2) *Filing requirement.* Q must file a Form 720 reporting the $98,000 luxury tax liability and the $4,500 section 4371 tax liability for the fourth calendar quarter of 1991 (§ 40.6011(a)–1T(a)). The Form 720 is due by January 31, 1992, the last day of the first month following the calendar quarter (§ 40.6071(a)–1T(a)). Q must continue to file a Form 720 for each subsequent calendar quarter until Q files a final return in accordance with § 40.6011(a)–2T.

(3) *Deposit and payment requirement*—(i) *Semimonthly deposit rule.* Q is required to deposit both the luxury tax and the section 4371 tax on a semimonthly basis (§ 40.6302(c)–1T(b)(1)). Deposits of these taxes for each semimonthly period are due by the 9th day of the following semimonthly period (§ 40.6302(c)–1T(b)(3)). Accordingly, Q meets the semimonthly deposit requirement if Q makes the following deposits:

By October 24th	$ 5,000
By November 12th	10,000
By November 25th	27,500
By December 9th	10,500
By December 24th	25,000
By January 9th	24,500

The deposit due by Tuesday, November 12th would ordinarily be due by November 9th (the 9th day after the end of the semimonthly period). Because November 9, 1991 is a Saturday, and Monday, November 11, 1991, is Veterans Day, a legal holiday, Q has until that Tuesday to make the required deposit. Similarly, Q has until Monday, November 25, 1991, to make the deposit that would ordinarily be due the preceding day because November 24th is a Sunday.

(ii) *Safe harbor.* Q may also meet the semimonthly deposit requirements using the safe harbor applicable to persons that filed a return during the safe harbor look-back quarter, in this case the second quarter of 1991. Because the deposits of luxury tax and section 4371 taxes Q must make are due on the same schedule, Q computes the safe harbor deposit amount based on the combined net tax liability for these taxes reported in the look-back quarter ($76,500). Accordingly, Q meets the safe harbor by:

(A) depositing $12,750 (⅛ of Q's combined liability for the second calendar quarter of 1991) by the 9th day of the semimonthly period following each semimonthly period in the third calendar quarter of 1991; and

(B) paying $26,000 (total tax liability for the fourth calendar quarter of $102,500 less $76,500 deposited) with the return by January 31, 1992, the last day of the month following the end of the fourth calendar quarter (§ 40.6071(a)–1T(a)).

PART 43—[AMENDED]

Par. 2. Part 43 is amended as follows.

1. The authority for part 43 continues to read in part as follows:

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

2. Section 43.0–1T is added to read as follows:

§ 43.0–1T Introduction (temporary).

(a) *In general.* The regulations in this part 43 are designated "Excise Tax on Transportation by Water." The regulations relate to the taxes on transportation by water imposed by section 4471 of the Internal Revenue Code. See part 40 of this subchapter for regulations relating to returns, payments, and deposits of taxes imposed by section 4471.

(b) *Termination of certain provisions.* Sections 43.6011(a)–1T, 43.6011(a)–2T, 43.6071(a)–1T, 43.6091–1T, 43.6101–1T, 43.6109(a)–1T, and 43.6151(a)–1T shall not apply for calendar quarters beginning after December 31, 1990, and § 43.6302(c)–1T shall not apply for calendar quarters beginning after March 31, 1991.

PART 44—[AMENDED]

Par. 3. Part 44 is amended as follows:

1. The authority for part 44 continues to read in part as follows:

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

§ 44.4402–1 [Removed]

2. Section 44.4402–1 is removed and a new § 44.4402–1T is added to read as follows:

§ 44.4402–1T Exemptions (temporary).

(a) *Parimutuel wagering enterprises.* Section 4402 provides that no tax shall be imposed by section 4401 on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law.

(b) *Wagering machines*—(1) *In general.* Section 4402 provides that no tax shall be imposed by section 4401 on any wager placed in a coin-operated device (as defined in section 4462 as in effect for years beginning before July 1, 1980), or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2) (as so in effect). These devices include:

(i) So-called "slot" machines that operate by means of the insertion of a coin, token, or similar object and that, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens; and

(ii) Machines that are similar to machines described in paragraph

(b)(1)(i) of this section and are operated without the insertion of a coin, token, or similar object.

(2) *Examples.* The following devices and machines are examples of the devices referred to in paragraph (b)(1) of this section:

(i) A machine that is operated by means of the insertion of a coin, token, or similar object and that, even though it does not dispense cash or tokens, has the features and characteristics of a gaming device whether or not evidence exists as to actual payoffs.

(ii) A so-called crane machine, claw, digger, or rotary merchandising type device that is operated by the insertion of a coin and adjustment of a control lever for the purpose or removing from the machine, by gripping, pushing, or other manipulation articles such as figurines, lighters, etc., in the machine.

(iii) A pinball machine equipped with a pushbutton for releasing free plays and a meter for recording the plays so released, or equipped with provisions for multiple coin insertion for increasing the odds.

(iv) Pinball machines in connection with which free plays are redeemed in cash, tokens, or merchandise, or prizes are offered to any person for the attainment of designated scores.

(v) A coin-operated machine that displays a poker hand or delivers a ticket with a poker hand symbolized on it that entitles the player to a prize if the poker hand displayed by the machine or symbolized on the ticket constitutes a winning hand.

PART 45—[REMOVED]

Par. 4. Part 45 is removed.

Par. 5. Part 46 is amended as follows.

1. The authority for part 46 continues to read in part as follows:

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

2. The heading for part 46 is revised.

3. Section 46.0–1 is removed and new § 46.0–1T is added.

4. Sections 46.0–3 and 46.0–4 are removed.

5. Subpart B is removed and subpart D is removed and reserved.

6. Subpart A1 is redesignated as subpart B.

7. Section 46.4375–1 is removed.

8. Section 46.6001–4 is redesignated as § 46.4371–4 of newly designated subpart B.

9. The revised heading and added provisions read as follows:

PART 46—EXCISE TAX ON POLICIES ISSUED BY FOREIGN INSURERS AND OBLIGATIONS NOT IN REGISTERED FORM

§ 46.0–1T Introduction (temporary).

(a) *In general.* The regulations in this part 46 relate to the taxes on policies issued by foreign insurers imposed by chapter 34 of the Internal Revenue Code and the tax on the issuer of registration-required obligations not issued in registered form imposed by chapter 39 of the Internal Revenue Code. See part 40 of this subchapter for regulations relating to returns, payments, and deposits of taxes imposed by chapters 34 and 39.

(b) *Termination of certain provisions.* Subpart E (other than §§ 46.6302(b)–1, 46.6302(c)–1 and 46.6302(c)–2) shall not apply for calendar quarters beginning after December 31, 1990, and §§ 46.6302(b)–1, 46.6302(c)–1, and 46.6302(c)–2 shall not apply for calendar quarters beginning after March 31, 1991.

PART 48—[AMENDED]

Par. 6. Part 48 is amended as follows.

1. The authority for part 48 continues to read in part as follows:

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

§ 48.0–1 [Removed]

2. Section 48.0–1 is removed and new § 48.0–1T is added.

3. The added provision reads as follows:

§ 48.0–1T Introduction (temporary).

(a) *In general.* The regulations in this part 48 are designated "Manufacturers and Retailers Excise Tax Regulations." The regulations relate to the excise taxes imposed by chapter 31 and 32 of the Internal Revenue Code. Chapter 31 (relating to retail taxes) imposes tax on certain luxury items, special fuels, fuel used in commercial transportation on inland waterways, and heavy trucks and trailers. Chapter 32 (relating to manufacturers taxes) imposes tax on gas guzzler automobiles, highway-type tires, gasoline, diesel and aviation fuel, coal, certain vaccines, and sporting goods. Although chapter 32 also imposes a tax on firearms, this tax is under the jurisdiction of the Bureau of Alcohol, Tobacco, and Firearms beginning in 1991, and the regulations in this part 48 relating to the tax are not in effect after December 31, 1990. See part 40 of this subchapter for regulations relating to returns, payments, and deposits of taxes imposed by chapters 31 and 32 (other than the tax on firearms imposed by section 4181).

(b) *Termination of certain provisions.* Sections 48.4181–1, 48.4181–2, 48.4182–1, 48.4182–2, 48.6011(a)–1, 48.6011(a)–2, 48.6071(a)–1, 48.6081(a)–1, 48.6091–1, 48.6101–1, 48.6109–1, 48.6151–1, 48.6151–1T, 48.6161(a)(1)–1, 48.6402(a)–1, and 48.6404(a)–1 shall not apply for calendar quarters beginning after December 31, 1990, and §§ 48.6302(c)–1 and 48.6302(c)–2 shall not apply for calendar quarters beginning after March 31, 1991.

PART 49—[AMENDED]

Par. 7. Part 49 is amended as follows.

1. The authority for part 49 continues to read in part as follows:

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

2. Sections 49.0–1, 49.0–3, and 49.0–4 are removed and new § 49.0–1T is added.

3. Subpart B is removed and reserved.

4. The heading for subpart E is revised to read as follows: "Subpart E—Transportation of Property."

5. Sections 49.4286–1 and 49.4287–1 of subpart E are removed.

§§ 49.9000 and 49.9000–1 [Removed]

6. The undesignated center heading preceding § 49.9000, and §§ 49.9000 and 49.9000–1 are removed.

7. The added provision reads as follows:

§ 49.0–1T Introduction (temporary).

(a) *In general.* The regulations in this part 49 are designated "Facilities and Service Excise Taxes." The regulations relate to the taxes on communications and transportation by air imposed by chapter 33 of the Internal Revenue Code. See part 40 of this subchapter for regulations relating to returns, payments, and deposits of taxes imposed by chapter 33.

(b) *Termination of certain provisions.* Subpart G (other than § 49.6302(c)–1) shall not apply for calendar quarters beginning after December 31, 1990. Section 49.6302(c)–1 (except for paragraph (a)(1)(iii) (relating to semimonthly deposits only)) shall not apply for calendar quarters beginning after March 31, 1991.

PART 52—[AMENDED]

Par. 8. Part 52 is amended as follows.

1. The authority for part 52 continues to read in part as follows:

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

2. Section 52.0–1T is added to read as follows:

§ 52.0–1T Introduction (temporary).

(a) *In general.* The regulations in this part 52 are designated "Environmental Tax Regulations." The regulations relate to the environmental taxes imposed by chapter 38 of the Internal Revenue Code.

See part 40 of this subchapter for regulations relating to returns, payments, and deposits of taxes imposed by chapter 38.

(b) *Termination of certain provisions.* Sections 52.6011(a)–1T, 52.6011(a)–2T, 52.6071(a)–1, 52.6071(a)–2T, 52.6091–1T, 52.6101–1T and 52.6109(a)–1T shall not apply for calendar quarters beginning after December 31, 1990 and §§ 52.6302(c)–1 and 52.6302(c)–2T shall not apply for calendar quarters beginning after March 31, 1991.

PART 138—[REMOVED]

Par. 9. Part 138 is removed.

PART 142—[REMOVED]

Par. 10. Part 142 is removed.

PART 145—[AMENDED]

Par. 11. Part 145 is amended as follows.

1. The authority for part 145 continues to read in part:

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

2. Sections 145.1–1 through 145.4–6 are removed.

PART 146—[REMOVED]

Par. 12. Part 146 is removed.

PART 147—[REMOVED]

Par. 13. Part 147 is removed

PART 148—[AMENDED]

Par. 14. Part 148 is amended as follows.

1. The authority for part 148 continues to read as follows:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805.

2. Section 148.1–6 is removed.

PART 49—[AMENDED]

Par. 15. Section 154.2–1 of part 154 is redesignated as § 49.4271–1T and transferred to subpart E of part 49, and newly designated § 49.4271–1T is amended by revising the section heading, by removing the last sentence of paragraph (a), and by revising paragraph (f) to read as follows:

§ 49.4271–1T Tax on transportation of property by air (temporary).

* * * * *

(f) *Collection of tax.* The tax imposed by section 4271 shall be paid by the person making the payment subject to tax and shall be collected by the person engaged in the business of transporting property by air for hire who receives such payment, except that in the case of amounts subject to tax which are paid by the U.S. Postal Service, the tax shall not be collected by the person engaged in the business of transporting property by air for hire who receives such payment, but instead shall be paid directly by such Service as if it were a collecting agent.

PART 154—[REMOVED]

Par. 16. Part 154 is removed.

Approved: December 19, 1990.

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 925

Missouri Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing approval, with certain exceptions and additional requirements, of a proposed amendment to the Missouri permanent regulatory program (hereinafter referred to the Missouri program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment was submitted to OSM on January 12, 1989, and pertains to prime farmland, hydrology, excess spoil disposal, coal processing waste disposal, fish and wildlife, rills and gullies, revegetation, subsidence, prohibitions, areas unsuitable for mining, bonding, and definitions. The amendment is intended to revise the State program to be consistent with the corresponding Federal standards and to incorporate the additional flexibility afforded by the revised Federal regulations.

EFFECTIVE DATE: January 3, 1991.

FOR FURTHER INFORMATION CONTACT: Jerry R. Ennis, Director, Kansas City Field Office, Office of Surface Mining Reclamation and Enforcement, 934 Wyandotte Street, Room 500, Kansas City, Missouri 64105; telephone: (816) 374–6405.

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Interior conditionally approved the Missouri program on November 21, 1980. Information pertinent to the general background and revisions to the permanent program submission, as well as the Secretary's findings, the disposition of comments, and the conditions of approval of the Missouri program can be found in the November 21, 1980, **Federal Register** (45 FR 77017). Subsequent actions concerning proposed amendments are codified at 30 CFR 925.10, 925.12, 925.15, and 925.16.

II. Submission of Amendment

On January 12, 1989, Missouri submitted proposed regulations to OSM as an amendment to its approved regulatory program (Administrative Record No. MO–410). The proposed regulations would amend Chapters 2, 3, 5, 6, 7, and 8 of Division 40—Land Reclamation Commission, Title 10—Department of Natural Resources, of the Missouri Code of State Regulations (CSR).

The amendment proposed by Missouri responds to (1) a June 11, 1986, letter from OSM (Administrative Record No. MO–295) sent in accordance with 30 CFR part 732 requiring certain provisions of the State program to be updated for consistency with the Federal regulations through July 1, 1983, (2) a January 30, 1986, letter from OSM (Administrative Record No. MO–351) sent in accordance with 30 CFR part 732 concerning the adequacy of Missouri's alternative bonding system, and (3) a required program amendment at 30 CFR 925.16(1)(1). Additionally, Missouri proposes to revise provisions at its own initiative.

Missouri proposes to revise: 10 CSR 40–3.040 sections (1), (3), (4), (6) through (13) along with 10 CSR 40–3.200 sections (3), (4), and (6) through (12) concerning Surface and Underground Requirements for Protection of the Hydrologic Balance; 10 CSR 40–3.060(1) along with 10 CSR 40–3.220(1) concerning Surface and Underground Requirements for the Disposal of Excess Spoil; 10 CSR 40–3.080 sections (1), (2), (4), (10), and (11) along with 10 CSR 40–3.230 sections (1), (2), (4), (10), and (11), concerning Surface and Underground Requirements for the Disposal of Coal Processing Waste; 10 CSR 40–3.100(2), Requirements for the Protection of Fish, Wildlife, and Related Environmental Values and Protection Against Slides and Other Related Damage; 10 CSR 40–3.110(6), Regrading or Stabilizing Rills and Gullies; 10 CSR 40–3.120 sections (6), and (8) along with

10 CSR 40–3.270(6) concerning Surface and Underground Revegetation Requirements; 10 CSR 40–3.280(1)(C), General Requirements for Subsidence Control; 10 CSR 40–5.010 sections (2), and (3) concerning Prohibitions and Limitations on Mining in Certain Areas; 10 CSR 40–5.020(4) State Designation of Areas Unsuitable for Mining; 10 CSR 40–6.060(4)(A)3, Prime Farmland Applicability; 10 CSR 40–7.011, Bond Requirements; 10 CSR 40–7.021, Duration and Release of Reclamation Liability; 10 CSR 40–7.031, Permit Suspension or Revocation, Bond Forfeiture, and Authorization to Expend Reclamation Fund Monies; 10 CSR 40–7.041, Form and Administration of the Coal Mine Land Reclamation (CMLR) Fund; and 10 CSR 40–8.010 (1)(A)59 and (1)(A)79, Definitions.

The Director announced receipt of the proposed amendment in the February 10, 1989, Federal Register (54 FR 6423) and, in the same notice, opened the public comment period and provided an opportunity for a public hearing on the amendment's substantive adequacy. No public comments were received by March 13, 1989, the close of the comment period. The public hearing, scheduled for March 7, 1989, was not held because no one requested an opportunity to testify.

Following a thorough review of the proposed amendment, OSM notified Missouri on June 5, 1989, of its concerns regarding impoundments, toxic spoil, coal waste disposal, fish and wildlife, revegetation success, and bonding (Administrative Record No. MO–441). These concerns identified provisions that appeared to be less effective than the Federal regulations.

On July 11, 1989, Missouri responded with additional, clarifying information on the coal waste disposal and bonding concerns (Administrative Record No. MO–448). Missouri also informed OSM that it plans to address OSM's other concerns during future rule makings.

The Director announced receipt of the additional information in the August 4, 1989, Federal Register (54 FR 32094) and, in the same notice, reopened the public comment period on the additional information's adequacy. No public comments were received by August 21, 1989, the close of the comment period.

On March 13, 1990, Missouri wrote a letter to OSM (Administrative Record No. MO–489) requesting that the proposed regulation at 10 CSR 40–2.110(1)(B)3 regarding interim program prime farmland performance requirements be withdrawn from the January 12, 1989, submission. The Director agreed to this request.

III. Director's Findings

1. Provisions Not Discussed

Missouri proposes revisions to regulations that are substantive in nature and contain language substantially identical to the corresponding Federal regulations. The Director, therefore, finds that these proposed revisions to Missouri's regulations are no less effective than the corresponding Federal regulations. The approved State regulations are identified in the Federal regulations at 30 CFR 925.15—Approval of regulatory program amendments.

2. 10 CSR 40–3.040(4)(B)3 and 40–3.200(4)(B)3, Stream Channel Diversions

The State regulations at 10 CSR 40–3.040(4)(B)3 and 40–3.200(4)(B)3 require that, when stream flow is allowed to be diverted, the stream channel diversion shall be designed, constructed, and removed in accordance with criteria detailed in subparagraphs 1 and 2. Missouri proposes to revise paragraphs (B) by adding subparagraphs 3, that would require the design and construction of all stream channel diversions on perennial and intermittent streams to be certified by a qualified registered professional engineer.

The Federal regulations at 30 CFR 816.43(b)(4) and 817.43(b)(4) also require a certification, but additionally require the design and construction of diversions to be certified as meeting the performance standards of the Federal regulations at 30 CFR 816.43 and 817.43 (diversions) and any design criteria set by the regulatory authority. Missouri's proposed revisions would not require certification of the design and construction of diversions to meet performance standards comparable to the Federal regulations at 30 CFR 816.43 and 817.43 and any design criteria set by the regulatory authority.

The Director finds that Missouri's proposed revisions to 10 CSR 40–3.040(4)(B)3 and 40–3.200(4)(B)3 concerning certification of stream channel diversions do not render the State regulations less effective than the Federal regulations at 30 CFR 816.43(b)(4) and 817.43(b)(4). However, the Director is requiring Missouri to further amend its program to provide that the design and construction of stream channel diversions be certified as meeting all design criteria set by the regulatory authority and the counterpart Federal regulations at 30 CFR 816.43 and 817.43 in order to be no less effective than the counterpart Federal regulations.

3. 10 CSR 40–3.040(6)(T) and 40–3.200(6)(T), Sedimentation Ponds

The State regulations at 10 CSR 40–3.040(6)(T) and 40–3.200(6)(T) discuss inspection requirements for sediment ponds. All ponds shall be examined for structural weakness, erosion, and other hazardous conditions, and reports of modifications shall be made to the director. When approved in the permit and plan, ponds not sufficient size to be regulated by the Mine, Safety, and Health Administration (MSHA) at 30 CFR 77.216(a) shall be examined four times per year. Missouri proposes to revise subparagraphs (T) by deleting the entire paragraph, thus affecting three requirements. First, the required examination for structural weakness, erosion, and other hazardous conditions would be eliminated here, but added to 10 CSR 40–3.040(10)(I)5 and 40–3.200(10)(I)5. Finding number 5 of this rule discusses this aspect of the proposed revision. Second, the required reporting of modifications would be eliminated except for 10 CSR 40–3.040(10)(I) and 40–3.200(10)(I) which contain an annual reporting requirement for ponds of sufficient size to be regulated by MSHA. And, third, the quarterly examination for ponds not of sufficient size to be regulated by MSHA would be eliminated.

The Federal regulations that address protection of the hydrologic balance at 30 CFR 816.49(a)(11) and 817.49(a)(11) do not require sediment pond modifications to be reported to the regulatory authority. They do, however, require that all ponds, including those not of sufficient size to be regulated by MSHA, be examined at least quarterly by a qualified person designated by the operator for appearance of structural weakness and other hazardous conditions. Since the Federal regulations addressing the protection of the hydrologic balance do not require reporting of modifications, Missouri's proposed revisions to delete the requirement do not make their regulations less effective than the Federal requirements. However, Missouri's proposed revisions to delete quarterly examination requirements of ponds not of sufficient size to be regulated by MSHA do make its requirements less effective than the Federal regulations.

The Director finds that the proposed deletion of paragraphs 10 CSR 40–3.040(6)(T) and 40–3.200(6)(T) concerning sedimentation pond inspections make Missouri's regulations less effective than the Federal regulations at 30 CFR 816.49(a)(11) and 817.49(a)(11) and is not

approving the language deletion to the extent that it would not require all impoundments to be examined at least quarterly by a qualified person designated by the operator for appearance of structural weakness and other hazardous conditions. The Director is requiring Missouri to amend its program to provide this requirement.

4. 10 CSR 40–3.040(10)(G) and 40–3.200(10)(G), Permanent and Temporary Impoundments

The State regulations at 10 CSR 40–3.040(9)(F) and 40–3.200(9)(F) require all dams and embankments meeting the size or other criteria of 30 CFR 77.216(a) to be routinely inspected by a qualified registered professional engineer or by someone under the supervision of a qualified registered professional engineer, in accordance with 30 CFR 77.216–3. Missouri proposes to revise subparagraphs (9)(F) by recodifying the subparagraphs to (10)(G) and adding the requirement that the professional engineer or specialist be experienced in the design and construction of impoundments. Inspections would have to be made regularly during construction, upon completion of construction, and at least yearly until removal of the structure of release of the performance bond.

The Federal regulations at 30 CFR 816.49(a)(10)(i) and 817.49(a)(10)(i) require all permanent and temporary impoundments to be inspected by a qualified registered professional engineer or other qualified professional specialist, under the direction of the professional engineer. Inspections shall be made regularly during construction, and at least yearly until removal of the structure or release of the performance bond. Missouri's proposed revisions would place requirements for inspections only on impoundments meeting the size or other criteria of 30 CFR 77.216(a), whereas, the Federal regulations require inspections on all impoundments.

The Director finds that the proposed revisions to 10 CSR 40–3.040(10)(G) and 40–3.200(10)(G) concerning inspection of impoundments meeting the requirements of 30 CFR 77.216(a) do not render the State regulations less effective than the Federal regulations at 30 CFR 816.49(a)(10)(i) and 817.49(a)(10)(i). However, the Director is requiring Missouri to amend its program to provide that all permanent and temporary impoundments be inspected in accordance with the comparable State performance standards of those Federal regulations at 30 CFR 816.49(a)(10)(i) and 817.49(a)(10)(i).

5. 10 CSR 40–3.040(10)(I) and 40–3.200(10)(I), Permanent and Temporary Impoundments

The State regulations at 10 CSR 40–3.040(9)(H) and 40–3.200(9)(H) require impoundments of sufficient size to be regulated by MSHA to be certified by a qualified registered professional engineer as having been constructed and/or maintained to comply with the requirements of (9)(H). Impoundments not of sufficient size to be regulated by MSHA must be certified by a qualified registered professional engineer. Missouri proposes to revise paragraphs (8) and (9) by recodifying the paragraphs to (9) and (10), respectively, in order to add regulations concerning other treatment facilities at paragraphs (7). Additionally, Missouri proposes to recodify the subparagraphs (9) (A) through (H) to (10) (B) through (I) in order to add regulations concerning new impoundment requirements at subparagraphs (A). Essentially, Missouri would revise its regulation codification without revising the reference to (9)(H) within the text of the regulation. The reference to (9)(H) would now pertain to the section on acid- and toxic-forming spoils where there is no paragraph (H), rather than the section on permanent and temporary impoundments at (10)(I). Missouri also proposes to revise the regulations at recodified (10)(I) by adding that certification of MSHA regulated impoundments be done during construction, and that certification reports include aspects of the dam stability including structural weakness, erosion, and other hazardous conditions.

The Federal regulations at 30 CFR 816.49(a)(10)(ii) and 817.49(a)(10)(ii) require all impoundments to be certified as having been constructed and/or maintained as designed and in accordance with the approved plan and Chapter VII of OSM's regulations for surface and underground coal mining operations. The certification report shall include discussion on any appearances of instability, structural weakness or other hazardous condition, depth and elevation of any impounded waters, existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

Missouri's proposed regulations are deficient in three areas. First, the State regulations continue to reference paragraph (9)(H) that, with its regulation recodification, no longer exists. However, State regulations should additionally require that impoundments be certified in accordance with the surface coal mining regulations or, its Title 10 CSR, Division 40 regulations, not just a sub-part of Division 40 such as (9)(H). Second, the proposed State regulations would make a distinction between impoundments regulated by MSHA and those not regulated by MSHA. The proposed State regulations would only require impoundments regulated by MSHA to meet certification reporting requirements, whereas the Federal regulations require all impoundments to meet the certification reporting requirements. Third, the State regulations do not contain the phrase "as designed and in accordance with the approved plan" as is required in the Federal regulations. This would allow impoundments to be certified that have not been constructed and/or maintained as designed and in accordance with the approved plan.

The Director finds that the proposed revisions to 10 CSR 40–3.040 (9)(H) recodified to (10)(I) and 40–3.200 (9)(H) recodified to (10)(I) concerning sedimentation pond certifications are less effective than the Federal regulations at 30 CFR 816.49(a)(10)(ii) and 817.49(a)(10)(ii) and is not approving the proposed changes. The Director is requiring Missouri to amend its regulations to require that all impoundments be certified as having been constructed and/or maintained as designed as in accordance with the approved plan and 10 CSR Division 40.

6. 10 CSR 40–3.060(1)(H), and 40–3.220(1)(H), Disposal of Excess Spoil

The State regulations at 10 CSR 40–3.060 and 40–3.220 detail requirements for handling excess spoil. Missouri currently does not have any provisions that require special handling of acid, toxic, or combustible spoil materials. Missouri proposes to add paragraphs (1)(H) that would require excess spoil that is acid- or toxic-forming or combustible to be adequately covered or treated to control the impact on surface and ground water, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

The Federal regulations at 30 CFR 816.71(e)(5) and 817.71(e)(5) require excess spoil that is acid- or toxic-forming or combustible to be adequately covered with nonacid, nontoxic, and noncombustible material or treated to control the impact on surface and ground water in accordance with 30 CFR 816.41 and 817.41, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

Missouri's proposed revisions would add a requirement concerning the handling of acid- or toxic-forming or

combustible excess spoil that is identical to part of the Federal requirements; however, the proposed revisions would not require nonacid, nontoxic, and noncombustible material to be used as the cover material. Additionally, the proposed revisions would not require the impact on surface and ground water to be controlled in accordance with the required State counterparts to 30 CFR 816.41 and 817.41.

The Director finds that the proposed revisions to 10 CSR 40–3.060(1)(H) and 40–3.220(1)(H) concerning the handling of acid- or toxic-forming or combustible excess spoil do not render the State regulations less effective than the Federal regulations at 30 CFR 816.71(e)(5) and 817.71(e)(5). However, the Director is requiring Missouri to amend its program to require excess spoil that is acid- or toxic-forming or combustible be adequately covered with nonacid, nontoxic, and noncombustible material, or treated to control the impact on surface and ground water to be no less effective than the Federal regulations at 30 CFR 816.41 and 817.41.

7. 10 CSR 40–3.080(10)(B) and 10 CSR 3.230(10)(B), Disposal of Coal Processing Waste

The State regulations at 10 CSR 40–3.080(10)(B) and 10 CSR 40–3.230(10)(B) allows diversions that carry runoff from areas above disposal facilities or runoff from the surface of such facilities to be designed to carry the peak runoff from a one hundred (100)-year, twenty-four (24)-hour precipitation event. In its June 11, 1986, letter to Missouri, OSM noted that the 24-hour duration specified in Missouri's regulation could be retained if the State can demonstrate that the peak runoff from this event will equal or exceed that from the 100-year, 6-hour event as specified in the counterpart Federal regulations at 30 CFR 816.84(d) and 817.84(d). In a July 11, 1989, letter (Administrative Record No. MO–449) Missouri provided statistics of the U.S. Weather Bureau, Technical paper #40, to substantiate its position that a 100-year, 24-hour event produces a greater peak flow than a 100-year, 6-hour event in Missouri's geographical location. OSM's review concurred with the statistics provided in that paper.

Based on this information, the Director finds that Missouri's requirement for a 100-year, 24-hour precipitation design event at 10 CSR 40–3.080(10)(B) and 10 CSR 40–3.230(10)(B) is no less effective than the Federal regulation requirements for a 100-year, 6-hour event at 30 CFR 816.84(d) and 817.84(d) and is approving Missouri's use of its design criteria.

8. 10 CSR 40–3.100(2), Endangered and Threatened Species

The State regulations at 10 CSR 40–3.100(2) detail reporting and consultation requirements for threatened, endangered, or other protected species. Missouri proposes to revise paragraph (2) by adding the requirement that no surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Missouri Department of Conservation and the U.S. Fish and Wildlife Service or which will result in the destruction or adverse modification of designated critical habitat of such species in violation of the Endangered Species Act (16 U.S.C. 1531).

The Director finds that the State's proposed revisions to its surface mining regulations concerning endangered and threatened species at 10 CSR 40–3.100(2) are no less effective than the Federal regulations at 30 CFR 816.97(b) and, in part, satisfies a required program amendment placed on the Missouri program at 30 CFR 925.16(b)(1). However, Missouri failed to address a required program amendment as it applies to the State's underground regulations. Therefore, the required program amendment at 30 CFR 925.16(b)(1) will be modified to require Missouri to amend its underground mining regulations to be no less effective than the Federal regulations at 30 CFR 817.97(b).

9. 10 CSR 40–3.110(6), Regrading or Stabilizing Rills and Gullies

The State regulations at 10 CSR 40–3.110(6) detail requirements for the regrading or stabilizing of rills and gullies. Missouri proposes to revise paragraph (6) by adding a limitation that only rills and gullies deeper than 9 inches "which either (1) disrupt the approved postmining land use or the re-establishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams," shall be filled, graded, and topsoiled. Additionally, Missouri proposes to revise the same regulations by adding a topsoiling requirement for the repair of all rills and gullies.

The Federal regulations at 30 CFR 816.95(b) require rills and gullies that form in areas having been regraded and topsoiled and that either (1) disrupt the approved postmining land use or the re-establishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted.

The Director finds that the proposed revisions to 10 CSR 40–3.110(6) concerning rills and gullies are no less effective than the Federal regulations at 30 CFR 816.95(b). The Director is also removing a required program amendment placed at 30 CFR 925.16(1)(1) that required Missouri to amend its program at 10 CSR 40–3.110(6) to require the replacement of lost topsoil during stabilization of rills or gullies.

10. 10 CSR 40–3.120(6) and 40–3.270(6), Revegetation Requirements

(a) 10 CSR 40–3.120(6)(A) and 40–3.270(6)(A)

The State regulations at 10 CSR 40–3.120(6)(A) and 40–3.270(6)(A) require success of revegetation to be measured by techniques approved in the permit and plan after consultation with appropriate State and Federal agencies. Missouri proposes to revise paragraphs (A) by replacing the phrase "approved in the permit and plan after consultation with appropriate State and Federal agencies" with "statistically valid techniques and in accordance with guidelines established by the Director and referenced under (6)(B)2 of this rule." Essentially, Missouri's changes would base revegetation success evaluation on statistically valid techniques and State guidelines rather than the applicant's permit.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require standards for success and statistically valid sampling techniques for measuring success to be selected by the regulatory authority and included in an approved regulatory program.

The Director finds that Missouri's proposed revisions to 10 CSR 40–3.120(6)(A) and 40–3.270(6)(A) that require revegetation success be based on guidelines rather than the applicant's permit are no less effective than the Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) and is, therefore, approving them. However, prior to implementation, the Director must review and approve the guideline standards for success and statistically valid sampling techniques for measuring success.

(b) 10 CSR 40–3.120(6)(B)2.A, B, C, D, E, and F and 40–3.270(6)(B)2.A, B, C, D, E, and F

The State regulations at 10 CSR 40–3.120(6)(B)2 and 40–3.270(6)(B)2 detail revegetation success standards for different land uses. Missouri proposes to revise subparagraphs A, B, C, D, E, and

F by adding a requirement at the end of each sub-paragraph that directs the standard for measuring performance to be in accordance with the applicable criteria contained in the policy adopted by the Land Reclamation Commission (LRC).

The Federal regulations at 30 CFR 816.116(b) and 817.116(b) also provide detailed revegetation success standards for different land uses, but do not reference criteria for measurement and performance. This requirement instead is placed at 30 CFR 816.116(a) and 817.116(a) as an all inclusive requirement for all land uses and to be selected by the regulatory authority and included in the approved regulatory program.

The Director finds that the proposed revisions to 10 CSR 40–3.120(6)(B)2.A, B, C, D, E, and F and 40–3.270(6)(B)2.A, B, C, D, E, and F concerning the need to meet LRC policy on revegetation criteria is not inconsistent with Federal regulation requirements at 30 CFR 816.116 and 817.116 and is, therefore, approving them. However, these revisions cannot be implemented until the Director reviews and approves the guidelines as discussed in finding 10(a) of this rule.

11. 10 CSR 40–3.120(8)(D), Reclamation Schedule

The State regulations at 10 CSR 40–3.120(8) detail reclamation time tables and variances from those timetables. Missouri proposes to revise paragraph (8) by adding subparagraph (D). This subparagraph would require the permittee to report to the regulatory authority the status of reclamation on all of his operations as of January 1 of each year. It details 11 narrative and map items required to be in the report.

There are no counterpart Federal regulations requiring submittal of an annual report, detailing the permittee's reclamation status. However, the Director finds that Missouri's proposed revisions would add reporting requirements that the State has determined to be necessary in order to efficiently administer its program. Since such reports are not inconsistent with the Federal regulations the Director is approving Missouri's proposed revision at 10 CSR 40–3.120(8)(D).

12. 10 CSR 40–6.060(4)(A)3 Permanent Program Prime Farmland Performance Requirements

The State regulation at 10 CSR 40–6.060(4)(A)(3) details the requirements that an applicant must meet in order to be exempted from the prime farmland (PFL) performance standards. Subparagraph (4)(A)3 requires the applicant to submit a plan, and any supportive data required by the regulatory authority, outlining the proposed procedures to meet the equivalent productive capacity of the exempted PFL soils. Missouri proposes to revise the subparagraph by deleting the word "equivalent" and replacing the phrase "the exempted PFL soils" with the phrase "the intended land use as declared in the permit as per 10 CSR 40–3.120." The revisions would require information from the applicant on how the productive capacity of the permit's intended land use for exempted PFL soils would be met.

The Federal regulations at 30 CFR 785.17(a) detail the requirements that an applicant must meet in order to be exempted from the PFL performance standards. They do not, however, require that a specific plan for meeting the postmining productive capacity be submitted in order for an applicant to be exempted from the PFL performance standards. However, the Director finds that Missouri's additional requirement for submittal of a plan by the applicant is not in conflict with or inconsistent with the Federal regulations regarding PFL exemption. The Director is therefore approving Missouri's proposed revisions to 10 CSR 40–6.060(4)(A)3.

13. 10 CSR 40–7, Bonding

On May 8, 1984, under the authority of 30 CFR 800.11(e), OSM approved an alternative bonding system for Missouri (49 FR 29476).

On January 30, 1986, pursuant to 30 CFR 732.17, OSM notified Missouri that it must (1) correct deficiencies in its alternative bonding system, and (2) outline plans to reclaim the backlog of forfeiture sites (Administrative Record No. Mo–351). OSM's letter indicated that Missouri's alternative bonding system no longer met the requirement of 30 CFR 800.11(e)(1) to "assure that the regulatory authority will have sufficient resources to complete the reclamation plan for any areas which may be in default at any time."

Missouri responded with the submittal of five separate amendments that addressed various components of its bonding program. Two of the amendments were approved by the Director as adequate partial responses to the January 30, 1986, letter. The three remaining submittals are now being combined into a single future rulemaking action. Following is a summary of the five amendment responses by Missouri.

Missouri's first response was to (1) enact statutory and regulatory changes that increased the bonding amount from $500 per acre to $2,500 per acre for the performance-bonding portion of the system and to (2) increase the ceiling of the Coal Mine Land Reclamation (CMLR) fund from $3 million to $7 million. OSM approved this amendment as an "adequate partial response" and published notice of this approval in the February 26, 1988, **Federal Register** (53 FR 5766).

Missouri's second response was to enact statutory changes that increased the performance bonding amount from $2,500 per acre up to $10,000 per acre for coal-preparation areas. The Director also approved this amendment as "an adequate partial response" and published notice of this approval in the October 31, 1988, **Federal Register** (53 FR 43866).

Missouri's third response was to enact regulatory changes that would require the minimum amount of bond applied to a single mine to be $10,000. This amendment was submitted to OSM for approval on March 18, 1988, (Administrative Record No. MO–371) and is being combined with other submittals for a future rulemaking decision by OSM.

Missouri's fourth response was to enact statutory changes at Mo. Rev. Stat. sections 444.805(8) (15), and (16); 444.830.1; 444.950.1, .2, .3, and .4; 444.960.1 and .5; and 444.965.1, .2, .3, .4, .5, and .6 to (1) add definitions, (2) allow a permittee to post a full-cost performance bond rather than participate in the alternative bonding system, (3) replace the alternative bonding system's term "pit reclamation" with the term "phase I reclamation", (4) establishing a minimum bond for mines of 1000 acres or less, (5) divide the CMLR fund for two uses, and (6) increase the CMLR fees and ceiling amounts. This amendment was submitted to OSM for approval on July 8, 1988 (Administrative Record No. MO–388), and is being combined with the other submittals for a future rulemaking decision by OSM.

Missouri's fifth response was to enact regulatory changes consistent with the five statutory sections described above. This amendment was submitted to OSM for approval on January 12, 1989, as part of this rulemaking (Administrative Record No. MO–410).

Due to the complexities involved with the analyses of these proposed revisions, the Director is deferring his decision on the adequacy of Missouri's alternative bonding system to a future rulemaking. Thus, a future rulemaking will address all of Missouri's State program amendments concerning its alternative bonding system.

IV. Public and Agency Comments

As discussed above, the Director solicited public comment and provided opportunity for a public hearing on the proposed amendment. No public comments were received, and since no one requested an opportunity to testify at a public hearing, no hearing was held.

Pursuant to section 503(b) of SMCRA and 30 CFR 732.17(h)(11), comments were also solicited from various Federal agencies with an actual or potential interest in the Missouri program. The Environmental Protection Agency (EPA) commented on several aspects of the proposed amendment (Administrative Record Nos. MO–421, MO–433, MO–455, MO–458 and MO–474):

In its April 5, 1989, letter (Administrative Record No. MO–433) EPA's Washington, D.C. office provided conditional concurrence to the State's proposed amendment. EPA was concerned that all diversions allowed under Missouri's proposed regulations at 10 CSR 40–3.040 and 40–3.080 would not necessarily comply with the applicable requirements of the Clean Water Act (CWA). In a July 5, 1989, reply to EPA (Administrative Record No. MO–444) OSM provided clarifying State regulations at 10 CSR 40–3.040 that requires the Missouri program to meet all Federal and State water quality statutes, regulations, standards, or effluent limitations. Based on this additional information, EPA provided its concurrence that Missouri's proposed regulation did meet the requirements of CWA (Administrative Record no. MO–455).

EPA's Region VII office provided separate comments in a February 27, 1989, letter (Administrative Record No. MO–421). One comment stated that, in addition to what the State has proposed at 10 CSR 40–3.040(4)(B)(3), stream channel diversions must be certified as being designed and constructed to meet the performance standards of this part and any design criteria set by the regulatory authority. In response, the Director agrees with the EPA comment and, as addressed in finding 2 of this rule, will require Missouri to amend its program to require that the design and construction of stream channel diversions be certified as meeting the performance standards of the Federal regulations at 30 CFR 816.43 and 817.43 and any design criteria set by the regulatory authority.

EPA also commented that the proposed regulations at 10 CSR 40–3.040(10)(G) and 10 CSR 40–3.200(10)(G) should require quarterly examinations of all dams and embankments for all permanent and temporary impoundments. The Director agrees with the EPA comment and, as addressed in finding 3 of this rule, will not approve the proposed regulation revisions to the extent that they do not require that all impoundments be examined at least quarterly, by a qualified person designated by the operator, for appearance of structural weakness and other hazardous conditions.

EPA also expressed concern with the definition of refuse pile at 10 CSR 40–8.010(79) in that depressions may be allowed on top of the refuse piles, and thus "impound" liquids. In response to this concern, the Director notes that Missouri is proposing a regulation at 10 CSR 40–8.010(1)(A)59 that defines refuse pile to mean a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material. This definition is substantively the same as the Federal regulation definition of refuse pile at 30 CFR 701.5 and will insure that refuse piles will not be allowed to impound liquids, thus satisfying EPA's concern.

EPA had several comments relating to Missouri's proposed bonding regulations. As discussed in finding 13, the Director is deferring his decision on the adequacy of Missouri's bonding system to a future rulemaking. The Director will consider EPA's comments on bonding in that action.

In accordance with 30 CFR 732.17(h)(4), comments were solicited from the State Historic Preservation Officer. That office responded with no objections to the proposed revisions (Administrative Record No. MO–419).

V. Director's Decision

Based on the above findings, with the exception of those provisions concerning regulations determined to be less effective than the Federal regulations, the Director is approving the proposed amendment submitted by Missouri on January 12, 1989.

The Federal regulations at 30 CFR part 925 codifying decisions concerning the Missouri program are amended to implement this decision. This approval is contingent upon the State's promulgation of the proposed regulations in the identical form submitted for OSM's review and approval. The final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

The Director is not approving the following provisions of the proposed amendments: (1) At 10 CSR 40–3.040(6)(T) and 10 CSR 40–3.200(6)(T), concerning quarterly examination of sediment ponds not under MSHA regulation and (2) at 10 CSR 40–3.040(9)(H) recodified to (10)(I) and 10 CSR 40–3.200(9)(H) recodified to (10)(I), concerning certification of all impoundments as having been constructed and/or maintained as designed.

The Director is revising the required program amendment of the Federal regulations at 30 CFR 925.16(b) concerning endangered and threatened species to apply only to the underground regulations of the Missouri program. The Director is also removing the required program amendment at 30 CFR 925.16(l)(1) concerning rills and gullies and, is deferring his decision on 10 CSR 40–7 concerning bonding.

The Director is requiring program amendments at 30 CFR 925.16(d): (1), Concerning the certification of stream channels diversions as meeting the applicable performance standards; (2), concerning the quarterly examination of sediment ponds by a qualified person for appearance of structural weakness and other hazardous conditions; (3), concerning inspection of all permanent and temporary impoundments even though they are not under MSHA regulations; (4), concerning certification of all impoundments as constructed and/or maintained as designed; and (5), concerning the covering of acid- or toxic-forming or combustible excess spoil to control impacts of surface and ground water in accordance with the hydrologic protection plan.

VI. Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary of the Interior. Federal regulations at 30 CFR 732.17(a) require that any alteration of an approved State program must be submitted to OSM as a program amendment. Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. Thus, any changes to the program are not enforceable by the State as a part of the approved program until approved by the Director. In his oversight of the Missouri program, the Director will recognize only statutes, regulations, and other materials approved by him, together with any consistent implementing policies, directives, and other materials, and will require the enforcement by Missouri of only such provisions.

VII. Procedural Determinations

1. National Environmental Policy Act

The Secretary has determined that, pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared for this rule making.

2. Executive Order No. 12291 and the Regulatory Flexibility Act

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Accordingly, for this action, OSM is exempt from the requirement to prepare a regulatory impact analysis, and this action does not require regulatory review by OMB.

The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal regulations will be met by the State.

3. Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the OMB under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 925

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 20, 1990.

Raymond L. Lowrie,

Assistant Director, Western Support Center.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T of the Code of Federal Regulations is amended as set forth below.

PART 925—MISSOURI

1. The authority citation of part 925 continues to read:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 925.15 is amended by adding paragraph (m) to read:

§ 925.15 Approval of regulatory program amendments.

* * * * *

(m) With the exceptions of 10 CSR 40–3.040(6)(T) and 40–3.200(6)(T), that are not approved to the extent that Missouri would not require all impoundments to be examined at least quarterly by a qualified person designated by the operator for appearance of structural weakness and other hazardous conditions, and 10 CSR 40–3.040(9)(H) recodified to (10)(I) and 10 CSR 40–3.200(9)(H) recodified to (10)(I) concerning all impoundments to be certified as having been constructed and/or maintained as designed in accordance with the approved plan, the following provisions of the Missouri Code of State Regulations (CSR) as submitted to OSM on January 12, 1989, are approved effective January 3, 1991: 10 CSR 40–3.040(1)(B), (3)(G), (4)(B)3, (6)(B), (6)(H), (7)(A), (7)(B), (10)(A), (10)(E), (10)(G), (10)(J), (13)(A)1, and (13)(B)1.C and 40–3.200(1)(B), (3)(H), (4)(B)3, (6)(B), (6)(H), and (7)(A), (7)(B), (10)(A), (10)(E), (10)(G), (10)(J), (12)(A)1, and (12)(B)1.C, Surface and Underground Requirements for Protection of the Hydrologic Balance; 10 CSR 40–3.060(1)(B), (1)(F), (1)(H), and (1)(K) and 40–3.220(1)(B), (1)(F), (1)(H), and (1)(K), Surface and Underground Requirements for the Disposal of Excess Spoil; 10 CSR 40–3.080(1)(C), (2)(A), (4)(A), (4)(D)3, (10)(B), and (11)(D) and 40–3.230(1)(C), (2)(A), (4)(A), (4)(D)3, (10)(B), and (11)(D), Surface and Underground Requirements for the Disposal of Coal Processing Waste; 10 CSR 40–3.100(2) Requirements for the Protection of Fish, Wildlife, and Related Environmental Values and Protection Against Slides and Other Related Damage; 10 CSR 40–3.110(6), Regrading or Stabilizing Rills and Gullies; 10 CSR 40–3.120(6)(A), (6)(B)2.A, B, C, D, E, F, and (8)(D) and 40–3.270(6)(A), (6)(B)2.A, B, C, D, E, and F Surface and Underground Revegetation Requirements; 10 CSR 40–3.280(1)(C), General Requirements for Subsidence Control; 10 CSR 40–5.010(2)(C), (2)(E), and (3)(B)2, Prohibitions and Limitations on Mining in Certain Areas; 10 CSR 40–5.020(4)(B)1, (4)(B)2, (4)(B)4, (4)(b)5, (4)(B)6, (4)(C)1, (4)(C)3, (4)(c)4, and (4)(C)5, State Designation of Areas Unsuitable for Mining; 10 CSR 40–6.060(4)(A)3, Prime Farmland Applicability; and 10 CSR 40–8.010(1)(A)59 and (1)(A)79, Definitions. A decision on the following provisions, also submitted as part of the January 12, 1989, amendment, is deferred until future rulemaking: (1) 10 CSR 40–7.011, Bond Requirements; (2) 10 CSR 40–7.021, Duration and Release of Reclamation Liability; (3) 10 CSR 40–7.031, Permit Suspension or Revocation, Bond Forfeiture, and Authorization to Expend Reclamation Fund Monies; and (4) 10 CSR 40–7.041, Form and Administration of the Coal Mine Land Reclamation (CMLR) Fund.

3. Section 925.16 is amended by revising paragraph (b), by adding paragraph (e) and by removing and reserving paragraph (i) to read:

§ 925.16 Required program amendments.

* * * * *

(b) By March 4, 1991:

(1) To be consistent with the Federal regulations at 817.97(b), Missouri must amend its program at 10 CSR 40–3.250 to prohibit surface mining activity that is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or that is likely to result in the destruction or adverse modification of their designated critical habitats.

* * * * *

(e) By March 4, 1991:

(1) To be consistent with the Federal regulations at 30 CFR 816.43(a)(4) and 817.43(a)(4), Missouri must require at 10 CSR 40–3.040(4) and 40–3.200(4) the design and construction of stream channel diversions be certified as meeting the comparable State performance standards of Federal regulations at 30 CFR 816.43 and 817.43 and any design criteria set by the regulatory authority.

(2) To be consistent with the Federal regulations at 30 CFR 816.49(a)(11) and 817.49(a)(11), Missouri must require at 10 CSR 40–3.040(6) and 40–3.200(6) that all impoundments be examined at least quarterly by a qualified person designated by the operator for appearance of structural weakness and other hazardous conditions.

(3) To be consistent with the Federal regulations at 30 CFR 816.49(a)(10)(i) and 817.49(a)(10)(i), Missouri must require at 10 CSR 40–3.040(10) and 40–3.200(10) that all permanent and temporary impoundments be inspected in accordance with the comparable State performance standards of the Federal regulations at 30 CFR 816.49(a)(10)(i) and 817.49(a)(10)(i).

(4) To be consistent with the Federal regulations at 30 CFR 816.49(a)(10)(ii) and 817.49(a)(10)(ii), Missouri must amend its program at 10 CSR 40–3.040(10) and 40–3.200(10) to require all impoundments be certified as having been constructed and/or maintained as designed and in accordance with the approved plan and 10 CSR Division 40.

(5) To be consistent with the Federal regulations at 30 CFR 816.71(e)(5) and 817.71(e)(5), Missouri must require at 10 CSR 40–3.060(1) and 40–3.220(1) that excess spoil that is acid- and toxic-forming or combustible be adequately covered with nonacid, nontoxic, and noncombustible material, or treated to control the impact on surface and ground water in accordance with Federal regulations at 30 CFR 816.41 and

817.41 that require a hydrologic protection plan.

[FR Doc. 91-97 Filed 1-2-91; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 172 and 173

[Docket No. HM-142A; Amdt. Nos. 172-124, 173-225]

RIN 2137-AB56

Etiologic Agents

AGENCY: Research and Special Programs Administration, DOT.

ACTION: Final rule.

SUMMARY: This final rule amends the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) by (1) Revising the definition of "etiologic agent" in 49 CFR 173.386(a)(1); (2) removing the "50 milliliter (1.666 fluid ounces) exception" for cultures of etiologic agents in § 173.386(d)(3); and (3) clarifying the "maximum net quantity in one package" limits for etiologic agents transported by aircraft as specified in Column 6 of the Hazardous Materials Table in § 172.101. This action is necessary to protect the health and safety of the public and to establish uniform requirements for all quantities of etiologic agents. The intended effect of these changes is to enhance the safe transportation of etiologic agents through the application of regulatory requirements for packaging and hazard communication.

EFFECTIVE DATE: These amendments are effective on February 19, 1991. However, compliance with the regulations, as amended herein, is authorized immediately.

FOR FURTHER INFORMATION CONTACT: George E. Cushmac, (202) 366-4545, Office of Hazardous Materials Technology, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION: .

I. Background

On November 10, 1988, the Research and Special Programs Administration (RSPA) published a notice of proposed rulemaking (NPRM) under Docket HM-142A, Notice No. 88-8 (53 FR 45525), to solicit comments on three proposals concerning etiologic agents. RSPA received 24 comments in response to the NPRM. These comments were from shippers, not-for-profit organizations, trade associations, and Federal and State agencies. The majority of the commenters expressed their support for the proposed rule. However, some commenters expressed concerns about the proposals. These comments are discussed in this final rule.

B. Etiologic Agent Definition

The first proposal concerns the definition of an "etiologic agent." As defined in 49 CFR 173.386(a)(1), an etiologic agent "means a viable microorganism, or its toxin, which causes or may cause human disease and is limited to those agents listed in 42 CFR 72.3 of the regulations of the Department of Health and Human Services" (DHHS). RSPA has not previously developed objective criteria for the etiologic agent hazard class, and the DHHS's list of etiologic agents has not been revised since July 21, 1980 (45 FR 48626). RSPA proposed to broaden the definition of an etiologic agent to include those agents listed in 42 CFR 72.3 and "any agent that poses a degree of hazard similar to those agents." Therefore, the definition of an etiologic agent would include additional agents which may cause human disease, such as the acquired immune deficiency syndrome (AIDS) virus and Lyme disease. However, the proposed definition was not as broad as the definition for infectious substances (Division 6.2) contained in the United Nations Recommendations on the Transport of Dangerous Goods (UN Recommendations), the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions) and the International Maritime Organization's International Maritime Dangerous Goods Code (IMDG Code). These international regulations define infectious substances as "those substances containing viable micro-organisms or their toxins which are known, or suspected, to cause disease in animals or humans." This definition of an infectious substance includes agents that affect animals and appears to include some relatively innocuous substances such as cold viruses, yeasts, and fungi that may cause minor illnesses.

Several commenters agreed that RSPA's proposal to broaden the definition of an etiologic agent was justified because the DHHS has not updated its regulations. However, some commenters considered the proposed language too broad and vague. One commenter suggested substituting the wording "the Acquired Immune Deficiency Syndrome (AIDS) virus" for the wording "any agent that poses a degree of hazard similar to those agents." Two other commenters, the Air Transport Association of America (ATA) and the Air Line Pilots Association (ALPA), suggested the wording "any other agent that has the potential to cause severe, disabling or fatal disease." RSPA believes adding the AIDS virus to the definition in place of the phrase "any agent that poses a degree of hazard similar to those agents" would satisfy RSPA's effort to regulate the AIDS virus but would not cover other agents that may pose an unreasonable risk to health and safety and should be regulated during transportation. RSPA believes the wording suggested by the ATA and ALPA would clarify and more appropriately define the other types of agents that should be regulated as etiologic agents. Therefore, the definition is revised to incorporate a modified version of the wording suggested by the ATA and ALPA.

Several commenters had other concerns with the proposed definition. Three commenters involved in blood collection and supply programs were concerned that the proposed definition would adversely affect those programs. One commenter stated that some carriers are refusing to transport packages containing blood intended for transfusion unless the units of blood are packed based on DOT "guidelines for transport of hazardous materials." RSPA emphasizes that the HMR do not contain "guidelines" for transporting blood *per se*. Most blood and blood components intended for use in transfusions and prepared according to U.S. Food and Drug Administration (FDA) requirements are not subject to the HMR. However, those shipments of blood and blood components containing an etiologic agent or suspected of containing an etiologic agent are subject to the HMR.

Another commenter requested that RSPA exclude infectious wastes from regulation as etiologic agents, even though the wastes may contain pathogens. Pathogens are microorganisms or other agents that cause disease. The commenter stated that these wastes are regulated by the Environmental Protection Agency under the Medical Waste Tracking Act of 1988 and, therefore, should not be regulated under the HMR. The HMR currently contain no specific requirements for infectious waste generated by medical and health care facilities. RSPA believes most infectious waste is composed of material that does not contain etiologic

agents. In many cases, if an infectious waste is known or suspected to contain an etiologic agent, the infectious waste is treated on site to destroy the etiologic agent by using a method such as incineration, autoclave, or treatment with disinfectants. However, if infectious waste that contains an etiologic agent is offered for transportation, it must conform with the requirements in the HMR for etiologic agents.

RSPA published an NPRM under Docket HM–181, entitled "Performance Oriented Packaging Standards; Miscellaneous Proposals" (52 FR 16482; May 5, 1987), prior to the NPRM under Docket HM–142A. Among other numerous changes, Docket HM–181 proposed to replace the term "etiologic agent" with the term "infectious substance" and adopt the INFECTIOUS SUBSTANCE label. The term "infectious substance" is used in the UN Recommendations, the ICAO Technical Instructions, and the IMDG Code. The scope of changes proposed in Docket HM–181 was so extensive that RSPA could not be certain when, if ever, a final rule would be issued. The NPRM under Docket HM–142A was subsequently issued to request public comments specifically addressed to definitions and criteria for etiologic agents and to authorize, on an interim basis pending publication of a final rule under Docket HM–181, use of the term "infectious substance". It was originally planned to published the final rule under Docket HM–142A prior to publication of the final rule under Docket HM–181. However, the latter was published on December 21, 1990 (55 FR 52402). A number of the provisions in this final rule are included in that publication, except that comments to this docket which are discussed herein were used in the decisionmaking process for Docket HM–181, and the changes implemented herein take effect prior to the October 1, 1991 effective date of Docket HM–181. Since compliance with Docket HM–181 is authorized beginning January 1, 1991, it is recommended that shippers implement the Docket HM–181 provisions as soon as practicable, rather than the interim provisions contained herein.

B. 50-Milliliter Exception

The second proposal concerns the "50-milliliter" (ml) exception in § 173.386(d)(3). This exception provides that etiologic agents with a total quantity of 50 ml (1.666 fluid ounces) or less in one outside package are not subject to the requirements of the HMR if the items, as packaged, contain no material otherwise regulated under the HMR. RSPA believes etiologic agents pose certain health hazards and inherent safety considerations without regard to quantity. Therefore, RSPA proposed to remove the 50-ml exception.

Some commenters agreed with RSPA that small amounts of etiologic agents are as dangerous as larger amounts. One commenter, supporting removal of the 50-ml exception, stated that any implication that an etiologic agent poses less of a hazard in volumes under 50 ml than the same etiologic agent in volumes of 51 ml or more is medically and scientifically illogical. The commenter also noted that the existing exception allows an etiologic agent to be transported domestically with fewer restrictions than most air carriers impose on biological fluids containing no infectious material.

Several commenters opposing the removal of the 50-ml exception expressed concern that it may take longer for a regulated material to reach its destination if the exception is eliminated. A review of the historical files concerning § 173.386(d)(3) revealed that the 50-ml exception was added in the HMR to facilitate the transportation of etiologic agents aboard passenger-carrying aircraft. The exception was adopted based on requests from DHHS's Centers for Disease Control (CDC) and other petitioners that the provision would enhance public health by allowing these materials to be transported expeditiously for testing and processing. In 1973 when the 50-ml exception was adopted, the air transport system was not as efficient as it is today. Cargo transporter services can now provide overnight and next-day delivery to and from all areas in the United States. Therefore, RSPA is not aware of any reason why a shipment properly prepared in accordance with applicable requirements would take longer to reach its destination than an unregulated shipment.

A commenter claimed that the removal of the 50-ml exception would result in additional paperwork and processing costs for shipping medical samples. Most etiologic agents are transported by aircraft and are packaged, marked, labeled and described on the transport documents according to the ICAO Technical Instructions, which contain no exception for small quantities. Therefore, RSPA believes cost increases associated with hazard communication and packaging for shipments of previously unregulated ecologic agents will be minimal.

One commenter stated that only certain, but not all, etiologic agents in any quantity may present a public health hazard and should be regulated. However, the commenter did not offer a way to differentiate between these two types of etiologic agents. Another commenter stated that eliminating the 50-ml exception would be financially detrimental to not-for-profit organizations which provide proficiency-testing materials to laboratories, particularly if RSPA were to require a detailed list of each package's contents on shipping papers. The commenter stated that his company has transported proficiency-testing materials, some containing etiologic agents labeled and packaged according to DOT and DHHS rules, for 25 years by aircraft and through the mail without a single injury or illness. The commenter also said that the CDC testified before a Congressional subcommittee in 1968 stating that calls to the CDC on verified damaged packages containing etiologic agents have averaged three per year, over the past 9 years. Of that number of incidents, none resulted in a reported infection. The commenter requested that RSPA carefully examine the economic impact of eliminating the 50-ml exception for test specimens, particularly on the medical community. RSPA believes the potential risks involved in shipping etiologic agents in amounts of 50 ml or less justify the regulation of those shipments where shippers have not been subject to the regulations. In the event special situations do occur, RSPA believes they can be handled effectively under the terms of an exemption.

Other commenters opposing the removal of the 50-ml exception stated RSPA has provided no data to support the change. In particular, one commenter stated that RSPA should state the specific reasons why the exception should be removed and provide an opportunity for public comment. In the NPRM, RSPA stated that this proposal was based on reconsideration of the health hazards presented by etiologic agents. While the safety record for transporting these materials has been satisfactory, the number of shipments of etiologic agents has increased significantly in recent years. RSPA has received telephone calls from air transport workers concerning the handling of damaged packages of etiologic agents in quantities not regulated under the HMR. Because etiologic agents may pose an unreasonable health and safety risk when transported in commerce, RSPA believes all transport workers should be aware of the presence of these materials. RSPA believes the safety benefits gained by removing the 50-ml

exception should more than offset the minimal costs imposed on persons offering small quantities of etiologic agents for transportation that would be affected by this final rule. For these reasons, the 50-ml exception is removed as proposed.

C. Maximum Net Quantity in One Package Aboard Aircraft

The third proposal concerns the maximum net quantity in one package of etiologic agents permitted aboard a passenger-carrying aircraft or a cargo-only aircraft, as prescribed in columns (6)(a) and (6)(b) of the Hazardous Materials Table in § 172.101 (the Table). These current limits of etiologic agents are 50 ml per package by passenger-carrying aircraft and 4 liters per package by cargo-only aircraft. The proposal contained provisions to align the quantity limitations for etiologic agents in the HMR with those for infectious substances in the ICAO Technical Instructions. As such, the maximum net quantity in one package would be 50 ml or 50 grams when transported by passenger-carrying aircraft, and 4 liters or 4 kilograms when transported by cargo-aircraft only.

The three commenters who addressed the per package quantity limits for etiologic agents transported by aircraft expressed their support for the proposal. These limits for the maximum net quantity of etiologic agents permitted in one package are adopted as proposed.

II. Additional Considerations

A. Revision of 42 CFR Part 72

Some commenters stated that the DHHS's Public Health Service, through the CDC, has been charged with the responsibility for comprehensively reviewing and revising the regulations for the shipment of etiologic agents and that RSPA should withhold promulgation of further changes until the CDC completes its review. After publication of the NPRM under HM-142A, the CDC published a notice of proposed rulemaking concerning the interstate shipment of etiologic agents (March 2, 1990; 55 FR 7678). In the notice, CDC proposes to (1) Remove the list of etiologic agents in 42 CFR 72.3 and require "that all cultures or suspensions of etiologic agents be packaged, labeled and shipped according to the regulation"; (2) substitute the term "clinical specimen" for "diagnostic specimen"; (3) impose packaging and labeling requirements for all clinical specimens and for biological products that contain an etiologic agent; and (4) require labels on inner containers of etiologic agent preparations. Although the outcome of the CDC's proposed rule is indeterminable at this time, RSPA plans to continue working with the CDC to harmonize both agencies' requirements.

B. Revision of International Regulations

The UN Subcommittee of Experts on the Transport of Dangerous Goods (Subcommittee) has started work to revise their recommendations for infectious substances. A 2-year work cycle was completed in December 1988, and revised recommendations for infectious substances were published in the sixth revised edition of the UN Recommendations. The revised recommendations were adopted as regulatory requirements in the ICAO Technical Instructions and the IMDG Code. During the 1989-1990 work cycle, the Subcommittee continued its work on infectious substances. Among other issues, it (1) Is revising the definition of infectious substances to remove the word "toxins" on the basis that toxins should be included in Division 6.1—Poisonous (toxic) substances of Class 6—Poisonous (toxic) and infectious substances; (2) is reviewing the assignment of infectious substances to risk levels or risk groups tied to packing groups; (3) is developing recommendations for packaging and maximum net quantity in one package for diagnostic specimens and biological products whereby these packages would not be subject to further requirements; (4) has eliminated the proposal regarding the "dynamic crush test" for certain packages; and (5) is planning to discuss medical waste in the context of the overall recommendations and not as an adjunct to Division 6.2—Infectious substances.

In the meantime, RSPA is publishing this final rule to correct safety deficiencies in the current HMR. RSPA plans to continue working with the UN Subcommittee to improve the definition, classification, packaging, and operational controls for etiologic agents.

III. Review by Section

Section 172.101. In the Table, the entry "Etiologic agent, n.o.s." is amended to specify a maximum net quantity permitted in one package of 50 ml or 50 g when transported by passenger-carrying aircraft and 4 L or 4 kg when transported by cargo-only aircraft. The entry "Infectious substance, human, n.o.s. See Etiologic agent, n.o.s." is revised to read "Infectious substances, affecting humans See Etiologic agent, n.o.s." and the identification number "UN2814" is added in column (3A). The use of either proper shipping name ("Etiologic agent, n.o.s." or "Infectious substances, affecting humans") is acceptable. Any quantity of an etiologic agent must conform to the packing and shipping requirements and must be labeled etiologic agent. The exceptions granted for diagnostic specimens and biological products remain unchanged.

Section 172.203. In paragraph (k)(3), the proper shipping name "Infectious substance, human, n.o.s." is removed and replaced with "Infectious substances, affecting humans" in order to be consistent with international modal regulations.

Section 173.386. In paragraph (a)(1), the definition of "etiologic agent" is revised to include other agents that have the potential to cause severe, disabling or fatal diseases in humans in addition to the agents listed in 42 CFR 72.3 of the DHHS regulations. In paragraph (a)(3), the definition of "biological product" is revised to correct various CFR citations. Paragraph (d)(3), which grants an exception for cultures of etiologic agents of 50 ml or less, is removed.

Section 173.387. Paragraph (a) is revised to specify the maximum quantity of a solid containing an etiologic agent that may be packed in one package.

IV. Administrative Notices

A. Executive Order 12291 and Administrative Notices

RSPA has determined that this rulemaking (1) Is not "major" under Executive Order 12291; (2) is not "significant" under DOT's regulatory policies and procedures (44 FR 11034); (3) will not affect not-for-profit enterprises or small governmental jurisdictions; and (4) does not require an environmental impact statement under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). A regulatory evaluation is available for review in the Docket.

B. Executive Order 12612

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

C. Regulatory Flexibility Act

The changes in this final rule will affect persons involved in the transportation of etiologic agents by expanding the definition of an etiologic agent to include some agents not previously subject to the HMR, and by making all quantities of etiologic agents subject to the packaging and hazard communication requirements in the

HMR. Although there may be incremental costs associated with this amendment, the increase in safety outweighs the minimal cost impacts of this rule. Based on limited information concerning size and nature of entities likely affected by this final rule, I certify this regulation will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

The final rule imposes information collection requirements, for shipping papers, for certain previously unregulated shipments of etiologic agents. The information collection requirements for shipping papers contained in current 49 CFR part 172, subpart C, have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. chapter 35 under OMB control number 2137–0034 (expiration date: 6/30/92).

E. Regulatory Information Number (RIN)

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

In consideration of the foregoing, 49 CFR Parts 172 and 173 in effect on the date of this amendment are amended as follows:

PART 172—HAZARDOUS MATERIALS TABLES, HAZARDOUS MATERIALS COMMUNICATIONS REQUIREMENTS AND EMERGENCY RESPONSE INFORMATION REQUIREMENTS

1. The authority citation for part 172 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1808; 49 CFR part 1.)

2. The Hazardous Materials Table in § 172.101 is amended by revising entries to read as follows:

§ 172.101 Purpose and use of hazardous materials table.

* * * * *

§ 172.101 HAZARDOUS MATERIALS TABLE

(1)+/A/W	(2) Hazardous materials descriptions and proper shipping names	(3) Hazard Class	(3A) Identification number	(4) Label(s) required (if not excepted)	(5) Packaging		(6) Maximum net quantity in one package		(7) Water Shipments		
					(a) Exceptions	(b) Specific requirements	(a) Passenger carrying aircraft or railcar	(b) Cargo only aircraft	(a) Cargo vessel	(b) Passenger vessel	(c) Other Requirements
	REVISE Etiologic agent, n.o.s	Etiologic agent.	NA2814	Etiologic agent.	173.386	173.387	50 ml or 50 g.	4 L or 4 kg	.....	.....	Not permitted except under specific conditions approved by the Department.
	Infectious substances, affecting humans. *See* Etiologic agent, n.o.s.	.....	UN2814								

§ 172.203 [Amended]

3. In § 172.203, paragraph (k)(3) is amended by removing the proper shipping name "Infectious substance, human, n.o.s." and replacing it with "Infectious substances, affecting humans."

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

4. The authority citation for part 173 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, 1806, 1807, 1808; 49 CFR Part 1, unless otherwise noted.

§ 173.386 [Amended]

5. In § 173.386, paragraph (d)(3) is removed and paragraphs (a)(1) and (a)(3) are revised to read as follows:

§ 173.386 Etiologic agents; definition and scope.

(a) * * *

(1) An *etiologic agent* means a viable microorganism, or its toxin, which is listed in 42 CFR 72.3 of the regulations of the Department of Health and Human Services or which causes or may cause severe, disabling or fatal human disease.

* * * * *

(3) A *biological product* means a material prepared and manufactured in accordance with the provisions of 9 CFR part 102 (Licensed Veterinary Biological Products), 9 CFR part 103 (Biological Products for Experimental Treatment of Animals), 9 CFR part 104 (Imported Biological Products), 21 CFR part 312 (Investigational New Drug Application), or 21 CFR parts 600 to 680 (Biologics), and which, in accordance with these provisions, may be shipped in interstate commerce.

* * * * *

6. In § 173.387, paragraph (a) is revised to read as follows:

§ 173.387 Packaging requirement for etiologic agents.

(a) Except as provided in § 173.386(d), no person may ship a package

containing more than 4 liters of a liquid containing an etiologic agent or 4 kilograms net weight of a solid containing an etiologic agent.

* * * * *

Issued in Washington, DC, on December 21, 1990, under authority delegated in 49 CFR part 1.

Travis P. Dungan,

Administrator, Research and Special Programs Administration.

[FR Doc. 91–18 Filed 1–2–91; 8:45 am]

BILLING CODE 4910–60–M

Proposed Rules

Federal Register
Vol. 56, No. 2
Thursday, January 3, 1991

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

Farmers Home Administration

7 CFR Part 1980

Rural Housing Loans

AGENCY: Farmers Home Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Farmers Home Administration (FmHA) proposes to amend its Guaranteed Rural Housing Loans regulation. This action is taken to implement the provisions of the Cranston-Gonzalez National Affordable Housing Act, to provide for the implementation of an interest assistance program for guaranteed loans, to further conform the guaranteed program with the insured 502 Rural Housing Program, to revise the method of guaranteeing loans made by other lenders, and to remove certain obstacles in guaranteed loan making. The intended effect of this action is to strengthen the Agency's mission of rural development and to implement a guaranteed rural housing loan program.

DATES: Comments must be received on or before February 4, 1991.

ADDRESSES: Submit written comments in duplicate to the Office of the Chief, Regulations Analysis and Control Branch, Farmers Home Administration, U.S. Department of Agriculture, room 6348, South Agriculture Building, 14th and Independence, SW., Washington, DC 20250. All written comments will be available for public inspection at the above address. The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980.

FOR FURTHER INFORMATION CONTACT: Michael S. Feinberg, Senior Loan Specialist, at Farmers Home Administration, USDA, room 5334–S, South Agriculture Building, 14th and Independence SW., Washington, DC 20250, Telephone (202) 382–1474.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established in Departmental Regulation 1512–1 which implements Executive Order 12291, and has been determined to be nonmajor because there is no substantial change from practices under existing rules that would have an annual effect on the economy of $100 million or more. There is no major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies or geographical regions or significant adverse effects on competition, employment, productivity, innovation or in the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

La Verne Ausman, Administrator of Farmers Home Administration, has determined that this action will not have a significant economic impact on a substantial number of small entities because the regulatory changes affect FmHA processing and servicing of guaranteed rural housing loans.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, "Environmental Program." It is the determination of FmHA that this action does not constitute a major Federal Action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969, Public Law 91–190, an Environmental Impact Statement is not required.

Intergovernmental Consultation

For the reason set forth in the final rule related Notice to 7 CFR part 3015. Subpart V, 48 FR 29115, June 24, 1983, this program/activity is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials. However, this activity impacts on planning and performing site development work when an application involves a subdivision of 5 or more units which has not been approved by FmHA, HUD, or VA which is included in the scope of Executive Order 12372.

Discussion

On November 28, 1990, the President signed the Cranston-Gonzalez National Affordable Housing Act. This Act provides for extensive revision to, and expansion of the guaranteed Rural Housing program for housing acquisition. On March 29, 1989, an interim rule was published on the Guaranteed Rural Housing program. That regulation provided for a demonstration program for guaranteed loans to moderate income borrowers only. However, the 1991 Agriculture Appropriations Act includes funds for a loan guarantee program both for moderate income borrowers and with an interest assistance feature for low-income borrowers. The interest assistance feature is incorporated into this proposed rule.

This revision removes language regarding the demonstration program. The contact point for the program has moved from the State Office to the County Office. Several definitions have been clarified or revised and new definitions have been added.

Loans guaranteed under this regulation will be made through lenders determined eligible by FmHA. FmHA has revised its lender qualification criteria to allow maximum lender participation in the program. The concept of Approved Lender has been deleted from the regulation in favor of an eligible lender. Any lender approved by the Federal Housing Administration or by Fannie Mae may be considered an eligible lender. A Farm Credit System institution with direct lending authority is also an eligible lender.

FmHA permits the lender to use its own forms to the maximum extent possible. Lenders will process loans to the point of approval and submit information on the applicant and the loan proposal to FmHA. FmHA will evaluate the application and respond to the lender with a determination of eligibility and funds availability.

The Cranston-Gonzalez Act provides for an additional consideration in the designation of rural area in addition to the definition in section 520 of title V of the Rural Housing Act of 1949, as amended. Section 520 is the basis for the insured program rural area definition. The Cranston-Gonzalez Act provides that guaranteed loans that are made must be for housing in a rural area that

is more than 25 miles from an urban area or densely populated area. FmHA considered different methods of identifying and describing these rural areas. The Agency believes that it was not the intent of Congress to place severe constraints on the program. FmHA studied the impact of utilizing different sizes in defining urban area. FmHA found that using Metropolitan Statistical Areas (populations of 50,000 or more) resulted in the exclusion of a significant number of areas considered rural for other FmHA programs. FmHA proposes to utilize the Office of Management and Budget's "Consolidated Metropolitan Statistical Area" (CMSA) to identify urbanized and densely populated areas. A Consolidated Metropolitan Statistical Area is an area of more than 1 million population and meets certain other specified requirements. These areas consist of a geographic area with a large population nucleus together with adjacent communities having a high degree of economic and social integration with that nucleus. The urbanized areas within a CMSA are clearly delineated by the Department of Census. Therefore, a rural area for guaranteed loans is an area which is identified as rural in accordance with section 520 of the Housing Act of 1949, as amended *and* is located at least 25 miles from the urbanized area contained within a Consolidated Metropolitan Statistical Area (CMSA). Any city, place, town or village intersecting the 25 mile limit(s) is not considered an eligible rural area.

FmHA's authorizing legislation requires that the amount of a loan cannot exceed the cost of modest housing in the local area. Allowable square footage and size provisions have been revised for interest assisted borrowers to be consistent with revisions being made in the section 502 insured loan program. The Cranston-Gonzalez Act provides that the maximum amount of the loan is the dollar limitation of section 203(b)(2) of the National Housing Act.

FmHA presently relies on the standards spelled out in § 1980.313 which states the maximum size of the dwelling and the type and number of amenities in order to determine whether the dwelling is modest. The Agency is interested in exploring other methods of determining what is modest. FmHA's primary concerns are to assure that the cost of acquiring and maintaining the dwelling is modest for the borrower and the government, that the dwelling will retain its value in relation to other dwellings in the area, and that the dwelling be considered modest in the community.

The Agency is interested in identifying alternative methods for implementing the goals of the program—providing housing to moderate and low income rural residents that is decent, safe, sanitary, and modest—while allowing buyers more freedom to choose homes with features suited to their individual circumstances. The Agency is also interested in how such alternatives might affect its ability to achieve the goals of the program.

One possible alternative would be to define "modest" based on housing costs rather than in terms of size and design features. For example, FmHA might identify a certain percentage of the median housing price in an area as the price-cap for that area. With that area, an eligible borrower could choose a structurally sound existing house within the price-cap regardless of its specific design features. Without an available existing dwelling that is adequate, the borrower could choose to build within the limits of the price-cap.

The primary advantage of limiting cost rather than design would be to allow borrowers to purchase the housing best suited to their own needs by permitting them to make trade-offs among desirable housing features within the limits of cost. A borrower who values a den or family room more than a third bedroom would be able to choose such an option.

Therefore, instead of trying to determine which of the many features in a house are too expensive (and therefore not "modest"), the FmHA would define "modest" in terms of an overall level of housing cost and let the borrower make the decisions about individual housing features. This approach also would eliminate the potential bias toward new construction since existing dwellings would be evaluated based on cost rather than the presence of any particular design features. Additionally, it might provide incentives to enhance the resale value of all dwellings.

In addition, the program may be simpler to implement once an objective cost measurement of "modest" housing is established. For example, for new houses, FmHA's administrative involvement throughout the design and construction process would decrease. The FmHA would need only to certify that the housing costs are within the acceptable price-cap.

There are potential disadvantages to this approach. If a borrower is not knowledgeable about the options or makes poor choices among housing features, a house might be difficult or expensive to maintain. Also, its value might decline. However, since the cost of maintenance is generally related to the quality of the materials used, the FmHA, by inspecting building plans before construction, can check that a house is constructed with adequate materials.

Another concern is that without strict regulatory guidelines prohibiting certain features FmHA officials would have difficulty denying borrowers excessive housing features. However, a price-cap would obivate the affordability of most features. With a price-cap, not all features would be affordable, but the borrowers are allowed to make the trade-offs and choose what are desirable features to them.

FmHA is seeking comments on all the potential advantages and disadvantages of using some type of "price-cap" to determine housing limits. For instance, should the "price-cap" be tied to the median housing price in the area or some other cost indicator? Would a "price-cap" provide sufficient incentives to borrowers? Does the minimum level of construction quality control provide adequate assurance that a borrower would be able to maintain the house?

In most cases the regulation allows loans of up to 100 percent of the market value of the property being financed or 100 percent of the acquisition cost, whichever is less.

Although the Cranston-Gonzalez Act allows a lesser loan amount for borrowers other than first-time home buyers, FmHA does not propose a different limit for these buyers. The Agency already requires borrowers to use their own resources to the extent possible. Further, most of the loans FmHA makes now are to borrowers who would qualify as first-time home buyers anyway. The Agency believes that most of the guaranteed loans would also reflect this fact.

The regulation provided for a one percent loan guarantee fee payable by the lender to FmHA. The lender may pass the fee onto the borrower.

The appraisal provisions have been revised to reflect the requirements of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3331–3351) which provides for certification and licensing of appraisers.

FmHA's regulation called for a 90 percent loan guarantee. The loan guarantee was structured similar to FmHA loan guarantees for Business and Industry loans and for Farmer Program loans. Under the proposed rule, lenders are no longer required to hold the unguaranteed portion of the note;

however, loans may only be sold to FmHA eligible lenders.

FmHA is considering alternative methods for determining the amount of a loand guarantee. The Agency solicits comments on the positive and negative aspects of the alternatives outlined below including the attractiveness of each alternative to lenders and secondary markets. Three alternatives for the loan guarantee have been developed for proposal for public comment. FmHA is seeking comments on these alternatives, as well as, any other alternative methods of structuring the guarantee which result in FmHA bearing 90 percent of the loss of the total amount of the loan so guaranteed. FmHA is interested in structuring its guaranteed program so as to create mortgage-backed securities which will be attractive to investors and thus maximize the capital available flowing through to finance homes for moderate- and low-income borrowers.

These alternatives are outlined below as alternatives 1, 2, and 3. In order to show how the alternatives differ 2 examples are used assuming that the original loan amount is $50,000; the balance owed on the loan at the time liquidation occurs is $46,000 plus $2,000 in liquidation costs. The security is valued at $45,000. In the second example, the security is valued at $25,000. Thus the basis for the loss is determined as follows:

Alternative 1 is to keep the present method of guarantee. Under the present method, FmHA and the lender share the loss on a 90–10 basis with FmHA's share being 90 percent. At liquidation:

	Example 1	Example 2
Balance owed on loan=	$46,000	$46,000
Liquidation Costs =	2,000	2,000
Total	$48,000	$48,000
Value of Security	45,000	25,000
Difference	$3,000	$23,000

Example: For a $50,000 loan, the limit of the guarantee would be determined as follows:
At loan origination:
$50,000×90%=$45,000
Loss payable
Example 1 90% of $3,000=$2,700
Example 2 90% of $23,000=$20,700

Alternative 2

Once the base amount of the guarantee is determined, the guarantee will cover the loss on the top 10 percent of the loan. On the next 10 percent of the loan, the loss will be shared on an 80/20 basis with FmHA taking the 80 percent. Any loss in excess of 20 percent of the loan will be shared on a 90/10 basis with FmHA taking the 90 percent portion.
Original loan was $50,000.
Maximum guarantee was $45,000.

Example 1

FmHA would pay the lender the entire $3,000 loss since the amount of the loss is less than the first 10 percent of the loan ($5,000).

Example 2

FmHA would pay the lender as follows:

	FmHA cost	Lender cost
1st 10 percent ($5,000)	$5,000	$0
2nd 80 percent ($5,000)	4,000 (80%)	1,000 (20%)
Balance ($13,000)	11,700 (90%)	1,300 (10%)
Total cost	$20,700	$2,300

Alternative 3

Once the base amount of the guarantee is determined, the guarantee will cover the entire loss on the first 10 percent of the loan. On the next 80 percent of the loan, the loss will be shared on a 90/10 basis with FmHA taking the 90 percent portion. Any loss in excess of 90 percent of the loan will be shared 80/20 with FmHA taking the 80 percent part.
Original loan was $50,000.
Maximum guarantee was $45,000.

Example 1

FmHA would pay the lender the entire $3,000 loss since the amount of the loss is less than the first 10 percent of the loan ($5,000).

Example 2

FmHA would pay the lender as follows:

(Basis):	FmHA cost	Lender cost
1st 10 percent ($5,000)	$5,000	$0
2nd 80 percent ($18,000)	16,200 (90%)	1,800 (10%)
Balance ($0)	0 (0%)	0 (0%)
Total cost	$21,700	$1,800

The Cranston-Gonzalez Act permits the Agency to add a requirement that first-time home buyers successfully complete a program of home ownership counseling under section 106(a)(1)(iii) of the Housing and Urban Development Act of 1968. Based on information from the Department of Housing and Urban Development, FmHA believes that such counseling is not readily available in rural areas and is not making this a requirement at this time. However, where available, FmHA endorses voluntary participation of the applicant.

FmHA has added guidance for lenders for evaluating credit history and repayment ability of loan applicants.

An interest assistance feature has been added to the program allowing low-income borrowers to participate and have a reasonable prospect of success. Interest assistance will be recaptured when the borrower sells or ceases to occupy the dwelling.

The lender is responsible for assuring that loan servicing actions are carried out as needed. FmHA has further defined loan making, loan servicing, and administration of the loan guarantee to provide lenders and FmHA field staff with more guidance.

If the account must be liquidated, the lender is responsible for carrying out the liquidation action. FmHA pays the loss to the lender after the loan has been liquidated based on the amount of the guarantee.

The Cranston-Gonzalez Act provides that the borrower may not be released of liability although the property has been transferred.

FmHA has reviewed the section on ineligible transfers and determined that it was inappropriate to allow for ineligible transfers of a guaranteed rural housing loan.

FmHA has revised the section on appeals to clarify when appeal rights are appropriate.

Not all the exhibits to this regulation are being published because either they are not required to be published or, if published, are not being changed at this time.

The number and substance of the revisions to the program will have a significant impact on the program. For this reason, and because section 706(d) of the Cranston-Gonzalez Act requires that the regulations implementing its amendments to the guaranteed rural housing program be published for prior comment, this action is set forth as a proposed rule.

It is the policy of this Department that rules relating to public property, loans, grants, benefits, or contracts shall be published for comment notwithstanding the exemption of 5 U.S.C. with respect to such rules. The Housing Act of 1949, as amended, requires a 60 day comment period. However, this action is being published with a 30 day comment period as required by the Cranston-Gonzalez Act.

Programs Affected

This program is listed in the catalog of Federal Domestic Assistance under 10.429, Guaranteed Rural Housing Loans—Demonstration Program.

List of Subjects in 7 CFR Part 1980

Home improvement, Loan Programs—Housing and community development, Mortgage insurance, Mortgages, Rural areas.

Therefore, chapter XVIII, title 7, Code of Federal Regulations is proposed to be amended as follows:

PART 1980—GENERAL

1. The authority citation for part 1980 continues to read as follows:

Authority: 7 U.S.C. 1989, 42 U.S.C. 1480, 5 U.S.C. 301, 7 CFR 2.23, 7 CFR 2.70

Subpart D—Rural Housing Loans

2. Sections 1980.301–1980.400 of subpart D and exhibits D, and E are revised, exhibits G, I, and J are added and exhibit H is added and reserved to read as follows:

Subpart D—Rural Housing Loans

§ 1980.301 Introduction.

(a) *Policy.* This subpart contains regulations for single family Rural Housing (RH) loan guarantees by the Farmers Home Administration (FmHA) and applies to lenders, borrowers, and other parties involved in making, guaranteeing, servicing, holding or liquidating such loans.

(b) *Program objective.* The basic objective of the RH guaranteed loans program is to assist eligible households in obtaining adequate but modest, decent, safe, and sanitary dwellings and related facilities for their own use in rural areas by guaranteeing sound RH loans which otherwise would not be made without a guarantee. Guarantees issued under this subpart are limited to loans to applicants with incomes that do not exceed median income limits as provided in exhibit C (available in any FmHA office).

(c) *Program administration.* The loan guarantee program is administered by the Administrator through a State Director who serves each state through District Directors and County Supervisors. The local contact person and focal point for loan processing and loan servicing is the County Supervisor. The State Director is responsible for the approval of lenders. State Directors will not issue supplements to this subpart without the prior approval of the Assistant Administrator, Housing, except as specifically provided in this subpart.

(d) *Nondiscrimination.* Loan guarantees and services provided under this subpart are subject to various civil rights statutes. Assistance shall not be denied to any person or applicant based on race, sex, national origin, color, familial status, religion, age, or physical or mental handicap (the applicant must possess the capacity to enter into a legal contract for services). The Consumer Protection Act provides that the applicant may not be denied assistance based on receipt of income from public assistance or because the applicant has, in good faith, exercised any right provided under the Act.

§ 1980.302 Definitions.

The following definitions are applicable to RH loans:

Applicant. The party applying to an eligible lender for a loan.

Approval official. An FmHA employee with delegated loan approval authority under subpart A of part 1901 of this chapter consistent with the amount and type of loan considered.

Assignment and Assumption Agreement (Form FmHA 1980–11). An agreement which is signed by and represents an agreement between FmHA and the lender setting forth the terms and conditions of an assignment of a guaranteed loan.

Borrower. All parties who are liable for the loan or any part of it. A co-signer is not considered a borrower.

Conditional Commitment for Single Family Housing Loan Guarantee (Form FmHA 1980–18). FmHA's notice to the lender that the material it has submitted is approved subject to the completion of all conditions and requirements set forth in the Constitutional Commitment.

Cosigner. A party who joins in the execution of a promissory note to ensure its repayment by the borrower. The cosigner becomes jointly and severally liable for the terms of the note but acquires no interest in the security and no borrower rights.

Development Standard. A building code adopted by the FmHA State Director in accordance with § 1924.5 (d)(1)(i)(E) of Subpart A of Part 1924 of this chapter. This information is available in any FmHA office.

Disabled person. A person who is unable to engage in any substantially gainful activity by reason of any medically determinable physical or mental impairment expected to result in death or which has lasted or is expected to last for a continuous period of not less than 12 months. In the case of an individual who has attained the age of 55 and is blind, disability is defined as inability by reason of such blindness to engage in substantially gainful activity requiring skills or abilities comparable to those of any gainful activity in which the individual has previously engaged with some regularity over a substantial period of time. A disabled person also includes a person with a developmental disability. A developmental disability means a severe, chronic disability of a person which:

(a) Is attributable to a mental or physical impairment or a combination of mental and physical impairments;

(b) Is manifested before the person attains age 22;

(c) Is likely to continue indefinitely;

(d) Results in substantial functional limitations in one or more of the following areas of major life activity:

(1) Self-care,

(2) Receptive and expressive language,

(3) Learning,

(4) Mobility,

(5) Self-direction,

(6) Capacity for independent living,

(7) Economic self-sufficiency; and

(e) Reflects the person's need for a combination and sequence of special care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

Displaced homemaker. An individual who is an adult; has not worked full-time full year in the labor force for a number of years but has during such years worked primarily without remuneration to care for the home and family; and is unemployed or underemployed and is experiencing difficulty in obtaining or upgrading employment.

Elderly family. An elderly family consists of one of the following:

(a) A person who is the head, spouse, or sole member of a household and who is 62 years or age or older, or who is handicapped or disabled and is the applicant/borrower or the co-applicant/co-borrower; or

(b) Two or more unrelated elderly (age 62 or older), disabled, or handicapped persons who are living together, at least one of whom is the applicant/borrower or co-applicant/co-borrower; or

(c) In the case of a family where the borrower/co-borrower or spouse, was at least 62 years old, handicapped, or disabled, the surviving household member(s) shall continue to be classified as an "elderly family" for the purpose of determining adjusted income even though the surviving member(s) may not meet the definition of elderly family on their own, provided:

(1) They occupied the dwelling with the deceased family member at the time of his/her death; and

(2) If one of the surviving members is the spouse of the deceased family member, the surviving family shall be classified as an elderly family only until the remarriage of the surviving spouse; and

(3) At the time of death, the dwelling of the deceased family member was financed under Title V of the Housing Act of 1949, as amended.

Existing dwelling. A dwelling which:

(a) Is more than 1 year old, or

(b) Has been previously occupied as a residence.

Extended family. A double family unit comprise of adult relatives who live together with the other members of the household, for reasons of physical dependency, economics, and/or social custom, who, under other circumstances, could maintain separate households. A typical example is: parents living with their adult children.

Finance Office. The office which maintains FmHA's financial records. It is located at 1520 Market Street, St. Louis, Missouri 63103.

First-time homebuyer. Any individual who (and whose spouse) has had no present ownership in a principal residence during the three (3) year period ending on the date of purchase of the property acquired with a guaranteed loan under this subpart.

Guaranteed loan. A loan made, held, and serviced by a lender for which FmHA has entered into an agreement with the lender in accordance with this subpart.

Handicapped person. A person having a physical or mental impairment which:

(a) Is expected to be of long or indefinite duration;

(b) Substantially impedes his or her ability to live independently.

(c) Is of such a nature that the person's ability to live independently could be improved by more suitable living conditions. Form FmHA 1944–4 will be used to verify handicap in cases where State Review Board or Social Security records are not available.

Household or family. The applicant, co-applicant, and all other persons who will make the applicant's dwelling their primary residence for all or part of the next 12 months (excluding foster children and live-in aides).

Interest assistance. Loan assistance payments made by FmHA to the lender on behalf of the borrower.

Lender. The organization making, holding, and servicing the loan which is guaranteed under the provisions of this subpart. The lender is also the party requesting the guarantee. The lender includes an entity purchasing an FmHA guaranteed loan. A purchasing lender acquires all the privileges, duties, and responsibilities of the originating lender.

Lender Agreement (Form FmHA 1980–16). The signed master agreement between FmHA and the lender setting forth the lender's loan responsibilities when the Loan Note Guarantee is issued.

Loan Note Guarantee (Form FmHA 1980–17). The signed commitment issued by FmHA setting forth the terms and conditions of the guarantee.

Manufactured home. A structure built to the Federal Manufactured Home Construction and Safety Standards and FmHA thermal requirements.

Master Interest Assistance and Recapture Agreement (Form FmHA 1980–12). The agreement between FmHA, the borrower, and the lender which provides the basis for payment and recapture of interest assistance.

Metropolitan Statistical Area (MSA). An MSA is defined according to a detailed set of standards prepared by the Federal Committee on MSAs. An area is defined as an MSA if it contains a city of at least 50,000 population or an urbanized area of at least 50,000 with a total metropolitan population of at least 100,000.

Minimum adequate site. The smallest area sufficient for the dwelling, an adequate water supply and waste disposal system, related facilities, and a yard to be built, purchased, or refinanced. It is usually not more than 1 acre of non-income producing land unless more is needed to provide for a safe and adequate water supply and waste disposal system.

Minor. A person under 18 years of age. Neither the applicant, co-applicant, or spouse may be counted as a minor. Foster children are not counted as minors for the purpose of determination of annual or adjusted income.

Net family assets Include:

(a) The value of equity in real property, savings, demand deposits, and the market value of stocks, bonds, and other forms of capital investments, but exclude:

(1) Interests in Indian Trust land,

(2) The value of the dwelling and a minimum adequate site,

(3) Cash on hand which will be used to reduce the amount of the loan,

(4) The value of necessary items of personal property such as a furniture and automobiles(s), and the debts against them,

(5) The assets that are a part of the business, trade, or farming operation in the case of any member of the household who is actively engaged in such operation, and

(6) The value of a trust fund that has been established and the trust is not revocable by, or under the control of, any member of the household, so long as the funds continue to be held in trust.

(b) The value of any business or household assets disposed of by a member of the household for less than fair market value (including disposition in trust, but not in a foreclosure or bankruptcy sale) during the two years preceding the date of application, in excess of the consideration received therefore. In the case of a disposition as part of a separation or divorce settlement, the disposition shall not be considered to be less than fair market value if the household member receives important consideration not measurable in dollar terms.

Originating lender. The lender making the loan. This is typically the lender requesting the guarantee from FmHA.

Packager. A builder, developer, real estate agent, or other party who obtains and presents one or more completed applications for guaranteed RH loans to an eligible lender.

Single parent. An individual who is unmarried or legally separated from a spouse and has custody or joint custody of one (1) or more minor children or is pregnant.

State Director. Director of FmHA programs within a State Office area and local contact for the guaranteed loan program. For the purposes of this Subpart, State Director includes Rural Housing Chiefs and State Office Rural Housing Specialists.

Transfer and assumption. The conveyance by a debtor to an assuming party of the assets, collateral, and liabilities of the loan in return for the assuming party's binding promise to pay the outstanding debt.

Veteran. A veteran is a person who has been discharged or released from the active forces of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard under conditions other than dishonorable discharge including "clemency discharges" and who served on active duty in such forces:

(a) from April 6, 1917 through March 31, 1921;

(b) from December 7, 1941 through December 31, 1946;

(c) from June 27, 1950 through January 31, 1955; or

(d) for more than 180 days, any part of which occurred after January 31, 1955, but on or before May 7, 1975.

§§ 1980.303–1980.307 [Reserved]

§ 1980.308 Full faith and credit.

The Loan Note Guarantee constitutes an obligation supported by the full faith and credit of the United States and is

incontestable except for fraud or misrepresentation of which the lender has actual knowledge at the time it becomes such lender or which the lender participates in or condones. A note which provides for the payment of interest on interest shall not be guaranteed. Any guarantee or assignment of a guarantee attached to or relating to a note which provides for the payment of interest on interest is void. Notwithstanding the prohibition of interest on interest, the loan may be reamortized within its remaining term with written concurrence of FmHA. The Loan Note Guarantee will be unenforceable to the extent any loss is occasioned by violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which FmHA acquires knowledge of the forgoing. Negligent servicing is defined as the failure to perform those services which a reasonably prudent lender would perform in servicing its own loan portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act, but also not acting in a timely manner, or acting contrary to the manner in which a reasonably prudent lender would act up to the time of loan maturity or until a final loss is paid. Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those approved by FmHA in its conditional commitment for guarantee. The Loan Note Guarantee shall not cover interest accruing 90 days after FmHA has approved the lender's decision to liquidate the loan.

§ 1980.309 Lender participation in guaranteed RH loans.

(a) *Eligible lender.* The following lenders are eligible to participate in the FmHA guaranteed RH loan program upon presentation of evidence of said approval and execution of Form FmHA 1980–16, "Lender Agreement for Single Family Housing Loan Guarantees" (Exhibit D to this subpart).

(1) Any lender approved as a supervised or nonsupervised mortgage for submission of 1–4 family housing applications for Federal Housing Mortgage Insurance or

(2) any lender approved by Fannie Mae for participation in "First Mortgages"

(3) A Farm Credit system institution with direct lending authority.

(b) *Lender approval.* A lender must request a determination of eligibility in order to participate in the program.

(1) The lender must provide the following information to FmHA:

(i) The name of an official of the lender who will serve as a contact for FmHA regarding the lender's guaranteed loans.

(ii) A list of names, titles, and responsibilities of the lender's principal officers.

(iii) Copies of financial statements, budgets, loan agreements, analysis sheets, record keeping methods, security, and other forms to be used.

(iv) An outline of the lender's internal loan criteria for issues of credit history and repayment ability.

(2) The lender must agree to:

(i) Process and service FmHA guaranteed loans in accordance with FmHA regulations.

(ii) Permit FmHA employees or its designated representatives to examine or audit all records and accounts related to any FmHA loan guarantee.

(iii) Retain the loan in the lender's portfolio and be responsible for servicing of the loan, or if the loan is to be sold, sell only to an FmHA eligible lender.

(iv) Use forms which have been approved by the Federal Housing Administration (FHA) or Fannie Mae.

(v) Abide by all applicable conditions of § 1980.334 of this subpart for all RH loan guarantees.

(c) *FmHA review of lender eligibility.* The State Director, or designee, will assure that the lender's request for eligibility is complete, and notify the lender within 15 calendar days of the receipt of a request of the decision or the need for additional information. The following are the steps required for reviewing a request for lender eligibility:

(1) Check current "Lists of Parties Excluded from Federal Procurement/ Nonprocurement Programs" to determine whether the lender or any of its principal officers have been debarred from doing business with the government.

(2) Review the lender's evidence of approval by FHA or Fannie Mae.

(3) Determine whether the lender has made previous FmHA guaranteed loans and consider any history in other FmHA programs.

(d) *Handling applications for lender approval.* Upon determination of a lender's eligibility, FmHA and the lender will execute Form FmHA 1980–16.

(1) *Application retention.* The application material will be retained by the State Director for all eligible lenders. Periodic checks will be made by the State Director to insure the lender's performance is as outlined in the application.

(2) *Appeal of adverse decision for approved lender status.* The State Director's decision on eligible lender status may not be appealed but the lender may request a review of the decision in accordance with subpart B of part 1900 of this chapter.

(e) *Monitoring lenders.* The State Director, or designee, will review 20 percent of the outstanding loans serviced by each lender every two years, or more often if necessary.

(1) If the State Director determines that the lender is not fulfilling the obligations of Form FmHA 1980–16 or that the lender fails to maintain the required criteria, the lender will be notified in writing of the deficiencies and allowed a maximum of 30 days to correct them.

(2) If the lender fails to make the required corrections, the lender's eligible status may be revoked by the State Director. The revocation will be a certified letter and will state all of the reasons for the action. Outstanding guaranteed loans shall continue to be the responsibility of the lender.

(f) *Renewing lender eligibility.* Renewal of lender eligibility is not an automatic process. Lenders desiring to keep their eligible lender status must request a subsequent approval at least 60 days prior to the expiration of the approved eligible period. The lender's request to the State Director for renewal will include at least the following:

(1) A brief summary of activity as an eligible lender including number and dollar amount of guaranteed loans, the number of applications for guaranteed loans under consideration, and a recap of any loss settlements.

(2) Present evidence of approval of FHA or Fannie Mae.

(3) Request for a new 2-year period of eligible lender status.

(g) *FmHA review.* At least 30 days prior to the expiration of the lender's eligibility, the State Director will review the lender's performance. The review will include an examination of the lender's loan processing and servicing as follows:

(1) The incidence of first-year delinquency on loans made by the lender;

(2) Any reviews conducted of the lender's portfolio;

(3) Loan servicing actions taken by the lender;

(4) Any other information regarding the lender.

(h) *Termination of lender eligibility*—(1) *Expiration.* Lender eligibility will expire at the end of 2 years, unless the lender obtains a new agreement as provided in paragraph § 1980.309(g) of this section.

(2) *Revocation.* The State Director shall revoke the eligible lender status of

any lender who fails to comply with the requirements of paragraph (b) of this section. Status will also be revoked if the lender violates the terms of Form FmHA 1980–16, or fails to properly service any guaranteed loan, or adequately protect the interests of the lender and the government.

(i) *Lender responsibility.* The lender will be responsible for the servicing and liquidating (if necessary) of the loan. The lender may use agents, correspondents, branches, financial experts, or other institutions in carrying out its responsibilities.

(1) *Processing.* If upon review of an application the lender concludes that the application can be considered for an FmHA guarantee, the lender will prepare a written statement addressing each of the loan eligibility requirements of this subpart and the basis for the conclusion and place the statement in the applicant's file. The lender must abide by limitations on loan purposes, loan limitations, interest rates, and terms set forth in this subpart. The lender will obtain, complete, and submit to FmHA the items required in § 1980.353(d) of this subpart.

(2) *Servicing.* Lenders are fully responsible for servicing and protecting the security for all guaranteed loans.

(3) *Liquidation.* The lender will complete any liquidation of loans guaranteed under the provisions of Form FmHA 1980–16. Loss claims will be submitted on Form FmHA 449–30, "Loan Note Guarantee Report of Loss." The loss report will be accompanied by supporting information to outline disposition of all security pledged to secure the loan.

(j) *FmHA responsibility.* The approval official will review each submission and compare material with Form FmHA 1980–16. The lender will be immediately contacted for information found not to be in accordance with the approved agreement. The approval official may request additional information, review the lender's complete file or make an independent evaluation of an application, if needed. FmHA will make the final determinations on eligibility of the applicant and the dwelling for the guaranteed loan program.

(1) *FmHA processing time.* FmHA will provide a response to all eligible lender requests for a guarantee within 10 working days of receipt.

(2) *Compliance reviews.* The FmHA official who conducts reviews of the requirements of this paragraph will document the review in the FmHA loan docket. Any discrepancies noted and not resolved will be reported to the State Director.

(i) *Loan closing review.* FmHA will review each lender's guaranteed loan file within 90 days of loan closing to assure compliance with the requirements of this subpart.

(ii) *Loan processing review for new lenders.* The approval official will make a complete review of the first five loans developed by a newly eligible lender. The State Director will also review not less than the first 5 loan submissions from a newly eligible lender to assure compliance with and understanding of FmHA regulations. FmHA will review the lender file on each guaranteed RH loan at least annually.

(3) *Lender Agreement.* The State Director will maintain the original of Form FmHA 1980–16 in an operational file for each eligible lender. A copy of Form FmHA 1980–16 will also be placed in the FmHA borrower's docket at the time Form FmHA 1980–17 is issued.

(k) *Lender sale of loan.* Upon prior written notification to the FmHA State Director, the lender may sell the loan. The lender and purchaser will execute Form FmHA 1980–11, "Assignment and Assumption Agreement" (Exhibit J to this subpart). The lender will also comply with § 941 of the Cranston-Gonzalez National Affordable Housing Act. The State Director will notify the County Office of the sale.

(l) *Purchasing lenders.* A lender that does not wish to originate FmHA loans, but is interested in purchasing loans made by other lenders for servicing purposes, may participate if the lender is approved by FHA or Fannie Mae for servicing.

(m) *Debarment.* See subpart M of part 1940 of this chapter.

§ 1980.310 Loan purposes.

A loan may be guaranteed if made to an applicant who has been determined eligible in accordance with § 1980.350 of this subpart.

(a) To buy, build, rehabilitate, improve, or relocate a dwelling and provide related facilities for use by the applicant as a primary residence.

(b) To refinance secured or unsecured non-FmHA debts that meet the following:

(1) If a loan of $5,000 or more is necessary for repairs to correct major deficiencies to make the dwelling decent, safe, and sanitary, an existing lien which meets the requirements of paragraphs (b)(2)(i) and (b)(2)(ii) of this section may be refinanced regardless of delinquency, if necessary for the applicant to have repayment ability for the existing loan and the requested loan for repairs.

(2) Debts or costs incurred after the date of application, but before the loan was closed, may be refinanced if the costs were incurred for fees for legal, architectural, and other technical services, or for materials, construction, or site acquisition. These costs may be included in the loan when:

(i) The applicant is unable to pay the costs from personal resources and failure to authorize the use of loan funds would jeopardize the applicant's ability to repay the loan; and

(ii) The construction or repair work conforms to that shown on the applicable plans and specifications, and the costs were incurred for authorized loan purposes.

(3) Costs in paragraphs (b)(2)(i) and (b)(2)(ii) of this section may be included in the loan when:

(i) The costs were incurred after the applicant filed a written application for a loan, but before the loan was closed; and

(ii) The applicant is unable to pay the costs from personal resources, and failure to authorize the use of loan funds would jeopardize the applicant's ability to repay the loan; and

(iii) The construction or repair work conforms to that shown on the applicable plans and specifications, and the costs were incurred for authorized loan purposes.

(c) A loan made under paragraph (a) of this section may be used to:

(1) Purchase in fee title, a minimum adequate site, as outlined in § 1980.316 of this subpart, on which improvements are or will be located, if the applicant does not own an adequate site.

(2) Pay reasonable acquisition cost for a leasehold interest in a minimum adequate site at the time an initial guaranteed loan is made.

(3) Provide an adequate and safe water supply and/or an adequate sewerage facility.

(4) Provide site preparation, including grading, seeding or sodding of lawns, foundation planting, trees, walks, yard fences, and driveways to building sites.

(5) Purchase and install essential equipment in the dwelling including items such as a range, refrigerator, clothes washer, or clothes dryer, if these items are normally sold with dwellings in the area and if purchase of these items is not the primary purpose of the loan.

(6) Provide special design features or equipment when necessary because of physical handicap or disability of the applicant or a member of the household.

(7) Purchase and install approved energy saving measures and approved furnaces and space heaters which use a commonly used, economical, and dependably available type of fuel.

(8) Provide storm cellars and similar protective structures.

(9) Pay incidental expenses such as fees for tax monitoring service, architectural, appraisal, surveying, environmental, and other technical services.

(10) Pay reasonable connection fees for utilities such as water, sewer, electricity, or gas, which the borrower is required to pay and cannot pay from other funds.

(11) Pay real estate taxes which are due and payable on the building and/or site at the time of closing an initial loan, if this amount is not a substantial part of the loan.

(12) Establish escrow accounts for the payment of real estate taxes and/or insurance premiums.

(13) Provide living area for all members of the applicant's household, including "extended family," as provided in § 1980.313(g) and § 1980.313(k) of this subpart.

(14) Pay legal services, title clearance, loan closing, and points within the provisions of § 1980.312(b) of this subpart (interest assisted borrowers only).

(15) Purchase any stock in a cooperative lending agency that is necessary to obtain the loan.

(16) Pay incidental expenses specifically authorized for manufactured housing in exhibit F of subpart A of part 1944 of this chapter.

§ 1980.311 Rural area designation.

The State Director is responsible for establishing rural area boundaries in accordance with the provisions of § 1944.10 of subpart A of part 1944 of this chapter and this section.

(a) A rural area is an area which is identified as rural in accordance with § 1944.10 of subpart A of part 1944 of this chapter *and* is located at least 25 miles from the urbanized area contained within a Consolidated Metropolitan Statistical Area (CMSA). Any city, place, town or village intersecting the 25 mile limit(s) is not considered an eligible rural area.

(b) The urbanized area of a CMSA is defined in the Census Block number maps which are available from the Bureau of Census, Geography Branch, 1201 East 10th Street, Jeffersonville, Indiana 47132.

(c) FmHA will maintain current county maps showing ineligible areas in the District and County offices. These maps will be made available to the public on request.

(d) If an area designation is changed from rural to nonrural, guarantees may be made only in the following instances:

(1) Applications received by FmHA prior to the change of designation may be processed.

(2) Subsequent guarantees may be made on property in an area where the designation was changed from rural to nonrural after the initial loan was made to pay equity in connection with an assumption and transfer of an RH loan.

§ 1980.312 Loan limitations and special provisions.

(a) *Prohibited loan purposes.* Loans will not be guaranteed if loan funds are to be used for:

(1) Payment of construction draws.

(2) The purchase of furniture or other personal property except for essential equipment and materials authorized in accordance with § 1980.310 of this subpart.

(3) Refinancing FmHA debts, debts owed the lender, debts on a building site without a building, or debts on a manufactured home.

(4) Purchase or improvement of income-producing land, or buildings to be used principally for income-producing purposes, or buildings not essential for RH purposes, or to buy or build buildings which are largely or in part specifically designed to accommodate a business or income-producing enterprise.

(5) Payment of fees, charges, or commissions, such as finder's fees for packaging the applications or placement fees for the referral of a prospective applicant to FmHA.

(6) Improving the entry of a homestead entryman or desert entryman prior to receipt of patent.

(b) *Limitations.* The amount of the loan may not exceed the maximum dollar limitation of section 203(b)(2) of the National Housing Act (12 U.S.C. (1702)).

(1) A loan for new or existing housing may be made for up to 100 percent of the present market value, the selling price, or the cost of acquisition and development, whichever is less, except as provided in paragraph (b)(2) of this section.

(2) A loan for the purchase of a dwelling which is less than one year old may not exceed 90 percent of the market value or the selling price, whichever is less, when the lender, lender's representative, Department of Housing and Urban Development, Department of Veteran's Affairs, or FmHA did not make inspections during construction unless the dwelling is covered by an FmHA approved 10-year warranty plan and the builder provides evidence of good standing under said plan.

(3) Not more than 3 discount points may be paid by the borrower unless authorized by the Administrator.

(i) Discount points paid by the seller are permitted.

(ii) The payment of points will not be considered in the appraisal.

(c) *Subdivision clearance and approval—5 or more units.* (1) When housing units are proposed for a new or existing subdivision, the subdivision must be approved by FmHA, HUD, or VA before issuance of a Conditional Commitment for Guarantee. The subdivision must meet the requirements of subpart E of part 1901 and subpart C of part 1924 of this chapter.

(2) The builder, developer, or packager will submit the necessary information to FmHA in accordance with § 1924.119 of subpart C of part 1924 of this chapter to FmHA with a request for subdivision approval.

(3) The State Director will provide the lender a list of approved subdivisions upon the lender's request and will maintain a record of these requests for the purpose of updating the lists as changes occur.

(d) *Limitations on lender's sale of the loan.* A lender may sell the FmHA guaranteed loan only to a lender approved by FmHA. The lender may be debarred from program participation for selling the loan to a non-approved entity.

§ 1980.313 Site and building requirements.

(a) *Rural area.* The property on which the loan is made must be located in a designated rural area as defined in § 1980.311 of this subpart. A nonfarm tract to be purchased or improved with loan funds must not be closely associated with farm service buildings.

(b) *Access.* The property must be contiguous to and have direct access from a street, road, or driveway that meets the applicable requirements of § 1924.115 (Subdivisions), § 1924.116 (Existing Subdivisions), and § 1924.117 (Scattered Sites) of subpart C of part 1924 of this chapter. For properties having access from a driveway, the maintenance cost for the driveway must be considered when determining the applicant's repayment ability.

(c) *Site.* A nonfarm tract on which a loan is to be made may not be larger than a minimum adequate site which is the smallest area sufficient for the dwelling, an adequate water and/or waste disposal system, other related facilities, and a yard. An applicant who is the owner of a larger than minimum adequate site is expected to liquidate the excess portion(s) as a condition of the loan unless a waiver is granted in

accordance with paragraph (d) of this section. Minimum adequate sites are:

(1) Scattered sites of 1 acre or less.

(2) House sites of 1 acre or less within a subdivision environment without central water or sewer facilities.

(3) Not in excess of one quarter of an acre in a subdivision with adequate water and sewer, except some variation in individual lots may be permitted to accommodate cul-de-sacs, cluster housing concepts, or other subdivision designs which maximize good land usage.

(d) *Waiver provision.* The State Director may waive the size limits in paragraph (c) of this section on a case-by-case basis when it is determined that:

(1) Minimum adequate sites are not available in the area, the value of the total site is comparable to the value of a minimum adequate site, and the extra land does not qualify as a minimum adequate site.

(2) Zoning ordinances which require lots in excess of the limits set forth in paragraph (c) of this section were established because additional land is needed to protect the water supply and/or provide an adequate waste disposal system, or the zoning complies with either an established State or National environmental plan or a State law, or

(3) The scattered site or subdivision was approved before May 14, 1987.

(e) *Environmental concerns.* The property must meet the siting and environmental requirements contained in subpart G of part 1940 of this chapter.

(f) *Modest house.* Dwellings financed must provide decent, safe, and sanitary housing and be modest in size, design, and cost.

(g) *Characteristics of new dwellings*—(1) *Moderate income borrowers.* The construction or purchase of a new dwelling shall not exceed what is typical of modest housing for the area.

(2) *Borrowers eligible for interest assistance.* Housing needs will be based on the number and composition of the household along with consideration of special needs, such as facilities for the elderly, disabled, or handicapped. The construction or purchase of a new house shall not exceed what is typical for the current needs of low and moderate income persons in the area or the following, whichever is smaller:

No. of occupants	Maximum sq. ft.
1	960
2-3	1008
4-5	1104
6	1248

(3) A reasonable amount of additional square footage may be added to the dwelling when the dwelling is considered modest for the area for the applicant's family size and the additional space is:

(i) Justified by the composition of current family members, special needs, or for family size in excess of 6 members, or

(ii) Is the result of a more efficient design. Allowable design concepts include:

(A) Incorporating standard size building materials where a smaller house would result in a waste of materials,

(B) Volume construction using stock plans that meet FmHA size requirements for the majority of families involved, or

(C) An increase in space to compensate for the loss in living area due to super insulation.

(4) If the square footage exceeds the limits specified in paragraph (g) (1) or (2) of this section, the lender will document that the dwelling is considered modest for the area and is being provided at equal or less cost than a ranch style dwelling that meets these requirements. The FmHA approval official will document concurrence with the lender's determination prior to approval of the guarantee.

(h) *Living area.* Living area or gross floor area, for the purposes of this section, will be measured from the outside walls of the dwelling. For a dwelling built on a slab or crawl space, a reasonable deduction may be made for that space designed and used for utility and storage. Living area will be determined as follows:

(1) *Ranch on slab, crawl space, or basement*: First floor excluding garage or carport.

(2) *Split foyer, bi-level, raised ranch, etc.*: All space except for a basement garage. If the lower level is finished, the area will be counted as living area. If the lower level is not finished, one half of the potential living area will be counted.

(3) *Cape Cod*: All of the first floor, and all of the second floor measured to the outside of the knee stud wall, excluding below ground basements. If the second level is finished, the area will be counted as living area. If the second level is not finished, one half of the potential living area will be counted.

(4) *Two-story townhouses—zero lot line*: The area, center to center of party walls, and outside of all exterior walls of all floors, excluding below ground basements. If the dwelling is built on a slab or crawl space, the living area may exceed paragraph (g) by up to 10 percent for storage purposes.

(i) *Dwelling designs and materials.* FmHA and lenders shall not require the use of any building designs and/or materials which exceed the applicable development standards for new houses or new construction. However, such designs may be permitted when the costs are comparable to or less than the cost of fair quality material.

(j) *Prohibited features/amenities.* The following design features will not be permitted when financing construction of a dwelling or purchase of a new dwelling for an applicant who is eligible for interest assistance:

(1) Garages or carports if not customary in the area;

(2) Garages or carports exceeding 320 square feet;

(3) Nonliving areas such as balconies, decks, and patios;

(4) Dwelling designs which are incompatible with existing site conditions; i.e. basements in wet areas;

(5) Den/recreation room;

(6) Central cooling systems unless authorized by the State Director;

(7) Fireplaces;

(8) Bay or bow windows;

(9) Components of the house, such as kitchen cabinets, bathroom fixtures, light fixtures, etc., which exceed "fair-quality," (or "average-quality" for manufactured housing), described in Marshall and Swift Residential Cost Handbook or similar cost guide, unless the cost of the selected component is comparable to or less than one of "fair quality;"

(10) Fences, except:

(i) When needed to provide protection from a potentially dangerous situation; or,

(ii) When customary in the area on zero lot lines, townhouse properties, or on house lots of 6,000 sq. ft. or less, to afford privacy;

(11) Decorative iron work which is not needed as a safety measure;

(12) Kitchen appliances that FmHA determines to be above modest for the area;

(13) Sliding glass or atrium doors unless:

(i) The State Director determines that these types of doors are customary in other modes homes in area;

(ii) They will not increase the cost of the house;

(14) Vaulted ceilings unless they will not increase the cost of the house; and

(15) Skylights and cathedral ceilings.

(k) *Permitted features.* (1) Special design features necessary to accommodate the needs of the elderly, disabled, or handicapped persons.

(2) Energy saving features which exceed FmHA requirements and cost more than 1 percent of the market value of the property and cost effective solar energy systems may be used only after approval by FmHA's State Architect/Engineer and authorization by the State Director. Complex systems, such as active solar space heating or cooling, geothermal, hydropower, wind, and photovoltaic, that could be considered unconventional, must be submitted to the National Office for concurrence prior to authorization by the State Director.

(3) Solid fuel burning devices may be authorized only if the approval official determines and documents that a dependable and economical fuel supply is available. To assure compliance and to remove uncertainties regarding safety and efficiency, solid fuel burning devices are authorized only after approval by the local fire official, FmHA State Architect/Engineer and subsequent authorization by the FmHA State Director.

(4) A dwelling for extended families as defined in § 1980.302 of this subpart may include bedroom area with an exterior entrance and an additional bathroom. This area should be designed in a manner that will not adversely affect the home's potential for resale.

(l) *Existing dwellings.* Priority should be given to financing existing dwellings in areas with a good supply of competitively priced, suitable housing stock. Applicants should be counseled regarding the type of housing necessary to meet their current needs. The cost advantage should not be offset by the cost of utilities and maintenance. Loan guarantees will not be issued on an existing manufactured home unless it is already financed with an insured Section 502 Rural Housing loan or a guaranteed loan made under this subpart, or is being sold from FmHA inventory. Existing dwellings must:

(1) Be structurally sound, functionally adequate, be in good repair, or placed in good repair with loan funds, and meet the general requirements in Guide 2, subpart A, part 1924 of this chapter (available in any FmHA office).

(2) Be consistent with program objectives to provide only housing that is modest in size, cost, and design.

(3) Meet the thermal standards required in Exhibit D, paragraph IV B, subpart A, part 1924 of this chapter.

(4) Have adequate electrical, plumbing, heat, water, and wastewater disposal systems, and be free of termites. The dwelling must be inspected by a qualified party to determine the adequacy of those items. The sale agreement must identify responsibility for these inspections and certifications. FmHA inventory property will be inspected and repaired in accordance with § 1955.64 of subpart B of part 1955 of this chapter. Inspections are not required on public water and public wastewater disposal systems.

(5) When the borrower is eligible for interest assistance, contain no more than 1500 square feet measured in accordance with paragraph (h) of this section for households of two or more persons, or not more than 1120 square feet of living area for one member households unless:

(i) A larger house is needed to meet the needs of the family in accordance with paragraph (g) of this section, or

(ii) The house is being transferred by assumption of an existing guaranteed loan, purchased from FmHA inventory, or transferred from a presently indebted FmHA 502 Rural Housing loan borrower.

(m) *Design features/amenities in existing dwellings.* Existing dwellings with design features that add significantly to the value of the dwelling (such as those listed in paragraph (j) of this section) will not be financed unless the cost of the dwelling is no more than the cost of a new dwelling, and FmHA determines that the dwelling with such features is considered modest. Amenities such as those mentioned in paragraph (k) may be included in the dwelling unless FmHA determines that a combination of those amenities causes the dwelling to be above modest.

(n) *Repairs.* Any dwelling financed with an FmHA guarantee must be structurally sound, functionally adequate, and placed in good repairs with loan funds. Manufactured homes will not be repaired except for situations involving subsequent loans in connection with a credit sale, transfer or repair of a unit currently financed with a loan guaranteed under this subpart. Repairs required as a condition of the loan will be performed in accordance with § 1924.6 of subpart A of part 1924 of this chapter after loan closing.

(o) *Improvements.* Improvements financed with guaranteed loan funds must be on land in a rural area, which after loan closing, is part of a tract owned by the borrower in accordance with § 1980.313(a) of this section, or on an easement appurtenant to such a tract.

(p) *Manufactured homes.* Only units approved by FmHA, purchased through FmHA approved dealer-contractors, may be guaranteed under this subpart. The lender may obtain a list of FmHA approved models and dealer-contractors from any FmHA office in the area served.

(1) Loans may be guaranteed for the following purposes when the security covers both the unit and the lot:

(i) A new unit for a site, owned or purchased by the applicant which meets the requirements and limitations of this section or a leasehold meeting the provisions of § 1980.314 of this subpart.

(ii) Site development work consistent with the requirements of Exhibit J of subpart A of part 1924 of this chapter.

(iii) Subsequent loans in accordance with paragraph (n) of this section.

(iv) Transportation and set-up costs for a new unit.

(2) Loans may not be guaranteed for:

(i) An existing unit and site unless it is already financed with a Section 502 Rural Housing insured or guaranteed loan, it is being sold from FmHA inventory, or it is being sold from the lender's inventory provided the lender acquired possession of the unit through a loan guaranteed under this subpart.

(ii) The purchase of a site without also financing the unit.

(iii) Existing debts owed by the applicant/borrower.

(iv) A unit without an affixed certification label indicating the unit was constructed in accordance with the Federal Manufactured Home Construction and Safety Standards.

(v) Alteration or remodeling of the unit when the initial loan is made.

(vi) Furniture, including movable articles of personal property such as drapes, beds, bedding, chairs, sofas, lamps, tables, televisions, radios, stereo sets, and similar items. This does not include items such as wall-to-wall carpeting, refrigerators, ovens, ranges, clothes washers or dryers, heating or cooling equipment, or similar items.

(vii) Any unit not constructed to the FmHA thermal standards as identified by an affixed label for the winter degree day zone where the unit will be located.

(viii) A unit that at the time of loan approval, would result in more than one person per room. The number of rooms include bedrooms, living room, dining room, kitchen, den, or family room.

(ix) Repairs unless authorized in paragraph (n) of this section.

§ 1980.314 Loans on leasehold interests.

A loan may be guaranteed if made on a leasehold owned or being acquired by the applicant when the lender determines that long-term leasing of homesites is a well established practice and such leaseholds are freely marketable in the area provided the lender determines and certifies to FmHA that:

(a) *Unable to obtain fee title.* The applicant is unable to obtain fee title to the property.

(b) *Unexpired term.* (1) The lease has an unexpired term of at least 40 years from the date of approval. A lease for 25 years with an option to the lessee to renew for an additional 15 years would be considered a 40 year lease.

(2) When a lease is in existence at least one year prior to the date of loan approval, a housing loan may be guaranteed provided the unexpired term of the lease is at least 50 percent longer than the repayment period of the loan. In no case will the unexpired term of the lease be less than 15 years.

§ 1980.315 Intergovernmental consultation.

When the application involves a loan or loans in a subdivision of 5 or more new dwelling units in which HUD, VA, or FmHA has not previously made, insured, or guaranteed a housing loan, FmHA will comply with the requirements of 7 CFR part 3015 Subpart V, "Intergovernmental Review of Department of Agriculture Programs and Activities." See FmHA Instruction 1940–J (available in any FmHA office), which implements Executive Order 12372. This Order is intended to foster intergovernmental consultation relying on State and local processes for coordination and review of proposed federal financial assistance.

§ 1980.316 Environmental requirements.

The requirements of subpart G of part 1940 of this chapter apply to loan guarantees made under this subpart. Lenders and applicants must cooperate with FmHA in the completion of these requirements. Lenders must become familiar with these requirements so that they can advise applicants and reduce the probability of unacceptable applications being submitted to FmHA. Required environmental reviews will be completed by the appropriate FmHA officials. FmHA may require that lenders and/or applicants obtain information for completing environmental assessments when necessary.

§ 1980.317 Equal opportunity and nondiscrimination requirements in use, occupancy, rental, or sale of housing.

(a) *Compliance.* Loans guaranteed under this subpart are subject to the provisions of various civil rights statutes. FmHA and the lender may not discriminate against any person in making guaranteed housing loans available, or impose different terms and conditions for the availability of these loans based on a person's race, color, familial status, religion, sex, age, physical or mental handicap, or national origin, provided the applicant possesses the capacity to enter into a legal contract for services. These requirements will be discussed with the applicant or packager, builder, developer, and other parties involved as early in the negotiations as possible.

(b) *Reporting.* If there is indication of noncompliance with these requirements, such facts will be reported by the borrower, lender, or FmHA personnel to the Administrator, FmHA or the Director, Equal Opportunity. Complaints and compliance will be handled in accordance with Subpart E of Part 1901 of this chapter.

(c) *Forms and requirements.* In accordance with Executive Order 11246, the following equal opportunity and nondiscrimination forms and requirements are applicable to certain cases involving construction as indicated. The borrower is responsible for seeing that the requirements of paragraphs (c) (1) through (5) of this section are met:

(1) *Compliance reports.* No prospective contractor or subcontractor will be eligible for a contract or subcontract financed with a guaranteed loan until the contractor has filed all of the compliance reports required under any previous contracts.

(2) *Equal Opportunity Agreement.* Before loan closing, each borrower whose loan involves a construction contract of more than $10,000 must execute Form FmHA 400–1, "Equal Opportunity Agreement."

(3) *Contract or subcontract in excess of $10,000.* If the contract or a subcontract exceeds $10,000:

(i) The contractor or subcontractor must submit Form FmHA 400–6, "Compliance Statement," before or as a part of the bid or negotiation.

(ii) An Equal Opportunity Clause must be part of each contract and subcontract. This clause is incorporated in Form FmHA 1924–6, "Construction Contract," which may serve as a guide.

(iii) With notification of the contract award, the contractor must receive:

(A) Form FmHA 400–3, "Notice of Contractors and Applicants," signed by the County Supervisor, with an attached Equal Employment Opportunity Poster. Posters in Spanish must be provided and displayed where a significant portion of the population is Spanish speaking.

(B) Form AD–425, "Contractor's Affirmative Action Plan for Equal Employment Opportunity Under Executive Order 11246 and Executive Order 11375," if the contractor or subcontractor is subject to the requirements of paragraph (5) of this paragraph.

(4) *One hundred or more employees and contract or subcontract exceeds $100,000.* If the contractor or subcontractor has 100 or more employees and the contract or subcontract is for more than $10,000:

(i) In addition to meeting the requirements of paragraph (d)(3) of this section, each such contractor or subcontractor must file Standard Form 100, "Equal Employment Opportunity Employer Information Report EEO–1," with the Joint Reporting Committee within 30 days of the contract or subcontract award unless this report has already been submitted within the last 12 months.

(ii) An annual report must be filed on or before March 31, as long as the contractor or subcontractor holds a contract equal to $10,000 or more which is financed with a guaranteed loan.

Failure to file timely, complete and accurate reports constitutes noncompliance with the Equal Opportunity Clause. Report forms are distributed by the Joint Reporting Committee and any questions on this form should be addressed by the contractor or subcontractor to the Joint Reporting Committee, 1800 G Street, NW., Washington DC 20006.

(5) *Fifty or more employees and contract or subcontract exceeds $50,000.* If the contract or subcontract is more than $50,000 and the contractor or subcontractor has 50 or more employees, in addition to the requirements of paragraph (d)(3) of this section, each such contractor or subcontractor must be informed that he must develop a written affirmative action compliance program for each of his establishments and put it on file in each of his personnel offices within 120 days of the commencement of the contract or subcontract. Form AD–425 provides guidelines for the contractor or subcontractor in developing such a program.

(6) *Compliance reviews.* Compliance reviews must be made during construction inspections to determine whether the required posters are displayed, the facilities are not segregated, and there is no evidence of discrimination in employment. Findings of the borrower or lender (when inspections are made) will be shown on Form FmHA 1924–12, "Inspection Report." If there is any evidence of non-compliance, the borrower or lender will be made to achieve voluntary compliance. If the effort fails, the Compliance Review Officer will report all the facts in writing to the

Administrator, ATTN: Equal Opportunity Officer.

(7) *Employee complaints.* Any employee of or applicant for employment with such contractors or subcontractors may file a written complaint of discrimination with FmHA.

(i) A written complaint of alleged discrimination must be signed by the complainant and should include the following information:

(A) The name and address (including telephone number, if any) of the complainant.

(B) The name and address of the person committing the alleged discrimination.

(C) A description of the acts considered to be discriminatory.

(D) Any other pertinent information that will assist in the investigation and resolution of the complaint.

(ii) Such complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by FmHA for good cause shown by the complainant.

§ 1980.318 Flood or mudslide hazard area precautions.

(a) *Project location.* Projects located in special flood or mudslide hazard areas, as designated by the Federal Emergency Management Agency (FEMA) may be financed under this subpart only if:

(1) The community, as a result of such designation by FEMA as a special flood or mudslide prone area, has an approved flood plain area management plan.

(2) The project location and construction plans and specifications for new buildings or improvements to existing buildings comply with an approved flood plain area management plan in paragraph (a)(1) of this section.

(3) The requirements of subpart G of part 1940 of this chapter have been met.

(b) *Flood insurance.* If project is located in a special flood or mudslide hazard area and if flood insurance is available it will be purchased by the borrower prior to loan closing. (See part 1806 subpart B of this chapter, FmHA Instruction 426.2).

§ 1980.319 Other Federal, State and local requirements.

In addition to the specific requirements of this subpart, proposals financed with an FmHA guarantee will be coordinated with all appropriate Federal, State, and local Agencies in accordance with the following:

(a) *Compliance with special laws and regulations.* Applicants and/or lenders will be required to comply with any Federal, State, or local laws, regulatory commission rules, ordinances, and regulations which are presently in existence or may be later adopted which affect the project including, but not limited to:

(1) Organization and authority to design, construct, develop, operate, and/or maintain the proposed facilities;

(2) Borrowing money, giving security therefore, and raising revenues for the repayment thereof;

(3) Land use zoning;

(4) Health, safety, and sanitation standards;

(5) Protection of the environment and consumer affairs.

(b) *In compliance.* The applicant and/or lender will be in compliance with this section effective with the date of issuance of Form FmHA 1980–17.

§ 1980.320 Interest rate.

The lender will charge the same rate on both the guaranteed and non-guaranteed portions of the note. The interest rate will not exceed any established usury rate. Loan guarantees will not be approved for any loan which provides for a negative amortization of principal. Loans guaranteed under this subpart must bear a fixed interest rate agreed upon by the borrower and the lender and must not be more than the rate being authorized by the Department of Veterans' Affairs or the current Fannie Mae rate.

§ 1980.321 Terms of loan repayment

(a) *Note.* Principal and interest shall be due and payable monthly as provided in the promissory note.

(b) *Maximum term.* The maximum term for final maturity shall not exceed thirty (30) years from the date of the note. The term may be shorter as necessary to assure the loan is adequately secured.

§ 1960.322 Loan guarantee limits.

(a) *Alternative 1.* Guarantees against loss for Single Family Housing Loans will be 90 percent of the note amount. The maximum loss covered by the Loan Note Guarantee can never exceed the lesser of:

(1) The percentage of guarantee of the principal and interest indebtedness as evidenced by said note(s) or assumption agreement(s), any loan subsidy due, and 90 percent of the principal and interest indebtedness on secured protective advances for protection and preservation of collateral made with FmHA's authorization; or

(2) The percentage of guarantee of the principal and interest advanced to or assumed by the borrower under said note(s) or assumption agreement(s) and any interest due (including any loan subsidy).

For example:

$50,000 × 90% = $45,000

FmHA and the lender share all of the loss with FmHA taking 90 percent and the lender taking the remaining 10 percent.

If the balance owed on the loan at the time of account liquidation is $48,000 and the value of the security is $45,000 FmHA would pay the lender 90 percent of the $3,000 loss. ($48,000 − $45,000 = $3,000).

The amount FmHA must pay is $2,700.

If the balance owed on the loan at the time of account liquidation is $48,000 and the value of the security is $25,000, FmHA would pay the lender 90 percent of the $23,000 loss. ($48,000 − $25,000 = $23,000).

The amount FmHA must pay is $20,700.

(b) *Alternative 2.* Once the base amount of the guarantee is determined, the guarantee will cover the loss on the top 10 percent of the loan. On the next 10 percent of the loan, the loss will be shared on an 80/20 basis with FmHA taking the 80 percent. Any loss in excess of 20 percent of the loan will be shared on a 90/10 basis with FmHA taking the 90 percent portion.

For example:

Original loan was $50,000.

Maximum guarantee was $45,000.

Example 1

FmHA would pay the lender the entire $3,000 loss since the amount of the loss is less than the first 10 percent of the loan ($5,000).

Example 2

FmHA would pay the lender as follows:

	FmHA cost (dollars)	Lender cost (dollars)
1st 10 percent ($5,000).	5,000	0
2nd 10 percent ($5,000).	4,000 (80%)	1,000 (20%)
Balance ($13,000)	11,700 (90%)	1,300 (10%)
Total cost	20,700	2,300

(c) *Alternative 3.* Once the base amount of the guarantee is determined, the guarantee will cover the entire loss on the first 10 percent of the loan. On the next 80 percent of the loan, the loss will be shared on a 90/10 basis with FmHA taking the 90 percent portion. Any loss in excess of 90 percent of the loan will be shared 80/20 with FmHA taking the 80 percent part.

Original loan was $50,000.

Maximum guarantee was $45,000.

Example 1

FmHA would pay the lender the entire $3,000 loss since the amount of the loss is less than the first 10 percent of the loan ($5,000).

Example 2

FmHA would pay the lender as follows:

(Basis)	FmHA cost (dollars)	Lender cost (dollars)
1st 10 percent ($5,000).	5,000	0
2nd 80 percent ($18,000).	16,200 (90%)	1,800 (10%)
Balance ($0)	0 (0%)	0 (0%)
Total Cost	21,700	1,800

§ 1980.323 Guarantee fee.

The lender will pay a non-refundable fee of 1 percent of the principal loan amount multiplied by the percent of the guarantee to FmHA at the time the loan note guarantee is issued. The fee may be passed on to the borrower.

§ 1980.324 Charges and fees by lender.

(a) *Routine charges and fees.* The lender may establish the charges and fees for the loan, provided they are the same as those charged other applicants for similar types of transactions.

(b) *Late payment charges.* Late payment charges will not be covered by the Loan Note Guarantee. Such charges may not be added to the principal and interest due under any guaranteed note. Late charges may be made only if:

(1) *Routine.* They are routinely made by the lender in similar types of loan transactions.

(2) *Payments received.* Payments have not been received within the customary time frame allowed by the lender. The term "payment received" means that the payment in cash, check, money order, or similar medium has been received by the lender at its main office, branch office, or other designated place of payment.

(3) *Calculating charges.* The lender agrees with the applicant in writing that the rate or method of calculating the late payment charges will not be changed to increase charges while the Loan Note Guarantee is in effect.

(4) *Interest-assisted loans.* The lender must not penalize the borrower when the only delinquency is a Loan Subsidy payment(s) which the lender is entitled to but has not received.

§ 1980.325 Transactions which will not be guaranteed.

(a) *Lease payments.* Lease payments will not be guaranteed.

(b) *Loans made by other Federal agencies.* Loans made by other Federal agencies will not be guaranteed. This does not preclude guarantees of loans made by a Farm Credit System institution with direct lending authority. This also does not preclude loans made by State or local government agencies assisted by a Federal agency.

§§ 1980.326–1980.329 [Reserved]

§ 1980.330 Applicant equity requirements.

The applicant is expected to reduce the need for loan funds using available non-essential assets and/or cash on hand to the extent possible.

(a) A loan to buy or build a dwelling may be made up to the appraised market value of the security less the unpaid principal balance and past-due interest of any other liens.

(b) A loan will be limited to 90 percent of the market value of the security for any dwelling less than one year old when approved construction inspections were not made unless the dwelling is covered by an FmHA approved insured 10-year warranty plan. (See § 1980.341(b) of this subpart for construction inspection requirements.)

§ 1980.331 Collateral.

(a) *General.* The entire loan must be secured by a first lien, or a second lien in the case of a repair loan, on the housing being financed and the lender will maintain this lien priority. The lender is responsible for assurance that proper and adequate security is obtained, maintained in existence, and of record to protect the interests of the lender and FmHA.

(b) *Third party liens, suits pending, etc.* Among other things in obtaining the required security, it is necessary to ascertain that there are no claims or liens against the security property or the borrower, and that there are no suits pending or anticipated that would affect the security property or the borrower.

(c) *All collateral must secure the entire loan.* All collateral must secure the entire loan unless it is legally impossible as in some homestead cases. The lender will not take separate collateral including but not limited to mortgage insurance, to secure that portion of the loan or loss not covered by the guarantee.

§ 1980.332 [Reserved]

§ 1980.333 Promissory notes and security instruments.

(a) *Loan instruments.* The lender may use its own forms for promissory notes, real estate mortgages, including deeds of trust and similar instruments, and security agreements provided there are no provisions that are in conflict or otherwise inconsistent with the provisions of this subpart. The lender is responsible for determining that the security instruments are adequate.

(b) *Interest assistance instruments.* FmHA will provide the lender with the necessary forms and security instruments related to the interest assistance. The lender will complete the Interest Assistance and Recapture Agreement, properly record the subsidy recapture lien, and forward the agreements and recorded instruments to FmHA.

§ 1980.334 Appraisal of property serving as collateral.

An appraisal of all property serving as security for the proposed loan will be completed. A copy of the appraisal will be submitted to FmHA for review with the request for loan guarantee.

(a) *Qualified appraiser.* The lender will use a qualified appraiser to make residential real estate appraisals. If the appraiser does not hold a designation from a professional appraisal organization that requires testing, continuing education, and experience as a condition of designation, the lender will obtain the prior approval of FmHA. Appraisers may not discriminate against any person in making or performing appraisal services because of race, color, familial status, religion, sex, age, handicap, or national origin.

(b) *Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3331–3351).* In those States which have implemented the FIRREA, the appraiser must be properly licensed or authorized, as appropriate, to perform residential appraisals in the area in which the property is located. The appraiser shall comply with the provisions set forth in the FIRREA.

(c) *Appraisal report.* Residential appraisals will be completed using the sales comparison (market) and cost approach to market value. Factors such as race, color, familial status, religion, sex, age, handicap, or national origin are not valid considerations for appraisals and shall not be used.

(1) *Uniform Residential Appraisal Report (URAR).* The appraiser will complete the URAR.

(i) A cost handbook or building valuation manual approved by the Assistant Administrator, Housing will be used and the completed cost calculation sheet attached to the appraisal.

(ii) Not less than three (3) comparable sales which are not more than 12 months old will be used unless the appraiser provides documentation that such comparables are not available in the area.

(2) *Supporting documentation.* All mathematical calculations of adjustments, justification for adjustment, and a narrative explanation

supporting any other adjustments will be attached to the appraisal.

(3) *Photographs.* The appraisal report will include photographs which provide front, rear and side views of the subject property and each comparable sale used in the completion of the appraisal.

(d) *FmHA review.* A desk review of the appraisal will be done by a qualified FmHA staff person prior to issuance of a conditional commitment for guarantee. A field review will also be performed on at least one appraisal submitted by each appraiser each year.

(1) Appraisals which are determined to be deficient and/or unacceptable will be returned to the lender for corrective actions.

(2) The lender is responsible for communicating with and initiate corrective actions with the appraiser. The corrected appraisals will be subject to the same review process described in this section.

§§ 1980.335–1980.339 [Reserved]

§ 1980.340 Acquisition, construction, development, and cost overruns.

(a) *Acquisition of property.* The lender is responsible for seeing that any property to be acquired with loan funds is acquired as planned and that the required security is obtained. The lender is also responsible for seeing that termite inspections are obtained if required in the area when an existing dwelling is financed.

(b) *Construction or development.* The lender and borrower are responsible for seeing that the loan purposes are accomplished and loan funds are properly utilized. This includes, but is not limited to seeing that:

(1) Subparts A and C of part 1924 of this chapter for planning and performing construction and other development work.

(2) Applicable laws, ordinances, codes, and regulations are complied with.

(3) Drawings, specifications, and estimates are adequate.

(4) Adequate water, electric, heating, waste disposal, and other necessary utilities and facilities are obtained.

(5) Construction or development contracts contain adequate provisions for the undertaking and are properly awarded and executed, and contractors are bonded when the lender determines that bonding is necessary.

(6) Equal opportunity and nondiscrimination requirements are met. See § 1980.317 of this subpart.

(7) Construction and development are performed expeditiously and properly, including inspections of sites and construction or development in various stages of completion to determine that work and material conform with the approved certified drawings and specifications and any other requirements.

(8) Final payment is made only after final inspection has been made and the construction or development has been found proper in all respects.

(9) A builder's warranty is issued when new construction, repair, or rehabilitation is involved, which provides for at least one year's warranty from the date of completion or acceptance of the work.

(10) No claims or liens exist against the borrower or the security property.

(c) *Overruns in development costs.* When it is determined that there will be an overrun the lender and borrower will, with the advice of FmHA, determine how the overrun costs will be met.

(1) *Minor changes.* Minor changes in the project which do not effect the approved loan purposes, increase the cost, or adversely effect the objectives or soundness of the loan may be approved by the borrower and lender. If any line item as reflected in the use of proceeds is changed 10 percent or less and the total loan remains the same, the lender may approve the change.

(2) *Major changes.* If changes cannot be handled under paragraph (c)(1) of this section, the lender and borrower, with the advice of FmHA, will determine how the change or overrun can be met. FmHA will determine and advise the lender in writing whether the loan can still be guaranteed. The FmHA approval official may approve cost overruns and revisions on all loans. The loan may never exceed the limitations specified in § 1980.312 of the subpart.

(3) *Revision of loan amounts.* When it is necessary to increase the amount of the loan guarantee as a result of an overrun in cost, FmHA will prepare and submit Form 1940–1, "Request for Obligation of Funds," to the Finance Office for the new amount of any increased loan. The original obligation must be cancelled using Form FmHA 1940–10, "Cancellation of U.S. Treasury Check and/or Obligation."

§ 1980.341 Inspections of construction and compliance reviews.

(a) *Qualified inspectors.* Inspections will be made during construction by a qualified construction inspector approved by the lender. In connection with inspections of construction, equal opportunity and nondiscrimination compliance reviews will be made as required by § 1980.317 of this subpart.

(b) *Required inspections.* The lender will see that the following three inspections are made in addition to any additional inspections the lender deems appropriate:

(1) When footings and foundations are ready to be placed.

(2) When shell is closed in but plumbing, electrical, and mechanical work are still exposed.

(3) When construction is completed, prior to occupancy.

§§ 1980.342–1980.344 [Reserved]

§ 1980.345 Applicant eligibility requirements for a loan guarantee.

Applicants who meet the requirements below are eligible for a loan guaranteed under this subpart.

(a) *Eligible income.* The applicant's adjusted annual income determined in accordance with § 1980.352 of this subpart may not exceed the applicable income limit in Exhibit C of this subpart (available in any FmHA office) at time of loan approval.

(b) *Adequate and dependable income.* The applicant (and co-applicant, if applicable) has adequate and dependably available income. The applicant's history of income and the history of the typical annual income of others in the area with similar types of employment will be considered in determining whether the applicant's income is adequate and dependable.

(1) A farm or nonfarm business loss must be considered in determining repayment ability.

(2) A loss may not be used to offset other income in order to qualify for or increase the amount of FmHA assistance.

(c) *Determining repayment ability.* In considering whether the applicant has adequate repayment ability, the lender may calculate a Monthly Obligation to Income (MOTI) ratio. The applicant's MOTI should be calculated by dividing the applicant's monthly obligations by monthly income. FmHA does not require that an applicant meet any specific ratio. A high MOTI ratio, by itself, is not reason enough to reject a loan guarantee request.

(1) Monthly Obligation consists of the principal, interest, taxes, and insurance (PITI) for the proposed loan, homeowner and other assessments, and the applicant's long term debt obligations. Long term debt obligations include those debts with a remaining repayment period of more than 6 months and other shorter term debts that are considered to have a significant impact on repayment ability.

(2) Income, for the purpose of determining the MOTI ratio includes the total gross income of the applicant, co-applicant, and any other member of the

household who will be a party to the note plus any interest assistance under this program or any other assistance from a State or County sponsored program, for which the applicant is eligible.

(3) The applicant is considered to have repayment ability for the purpose of the FmHA loan guarantee when one of the following conditions is met:

(i) The applicant's MOTI ratio is less than or equal to 38 percent; or

(ii) The applicant has maintained rent payments greater than or equal to the monthly PITI for the past two years, has not had a significant increase in debt load, and has not had a significant decrease in income; or

(iii) The applicant's MOTI ratio is greater than 38 percent, but the lender and the applicant are able to demonstrate the applicant's repayment ability using a realistic cash flow budget.

(4) *Using budgets to determine repayment ability.* Lenders may use FmHA's budget form, Form FmHA 1944–3, "Household Financial Statement and Budget," or any other similar form, if a budget is needed. The lender should prepare the budget jointly and/or review it in detail with the applicant. The discussion should lead to a consensus on what the applicant is spending. A budget is intended to be a reflection of the applicant's income and expenses. Rules of thumb, cost of living tables, and other means of estimating household living costs will not be used as a basis for preparing a budget. The lender and the applicant will sign and date the budget form. When a budget is revised, the lender will document the basis for the revision. The lender will consider the following when evaluating the applicant's budget for repayment ability:

(i) Non-cash items (e.g. food stamps, scholarships, free clothing, or transportation which help reduce the applicant's budgeted expenses) will be properly documented, and the budget items will be reduced accordingly.

(ii) Dependable, available income from all sources not used to determine adjusted annual income. For example income from employment of minors, foster care payments, and similar income items, will be considered to the extent it is used to offset budgeted expenses even though such income may not be included in "annual income."

(iii) The amount of any interest assistance provided under this subpart or any other payment assistance from a State or County sponsored program for which the applicant may be eligible.

(5) *Additional co-applicant.* Applicants who do not meet the requirements of this section will be considered ineligible unless another adult(s) in the household has adequate income and wishes to join in the application as a co-applicant. The combined incomes then may be considered in determining repayment ability.

(6) *Cosigner.* The lender may accept a cosigner with dependably available income which is sufficient to repay the loan. The cosigner must be an individual and may not be a member of the applicant's household.

(d) *Credit history.* The applicant must have a credit history which indicates a reasonable ability and willingness to meet obligations as they become due. "Creditworthiness: A Guide to Evaluating Credit History of Single Family Housing Applicants" (available in any County Office) will be used to determine whether an applicant has an acceptable credit history.

(1) Any or all of the following are indicators of an unacceptable credit history unless the cause of the problem was beyond the applicant's control:

(i) Incidents of secured or unsecured debt payments being more than 30 days late if the incidents have occurred within the last 12 months.

(ii) Loss of security due to a foreclosure if the foreclosure has occurred within the last 36 months.

(iii) Outstanding tax liens or delinquent Government debts with no satisfactory arrangements for payments, no matter what their age as long as they are currently delinquent and/or due and payable.

(iv) A court-created or affirmed obligation (judgement) that is currently outstanding or has been outstanding within the last 12 months.

(v) Repeated incidents of rent payments being 30 days or more past due that have occurred within the last three years.

(vi) All accounts that have been converted to collections within the last 12 months (utility bills, hospital bills, etc.)

(vii) Collection accounts outstanding, with no satisfactory arrangements for payments, no matter what their age as long as they are currently delinquent and/or due and payable.

(2) The following will not indicate an unacceptable credit history:

(i) "No history" of credit transactions by the applicant.

(ii) A discharged bankruptcy, completed foreclosure or satisfied judgment which occurred more than 36 months before applications, or delinquent payments which occurred more than 18 months before application if no recent delinquencies have occurred, and the account is now current or paid in full.

(iii) Isolated incidents of delinquent payments which do not represent a general pattern of unsatisfactory or slow payment.

(iv) Any bankruptcy, foreclosure, judgment or delinquent payment when the applicant can satisfactorily demonstrate that:

(A) The circumstances were of a temporary nature, were beyond the applicant's control and have been removed. Examples: loss of job; delay or reduction in government benefits, or other loss of income; increased expenses due to illness, death, etc., or;

(B) The adverse action or delinquency was the result of a refusal to make full payment because of defective goods or services or as a result of some other justifiable dispute relating to the goods or services purchased or contracted for.

(e) *Previous loan.* When the applicant previously had an FmHA loan:

(1) If, within the previous two years, the applicant had a Section 502 RH loan disposed of through a sale or transfer, the County Supervisor must determine that:

(i) The dwelling was inadequate to meet the household's needs,

(ii) The relocation was necessary due to a change of employment and the new property is in a different trade, market, or employment area,

(iii) The relocation was due to health reasons, or

(iv) The change in housing need was due to a legal separation or divorce, or

(2) If the applicant had any previous FmHA debt settled pursuant to part 1864 of this chapter (FmHA Instruction 456.1), of subpart B of part 1956 of this chapter or by release from personal liability under subpart A of part 1955 of this chapter, or if debt settlement is being considered, the State Director must determine and document in the running case record that failure to pay the debt was the result of circumstances beyond the applicant's control, or the conditions which necessitated the debt settlement or release, other than weather hazards, disasters or price fluctuations, have been or will be removed by making the loan.

(f) *Maintenance.* If the applicant has demonstrated inability to carry out the required obligations of the loan by recent failure to maintain a former residence in a habitable and responsible manner, unauthorized conversion of security, unauthorized alteration of the structure, or creating a public nuisance in or around a former residence, the State Director must;

(1) Determine that the reasons contributing to such inability have been removed and are not likely to recur, or

(2) Fully document the evidence of such inability in the case file running record to assure that the determination was not due to any presumed inability based on any basis prohibited by the Equal Credit Opportunity Act (ECOA), specifically addressing the evidence supporting the determination in any rejection letter.

(g) *Other Federal debts.* The applicant is not delinquent on any tax and non-tax debts and there are no judgment liens against the applicant's property for a debt owed to the Federal Government. The lender will check the Department of Housing and Urban Development's Credit Alert Interactive Voice Response System (CAIVRS) to determine whether the applicant is listed as delinquent on a Federal debt. The lender will document the call in the applicant's case file.

§ 1980.346 Other eligibility criteria.

The applicant must:

(a) Qualify as one of the following:

(1) A person who does not own a dwelling, or owns a dwelling which is not structurally sound, functionally adequate, or large enough to accommodate the needs of the applicant, or

(2) A farmowner without decent, safe and sanitary housing for the farmower's own use or for the use of farm tenants, sharecroppers, farm laborers, or farm manager.

(b) Be without sufficient resources to provide the necessary housing or related facilities, and be unable to secure the necessary credit from other sources upon terms and conditions which the applicant could reasonably be expected to fulfill.

(c) Be a natural person (individual) who resides as a citizen in any of the 50 States, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, America Samoa, the Commonwealth of the Northern Marianas, or a noncitizen who resides in one of the foregoing areas after being legally admitted to the U.S. for permanent residence or on indefinite parole.

(d) Possess legal capacity to incur the loan obligation, and have reached the legal age of majority in the State, or have had the disability of minority removed by court action.

(e) Have the potential ability to personally occupy the home on a permanent basis, if the loan is to provide housing for the applicant's own use. To illustrate, because of the probability of their being transferred or moving after graduation, military personnel on active duty and full-time students will not be granted loans unless:

(1) The applicant, if military personnel, will be discharged at an early date (usually within one year). The family must continue to occupy the home in case the borrower is transferred to another duty station before discharge, and

(2) The applicant intends to make the home a permanent residence and there are reasonable prospects that employment will be available in the area after graduation or discharge, and

(3) An adult member of the household will be available to make inspections if the home is being constructed and to sign checks for work performed.

§§ 1980.347–1980.350 [Reserved]

§ 1980.351 Annual income.

Annual income determinations will be thoroughly documented in the lender's case file. Historical data based on the past 12 months or previous fiscal year may be used if a determination cannot logically be made. Annual income will be calculated as follows:

(a) Current verified income, either part-time or full-time, received by the applicant and all adult members of the household including the spouse is derived by multiplying:

(1) An hourly wage by 2080 hours (for part-time employment use anticipated annual hours); or

(2) A weekly wage by 52 weeks; or

(3) A biweekly wage by 26 weeks; or

(4) A monthly wage by 12 months.

(b) If the spouse or any other adult member of the household is not presently employed but there is a recent history of such employment, that person's income will be considered unless the applicant/borrower and the person(s) involved sign a statement that the person(s) is not presently employed and does not intend to resume employment in the foreseeable future, or if interest credit is involved, during the term of the Interest Credit Agreement. The statement will be filed in the applicant/borrower's case file.

(c) Income from such sources as seasonal type work of less than 12 months duration, commissions, overtime, bonuses, and unemployment compensation will be computed as the estimated annual amount of such income for the ensuing 12 months.

(d) The following *are* included in annual income:

(1) The gross amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services of all adult members of the household.

(2) The *net* income from operation of a farm, business, or profession. Consider the following:

(i) Expenditures for business or farm expansion and payments of principal on capital indebtedness shall not be used as deductions in determining income. A deduction is allowed in the manner prescribed by Internal Revenue Service (IRS) regulations only for interest paid in amortizing capital indebtedness.

(ii) Farm and nonfarm business losses are considered "0" in determining annual income.

(iii) A deduction, based on straight line depreciation, is allowed in the manner prescribed by IRS regulations for the exhaustion, wear and tear, and obsolescence of depreciable property used in the operation of a trade, farm or business by a member of the household. The deduction must be based on an itemized schedule showing the amount of straight line depreciation actually claimed for Federal income tax purposes.

(iv) Any withdrawal of cash or assets from the operation of a farm, business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by a member of the household.

(v) A deduction for verified business expenses, such as for lodging, meals and/or fuel, for overnight business trips made by salaried employees, such as long-distance truck drivers, who must meet these expenses without reimbursement.

(3) Interest, dividends, and other net income of any kind from real or personal property, including:

(i) The share received by adult members of the household from income distributed from a trust fund.

(ii) Any withdrawal of cash or assets from an investment except to the extent the withdrawal is reimbursement of cash or assets invested by a member of the household.

(iii) Where the household has net family assets, as defined in § 1944.2(n) of Subpart A of Part 1944 of this chapter, in excess of $5,000, the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate.

(4) The full amount of periodic payments received from social security (including social security received by adults on behalf of minors or by minors intended for their own support), annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts.

(5) Payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation and severance pay.

(6) Public assistance except as indicated in paragraph (e)(2) of this section.

(7) Periodic allowances, such as:

(i) Alimony and/or child support awarded in a divorce decree or separation agreement, unless the payments are not received and a reasonable effort has been made to collect them through the official entity responsible for enforcing such payments and they are not received as ordered; or

(ii) Recurring monetary gifts or contributions from someone who is not a member of the household.

(8) Any earned income tax credit to the extent it exceeds income tax liability.

(9) Any amount of educational grants or scholarships or Veteran's Administration benefits available for subsistence after deducting expenses for tuition, fees, books, and equipment.

(10) All regular pay, special pay (except for persons exposed to hostile fire), and allowances of a member of the armed forces who is the applicant/borrower or spouse, whether or not that family member lives in the unit.

(11) The income of an applicant's spouse, unless the spouse has been living apart from the applicant for at least 6 months (for reasons other than military or work assignment), or court proceedings for divorce or legal separation have been commenced.

(e) The following *are not* included in annual income but will be considered in determining repayment ability:

(1) Income from employment of minors (including foster children) under 18 years of age. The applicant and spouse may never be considered minors.

(2) The value of the allotment provided to an eligible household under the Food Stamp Act of 1977.

(3) Payments received for the care of foster children.

(4) Casual, sporadic or irregular cash gifts.

(5) Lump-sum additions to family assets such as inheritances, capital gains, insurance payments included under health, accident, hazard, or worker's compensation policies, and settlements for personal or property losses (except as provided in paragraph (d)(5) of this section).

(6) Amounts which are granted specifically for, or in reimbursement of, the cost of medical expenses.

(7) Amounts of education scholarships paid directly to the student or to the educational institution, and amounts paid by the Government to a veteran for use in meeting the costs of tuition, fees, books and equipment. Any amounts of such scholarships or veteran's payments, which are not used for above purposes and are available for subsistance, are considered to be income. Student loans are not considered income.

(8) The hazardous duty pay to a service person applicant/borrower or spouse away from home and exposed to hostile fire.

(9) Payments to volunteers under the Domestic Volunteer Service Act of 1973, including but not limited to:

(i) National Volunteer Antipoverty Programs which include VISTA, Peace Corps, Service Learning Program and Special Volunteer Programs.

(ii) National Older American Volunteer Programs for persons age 60 and over which include Retired Senior Volunteer Programs, Foster Grandparent Program, Older American Community Services Program, and National Volunteer Programs to Assist Small Business and Promote Volunteer Service to Persons with Business Experience, Service Corps of Retired Executives (SCORE) and Active Corps of Executives (ACE).

(10) Relocation payments made pursuant to Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(11) Payments received under the Alaska Native Claims Settlement Act.

(12) Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes.

(13) Payments or allowances made under the Department of Health and Human Services Low-Income Home Energy Assistance Program.

(14) Payments received from the Job Training Partnership Act.

(15) Income derived from the disposition of funds of the Grand River Bank of Ottawa Indians.

(16) The first $2,000 of per capita shares received from judgment funds awarded by the Indian Claims Commission or the Court of Claims, or from funds held in trust for an Indian tribe by the Secretary of Interior.

(17) Payments received from programs funded under title V of the Older Americans Act of 1965.

(18) Any funds that a Federal statute specifies must not be used as the basis for denying or reducing Federal financial assistance or benefits.

(f) Income of live-in aides who are not relatives of the applicant or members of the household will not be counted in calculating annual income and will not be considered in determination of repayment ability.

§ 1980.352 Adjusted annual income.

Adjusted annual income is annual income as determined in § 1980.351 of this subpart less the following:

(a) A deduction of $480 for each member of the family residing in the household, other than the applicant, spouse, or co-applicant, who is:

(1) Under 18 years of age; or

(2) Eighteen years of age or older and is disabled or handicapaped as defined in § 1980.302 of this subpart; or

(3) A full-time student aged 18 or older.

(b) A deduction of $400 for any elderly family as defined in § 1980.302 of this subpart.

(c) A deduction for the care of minors 12 years of age or under, to the extent necessary to enable a member of the applicant/borrower's family to be gainfully employed or to further his or her education. The deduction will be based only on monies reasonably anticipated to be paid for care services and, if caused by employment, must not exceed the amount of income received from such employment. Payments for these services may not be made to persons whom the applicant/borrower is entitled to claim as dependents for income tax purposes. Full justification for such deduction must be recorded in detail in the loan docket.

(d) A deduction of the amount by which the aggregate of the following expenses of the household exceeds 3 percent of gross annual income:

(1) Medical expenses for any elderly family as defined in § 1980.302 of this subpart. This includes medical expenses for any household member the applicant/borrower anticipates incurring over the ensuing 12 months and which are not covered by insurance. Examples of medical expenses are dental expenses, prescription medicines, medical insurance premiums, eyeglasses, hearing aids and batteries, the cost of home nursing care, monthly payments on accumulated major medical bills, and cost of full-time nursing or institutional care which cannot be provided in the home for a member of the household; and

(2) Reasonable attendant care and auxiliary apparatus expenses for each handicapped disabled member of any household to the extent necessary to enable any member of such household (including such handicapped/disabled member) to be employed.

§ 1980.353 Filing and processing applications.

(a) *Applicant's contact.* Applicants desiring loan assistance as provided in this subpart must file loan applications with an approved lender.

(b) *Loan priorities.* Complete applications will be considered by FmHA in the order received from lenders authorized to participate in the program.

(c) *Preference.* Applications for guarantees on loans to first-time homebuyers or veterans, their spouses, or children of deceased servicemen who died during one of the periods described in § 1980.302 of this subpart will be given preference by FmHA.

(d) *Applications.* The lender will submit a request for the guarantee using Form FmHA 1980–21, "Lender's Transmission of Request for Single Family Housing Loan Note Guarantee," including all of the following information:

(1) An application for a loan on the lender's form which includes at a minimum all information outlined below:

(i) Name, address, telephone number, statement of current annual family income and expenses, net worth, age, number of persons in the household, and citizenship status of the applicant.

(ii) Amount of loan request.

(iii) Name, address, contact person, and telephone number of the proposed lender.

(iv) Copy of the applicant's purchase agreement or other similar instrument and a brief description of the housing to be financed.

(v) Anticipated loan rates and terms.

(vi) Statement from the lender that it will not make the loan as requested by the applicant without the proposed guarantee and that the applicant has been advised in writing that the applicant is subject to criminal action if he or she knowingly and willfully gives false information to obtain a federally guaranteed loan.

(vii) Statement of the applicant's present housing circumstances.

(viii) If the applicant is not a United States citizen, evidence of being legally admitted for permanent residence or indefinite parole.

(ix) The applicant's sex, race, and veteran status, and whether applicant is first-time homebuyer.

(x) The applicant's social security number.

(2) Certified architectural or engineering plans and specifications for dwelling and site if new construction or rehabilitation is planned, including a plot plan showing the location of the house and utilities, topography, landscaping, drainage, and other site development such as driveways, sidewalks, curbs, street, etc., and a soils map and foundation design, if applicable.

(3) Cost estimates including forecasts of contingency funds.

(4) Appraisal reports including information about the dwelling location with respect to neighborhood and community services and facilities, business and industrial enterprises, and streets or roads serving the housing.

(5) Credit report obtained by the lender.

(6) Form FmHA 400–1, "Equal Opportunity Agreement" for construction costing more than $10,000.

(7) Copies of building permits, if applicable, and any necessary certifications and recommendations of appropriate regulatory or other agencies having jurisdiction including any pollution control agency.

(8) Proposed loan documents between the borrower and lender.

(9) Evidence of compliance with the Privacy Act of 1974.

(10) Lender's analysis of loan feasibility.

(11) Written verification of the applicant's household income. Verification of income will be obtained for each adult member of the household from the appropriate source. The verification must be signed by the source of information and be less than 90 days old at the time of loan approval.

(12) A statement for each debt to be refinanced from the lender to be paid showing the purpose for which the debt was incurred, the date on which it was incurred, the final due date, interest rate, amount and frequency of installments, amount of delinquency, unpaid principal, and accrued interest.

(e) *Filing applications.* The requirements of the Right to Financial Privacy Act of 1978 must be met as follows:

(1) Within 3 days of the receipt of a complete application from a lender for a guarantee for a loan, FmHA will forward Form FmHA 410–7, "Notification to Applicant on Use of Financial Information from Financial Institution," to the loan applicant.

(2) FmHA will notify lenders and other financial institutions to which FmHA makes a direct request for financial records. The notification will read as follows:

I certify that the United States Department of Agriculture, acting through the Farmer's Home Administration, has complied with the applicable provisions of Title XI, Public Law 95–630, in seeking financial information regarding _____(applicant).

Date

County Supervisor

(3) Under no circumstances may financial information obtained under this subpart be disseminated to any other department or agency of the Federal Government (other than the Office of the Inspector General (OIG) without express approval of OGC.

(f) *Verifying information provided.* Written documentation from third parties is the preferred method of verifying information. Verifications must pass directly from the source of information to the lender.

(1) *Income verification.* Employment verifications and other income verifications obtained in accordance with this paragraph are valid for 90 days except as noted below. The lender may request oral reverification at the end of the 90-day period. Oral verifications must be thoroughly documented and are valid for 30 days. In no case may information older than 120 days (90 days written plus 30 days oral verification) be used.

(i) Form FmHA 1910–5, "Request for Verification of Employment," or the equivalent Housing and Urban Development/Federal Housing Administration or Veteran's Administration form will be used to verify employment income of the loan applicant except when the applicant is self employed. The form will be signed by the applicant or borrower and sent directly to the employer by the lender.

(ii) Income information that cannot be obtained by use of this form will be obtained in writing from third parties to the extent possible.

(iii) Alimony and/or child support payments will be verified by obtaining a copy of the divorce decree or other legal document indicating the amount of the payments. When the applicant states that less than the amount awarded is received, the lender will request documentation from the official entity through which payments are received, or other third party able to provide the verification when payment is not made through an official entity indicating the amounts and dates of payments to the applicant during the previous 12 months.

(iv) When it is not feasible to verify income through third parties, the lender is authorized to accept a notarized statement or signed affidavit from the applicant stating the effort made to collect the amount awarded, and the amounts and dates of payments received during the previous 12 months.

(v) Applicants and borrowers deriving their income from a farming or business enterprise will provide current

documentation of the income and expenses of the operation. This information must not be older than the previous fiscal year.

(vi) Social Security, Pension, and Disability income may be verified by obtaining a copy of the most recent award or benefit letter prepared and signed by the authorizing agency. This verification will be considered valid only for one year from the date of the award or benefit letter.

(2) *Verification of disability or handicap.* Form FmHA 1944–4, "Certification of Disability or Handicap," is used to verify disability or handicap in cases where state review board or Social Security records are not available. Receipt of veteran's benefits for disability, whether service-oriented or otherwise, does not automatically establish disability.

(3) *Verification of alien status.* Aliens are required to present documentation of their status. Section 1944.9 of subpart A of part 1944 outlines the acceptable forms of documentation. If the authenticity of the documentation is questioned, the County Supervisor will verify the information using the guidelines prescribed in the exhibit.

(4) *Verification of credit history and current debt.* A credit report will be ordered in accordance with subparts A and B of part 1910 of this chapter. Form FmHA 410–8, "Applicant Reference Letter (A Request for Credit Reference)," may be used in areas where credit reports are unavailable.

§ 1980.354 FmHA evaluation of applications.

FmHA will review the application for completeness, determine whether the proposed loan is for an eligible loan purpose, there is a reasonable assurance of repayment ability, sufficient collateral, and the environmental requirements of § 1980.316 are met. FmHA will notify the lender within 10 days of receipt of a completed application of FmHA's decision.

(a) *Incomplete applications.* Incomplete applications will be returned to the lender with a letter outlining all information necessary to make a determination.

(b) *Denial.* If FmHA determines it is unable to guarantee the loan, the lender will be informed in writing by use of the Form FmHA 449–13, "Denial Letter." Such notification will include the reasons for denial of the guarantee and appropriate appeal or review rights. Only the applicant and the lender may appeal an FmHA decision, and this must be done jointly in a written request for an appeal or review. These requests will be handled in accordance with Subpart B of Part 1900 of this chapter.

(c) *Issuance of commitment.* If FmHA is able to guarantee the loan, and adequate funds are available, the approval official will:

(1) Prepare Form FmHA 1940–1 and Form FmHA 1944–2, "Single Family Housing Fund Analysis."

(2) Prepare a Form FmHA 1980–18 listing all approval requirements and send an original and one copy to the lender provided adequate funds are available.

§ 1980.355 Review of requirements.

Upon the lender's review of the Form FmHA 1980–18, the lender may determine whether to accept the conditions outlined in it.

(a) *Accepting conditions.* Immediately after reviewing the conditions and requirements in the Form FmHA 1980–18 and the options listed on the back of the form, the lender should complete and sign the acceptance or rejection of conditions, and return a copy to the FmHA approval official. If the conditions cannot be met, the lender and borrower may propose alternate conditions to FmHA. The FmHA approval official may negotiate any revisions consistent with this subpart. These alternatives will be considered and the lender will be advised of FmHA's decision. If altered conditions are accepted by FmHA, Form FmHA 1980–18 will be revised as appropriate.

(b) *Cancelling commitment.* If the lender indicates in the acceptance or rejection of conditions that it desires to obtain a loan note guarantee and subsequently decides prior to loan closing that it no longer wants a loan note guarantee, the lender should immediately advise the FmHA approval official. Upon cancellation, the approval official will notify the Finance Office by preparation and submission of the Form FmHA 1940–10, "Cancellation of U.S. Treasury Check and/or Obligation," through the field office terminal system.

§ 1980.356 Interest assistance.

In order to assist low income borrowers in the repayment of the loan, the FmHA is authorized to provide interest assistance payments. Interest assistance payments will be made by FmHA directly to the lender on or before the 15th day of the month for which the borrower's payment is due.

(a) *Policy.* It is the policy of FmHA to grant interest assistance on guaranteed loans to low-income borrowers to assist them in obtaining and retaining decent, safe, and sanitary dwellings and related facilities as long as the borrower remains eligible for payments when funds are available for interest assistance.

(b) *Processing interest assistance agreements.* The lender will process the interest assistance agreement and submit it to FmHA for approval.

(1) FmHA will reimburse the lender in the amounts authorized in Exhibit H of this subpart (available in any FmHA office) for the cost of processing the agreement. The fee will be paid upon receipt of a valid agreement which has been coded as requiring a processing fee payment. The processing fee is payable when:

(i) A new agreement is made with the borrower.

(ii) The borrower had an agreement for the previous year and a new agreement is made for the current year.

(iii) The borrower is eligible for but not presently on interest assistance and enters into a new interest assistance agreement.

(iv) The borrower has a change in circumstances which requires a revision to the current agreement. When the change in circumstances results in an agreement with less than 90 days remaining, the agreement for the subsequent year will be processed at the same time. Only one processing fee may be paid to the lender.

(2) A processing fee will not be paid when the revision to an existing agreement is required due to an error on the part of the lender or the borrower.

(c) *Amount of interest assistance.* (1) The amount of interest assistance granted will be the lesser of:

(i) The difference between the monthly installment due on the Promissory Note(s) eligible for interest assistance and the amount the borrower would pay if the note were amortized at the rate corresponding to the borrower's income range as outlined in the Attachment A to Form FmHA 1980–12, "Master Interest Assistance and Recapture Agreement" (exhibit I to this subpart); or

(ii) The difference between the sum of the monthly installments due at the note interest rate and 20 percent of the borrower's adjusted income.

(2) The basis for the amount of interest assistance for each loan in attachment A is determined by the amount of interest assistance authorized to the Agency and the maximum interest rate a lender may charge on an interest assisted guaranteed loan as published in FmHA Instruction 440.1.

(3) The lender of a borrower receiving a loan in a high cost area will be granted an additional one percent interest assistance in order to assist the borrower.

(i) A high cost area is an area which has been designated as high cost by the Department of Housing and Urban Development.

(ii) The change in a designation to (or from) a high cost area will not affect existing loans. An individual loan's eligibility for high cost designation is determined at the time of issuance of the conditional commitment for loan guarantee.

(d) *Recapture.* Prior to loan closing, the lender will advise the applicant that interest assistance is subject to recapture. Applicants who receive interest assistance will be required to sign Form FmHA 1980–12 at the time the initial interest assistance agreement is granted. This form specifies the terms of the recapture agreement.

(e) *Eligibility.* To be eligible for interest assistance, a borrower must personally occupy the dwelling, must have executed Form FmHA 1980–12 at the time of loan closing, and must meet the following additional requirements:

(1) *Initial loans.* Interest assistance may be granted at the time the Loan Note Guarantee is issued when:

(i) The borrower's adjusted income at the time of loan guarantee approval did not exceed the applicable low-income limit.

(ii) The borrower's net family assets do not exceed $7,500 (maximum as defined in § 1980.302). Net family assets of $10,000 will be allowed for an elderly family as defined in § 1980.302 unless and exception is authorized. The calculation of net family assets will exclude the value of the dwelling and a minimum adequate dwelling site, cash on hand which will be used to reduce the amount of the loan, and household goods and personal automobile(s) and the debts against them. The lender may request an exception at the time the initial application is submitted to FmHA for a loan guarantee. For the purpose of determining whether an exception is justified, consideration will be given to the nature of the assets upon which a borrower is currently dependent for a livelihood or which could be used to reduce or eliminate the need for interest assistance. The District Director may authorize exceptions of net family assets up to $20,000. The State Director may submit cases for which the net family assets exceeds $20,000 to the National Office for authorization to grant assistance.

(iii) The term of the loan is for 30 years, unless shorter terms authorized otherwise by the State Director based upon complete documentation of the justifiable reasons on an individual case basis. Justifiable reasons include situations such as the typical loan term for mortgage loans in the area is less than 30 years or the remaining life of the security is expected to be less than 30 years.

(iv) The loan was approved on or after (insert date of publication of the final rule).

(v) The amount of interest assistance will be $20.00 or more per month or $240.00 annually in accordance with the provisions of § 1980.356(c)(1) of this subpart. Interest assistance in amounts of less the $20.00 per month will not be granted.

(2) *Subsequent loans.* Interest assistance may be granted on subsequent loans with a term of 25 years or more which meet all other terms of paragraph (e)(1) of this section.

(3) *Existing loans.* Interest assistance may be granted at any time after loan closing if:

(i) The requirements of paragraph (e)(1) (i), (ii), (iii), (iv), and (v) of this section are met.

(ii) The existing loan is refinanced because it meets the requirements of § 1980.310(b) of this subpart and the borrower executes Form FmHA 1980–12 and the required recapture lien at loan closing of the new loan.

(iii) The borrower's adjusted annual income does not exceed the low-income limit.

(iv) The borrower requests interest assistance through the lender or the lender determines that interest assistance is needed to enable the borrower to repay the loan.

(f) *Processing interest assistance.* The lender will process interest assistance agreements in accordance with this section. The interest assistance agreement, Form FmHA 1980–13, "Annual Interest Assistance Agreement," will be executed by the lender and borrower and forwarded to FmHA for approval.

(1) The amount of interest assistance for which a borrower is eligible will be determined by use of Form FmHA 1980–13 as outlined in paragraph (c) of this section.

(i) *Determination of income.* The lender is responsible for determining the borrower's annual and adjusted annual income as defined in §§ 1980.351 and 1980.352 of this subpart. Form FmHA 1910–5 will be used to verify the earnings from employment of all persons occupying the dwelling. Income will be verified in accordance with § 1980.351 of this subpart.

(ii) *Effective period.* Annual Interest Assistance Agreements will be for a 12 month period.

(2) *Initial and subsequent loans.* Form FmHA 1980–12 will be executed for each qualifying loan at loan closing. This Agreement establishes the conditions and maximum amounts of interest assistance for the life of the loan. Each year, an Annual Interest Assistance Agreement will be used to determine the amount of interest assistance for the coming 12 months.

(i) The lender will determine the borrower's adjusted annual income, document the calculations, and complete the interest assistance agreement form.

(ii) The borrower will review the interest assistance agreement form and sign the form signifying that all information is correct as shown.

(iii) FmHA will review the interest assistance agreement to determine if the information contained on it appears correct. If so, FmHA will then approve the agreement and make monthly payments to the lender on behalf of the borrower.

(iv) When the borrower's income is within the Low-Income limits but the provisions of § 1980.356(c)(1)(ii) or (e)(1) preclude granting interest assistance, Form FmHA 1980–12 must be executed in accordance with the FMI if the borrower desires to be considered for interest assistance at a later date due to a change in circumstances.

(g) *Interest assistance modification.* A change in the borrower's circumstances after the effective date of Form 1980–13 will be handled as follows:

(1) *FmHA required modifications before expiration.* The borrower is responsible for reporting any increases in income exceeding $100 per month to the lender. The lender is not responsible for monitoring the borrower's income. The lender will process a revised interest assistance agreement when a reported increase in the borrower's income results in the need for less interest assistance in accordance with formula in this section.

(2) *Additional interest assistance before expiration.* The lender may process a modification of the interest assistance agreement and submit the modified agreement to FmHA when:

(i) The borrower's adjusted annual income decreases by more than $100 per month; and

(ii) The interest assistance calculation formula indicates that the borrower is eligible for an additional $20 interest assistance per month.

(3) *Other changes in the borrower's circumstances.* In the case of married borrowers, when one spouse has left the dwelling due to marital discord, interest assistance based on the remaining spouse's income may be extended if:

(i) The remaining spouse is occupying the dwelling, owns a legal interest in the property, and is liable for the debt;

(ii) The remaining spouse certifies as to who lives in the house;

(iii) Separation is not due only to work assignment or military order; and

(iv) The remaining spouse is informed and agrees that should the spouse begin to live in the dwelling, that spouse's income will then be counted toward annual income and interest assistance may be reduced or cancelled.

(4) *Effect of modification.* An Interest Assistance Agreement modified as per paragraph (g)(1), (2), or (3) of this section will be valid for the remainder of the agreement period. When a modification is made within 90 days of the anniversary date of the existing agreement, the lender has the option of preparing Form FmHA 1980–13 needed on the anniversary date at the same time.

(5) *Correction of Interest Assistance Agreement.* When an error by FmHA or the lender results in too little interest assistance being granted, a corrected agreement will be prepared effective the date of the error if the error results in granting $20 or more per month less interest assistance than the borrower was eligible to receive.

(h) *Eligibility review.* Borrowers receiving interest assistance will be reviewed annually during the review period. The annual review period for interest assistance agreements is that period within 30 to 60 days prior to the anniversary date of the loan. All existing agreements must be reviewed and processed for the upcoming 12 months during the review period. Interest Assistance will not be renewed if the amount that the borrower qualifies for is less than $20 per month.

(1) *Initiation of renewal action.* At least 15 but not more than 30 days prior to the beginning of the annual review period, FmHA will mail a list of borrowers whose interest assistance agreements are to be reviewed to the lender. The lender will obtain written verification of the income of each borrower and all adult members of the borrower's household and conduct the review.

(i) *Borrower responsibility.* The borrower will:

(A) Report the income of each adult member of the household to the lender; and

(B) Assure that each household member has provided sufficient information on that person's income for the lender to conduct the review.

(C) Cooperate in the lender's efforts to verify income.

(iii) *FmHA actions.* FmHA will:

(A) Maintain a list of borrowers as a record of interest assistance agreements processed.

(B) Review the calculations of adjusted annual income and document the results in the running case record. The County Supervisor will utilize "Wage Matching" if available.

(C) Retain the original of the interest assistance agreement and send 2 copies to the lender.

(D) Notify the lender in writing of any errors noted in processing and the necessary corrective actions.

(E) When the information received for the interest assistance review period indicates that the borrower's income exceeds the previous year's income by twenty (20) percent or more, FmHA will determine when the change in income occurred and whether the borrower failed to report an increase as required. If any interest assistance has been overpaid, the overpayment will be collected from the borrower in the following manner:

(*1*) If the borrower is eligible for further interest assistance, the amount of overpayment will be deducted from future interest assistance payments at the rate of 1/12 per month unless the borrower repays the interest assistance in a lump sum.

(*2*) If the borrower is not eligible for further interest assistance or the amount of interest assistance is not sufficient to cover the overpayment, the repayment schedule will be negotiated in such a manner as to minimize the possibility that the repayment of the loan will suffer. When repayment is negotiated in this manner, the lender will collect from the borrower and remit the payments to the Finance Office in accordance with Form FmHA 451–2, "Schedule of Remittances" and Subpart B of Part 1951. The preferred method of collection in this circumstance is lump sum. Interest assistance repayment will never take more than 12 months unless prior authorization is obtained from the State Director.

(*3*) If FmHA is unable to collect the interest assistance by deductions or voluntary repayment by the borrower, the FmHA servicing official will obtain the advice of the State or National Office as appropriate.

(ii) *Processing interest assistance renewals not reviewed during the review period.* The lender may process interest assistance renewals not completed during the review period as follows:

(1) The amount of interest assistance will be based on the borrower's current annual income. The effective date will be:

(A) The expiration period of the previous interest assistance agreement if the FmHA approval official determines failure to renew was the fault of FmHA or the lender.

(B) The next payment due date following approval in all other cases.

(ii) The borrower's interest assistance will be considered expired as of the expiration date until FmHA receives a new interest assistance agreement form.

(i) *Cancellation of interest assistance.* (1) An existing interest assistance agreement will be cancelled under the following circumstances:

(i) When the borrower has never occupied the dwelling and the lender will not continue with the loan, the interest assistance will be cancelled as of the date of issuance of the guarantee. The lender will refund all interest assistance payments to FmHA.

(ii) The cancellation will be effective on the date on which the earliest action occurs which causes the cancellation or the date the lender became aware of the situation if the date cannot be determined when:

(A) The borrower ceases to occupy, sells, or conveys title to the dwelling.

(B) The borrower has received improper interest assistance and a corrected agreement will not be submitted.

(C) The borrower has had an increase in income and is no longer eligible for interest assistance.

(D) The security is acquired by the lender.

(E) The lender formally declares the loan to be in default and accelerates the loan.

(2) The FmHA servicing office will notify the Finance Office of the effective date for cancellation. The Finance Office will process the cancellation and notify the FmHA servicing office of any interest assistance payments made after the effective date. The servicing office will collect the overpaid interest assistance from the lender.

(j) *Overpayment.* When the lender becomes aware of circumstances that have resulted in an overpayment of interest assistance for any reason as provided in paragraph (k) of this section, the following actions will be taken:

(1) The lender will immediately notify FmHA,

(2) The borrower will be notified and the interest assistance agreement will be corrected.

(3) A repayment agreement will be reached as per paragraph (h)(4)(iii)(E) of this section.

(k) *Unauthorized use of loan funds* When FmHA becomes aware that loan funds were used for unauthorized

purposes, interest assistance paid on said amounts will be collected from the lender. The lender may work out a repayment agreement with the borrower but is expected to make every effort to minimize the adverse impact on the borrower's repayment ability.

(l) *Appeals.* All applicants/borrowers and lenders will be notified of their appeal rights in accordance with § 1980.399 of this subpart when FmHA denies interest assistance, or when FmHA reduces, cancels, or refuses to renew the interest assistance.

§ 1980.357 Recapture of interest assistance.

The policy of the FmHA is to recapture all or a portion of interest assistance granted on a RH guaranteed loan or assumption when any equity exists in the secured property.

(a) *Securing recapture.* The lender, borrower, and FmHA will execute Form FmHA 1980–12 as provided in § 1980.356(f)(2) of this subpart for all loans eligible for interest assistance.

(1) The lender will attach an addendum to the mortgage or deed of trust which grants FmHA a lien on the security subject only to the first mortgage or deed of trust to the lender or other authorized prior lien(s). The State Director with the assistance of the Office of General Counsel will develop the addendum.

(2) In order for a borrower not presently receiving interest assistance on an existing guaranteed loan to receive such assistance in the future, the requirements of § 1980.356(e)(3) of this subpart must be met.

(b) *Determining the amount of recapture.* The County Supervisor will calculate recapture when a borrower's account is settled by sale (including transfers), refinancing, or payment in full.

(1) *How to calculate.* The County Supervisor will determine the current market value of the property. Any non-FmHA prior liens, the unpaid balance of all FmHA guaranteed loans, sale/refinancing expense, original borrower equity, and the value of capital improvements will be subtracted from current market value. Value appreciation is the difference of the adjusted current market value and the market value at the time the loan was made. If there is no value appreciation, there is no recapture. If there is value appreciation, the County Supervisor will determine the percent available for recapture (not to exceed 50 percent) by dividing the months of interest assistance by the number of months the loan was outstanding. Partial months are considered as full months. If only a subsequent loan(s) is subject to recapture, the County Supervisor will multiply the current balance of the subsequent loan(s) obtained above then divide by the outstanding amount of the total FmHA debt against the property to determine the percent of value appreciation available for recapture. Recapture will be the lesser of subsidy granted and the amount of value appreciation available for recapture.

(i) *Market value.* Market value of the property as the date the loan is to be paid in full and will be documented by one of the following:

(A) A sales contract which reasonably represents the fair market value based on the lender's and the County Supervisor's knowledge of the property and the area.

(B) Lender's appraisal when the loan will be refinanced provided the appraisal reasonably represents the fair market value.

(C) Another current appraisal when the appraiser meets qualifications of § 1980.334 of this subpart if (A) or (B) is not available.

(D) When the account is being paid off from insurance proceeds, the most recent appraisal available if the lender or FmHA can document that it represents an accurate indication of the value at the time the dwelling was damaged or destroyed. If not, the best information available will be used to determine the market value. The County Supervisor will interview the borrower to determine the extent of improvements, if any, and the general condition of the property at the time of loss. The amount of the insurance payment is generally a good indication of value; however, tax records or comparable sales will be considered.

(ii) *Sale/refinancing expenses.* Sale/refinancing expense includes expenses commonly associated with the sale or refinancing or real estate that are not reimbursed, such as sales commissions, advertising costs, recording fees, pro rata taxes, points based on the current interest rate, appraisal fees, transfer tax, deed preparation fee, loan origination fee, etc. In refinancing situations, only those expenses necessary to refinance the amount of the current FmHA debt are allowed. Recapture may be calculated using estimated expenses if actual expenses cannot be obtained and the County Supervisor is satisfied with the estimated amount and the prorating of the expenses are accurate for this transaction.

(iii) *Original borrower equity.* Original equity consists of a contribution by the borrower that reduces the amount of the loan below the market value. The contribution may be in the form of cash and/or value of the lot if the home was constructed on the borrower's property.

(iv) *Capital improvements.* Capital improvements will be considered to the extent that they do not exceed market value contribution as indicated by a sales comparison analysis. Generally, the value added by improvements will be the difference in market value at the time of sale and market value without capital improvements. Cost of the improvement will not be considered, only contribution to value. Maintenance cost and replacement of short-lived depreciable items are normal expenses associated with home ownership and are not considered capital improvements.

(v) *Assumptions.* When a loan subject to recapture is transferred, the amount of subsidy to be repaid by the transferor must be paid at closing.

(2) *Other considerations.* (i) *Multiple loans.* When borrower has more than one loan and elects to pay only some of the loans, recapture will not be calulated unless the remaining loan(s) is not subject to recapture. Recapture will be calculated when the account is paid in full taking into consideration all of the interest assistance granted on the account.

(ii) *Overpayments of interest assistance.* When FmHA has overpaid interest assistance and the overpaid amounts remain uncollected at the time recapture is calculated, the overpaid amount will be added to recapture.

(c) *Option to defer payment of recapture.* If the account is refinanced or paid in full without trransfer of title, the borrower has the option of paying recapture or deferring the payment until the property is sold. In all other circumstances, the borrower must repay the recapture in full. If payment of recapture is deferred, interest will not accrue on the deferred balance. The borrower's case file and management record will be marked "recapture receivable" and kept with the active accounts. The County Supervisor will review recapture accounts at least every three years to protect the Government's interest and to assure that the security still exists.

(d) *Miscellaneous provisions.* (1) *Houses on farms.* Value appreciation on a farm will be determined based on the market value of the property being sold, paid off, or refinanced. Recapture will be based on the portion of the value appreciation attributed to the security. If the borrower is refinancing the house, the other lender's appraisal may be used if the County Supervisor believes the appraisal reasonably represents market value.

(2) *Changes in terms.* Recapture will not be calculated when an account is reamortized or payments are deferred.

(3) *Non-FmHA junior liens.* Non-FmHA junior liens are not consider in the recapture calculation. In the event a junior lien-holder forecloses, the County Supervisor will calculate recapture before providing the lien-holder with a pay off figure, which is in addition to any amounts still due the lender on the loan.

§§ 1980.358–1980.359 [Reserved]

§ 1980.360 Conditions precedent to issuance of the Loan Note Guarantee.

(a) *Lender certification.* The lender must certify the FmHA that:

(1) No major changes have been made in the lender's loan conditions and requirements since the issuance of the Conditional Commitment for Guarantee, except those approved in writing by FmHA.

(2) All planned property acquisition has been completed and all development has been substantially completed.

(3) Required insurance coverage is in effect.

(4) Truth-in-lending requirements have been met.

(5) All equal employment opportunity and nondiscrimination requirements have been or will be met at the appropriate time.

(6) The loan has been properly closed, and the required security instruments, including any required recapture instruments, have been obtained.

(7) The borrower has marketable title to the collateral then owned by the borrower, subject to the instrument securing the loan to be guaranteed and any other exceptions approved in writing by FmHA.

(8) Lien priorities are consistent with the requirements of the Conditional Commitment for Guarantee.

(9) The loan proceeds have been disbursed for purposes and in amounts consistent with the Conditional Commitment for Guarantee.

(10) There has been no adverse change in the borrower's financial condition or other adverse change in the borrower situation since the Conditional Commitment for Guarantee was issued by FmHA.

(11) All other requirements of the Conditional Commitment for Guarantee have been met.

(b) *Inspections.* The lender will provide FmHA with a copy of all inspection reports for inspections in accordance with § 1980.330 of this subpart.

(c) *Lender's agreement.* There is a valid lender's agreement on file.

(d) *Plans for marketing.* The lender will advise FmHA of its plans to sell the loan.

(e) *Borrower copies.* The lender will see that the borrower is provided the original or copy, as appropriate, of:

(1) Drawings and specifications.

(2) Plot plan.

(3) Truth-in-Lending and Real Estate Settlement Procedure Act disclosure statements.

(4) Builder's warranty.

(5) Deed and mortgage or security instruments.

(f) *Lender file.* The lender will maintain a file for each guaranteed RH loan containing originals or copies, as appropriate, of all documents pertaining to that loan.

(g) *FmHA review.* The FmHA approval official will review the items submitted by the lender to assure compliance with the conditions of guarantee. The Form FmHA 1980–16 will not be issued before the Finance Office has acknowledged the obligation of guarantee authority.

§ 1980.361 Issuance of Loan Note Guarantee.

(a) Loan Note Guarantee (Form FmHA 1980–17). (1) After all requirements have been met, FmHA will execute form FmHA 1980–17. All original(s) will be provided to the lender and attached to the note(s). A conformed copy with copies of the note(s) will be retained by FmHA.

(2) In the event the lender sells the loan to another lender in accordance with this subpart, the lenders and FmHA will execute Form FmHA 1980–11, "Assignment and Assumption Agreement."

(b) *Refusal to execute contract.* If FmHA determines that it cannot execute Form FmHA 1980–17 because all requirements have not been met, it will promptly inform the lender of the reasons using the denial letter form and give the lender a reasonable period to satisfy the objections. FmHA may grant additional time as it considers necessary and reasonable under the circumstances if the lender makes a request within the above period. If the objections are satisfied within the time allowed, FmHA will issue the guarantee. Otherwise, the lender will be informed of the appropriate appeal or review rights in accordance with § 1980.399 of this subpart and subpart B of part 1900 of this chapter.

(c) *Cancellation of obligations.* If the conditions for the guarantee cannot be met after allowance for the completion of the appeal process, FmHA will prepare and process Form FmHA 1940–10 through the field office terminal.

(d) *Reporting loan closing.* The lender will prepare Form FmHA 1980–19, "Guaranteed Loan Closing Report," for each loan to be guaranteed and will deliver the guarantee fee, if any, to the FmHA approval official who concurrently delivers the Form FmHA 1980–16 after a review to assure completeness. The County Supervisor will process the fee and the original Form FmHA 1980–19 in accordance with subpart B of part 1951.

§ 1980.362 Lender's sale of the loan.

Any sale by the lender of the guaranteed loan must be accomplished in accordance with the conditions of the Loan Note Guarantee and the Lender Agreement.

(a) The loan may not be sold if the loan is in a payment default at the time of sale.

(b) The lender should advise FmHA as early in the process as possible when it plans to sell or assign the loan.

(c) The loan may be sold only to an eligible lender under this subpart.

(d) Form FmHA 1980–11, "Assignment and Assumption Agreement" will be executed by the selling lender, the purchasing lender, and FmHA.

§ 1980.363 Review of loan closing.

FmHA will conduct a review of the lender's loan docket within 90 days of loan closing. The lender may forward the loan docket to FmHA for review or the review may be conducted at the lender's place of buisness. When FmHA is aware that the lender plans to sell the loan, every effort will be made to conduct the closing review before the loan is sold. FmHA will notify the lender of any deficiencies noted during the review and that the guarantee may be jeopardized if the deficiencies whether FmHA discovers them or notifies the lender.

§§ 1980.364–1980.369 [Reserved]

§ 1980.370 Loan servicing.

FmHA encourages lenders to provide borrowers with the maximum opportunity to become successful homeowners. Lenders should provide sufficient servicing and counseling to meet the objectives of the loan. Loan servicing should be approached as a preventative action rather than a curative action. Prompt follow-up by the lender on delinquent payments and early recognition and solution of problems are keys to resolving many delinquent loan cases. The lender shall perform those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are not guaranteed.

(a) *Normal loan servicing.* The lender is responsible for servicing the loan under Form FmHA 1980–16 and this subpart.

(b) *Other servicing requirements.* Other servicing requirements include making periodic inspections of the property and taking actions to offset the effects of liens, probate proceedings, and other legal actions.

(c) *Servicing options.* Lenders should make every effort to assist borrowers who are cooperative and willing to make a good faith effort to cure the delinquency. The lender should consider the borrower's financial condition in attempting to work out repayment agreements.

(1) *Annual reports.* The lender will provide an annual report to FmHA on the status of the loan account. The report will provide an update of the status of the loan account as of December 31 of the previous year. Information on the report will include information on the unpaid balance of the loan, status of real estate taxes, and information on whether required flood and hazard insurance is in force.

(2) *Delinquent accounts.* Within 20 days of a borrower being 30 days delinquent, the lender will submit a report to FmHA. The lender will provide updates to this report every 30 days thereafter until the delinquency is resolved.

(e) *FmHA responsibilities.* The County Supervisor:

(1) Must establish an office management system for guaranteed housing loans and monitor the loans for FmHA;

(i) Applications for loan guarantees will be maintained using Form FmHA 1905–4, "Application and Processing Card—Individual."

(ii) Form FmHA 1905–5, "Management System Card—Individual (RH Only)" will be maintained for each borrower.

(2) Must assure that the necessary reports and information from the lender are obtained as needed;

(3) Will perform a post review the lender's loan servicing activity by reviewing not less than 20 percent of the guaranteed loans made or serviced by the lender on an annual basis;

(4) May consult with the State Office on any servicing problem and if it cannot be handled at the State level, the State Office may request the assistance of the National Office.

§ 1980.371 Defaults by the borrower.

(a) Paragraph VIII of Form 1980–16 outlines the lender's responsibility in the event of a default.

(b) The lender will arrange a meeting with the borrower to resolve the problem. A memorandum of the meeting including a list of the individuals who attended, a summary of the problem, and proposed solutions will be sent to the State Director to be retained in the loan file.

§ 1980.372 Liquidation.

If the lender or FmHA concludes that liquidation is necessary because of one or more defaults or third party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, it will notify the other party and the matter will be handled in accordance with paragraph IX of Form FmHA 1980–16.

(a) *Liquidation responsibilities.* The lender is responsible for carrying out the foreclosure action in an expeditious manner and in accordance with State laws.

(1) The lender must send the borrower a letter at least 30 days before foreclosure proceedings begin. The letter will clearly explain the nature of the default, what action is required to cure the default, and the date by which the default must be cured. The letter will also advise the borrower the approximate date that foreclosure action will begin if the default is not cured, that a deficiency judgement might be pursued, and that the account will be reported to a credit repository.

(2) The lender is expected to work with the borrower to find alternatives to foreclosure. If the lender determines that the loss of the loan would be lessened by selling the property for an amount less than the debt rather than proceed with the foreclosure, the lender may submit a recommendation to FmHA.

(3) The lender may reinstate an account when all delinquent payments and any funds that were advanced to pay authorized expenses are paid or as required under State law.

(4) When the borrower offers a deed in lieu of foreclosure, the lender will consult with the County Supervisor. The County Supervisor may authorize the lender to accept the offer when an acceptable, marketable title to the property can be obtained, the property is vacant, and no junior liens will exist on the property.

(5) The lender will provide accounting reports on the liquidation to FmHA on a monthly basis using Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status" (available in any FmHA office).

(6) Any funds remaining in the borrower's escrow deposit account should be used to pay taxes, insurance, protective advances, and related foreclosure costs.

(b) *FmHA responsibility.* The State Director will monitor the Lender's liquidation progress. The State Director is responsible for the review and acceptance of the lender's accounting reports and for submitting such reports to the lender when FmHA is conducting the liquidation. If the State Director determines that the liquidation is not proceeding in a manner typical for the area, the State Director will notify the lender that liquidation must be completed within a reasonable time. If it is necessary for FmHA to carry out the liquidation action, the lender's eligible status will be revoked in accordance with § 1980.309(h)(2) of this subpart. FmHA will cease interest assistance payments as of the date the account is accelerated.

(c) *Allowable liquidation costs.* Reasonable liquidation costs (costs similar to those charged for like services in the area) are allowed. Liquidation costs are paid from the sale of collateral when the lender has conducted the liquidation. Therefore, if liquidation never occurs or is conducted by someone other than the lender, liquidation costs may not be paid from the proceeds to the lender.

(1) *In-house expenses.* In-house expenses of the lender are not allowable costs under a liquidation plan. These include but are not limited to employee salaries, staff attorneys, travel, and overhead.

(2) *Appraisals.* If an appraisal is made and the fee is shared by FmHA and the lender in accordance with the Lender's Agreement, this is an allowable liquidation cost. The lender and FmHA recover this cost from the first collateral sales proceeds received, each taking half of the proceeds until the actual cost is fully recovered.

§ 1980.373 Protective advances.

See paragraph X of Form FmHA 1980–16. Protective advances are not intended to be made in lieu of additional loans. FmHA will consider the following when approving a protective advance:

(a) *Total amount.* The total amount of outstanding advances, the amount of those for which approval is required, the outstanding loan balance, whether the account is current, and the extent of any delinquencies.

(b) *Ability to pay.* The borrower's ability to pay the remaining loan balance and future advances in accordance with the repayment schedule.

§ 1980.374 Loss payments.

Final settlement of the loan will be made upon liquidation of the loan.

(a) *Final loss payment.* See paragraph IX of Form FmHA 1980–16. Final loss

payments will be made within 60 days of liquidation of the loan.

(1) *Determination of loss payment.* Determination of final loss payments will be different depending on which of the following circumstances is involved:

(i) If, at liquidation, title to the security is conveyed to a bona fide third-party purchaser, then final loss payment will be based on the sales proceeds received for the property.

(ii) If, at liquidation, title to the security is conveyed to the lender, then the County Supervisor will obtain a current market value appraisal of the security using an appraiser meeting the qualifications in § 1980.334 of this subpart. The County Supervisor will subtract the amount of the principal and interest owed on the loan including any authorized advances plus the allowable liquidation costs at the time of the foreclosure sale from the appraised value.

(2) *Payment procedure.* FmHA will pay the difference up to the amount of the loan guarantee unless FmHA has determined there is cause for reduction of the loss amount.

(i) If there is no dispute between FmHA and the lender regarding the amount of the loss and the lender's eligibility for payment of loss, FmHA will pay the loss within the limits of the guarantee.

(ii) If FmHA and the lender do not agree on the amount of the loss, FmHA believes that the lender's servicing of the loan was negligent, FmHA determines that loan funds were used for unauthorized purposes, or a portion of the loss is due to an insurable hazard, FmHA may pay the undisputed portion until the dispute is resolved.

(iii) When FmHA has cause to believe that fraud or other actions negating the guarantee exist, no loss payment may be made unless the situation is resolved.

(3) The County Supervisor will conduct an audit of the account and review the loan in its entirety to determine why the loan failed and whether any reason exists for reducing or denying the loss claim. This information will be documented in the FmHA case file.

(4) If a lender's loss claim is denied or reduced, the County Supervisor will notify the lender of all of the reasons for the action within 10 days of the decision and its opportunity to appeal the decision as set forth in § 1980.399 of this subpart and, Subpart B of Part 1900 of this chapter.

(5) FmHA approved officials are authorized to approve loss payments in amounts of up to 25 percent of their delegated loan approval authority in accordance with Exhibit D of FmHA Instruction 1901–A (available in any FmHA office). The State Director may request approval from the National Office when the amount of the claim is in excess of his or her authority.

(b) *Denial or reduction of loss claims.* The County Supervisor will fully document any loss claim which is denied or reduced. A lender's loss claim may be denied or reduced by FmHA when:

(1) The lender has committed fraud. (denial of claim)

(2) The lender claims items not authorized under FmHA regulations. (reduced by amount of unauthorized claim)

(3) The lender violated usury laws. (reduction for amounts in violation)

(4) The lender failed to obtain required security. (reduction for loss attributed to failure)

(5) Loan funds were used for unauthorized purposes. (reduction by unauthorized amount)

(6) The lender was negligent in loan servicing. Negligent serving is a failure to perform those services which a reasonably prudent lender would perform in servicing its own portfolio of loans that are not guaranteed. The term includes a failure to act, a failure to act in a timely manner, or acting in a manner contrary to that in which a reasonably prudent lender would act. (reduction for loss amount attributable to lender negligence) Examples of negligent servicing include:

(i) A failure to contact the borrower in a timely manner when the borrower's account goes into default.

(ii) A failure by the lender to pay real estate taxes or hazard insurance when due.

(iii) A failure by the lender to notify FmHA within required time limits when the borrower defaults on the loan.

(iv) A failure by the lender to request loan subsidy when the borrower was eligible for loan subsidy and loan subsidy was available (subsidized loans only).

(v) A failure by the lender to protect security during the liquidation phase.

§ 1980.375 [Reserved]

§ 1980.376 Additional loans or advances.

The lender will not make additional loans to the borrower without FmHA consent even though such loans will not be guaranteed. Any additional loan that is to be guaranteed will meet the requirements of this subpart. Additional loans for necessary repairs or other authorized purposes necessary to enable the borrower to retain a safe, decent, and sanitary dwelling may be made even though the area has changed from rural to non-rural over the life of the initial loan. FmHA may approve additional loans or advances provided the approval official determines that there will be no adverse changes in the borrower's financial condition and that the loan or advance is not likely to adversely affect the collateral of the guaranteed loan.

§§ 1980.377–1980.379 [Reserved]

§ 1980.380 Transfer and assumptions.

(a) *General.* All transfers and assumptions must be approved by FmHA in writing.

(b) *Eligible transferee.* An eligible transferee is one who meets the eligibility requirements of this subpart and includes situations involving transfers of housing in an area that has ceased to be rural.

(c) *Determinations by the lender.* Before the transfer and assumption can be approved, the lender must determine that all of the following conditions can be met:

(1) The transferee is an eligible applicant.

(2) The transferee will acquire all of the property securing the guaranteed loan balance and assume the debt.

(3) The transfer could not be made without the continuation of the loan guarantee.

(4) The market value of the security being acquired by the transferee is at least equal to the secured indebtedness against it or the conditions of § 1980.380(d) are met.

(5) The priority of the existing lien securing the guaranteed loan will be maintained or improved.

(6) Proper hazard insurance will be obtained.

(7) The transfer can be properly closed and the conveyance instruments will be filed, registered, or recorded, as appropriate and legally permissible.

(8) The transferor acknowledges continued liability for the debt.

(d) *Total debt.* A transfer and assumption may be made for less than the total remaining indebtedness when the debt exceeds the current market value and the transferor agrees to execute a note in favor of the lender for the balance of the debt not to exceed a 10-year repayment period at the same rate as the guaranteed note. At the time of loss settlement, the lender will assign the note to FmHA.

(e) *Changes in the promissory note or security instrument.* If the assumption will result in changes in the repayment schedule or the interest rate, the changes must be approved by the present borrowers. Any changes in rates

and terms must not exceed rates and terms allowed for new loans under this subpart. The term of the loan may cover a period of up to 30 years from the date of transfer. The lender's request for approval to FmHA will be accompanied by:

(1) An explanation of the reasons for the proposed change in the rates and terms.

(2) A statement that the lender's determinations required by paragraph (b) of this section can be made.

(f) *Release of liability.* The lender may not release the transferor of liability.

(g) *Forms and case numbers.* The assumption may be made on the lender's assumption agreement form. The assumption agreement must contain the FmHA case numbers of the transferor and the transferee.

(h) *Notations and notices.* The lender will notify FmHA whether the loan and security can be properly transferred, the conveyance instruments filed, registered, or recorded, as appropriate, and whether the borrower is to be released of liability. Upon completion of the transfer, the lender will provide FmHA a copy of the transfer and assumption agreement. The lender is responsible for notation of the transfer on the Loan Note Guarantee.

(i) *Loan Note Guarantee.* The existing Loan Note Guarantee will continue to be in effect. The lender will note the transfer and assumption on the original Loan Note Guarantee by completing the Assumption Agreement block and inserting the name of the assuming party.

(j) *Lender's application to FmHA.* The lender will submit the items outlined in paragraph (e) of § 1980.353 of this subpart, in addition to items required in this section.

(k) *Closing the transfer and assumption.* As soon as the lender has obtained FmHA approval, the lender may proceed with closing the transaction. The closing will include, but will not be limited to, the proper execution and delivery of the conveyance and assumption documents, compliance with any legal requirements, and actions necessary to perfect the transfer and the required lien priority.

(l) *Material furnished to FmHA after closing.* Immediately after closing, the lender will furnish to FmHA:

(1) A conformed copy of the executed assumption agreement.

(2) A statement showing:

(i) Any changes made in the provisions of the promissory note or security instruments.

(ii) That all conditions and requirements of paragraph (b) of this section have been met.

(iii) That the required insertions have been made per § 1980.380(h) of this subpart.

(m) *FmHA responsibility.* The FmHA approval official may approve any transfer and assumption and corresponding release of liability of the transferor consistent with this subpart and notify the lender of the decision and the appropriate appeal rights. A copy of the assumption agreement will be maintained in the FmHA loan file.

(1) *Notification of lender.* The FmHA approval official will review the proposed transfer and notify the lender of the decision in writing. The request for transfer will be treated as an application for guaranteed loan assistance and will be handled in accordance with § 1980.353 of this subpart. The lender may proceed with the transfer upon obtaining FmHA approval.

(2) *Review of closing documents.* The FmHA review official is responsible for the review and approval of the executed assumption agreement and the original statement required from the lender in paragraph (d) of this section.

(i) *Errors and omissions.* If upon review of the conformed documents FmHA finds any errors or omissions, the review official will return the defective material to the lender so that errors and omissions may be corrected. If the original assumption agreement contains the same defects, it will be necessary to have the assuming parties and the lender initial the changes. If the transferors remain liable for the debt, they will also need to initial the changes.

(ii) *Notification of Finance Office.* If the material is in order, or upon correction per paragraph 1980.381(e)(2)(i), the review official will complete and submit the appropriate information to the Finance Office.

§§ 1980.381–1980.398 [Reserved]

§ 1980.399 Appeals.

The borrower and the lender can appeal an FmHA administrative decision that directly and adversely impacts them. Decisions made by the lender are not covered by this paragraph even if FmHA concurrence is required before the lender can proceed. Appeals will be conducted in accordance with subpart B of part 1900 of this chapter.

(a) *Appealable decisions.* (1) The borrower and the lender must jointly execute the written request for an alleged adverse decision made by FmHA and both must participate in the appeal when the appeal involves a denial of a loan guarantee, or a denial or reduction of interest assistance payments.

(2) The lender only may appeal cases where FmHA has denied or reduced the amount of a loss payment to the lender.

(b) *Nonappealable decisions.* (1) The lender's decision as to whether to make a loan is not subject to FmHA appeal procedures.

(2) The lender's decision to accelerate the account is not subject to FmHA appeal procedures.

§ 1980.400 [Reserved]

Exhibit D—Form FmHa 1980–16, Lender Agreement for Guaranteed Single Family Housing Loans.

_____

_____

(Lender) of _____

_____

_____ is designated as a Lender for the purpose of processing and requesting Loan Note Guarantee(s) authorized by 7 CFR part 1980, subpart D. This agreement does not apply to loan types other than those specifically named in this agreement. This agreement applies to the following offices of the Lender: _____

_____

The United States of America, acting through the Farmer's Home Administration (FmHA), agrees to enter into Loan Note Guarantees with the lender as may be issued pursuant to the regulations for Rural Housing loans and to participate in a percentage of any loss on any such loans not to exceed the amount established in the particular loan note guarantee as to the percentage of the amount of the principal and any accrued interest. The terms of any Loan Note Guarantee are controlling. The lender enters into this agreement as a condition for obtaining the guarantee.

The parties agree:

I. That the maximum loss covered under the Loan Note Guarantee will not exceed the amount established in the particular loan guarantee as to percentage of the principal and accrued interest on any Rural Housing loan guaranteed.

II. Lender's Sale of the Guaranteed Loan.

A. The Lender may retain all of any guaranteed loan. The Lender is not permitted to sell or participate any portion(s) of the loan(s) to the applicant or borrower or members of their immediate families. If the Lender desires to market all or part of the loan at or subsequent to loan closing, such loan must not be in default as set forth in the terms of the notes.

B. When a loan is sold by the Lender to a Purchaser, the Purchaser shall upon the sale succeed to all rights of the Lender under the Loan Note Guarantee. The Purchaser will remain bound to all of the obligations under the Loan Note Guarantee, this Agreement, the FmHA program regulations found in title 7 CFR part 1980 subpart D, and to future FmHA

program regulations not inconsistent with the express provisions of this Agreement. The Lender and Purchaser will execute Form FmHA 1980–11, "Assignment and Assumption Agreement."

III. The Lender agrees that loan funds will be used for the purposes authorized in 7 CFR part 1980 subpart D as set forth in Form FmHA 1980–18 "Conditional Commitment for Rural Housing Loan Guarantee," for the particular loan.

IV. The Lender certifies that none of its officers or directors, stockholders (except stockholders in a Farm Credit Bank or other Farm Credit System institutions with direct lending authority that have normal stockshare requirements for participating) or other owners has, or will have, a substantial financial interest in any guaranteed loan Borrower. The Lender certifies that neither any guaranteed loan borrower nor its officers or directors, stockholders or other owners have a substantial financial interest in the Lender. If the borrower is a member of the board of directors of a Farm Credit Bank or other Farm Credit System institution with direct lending authority the Lender certifies that an FCS institution on the next highest level will independently process the loan request and will act as the Lender's agent in servicing the account.

V. The Lender will certify to FmHA, prior to the issuance of a Loan Note Guarantee for each loan, that there has been no adverse change(s) in the Borrower's financial condition nor any other adverse change in the Borrower's condition during the period of time from FmHA's issuance of the Conditional Commitment for Guarantee to the issuance of the Loan Note Guarantee. The Lender's certification must address all adverse changes and be supported by financial statements of the borrower not more than 90 days old at the time of certification.

VI. The Lender will submit the required guarantee fee with a Guaranteed Loan Closing Report at the time a Loan Note Guarantee is issued.

VII. Servicing.

A. The Lender is encouraged to provide borrowers the opportunity to become a successful homeowner by providing appropriate loan servicing and counseling to meet the objectives of the loan. The Lender shall establish and maintain an escrow account to pay real estate taxes and assessments and required hazard insurance on the security. The Lender will service the entire loan and will remain mortgagee or the secured party of record, unless the loan is sold to another eligible Lender. The purchasing Lender agrees to be bound by all of the same terms as the selling Lender under the Loan Note Guarantee. The entire loan will be secured by the same security with equal priority for the guaranteed and the unguaranteed portions of the loan. The unguaranteed portion of a loan will not be paid first nor given any preference or priority over the guaranteed portion of the loan. The Lender shall perform those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are not guaranteed.

B. Disposition of the loan may be made prior to full disbursement, completion of construction and acquisitions only with prior written approval of FmHA. Subsequent to full disbursement, completion of construction, and acquisition, the guaranteed portion of the loan may be disposed of as provided in this Agreement.

It is the Lender's responsibility to see that all construction is properly planned before any work proceeds; that any required permits, licences or authorizations are obtained from the appropriate regulatory agencies; that the Borrower has obtained contracts through acceptable procurement procedures; that periodic inspections during construction are made and the FmHA's concurrence on the overall development schedule is obtained.

C. Lender's servicing responsibilities, in addition to those set forth in 7 CFR part 1980, subpart D, include, but are not limited to:

1. Obtaining compliance with the covenants, loan agreement, security instruments, and any supplemental agreements and notifying FmHA and the borrower in writing of any violations.

2. Receiving all payments as they fall due, and proper application to principal and interest, escrow accounts of taxes (including special assessments) and insurance. The monthly payment may be adjusted when it is not adequate to meet established charges of the escrow account for the coming year. Late charges when applicable may be assessed. The payments may also include additional funds to repay protective advances made by the Lender.

3. Taking actions to offset the effects of liens, foreclosures, bankruptcy, receivership, insolvency, condemnation, probate proceedings, and other legal actions to properly service the loan.

4. Inspection of the collateral before the loan becomes 60 days delinquent or the Lender has reason to believe that the borrower has vacated the property, or that the value of the security may be in jeopardy.

5. Assurance that adequate insurance, including hazard insurance, is maintained with a loss payable clause in favor of the Lender as the mortgagee or the secured party.

6. Assuring that:

a. Insurance loss payments, condemnation awards, or similar proceeds are applied on debts in accordance with lien priorities on which the guarantee was based, or to rebuild or otherwise acquire needed replacement collateral with written approval of FmHA;

b. Proceeds from the sale or other disposition of collateral are applied in accordance with the lien priorities on which the guarantee is based, except that proceeds from the disposition of collateral such as furniture, equipment, of fixtures may be used to acquire property of a similar nature without written concurrence of FmHA;

c. The borrower complies with all laws and ordinances applicable to the loan and the collateral;

d. If personal guarantees or consigners are part of the collateral, that financial statements are obtained from such guarantors which are not over 90 days old;

e. Obtaining the lien coverage and lien priorities specified by the Lender and agreed to by FmHA, property recording or filing the lien instruments to obtain or maintain such priorities during the existence of the guarantee by FmHA, including recording of the recapture mortgage;

f. The borrower obtains marketable title to the collateral;

g. The borrower is not released of liability for any or all of the loan except as provided in FmHA regulations.

7. Provide an annual report to FmHA on the status of the loan not later than January 31. The report will provided an update of the status of the account as of December 31 of the previous year including information on the unpaid balance of the loan, and status of the real estate taxes and property insurance.

VIII. Default of the Borrower

A. The Lender will notify FmHA within twenty (20) days when a borrower is thirty (30) days past due on payment or if the borrower is in default. The Lender will notify FmHA of the status of a borrower's default using Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status."

B. The Lender must send a notice to the borrower if the payment is not received by the 17th day after it is due, and a reasonable attempt to contact the borrower by telephone must be made, if the payment is not received by the 20th day.

C. A meeting will be arranged by the Lender with the borrower before the loan becomes 60 days delinquent for the purpose of resolving the delinquent account. The Lender is required to report borrower delinquences to credit repositories when the account is 90 days delinquent. The Lender will negotiate in good faith in an attempt to resolve any problem. The borrower must be given a reeasonable opportunity to bring the account current before any foreclosure proceedings are started. The Lender will advise FmHA in writing of the results of the meeting. Actions taken by the Lender with the written concurrence of FmHA may include but are not limited to the following or any combination thereof:

1. Deferral of principal payment.

2. Reamortization of or rescheduling the payments on the loan.

3. Tranfer and assumption of the loan.

4. Liquidation.

IX. Liquidation. The Lender must send the borrower a letter at least 30 days before foreclosure proceedings begin, explaining the nature of the default, what action is required to cure the default, the date by which the default must be cured, and the approximate date that foreclosure action will begin if the default is not cured. If the Lender concludes the liquidation of a guaranteed loan account is necessary because of one or more defaults or third party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, the Lender will advise FmHA of the decision and provide certification that all servicing options have been explored and been determined unworkable. When FmHA concurs with the Lender's conclusion or at any time concludes independently the liquidation is necessary, it will notify the Lender and the matter will be handled as follows:

The Lender will liquidate the loan unless FmHA, at its option, decides to carry out liquidation.

A. Lender's proposed method of liquidation. Within 30 days of the decision to liquidate, the Lender will prepare a written plan of liquidation and provide a copy of the plan to FmHA. If either the Lender or FmHA decides that an appraisal is necessary, the Lender will obtain an independent appraisal report on all collateral securing the loan for the purpose of aiding the Lender and FmHA in determining the appropriate liquidation and actions. Any independent appraiser's fee will be shared equally by the Lender and FmHA. The plan will address:

1. Such proof as FmHA requires to establish the Lender's ownership of the guaranteed loan promissory notes and related security instruments.

2. Information concerning the Borrower's assets including real and personal property and other assets.

3. A proposed method of making the maximum collection possible on the indebtedness.

B. FmHA response to Lender's liquidation plan. FmHA will advise the Lender in writing whether it concurs with the plan within 30 days of receipt of such plan from the Lender. Should FmHA and the Lender not agree on the Lender's liquidation plan, the Lender and FmHA will negotiate to resolve the disagreement. The Lender will ordinarily conduct the liquidation; however should FmHA opt to conduct the liquidation, the liquidation will proceed as follows:

1. The Lender will transfer to FmHA all rights and interests necessary to allow FmHA to liquidate the loan. In this event, the Lender will not be paid for any loss until after the collateral is liquidated and the final loss in determined by FmHA.

2. FmHA will attempt to obtain the maximum amount of proceeds from liquidation.

3. Options available to FmHA include any one or combination of the usual commercial methods of liquidation.

C. Acceleration: The Lender or FmHA, if it liquidates, will proceed as expeditiously as possible when acceleration of the indebtedness is necessary including giving any notices and taking any other required legal action. A copy of the acceleration document will be sent to FmHA or the Lender, as the case may be. If FmHA determines the liquidation is not proceeding in a manner typical for the area, it will notify the Lender that liquidation must be completed within a specified time, otherwise the Lender's approval status will be revoked.

D. Accounting and Reports. When the Lender conducts the liquidation, it will account for funds during the period of liquidation and will provide FmHA with periodic reports on the progress of liquidation, disposition of collateral, resulting cost and additional procedures necessary for successful completion of the liquidation. When FmHA liquidates, the Lender will be provided with similar reports upon request.

E. Lender Binding at Foreclosure Sale. If liquidation by the Lender results in a foreclosure sale, the Lender must bid either the current market value of the collateral or the amount of the remaining indebtedness secured by the collateral, whichever is less.

F. Determination of Loss and Payment. Final settlement will be made with the Lender after the collateral is liquidated. FmHA will have the right to recover losses if paid under the guarantee from any liable party.

1. Form FmHA 449–30, "Loan Note Guarantee Report of Loss," will be used for calculations of all final loss determinations.

2. After the Lender has completed liquidation and upon receipt of the final accounting and Report of Loss, FmHA may audit and will determine the actual loss. FmHA will investigate any questions regarding the amounts in the Final Report of Loss and contact the Lender regarding any discrepancies for correction. The Lender will make its records and assistance available to FmHA. The final Report of Loss will be tentatively approved when FmHA finds the report proper in all respects.

3. Upon tentative approval of the final Report of Loss, FmHA will submit the original of the final Report of Loss to the Finance Office for issuance of a Treasury check in payment of the balance owed by FmHA to the Lender.

4. If FmHA conducted the liquidation, it will provide an accounting and Report of Loss to the Lender and will pay the Lender in accordance with the Loan Note Guarantee.

5. In those instances where the Lender has made authorized protective advances, the amount advanced should be deducted from sales proceeds.

G. Maximum amount of interest loss payment. The amount payable to the Lender cannot exceed the limits set forth in the Loan Note Guarantee. If FmHA conducts the liquidation, loss occasioned by accruing interest will be covered by the guarantee only to the date FmHA accepts the responsibility for liquidation. Loss occasioned by accruing interest will be covered to the extent of the guarantee to the date of final settlement when the liquidation is conducted by the Lender provided it proceeds expeditiously with the liquidation plan approved by FmHA. Interest accrued may be covered to the extent of the guarantee when the Lender conducts the liquidation in an expeditious manner.

H. Application of FmHA loss payment. The total amount of the loss payment remitted by FmHA will be applied on the guaranteed portion of the loan. Application of loss payments from FmHA does not release the borrower from liability. Application of FmHA loss payments are intended only to compensate the lender for the loss and such payments do not release the Borrower of liability. Such amounts are only to compensate the Lender for the loss. (See paragraph XIII below.) In all cases a final Form FmHA 449–30 must be prepared and submitted by the Lender and processed by FmHA to close out the files.

I. Income from collateral. Any net rental or other income received by the lender from the collateral will be applied on the guaranteed loan debt.

J. Liquidation costs. Certain reasonable liquidation costs will be allowed during the liquidation process. An estimate of these costs will be submitted as a part of the liquidation plan. Such costs will be deducted from the gross proceeds from the disposition of collateral unless the costs have been previously determined by the Lender (with FmHA concurrence) to be protective advances. If due to changed circumstances the liquidation plan needs to be revised, the Lender will obtain FmHA's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the Lender will be allowed including but not limited to employee salaries, staff lawyers, travel and overhead.

K. Payment. Final loss payments will be made within 60 days after the review of the accounting of the collateral.

X. Protective Advances. Protective advances must constitute in indebtedness of the Borrower to the Lender and be secured by the security instrument(s). FmHA prior written authorization is required for all protective advances exceeding $500 except for advances made for real estate taxes and other annual assessments that constitute a prior lien against the security. Protective advances are advances made by a Lender when the borrower is in liquidation or close to being liquidated to protect or preserve the security itself from loss or deterioration. Protective advances include advances made for delinquent property taxes, annual assessments, ground rents, hazard or flood insurance premiums against or affecting the collateral, and other expenses of an emergency nature necessary to preserve or protect the physical security. Attorney fees are not a protective advance.

XI. Additional Loans or Advances. The Lender will not make additional expenditures or new loans without first obtaining the written approval of FmHA even though such expenditures or advances would not be guaranteed.

XII. Future Recovery. After a loan has been liquidated and a final loss has been paid by FmHA any future funds which may be recovered will be shared equally between FmHA and the Lender.

XIII. Transfer and Assumption cases: Refer to 7 CFR part 1980, subpart D. If a loss will occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor-debtor is released from liability, the Lender, if it holds the guaranteed portion of the loan may file an estimated Report of Loss on Form FmHA 449–30, "Loan Note Guarantee Report of Loss," to recover its pro rata share of the actual loss at that time. In completing Form FmHA 449–30, the amount of the debt will be entered on Line 24 as the Net Collateral (Recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption, if not assumed by the transferee will be entered on Lines 13 and 14 of Form FmHA 449–30.

XIV. Other requirements. This Agreement is subject to all the provisions of 7 CFR part 1980, Subpart D and any future amendments of the regulations not inconsistent with this Agreement.

XV. Execution of Agreements. This agreement is executed prior to the execution of any Loan Note Guarantee under 7 CFR part 1980, subpart D and does not impose any obligation upon FmHA with respect to execution of any such contract. FmHA in no way warrants that such a contract has been or will be executed. Each request for a Loan

Note Guarantee under 7 CFR part 1980, subpart D will be considered by FmHA on a case-by-case basis.

XIV. Notices.

All requests for Loan Note Guarantees and any notices or actions will be initiated through the following FmHA Office unless otherwise notified by FmHA:

_____

_____

_____

_____

_____

_____

_____

XVII. Termination of Agreement. The Lender's authority to submit guarantee requests under this agreement will terminate two (2) years from the date set forth in paragraph XVIII unless otherwise revoked by FmHA. This Agreement will remain in force for any Loan Note Guarantee issued under it and remaining in force at the time of expiration or revocation in accordance with the terms of Loan Note Guarantee until those loan note guarantees are concluded.

XVIII. This agreement is dated _____

Lender: _____

UNITED STATES OF AMERICA

(IRS I.D. Tax No.)

By _____

By _____

Title _____

Title _____

ATTEST: _____ (Seal)

Exhibit E—Form FmHA 1980–17, Loan Note Guarantee

State _____

County _____

Rural Housing Loan, 7 CFR Part 1980, Subpart D

Date of Note _____

Borrower's Name _____

FmHA Case No. _____

Lender _____

Lender's IRS ID No. _____

Lender's Address _____

Principal Amt of Loan _____

This Loan Note Guarantee is issued under Approved Lender Agreement for Single Family Housing Loan Guarantees dated _____.

The guaranteed portion of the loan is $_____ which is _____ percent of loan principal. The principal amount of the loan is evidenced by the attached note described below.

Lender's Identifying Number	Face amount	Percent of total face amount	Amount guaranteed
	$.....	%.....	$

In consideration of the making of the subject loan by the above named Lender, the United States of America, acting through the Farmer's Home Administration of the United States Department of Agriculture (called "FmHA"), pursuant to title V of the Housing Act of 1949, as amended (42 USC 1471 et seq.) does agree that in accordance with and subject to the conditions and requirements in this instrument, it will pay to the Lender the lesser of 1. or 2. below:

1. Any loss sustained by such Lender on the guaranteed portion including:

a. Principal and interest indebtedness as evidenced by said note(s) or by assumption agreement(s), and

b. Principal and interest indebtedness on secured protective advances for protection and preservation of collateral made with FmHA's authorization including but not limited to, advanced for taxes, annual assessment(s) and any interest due on the advances.

2. The guaranteed principal advanced to or assumed by the Borrower under said note or assumption agreement and any interest due on the note or assumption agreement.

If FmHA conducts the liquidation of the loan, loss occasioned to a Lender by accruing interest after the date FmHA accepts responsibility for the liquidation will not be covered by this Loan Note Guarantee. If Lender conducts the liquidation of the loan, accruing interest will be covered by this Loan Note Guarantee to 90 days after the date FmHA has approved the Lender's decision to liquidate the loan when the Lender conducts the liquidation expeditiously in accordance with the liquidation plan approved by FmHA.

Definition of Lender

The Lender is the person or organization making and servicing the loan which is guaranteed under the provisions of 7 CFR part 1980 subpart D. The Lender is also the party requesting the guarantee.

Conditions of the Guarantee

1. *Loan Servicing*

Lender will be responsible for servicing the entire loan and Lender will remain mortgagee and/or secured party of record. The Lender may sell the loan to an FmHA eligible Lender when the purchasing Lender agrees to be bound by all of the same terms as the selling Lender and this agreement the FmHA Lender Agreement for Single Family Housing Loans.

2. *Priorities*

The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will not be paid first nor given any reference or priority over the guaranteed portion of the loan.

3. *Full Faith and Credit*

The Loan Note Guarantee constitutes an obligation supported by full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which the Lender has actual knowledge at the time it becomes such Lender or which the Lender participates in or condones. A note which provides for the payment of interest on interest shall not be guaranteed. If the note to which this instrument is attached or relates provides for the payment of interest on interest, then this Loan Note Guarantee is void. In addition, the Loan Note Guarantee will be unenforceable by the Lender to the extent any loss is occasioned by violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which FmHA acquires knowledge of the forgoing. Any losses occasioned will be unenforceable by the lender to the extent that loan funds are used for purposes other than those approved by FmHA in its Form FmHA 1980–18, "Conditional Commitment for Single Family Housing Loan Guarantees." Negligent servicing is defined as the failure to perform those services which a reasonably prudent Lender would perform in servicing its own loan portfolio of loans that are not guaranteed. The term includes not only the concept of a failure act but also not acting in a timely manner or acting contrary to the manner in which a reasonably prudent Lender would act up to the time of loan maturity or until a final loss is paid. This Agreement shall not cover interest accruing 90 days after the date FmHA has approved the Lender's decision to liquidate the loan.

4. *Payments*

Lender will receive all payments of principal and interest and any loan subsidy on the account of the entire loan.

5. *Protective Advances*

Protective Advances made by the Lender pursuant to the regulations will be guaranteed against a percentage of the loss to the same extent as provided in this Loan Note Guarantee notwithstanding the guaranteed portion of the loan that is held by another.

6. *Custody of the Loan*

The Lender may retain or sell the loan to an FmHA eligible Lender.

7. *When the Guarantee Terminates*

The Loan Note Guarantee will terminate automatically (a) upon full payment of the guaranteed loan; or (b) upon full payment of any loss obligation hereunder; or (c) upon written notice from the Lender to FmHA that the guarantee will terminate after 30 days after the date of the notice, provided the Lender holds all of the loan and the Loan Note Guarantee(s) are returned to be cancelled by FmHA.

8. *Settlement*

The amount due under this instrument will be determined and paid as provided in 7 CFR part 1980, subpart D in effect on the date of this instrument.

9. *Notices*

All notices and actions will be initiated through the FmHA _____ (State) for _____ with the mailing address at the date of this instrument:

_____

_____

UNITED STATES OF AMERICA

Farmers Home Administration

By: _____

Title: _____

_____

(Date)

Exhibit G—FmHA Instruction 1980–D, Loans Made On or Before March 28, 1989.

Servicing Loan Guarantees.

Loans guaranteed before March 28, 1989 will be serviced in accordance with the Loan Note Guarantee and Lender's Agreement for the loan.

Transfers and Assumptions.

A loan made and guaranteed under subpart D of part 1980 prior to March 29, 1989 may be transferred to an applicant meeting all eligibility requirements of this subpart except the applicant's adjusted annual income may exceed the moderate income limit by not more than 10 percent of the moderate income limit for the area. Eligible applicant also includes an applicant who meets the eligibility requirements of this subpart except that the housing being transferred is in an area which has ceased to be rural.

Exhibit H [Reserved]

Exhibit I—Form FmHA 1980–12, Master Interest Assistance and Recapture Agreement with Promissory Note.

State _____
County _____
Case No. _____
Date _____
Date of Loan Note _____
Amount of Loan Note _____
Date of Mortgage _____
Amount of Mortgage _____
Maximum Amount of Interest Assistance Per Year _____

For value received, the undersigned (whether one or more persons, herein called "Borrower") jointly and severally promise to pay to the order of the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, (herein called the "Government"), at its offices in _____

the lesser of the following:

(a) The amount of interest assistance payments paid by the Farmers Home Administration, in accordance with this agreement on behalf of the Borrower under a note and mortgage or deed of trust dated _____.

(b) Fifty percent of the Net Appreciation of the property covered by the mortgage or deed of trust. The Net Appreciation will be computed in accordance with regulations prescribed by the Secretary of Agriculture in 7 CFR part 1980 subpart D.

The amount owed under this note will be payable when the first of the following occurs:

(a) Title to the property is conveyed to another party, or

(b) The borrower ceases to occupy the property.

Presentment, protest and notice are waived.

I. This master agreement between the Government and Borrower, supplements the Promissory Note between _____ (called Lender) and _____ and Borrower(s). This agreement provides a mechanism for the granting of interest assistance by the Government to the Borrower and for the recapture of all or part of that assistance. The term assistance, as used in this master agreement, means interest payment assistance.

II. In consideration of the Lender's making a FmHA guaranteed loan to the Borrower(s), FmHA agrees that it will supplement the Borrower's payments to the Lender in accordance with and subject to the conditions and requirements of this agreement.

a. The intent of this agreement is to assist the Borrower in being able to afford decent, safe, and sanitary housing by providing interest assistance in amounts as specified below to reduce the note interest rate paid by the Borrower to the Lender during the period interest payment assistance is actually payable to the Lender.

b. The assistance is not intended to affect the Lender's amortization schedule but rather reduce the amount of the note installment payable by the Borrower.

c. The Borrower agrees to the conditions set forth in this agreement for the receipt and repayment of FmHA interest assistance.

d. The Lender acknowledges the conditions of this agreement.

III. The Borrower's household income at the time of execution of this agreement is $_____ per annum and represents _____ percent of the area median income.

a. The Borrower will remain eligible for interest assistance as long as the Borrower's income stays within the low income range as then defined by FmHA and the borrower continues to personally occupy the dwelling.

b. The Borrower has executed a promissory note dated _____/_____/_____ in favor of the Lender in the amount of $_____ at _____% rate of interest for _____ months with monthly payments of $_____.

c. The Government will provide interest assistance not to exceed $_____ per month, as determined using the tables contained in Attachment A. The actual assistance granted will be based on the Borrower's household income and eligibility for assistance at the time of the annual review. Loan assistance funds will be paid directly to the Lender on behalf of the Borrower, and will be applied to the Borrower's loan note installment.

d. The amount of assistance is dependent on the Borrower's income. The Borrower agrees to report any increase in income that amounts to $100 per month or more over the amount used in the most current Annual Interest Assistance Agreement. The Borrower may report decreases in income which may affect eligibility for assistance. This information shall be reviewed and a determination will be made whether an adjustment to the current assistance agreement is required.

e. The Lender and the Government will enter into an Annual Interest Assistance Agreement for each period the Borrower is entitled to receive interest assistance during the life of this master agreement.

f. Based on changes in the Borrower's income, the Government may adjust the assistance amount in increments of $20.00 per month or in accordance with the Floor Rate as provided in Attachment A.

g. The amount in paragraph (c) above is the maximum amount of assistance which may be paid on the Borrower's behalf under this Agreement. The Borrower may request additional assistance if the Borrower's household income decreases. Requests for assistance amounts which exceed the maximum dollar figure above are subject to the availability of funds.

h. The maximum rate of assistance allowance under this program is _____% of _____ regardless of income.

h. In the event of an overpayment of assistance, the Government reserves the right to collect overpayments from the Borrower or the Lender or offset the overpayment by reducing future assistance payments at its option. Overpayment amounts may be added to the recapture amount at the Government's option if not collected by other means.

i. Underpayments of assistance by the Government will be paid in a lump sum to the Lender.

IV. The Lender agrees:

a. To provide for completion of the Annual Interest Assistance Agreements for submission to FmHA. This includes obtaining the necessary information and verifications of income and other information for calculation of the Annual Interest Assistance Agreement.

b. The Lender is not responsible for monitoring the Borrower's income but will promptly provide information to FmHA when the Borrower reports a change in income including carrying out all actions in paragraph IV.a above.

c. The Lender will not declare an account to be in default or otherwise penalize the Borrower because interest assistance payments due from the Government have not been paid.

V. The Borrower agrees that:

a. The real property described in the mortgage listed above is pledged as security for repayment of the assistance received or to be received.

b. The repayment of assistance is due and payable upon the Borrower's payment-in-full (including refinancing) of the outstanding indebtedness or transfer of title or the non-occupancy of the property.

c. The amount of repayment of the assistance specified in this master agreement is not determined from any other source other than the value (as determined by FmHA) of the real estate mortgaged in order to secure the Guaranteed Rural Housing loan.

d. As long as the Borrower continues to *own and occupy* the property, repayment of interest assistance may be deferred until title to the property is conveyed.

e. The amount of assistance to be repaid will be determined when the principal and interest balance is repaid (including refinancing), the title to the property is transferred, or the borrower ceases to occupy the property. The security instrument for assistance repayment will not be released of record until the total amount of assistance is repaid.

f. When the debt is satisfied by OTHER THAN FORECLOSURE or DEED IN LIEU OF FORECLOSURE, sale proceeds received through an arm's length transaction will be

divided between the Borrower and the Government as follows:

1. Unpaid balance of loans secured by a prior security instrument as well as real estate taxes and assessments levied against the property which are due will be paid.

2. Unpaid principal and interest owed on the FmHA guaranteed loan which were not assistance and are still due and payable to the Lender.

3. The actual expenses incurred by the Borrower necessary to sell the property such as sales commissions or advertising cost, appraisal fees, legal and related costs such as deed preparation and transfer taxes will be paid or reimbursed to the Borrower. Expenses incurred by the Borrower in preparing the property for sale are not allowed unless authorized by FmHA prior to incurring such expenses. Such expenses will be authorized only when FmHA determines they are necessary to sell the property, or will likely result in a return greater than the expense being authorized.

4. The original equity which consists of the actual contribution by the Borrower and reduces the amount of the loan below the market value of the property. The contribution may be in the form of cash and/or value of the lot if the home was constructed on the Borrower's property. The amount contributed by the Borrower for this agreement is $_____

5. The Borrower will receive the value of capital improvements to the extent that they do not exceed market value contribution, as indicated by a sales comparison analysis and documented in sufficient detail to support the conclusion. The cost of the improvement will not be considered, only contribution to value.

6. The remaining balance is considered the value appreciation and will be divided between FmHA and the Borrower by dividing the number of months that FmHA paid interest assistance by the number of months the loan was outstanding. If there is no value appreciation, there is no recapture.

g. When the loan is paid in full other than by sale of the property or the borrower has ceased to occupy the property, the amount of assistance to be repaid to the Government is determined in the same manner as above but is based on the appraised value as determined by FmHA rather than the sales price. In such cases, the assistance to be repaid upon non-occupancy, sale, or transfer of title to the property.

I have read and agree to the provisions of this agreement.

_____

Borrower

_____

Co-Borrower
Acknowledged by

_____

Lender
Accepted and Agreed to by

_____

FmHA

Attachment A

The chart below will serve as the basis for determining the amount of interest assistance paid by the government and the amount that the borrower will be responsible for payment of the Promissory Note in the attached agreement. The actual amounts for which each party is responsible will be reflected in Form FmHA 1980–12, "Annual Interest Assistant Agreement."

Percentage of Median Income when the borrower's income is:		Interest Assistance—the borrower's floor payment rate is:
More than	But less than	
55 percent	60 percent	____ percent.
60 percent	65 percent	____ percent.
65 percent	70 percent	____ percent.
70 percent	75 percent	____ percent.
75 percent	80 percent	____ percent.

Exhibit J—Form FmHA 1980–11, Assignment & Assumption Agreement.

(Lender) _____
of _____ owns a loan made to _____ as evidenced by a note dated _____ in the United States of America, acting through the Farmers Home Administration (FmHA) entered into a Loan Guarantee (Form FmHA 1980–17) dated _____ with the Lender pursuant to a _____ Lender's Agreement For Guaranteed Single Family Housing Loan (Form FmHA 1980–16) dated _____ as authorized by 7 CFR part 1980, subpart D.
(Purchaser) _____
of _____ desires to purchase from the Lender the loan as guaranteed by FmHA.

The Parties Hereto Agree:

I. The principal amount of the Loan now outstanding is $_____. FmHA has received the Guarantee Fee in exchange for the issuance of the Loan Note Guarantee.

II. Lender, for value received, hereby assigns to Purchaser all right, title and interest of the Lender in the loan and instruments and agreements relating thereto as more specifically set forth in a separate document in substantially the following form which shall include attestation and acknowledgements as necessary to effectuate and record the assignment under prevailing local law:

Assignment

Know that _____ (Lender) for value received, hereby assigns unto _____ (Purchaser) and unto the heirs, successors, legal representatives, and assigns of the Purchaser all right, title and interest of the Lender in and to those certain [mortgages(s)] [deed(s)] of trust] [trust indenture(s)] [deed(s) to secure debt], together with the note(s) or obligations described in said [mortgage(s)] [deed(s) of trust] [trust indenture(s)] [deed(s) to secure debt] and evidencing the loan(s) secured thereby (Loans) and all right, title and interest of the Lender in and to all loan agreements, security agreements, title and other insurance policies, Loan Note Guarantee, and other instruments, contracts or agreements pertaining the Loans in each case including all right as the Lender to exercise any election or option or to make any decision or determination or to give any notice, consent, waiver or approval under or in respect to any agreement pertaining to the Loans or to accept surrender of any property securing any Loan or any part thereof, as well as all right, powers and remedies on the part of the Lender, whether arising under any of the agreements pertaining to the Loans or by statute or at law or equity, or otherwise, arising out of any default or event of default under any agreement pertaining to the Loans, which are recorded in the [mortgage] [deed of trust] [deed] records of [County], [State] as follows, to-wit:

Grantor	Date of mortgage	Original loan amount	Book or reel	Page

To have and hold the same unto the Purchaser and to the heirs, successors, legal representatives and assigns of the Purchaser forever.

The Lender has duly executed the Assignment the _____ day of _____

_____

_____

By _____

[Include attestation and acknowledgements as necessary to effectuate and record the assignment under prevailing local law.]

III. Lender shall execute such other documents or instruments as may be necessary to effectuate this transaction, including compliance with § 941 of the Cranston-Gonzalez National Affordable Housing Act.

IV. Purchaser shall succeed to all rights, title, and interest of the Lender under the Loan Note Guarantee.

V. The Provisions of the note(s), security instrument(s), Loan Note Guarantee, and of any outstanding agreements executed or assumed in relation to the Loan or Loan Note Guarantee shall remain in full force and effect and Purchaser assumes the obligations of, and agrees to be bound by and to comply with, all covenants, agreements and conditions contained in said instruments and agreements the same as if it had executed them as of the dates thereof as principal obligor, and shall be subject to any defenses, claims, or setoffs that FmHA would have against the Lender if the Lender had continued to hold the Loan. The Purchaser also agrees to comply with § 941 of the Cranston-Gonzalez National Affordable Housing Act.

VI. This Agreement shall be subject to present regulations of FmHA and to its future regulations which are not inconsistent with the express provisions hereof.

Dated this _____ day of _____, 19____.

Lender

_____

Purchaser

_____

_____

United States of America
Farmers Home Administration
By: _____

_____

Dated: December 12, 1990.

La Verne Ausman,

Administrator, Farmers Home Administration.

[FR Doc. 91-5 Filed 1-2-91; 8:45 am]

BILLING CODE 3410-07-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 75

[Airspace Docket No. 90-ACE-3]

Proposed Alteration of Jet Route J-151

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This notice withdraws the notice of proposed rulemaking (NPRM), Airspace Docket No. 90-ACE-3, which was published in the **Federal Register** on August 21, 1990 (55 FR 34027). That NPRM proposed to alter the description of Jet Route J-151 between St. Louis, MO, and Vulcan, AL. This action was to improve the flow of traffic in the St. Louis terminal area. Because of the difficulty anticipated in flight-testing this route, the FAA will not be amending the description of J-151.

DATES: This withdrawal of proposed rulemaking is effective January 2, 1991.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Obstruction Evaluation Branch (STP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and procedures Service, Federal Aviation Administriton, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9250.

The Proposed Rule

On August 21, 1990, a notice of proposed rulemaking was published in the **Federal Register** to alter the description of Jet Route J-151 between St. Louis, MO, and Vulcan, AL. The new alignment of J-151 would shorten and enhance the flow of traffic in the St. Louis Airport terminal area. This action would reduce en route and terminal area delays.

Conclusion

FAA's Central Region Office, which requested the realignment of J-151, has been notified by FAA's Flight Inspection Office that due to the length of that segment of J-151 between St. Louis, MO, and Vulcan, Al, the airway cannot pass the required flight inspection unless such aircraft operate above Flight level 350. With this information in mind, Airspace Docket No. 90-ACE-3 is being withdrawn.

List of Subjects in 14 CFR Part 75

Aviation safety, Jet routes.

The Withdrawal

Accordingly, pursuant to the authority delegated to me, the notice of proposed rulemaking, Airspace Docket No. 90-ACE-3, as published in the **Federal Register** on August 21, 1990 (55 FR 34027) is hereby withdrawn.

Authority: 49 U.S.C. 1348(a), 1510; executive order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

Issued in Washington, DC, on December 18, 1990.

Harold W. Becker,

Manager, Airspace—Rules and Aeronautical Information Division.

[FR Doc. 90-24 Filed 1-2-91; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 40, 43, 46, 48, 49, 52, and 154

[PS-65-90]

RIN 1545-A097

Procedural Rules for Excise Taxes Currently Reportable on Form 720

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations portion of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to requirements for returns, payments, and deposits of tax for excise taxes currently reportable on Form 720. The temporary regulations amend and consolidate in new 26 CFR part 40 the procedural regulations currently provided in 26 CFR parts 43, 46, 48, 49, 52, and 154. The text of those temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATES: Written comments and requests for a public hearing must be received by February 4, 1991.

ADDRESSES: Send comments and requests for a public hearing to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, room 4429, Attention: CC:CORP:T:R (PS-65-90), Washington, DC 20044. In the alternative, comments and requests may be hand delivered to: CC:CORP:T:R (PS-65-90), Internal Revenue Service, room 4429, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Ruth Hoffman, 202-566-4475 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations in the Rules and Regulations portion of this issue of the **Federal Register** amend and consolidate the regulations relating to returns, payments, and deposits of tax for excise taxes currently reportable on Form 720. These taxes include those imposed under chapters 31, 32, 33, 34, 36, 38, and 39 of the Internal Revenue Code (except for the chapter 32 tax imposed by section 4181 (firearms tax) and the chapter 36 taxes imposed by sections 4461 (harbor maintenance tax), 4481 (vehicle use tax), and 4495 (deep seabed mineral removal tax)).

This document proposes to adopt the temporary regulations as final regulations. Accordingly, the text of the temporary regulations serves as the comment document for this notice of proposed rulemaking. For the text of the temporary regulations, see T.D. 8328 published in the Rules and Regulations portion of this issue of the **Federal Register**. The preamble to the temporary regulations explains the proposed and temporary rules.

Special Analyses

It has been determined that these proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, an initial regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted, consideration will be given to any written comments that are submitted (preferably a signed original and seven copies) to the Internal Revenue Service. All comments will be available for public inspection and copying. A public hearing will be scheduled and held upon written request to the Internal Revenue Service by any person who also submits written

comments. If a public hearing is scheduled, notice of the time and place will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Ruth Hoffman, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

[FR Doc. 90-30360 Filed 12-28-90; 1:57 pm]

BILLING CODE 4830-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300222; FRL-3798-1]

Parasitic and Predaceous Insects Used To Control Insect Pests; Proposed Exemption From a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to establish an exemption from the requirement of a tolerance for parasitic (parasitoid) and predaceous insects used to control insect pests of stored raw whole grains such as corn, small grains, rice, soybeans, peanuts, and other legumes either bulk or warehoused in bags where these insects are not expected to become a component of food. These insects may also be used as control agents in facilities and structures used for such storage, as well as general purpose food storage warehouses for disinfestation of areas not accessible to standard control measures where these insects do not become a component of food. This proposal is issued with the consultation and cooperation of the U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA).

DATES: Written comments, identified by the document control number, (OPP-300222), must be received on or before March 4, 1991.

ADDRESSES: By mail, submit comments to: Public Docket and Freedom of Information Section, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 246 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail, Mark Dow, Registration Support Branch, Registration Division (H7505C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703-557-4354.

SUPPLEMENTARY INFORMATION: Parasitic (parasitoid) and predatory insects, when intended for use in the control of insect pests in food, are considered pesticides and are subject to the requirements for tolerances under section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA). These pesticides, however, have been exempted from the registration requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended. With the cooperation and concurrence of USDA and FDA, EPA is proposing to exempt from the requirement of a tolerance, insect parasites (parasitoids) and predators used to control insects pests of stored raw whole grains such as corn, small grains, rice, soybeans, peanuts, and other legumes either bulk or warehoused in bags where these insects are not expected to become a component of food. These insects may also be used as control agents in facilities and structures used for such storage, as well as general purpose food storage warehouses for disinfestation of areas not accessible to standard control measures where these insects do not become a component of food.

For this proposed exemption, it should be noted that EPA is responsible for establishing tolerances or exempting certain pesticides from the requirements of a tolerance. FDA is responsible for the monitoring, compliance with, and enforcement of established tolerances. The USDA, Federal Grain Inspection Service, is responsible for the inspection and grading of grain in accordance with U.S. grain standards intended to: (1) Define uniform and acceptable descriptive terms to facilitate trade in grain; (2) provide information to aid in determining grain storeability; (3) offer users of such standards the best possible information from which to determine end product yield and quality; and (4) provide the framework necessary for the markets to establish grain quality improvement incentives.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) defines "a pesticide" in section 2(u), as "(1) Any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant." The term "pest" is in turn defined as "(1) Any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animal) which the Administrator declares to be a pest under section 25(c)(1)," in FIFRA section 2(t).

EPA issued a rule (47 FR 23930; June 2, 1982) which exempted parasitic and predatory insects from regulation under FIFRA section 25(b)(1). It was designated as 40 CFR 162.5 and later recodified as 40 CFR 152.20(a). As defined in the regulation, a biological control agent means "any living organism applied to or introduced into the environment to control the population or biological activities of another life form which is considered a pest under section 2(t) of FIFRA." All biological control agents are exempted from further regulation under FIFRA, in 40 CFR 152.20(a)(3), "except (i) Eucaryotic microorganisms, including protozoa, algae and fungi; (ii) Procaryotic microorganisms, including bacteria; and (iii) viruses."

For several years, parasitic and predatory insects have been experimentally added to stored grain to evaluate their effectiveness for pest control. In the interests of integrated pest management and reduced dependence on chemical controls, researchers and the grain storage industry believe the use of biological control agents could be practical and have less adverse impact on human health and the environment than the use of chemical pest control agents, such as commonly used grain fumigants. Furthermore, since the use of biological control agents would decrease the amount of chemical pest control agents

currently in use, applicator/worker exposure to highly toxic materials would be reduced.

The predatory and parasitoid insects that are the subject of this proposed rule occur naturally in many parts of the United States. They are either native or, in many cases, they were introduced as chance "residents" on pest insects that were in grain shipments. The parasitoid insects can easily be carried into grain storage from the field if the pest insect already has been attacked by the parasitoid in the field. A search of available data bases has identified a number of citations describing the natural occurrence of parasitoid insects where they were observed and studied in grain bins. The literature search, using as key words the names of genera of the parasitoids, resulted in no citations of adverse effects on humans or animals arising from eating grain in which the parasitoids had occurred.

Biological control agents can drastically reduce the total numbers of primary insect pests and their respective fragments in whole grain. Biological control agents, in and of themselves, do not eat or damage the kernels of whole grain or infest stored commodities. They attack individuals of the primary pest species. By reducing the potentially high numbers of pest populations, the ultimate numbers of insects and insect parts are, in effect, reduced. Due to the extremely small size of the biological control agents and the fact that they do not physically infest grain, they are easily removed during the cleaning of raw grains and commodities.

Typically, raw grain undergoes a thorough cleaning process prior to milling or processing for human consumption. The cleaning is performed to remove any "foreign matter," including insects and insect parts. In cases where biological control agents are used as a pest control treatment for stored raw grain, cleaning should be considered so that the FDA standards for cleanliness under section 402 of the FFDCA are met prior to milling or further processing for human consumption. Biological control agents used in this manner would not be expected to add to the total filth load on grain intended to be further processed for human consumption. There is no evidence that these insects will increase fragment counts in processed products. Therefore, the biological control agents would not have to be exempted from FDA's defect action levels.

Currently, the Federal Grain Inspection Service of the USDA will assign the inspection grade of "infested" to grain which contains a prescribed number of living insects "injurious" to the grain. Since the parasites and predators of insect grain pests are not injurious to the grain, they would not contribute to an evaluation of "infested."

EPA, USDA, and FDA are not aware of any adverse human health effects associated with the use of parasites and predators of insect pests of stored grain including those used for seed or animal feed purposes. Human dietary exposure to these biological pesticides is expected to be negligible since they are generally removed from the grain during the cleaning processes. However, EPA is herewith requesting comments relative to human health effects that might result from the use of these biological control agents.

It is generally very difficult to identify truly effective biological control agents. The uniqueness of this situation, i.e., stored grain, makes it unlikely that alternative forms of biological control will be identified in the near future. However, the grain industry will become less dependent upon chemical controls (primarily fumigants) as these sorts of biological controls become more widely available. Therefore, EPA specifically requests public comment regarding the organisms herewith to be exempted from the requirements of a tolerance. EPA seeks to determine if there are appropriate additional organisms that should be considered for this rule.

Based on the above information, and in the interest of improved worker safety as well as effective grain pest control, EPA believes that tolerances for parasitic (parasitoid) and predatory insects of grain pest species of insects are not necessary to protect human health and therefore proposes to exempt them from the requirements of tolerances under FFDCA section 408.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, (OPP-300222). All written comments will be available in the Public Docket and Freedom of Information Section, at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12991.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 27, 1990.

Linda J. Fisher,

Assistant Administrator for Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR part 180 be amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In subpart D, new § 180.1101 is added, to read as follows:

§ 180.1101 Parasitic (parasitoid) and predatory insects; exemption from the requirement of a tolerance.

Parasitic (parasitoid) and predatory insects are exempted from the requirement of a tolerance for residues when they are used in accordance with good agricultural and pest control practices to control insect pests of stored raw whole grains such as corn, small grains, rice, soybeans, peanuts, and other legumes either bulk or warehoused in bags where these insects are not expected to become a component of food. These insects may also be used as control agents in facilities and structures used for such storage, as well as general purpose food storage warehouses for disinfestation of areas not accessible to standard control measures where these insects do not become a component of food. For the purposes of this rule, the parasites (parasitoids) and predators are considered to be species of Hymenoptera in the genera *Trichogramma*, Trichogrammatidae; *Bracon*, Braconidae; *Venturia, Mesostenus*, Ichneumonidae; *Anisopteromalus, Choetospila, Lariophagus, Dibrachys, Habrocytus, Pteromalus*, Pteromalidae; *Cephalonomia, Holepyris, Laelius*, Bethylidae; and of Hemiptera in the genera *Xylocoris, Lyctocoris*, and *Dufouriellus*, Anthocoridae.

[FR Doc. 91-28 Filed 1-2-91; 8:45 am]

BILLING CODE 6560-50-F

Notices

Federal Register
Vol. 56, No. 2
Thursday, January 3, 1991

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Subsistence Take of Fish and Wildlife on Public Lands in Alaska; Final Rural and Non-Rural Determinations

AGENCY: Forest Service, USDA; Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: This notice by the Federal Subsistance Board (Board), on behalf of the Department of Agriculture and Department of the Interior land managing agencies in Alaska, announces the final determinations of "rural" and "non-rural" areas and communities in accordance with the procedures described in "Temporary Subsistence Management Regulations For Public Lands in Alaska" published in the **Federal Register** (55 FR 27114) on June 29, 1990.

DATES: These determinations are effective as of January 1, 1991. The determinations constitute an action of the Board, subject to requests for reconsideration under the procedures outlined in 36 CFR 242.18 and 50 CFR 100.18; the last day for filing such a request for reconsideration of these determinations is February 14, 1991.

ADDRESSES: Appeals should be addressed to the Chairman, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, attn: Richard Pospahala, 1011 E. Tudor Road, Anchorage, Alaska 99503.

FOR FURTHER INFORMATION CONTACT: Richard Pospahala, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503; telephone (907) 267–1461.

SUPPLEMENTARY INFORMATION: Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111–3126) requires the Secretaries of Agriculture and the Interior to implement a program to grant preference in favor of subsistence uses of fish and wildlife on public lands unless the State of Alaska implements a subsistence program consistent with ANILCA's requirements. The State of Alaska had such a program that was found by the Department of the Interior to be consistent with ANILCA. In December 1989, however, the Alaska Supreme Court ruled in *McDowell* v. *State of Alaska* that the rural limitation in the State subsistence definition, which is required by ANILCA, violates the Alaska Constitution. The Court stayed the effect of the decision until July 1, 1990.

As a result of the decision, the Departments of Agriculture and the Interior were required to take over implementation of title VIII of ANILCA on public lands on July 1, 1990. Federal subsistence management would impact the subsistence use of fish and wildlife resources on public lands in Alaska managed by the Fish and Wildlife Service, National Park Service, Bureau of Land Management, Bureau of Indian Affairs, Forest Service, Air Force, Army and various other Federal land managing agencies.

The Board, as the managing entity, started by publication in the **Federal Register** (55 FR 40897) on October 5, 1990, the process of collecting public comments relating to a number of issues on subsistence management on public lands, including the rural determination process. Again on November 23, 1990 (55 FR 48377), the Board published Notices in the **Federal Register** explaining the proposed Federal process for making rural determinations, the criteria to be used and the application of those criteria in preliminary determinations. Public meetings were then held in some 56 communities throughout Alaska, specifically to solicit comments on the Federal Subsistence Program, including rural determinations. The period for submitting comments on rural determinations closed on December 10, 1990. In addition to comments in the public meetings attended by some 1,670 persons, the Board received a total of 140 written comments from 34 governmental entities, 33 comments from organizations and 73 comments from individuals during the comment period.

The definition of rural is, perhaps, the key element in the regulations. The term "rural" was not defined in ANILCA. The Ninth Circuit Court of Appeals ruled in 1988 that the rural definition in the State's 1986 subsistence law was not consistent with ANILCA and the common meaning of the term rural. The legislative history of ANILCA provides some insight. Senate Report 96–413 identified Anchorage, Juneau, Fairbanks and Ketchikan as examples of non-rural communities in 1980 and Barrow, Kotzebue, Nome, Bethel and Dillingham as examples of rural communities. It further states that the rural nature of such communities is not a static condition and can change.

Analysis of Comments

(a) Several people commented that they felt the ANILCA subsistence preference for rural residents of Alaska was unconstitutional and objected to the establishment of regulations which allow for rural subsistence priority. Several comments called for an amendment to ANILCA.

The Departments of the Interior and Agriculture have no authority to make such an interpretation since the rural priority is a provision of Federal law. Only Congress may amend a law. Until such time as the law is changed, the Federal government must provide a subsistence priority to rural Alaskan residents for use of fish and wildlife resources on public lands.

(b) A large number of commentors felt that all Alaskans should receive equal treatment and access to subsistence resources.

Title VIII of ANILCA specifies that rural Alaska residents must be afforded a priority for subsistence use of fish and wildlife resources on public lands.

(c) Some comments addressed the issue of granting subsistence preference based on individual circumstances rather than by community or area.

Although not addressed in the Act, the legislative history clearly indicates the rural/non-rural determinations are to be made on a community or area basis and not on the basis of individual circumstance. The record also indicates that the designation of communities may change over time.

(d) Some commentors believed that the location of one's residence or the size of the community was not indicative of life style and the need for subsistence resources.

It is recognized that many urban residents utilize wild resources as part of their diet; however, as defined by Congress, "subsistence" applies to the customary and traditional usage of fish and wildlife by rural residents. We agree that population estimates are not the only component which should be used to define the character of a community. However, they are an important characteristic. The Ninth Circuit Court of Appeals in *Kenaitze Indian Tribe* v *State of Alaska* found the State's definition of rural to not be in accordance with ANILCA. The State definition relied totally on socioeconomic characteristics. The Court went on to state "the term rural is not difficult to understand * * * it refers to areas of the country that are sparsely populated." It give examples of existing Federal agency use where a base population figure is 2,500 and a set of community characteristic variables are used to allow the population of the community to exceed the 2,500 level and still be rural if the characteristics so indicated.

(e) Many commentors felt that a subsistence priority should be based on end as indicated by income level.

Many individuals may need assistance of various types. Congress did not include dependence as part of its subsistence definition in Section 803 of ANILCA. In contrast. Section 804 of ANILCA does include dependency on the resource and a criterion for implementing subsistence priority.

(f) Some commentors believe that being located on the road system should be used as a basis for making the rural/non-rural determination.

The Board believes that although being located on the road system might be an indicator of non-rural status, the road system is not in and of itself the primary determinant for dividing rural and non-rural communities. A much better primary characteristic is that of population.

(g) Many commentors felt that Alaska Natives, no matter where they live, should be afforded a subsistence priority; others disagreed.

Under ANILCA, a subsistence priority on Federal lands is to be provided only to rural Alaska residents regardless of ethnic background, meaning that Natives and non-Natives in rural areas only will receive this preference. Likewise, since ANILCA specifies rural residents, those individuals living in non-rural areas, even if they are Natives, do not qualify for a subsistence preference.

(h) Many commentors spoke to a history of fish and wildlife use and customary and traditional practices, desiring that a preference be based on those grounds.

We agree that the use of natural resources are important to the social and cultural well being of many communities throughout Alaska. There is sharing of these resources in every community in Alaska, even Anchorage. The question is to what extent does this take place in a community. A decision to consider any Alaska community non-rural will not prohibit those residents from taking wild resources. It will mean that in times of fish and game scarcity on land, and waters included in the Federal subsistence program, they will not have a priority use of those resources.

(i) Some commenters felt that to qualify for a subsistence priority, a person should meet certain residency requirements.

A subsistence user must be an Alaskan resident and eligible to purchase a resident hunting, fishing or trapping license.

(j) Many comments related specifically to the proposed non-rural classification for Sitka. These included comments addressing:

1. Incorrect comparison of the 7,000 population level with the 1988 population of the Sitka City/Borough (8257) because Sitka has unified its city and borough boundaries. Thus, the Board should either compare the 1980 Ketchikan Borough population (11,316) to the 1988 Sitka Borough population (8257) or compare the 1980 Ketchikan City population (7200) to the 1988 population residing within the pre-city/borough unification Sitka City limits.

After evaluating public comments and reexamining community characteristics, it became clear that Sitka possesses both rural and non-rural characteristics; therefore, the Board has determined Sitka to be rural for the purposes of subsistence on Federal lands.

2. The fish and game harvest information for Sitka, obtained from the Tongass Resource use Cooperative Study, isn't accurate because of the survey methodology. The survey employed a telephone sampling technique in Sitka while household interviews were used in the rest of the communities sampled.

The Study methodology is valid and it is the best data available. The Study does show very close correlation with an earlier study conducted by the Alaska Department of Fish and Game. Also, a comparison of the harvest rates of Kodiak (a community where household studies have been done and with very similar characteristics) and Sitka shows very similar rates and adds credibility to the Sitka data.

3. If Congress intended communities greater than 7,000 to be non-rural why did they not identify Sitka City, with a 1980 population of 7,800, as non-rural.

The Senate report only identifies examples of non-rural and rural communities to be used as guidelines by the administering entity. The list is not intended to be all inclusive. For example, not all communities which are obviously rural were mentioned. Only Dillingham, Bethel Nome, Kotzebue, and Barrow were listed as examples of rural communities. Because of the borderline nature of Sitka and because of extensive public testimony indicating rural characteristics, the Board designated Sitka as rural.

4. Another way of defining rural communities is to use a population density approach.

This is a very misleading approach when some communities have a unified City/Borough boundary and other communities do not. Using this approach according to the Sitka position paper would show that Ketchikan has had a density of 9.1 persons/square mile in 1980 while Sitka has a density of 2.8 persons/square mile in 1988. This is very misleading. The unified Sitka City/Borough had a 1988 population of 8,257 people. The City/Borough boundary covers 4,710 square miles. However, approximately 95% of the people live in a core area of approximately 30 square miles. By way of comparison the Municipality of Anchorage only covers 1,958 square miles.

5. The Sitka economy is seasonal. It is based on the seafood, forest products and tourism industries as well as government employment. The first three are seasonal as is even government employment to some extent. Thus indicating a rural nature. In addition, Sitka's unemployment rate and taxable income level indicated it is rural.

All of the above factors are very similar when Sitka is compared to Ketchikan. The economy of Ketchikan is also based on the seafood, timber products and tourism industries as well as government employment. In addition, the taxable income and employment rates are very similar between the two communities.

(k) Many comments related specifically to the proposed non-rural classification for Saxman. These included comments addressing:

1. The use of subsistence resources as being very important to the social and

cultural well being of Saxman residents. This should be an important criterion to be considered when determining whether a community is rural or not.

We agree that the use of natural resources is important to the social and cultural well being of many communities throughout Alaska. There is sharing of these resources in every community in Alaska, even Anchorage. Because of the overriding socioeconomic and cultural characteristics of Saxman, differentiating it from Ketchikan, the Board determined Saxman to be a rural community.

2. Saxman is a rural community because of its character composition and personality not because of the number of people living there.

Saxman possessess both rural and non-rural characteristics; therefore, based on extensive public testimony, the Board has determined Saxman to be rural for the purposes of subsistence on Federal lands.

(l) A few comments related specifically to the proposed non-rural classification for Kodiak. These included comments relating to the high use of fish and game resources.

After evaluating public comments and reexamining community characteristics, it became clear that Kodiak possesses both rural and non-rural characteristics. Therefore, because of the borderline nature of Kodiak as evidenced by extensive public testimony, Kodiak has been determined to be a rural community for the purposes of Federal subsistence management.

(m) Some individuals commented, asking that certain other specified communities be considered "rural", either continuing the State's prior designation or asking the Federal government to change a prior State non-rural designation. Many of these individuals pointed out a traditional use of the resources.

The level of past use is just one characteristic that is used only to modify a preliminary determination based on population level. Additionally, the level of past use is based on community-wide data, not on individual or single family history.

Federal Subsistence Management Program—Rural/Non-rural Determination Process

The Federal government recognized that communities of the same size may vary greatly in character for a variety of reasons. Therefore, no single population number adequately serves as a dividing line between rural and non-rural communities. Before examining community characteristics communities that are socially and economically integrated were aggregated. The criteria used to determine if communities are socially and economically integrated includes: (1) Do 15% or more of the working people commute from one community to another; (2) do they share a common school district; (3) are daily or semi-daily shopping trips made. The aggregation criteria were developed by working with the Institute of Social & Economic Research, the Alaska Department of Labor and the Municipality of Anchorage.

Communities were aggregated according to these criteria; the population for the community or area was determined; and preliminary rural/non-rural screening of communities began. The process to determine rural was designed to incorporate the common meaning of rural and is based on two rebuttable presumptions as described below. A community or area of less than 2,500 population is deemed rural unless it exhibits characteristics of a non-rural nature or area or is part of an urbanized area. The number 2,500 was selected because it is the figure used by the U.S. Census Bureau to divide rural from non-rural. A community between 2,500 and 7,000 bears no presumption as to its rural or non-rural status. Some communities that fall in this population range may have rural characteristics.

Communities 7,000 or greater in population are presumed to be non-rural. The 7,000 population level was chosen because Ketchikan, the smallest of the non-rural communities mentioned in the Senate report, was approximately that size when ANILCA was passed and consequently is an indicator of Congressional intent. Communities in Alaska can approach and may rarely exceed a population level of 7,000 and still be rural in character.

This definition and process recognizes that population alone is not the sole indicator of a rural or non-rural community. This flexibility is consistent with approaches other Federal agencies have used to determine if communities are rural. Indicators which the Federal Subsistence Board evaluates to decide if a community is rural or non-rural in character are: use of fish and game; development and diversity of the economy, community infrastructure, transportation, and educational institutions.

Use of fish and game includes the variety of species used per household, the participation of households using subsistence resources (percent of households in community), and the level of harvest based on the average pounds per-capita consumed. The economy of an area was considered to include whether employment was considered high, moderate, low, seasonal or year-round; the unemployment rate; and 1985 average taxable income level, the diversity of services within the community or area, and the cost of food index.

Community Infrastructure as a measure of urban development (based on the fact that electricity costs are normally lower in urban areas versus rural areas) included the 1988 average cost of electricity per kilowatt hour. Transportation included the variety and means, the predominate methods and the number of miles of road system. Evaluation of educational institutions included the level of education provided in a community.

The community characteristics were developed through coordination with the Alaska Department of Labor, Alaska Department of Revenue, the Institute of Social and Economic Research, the Alaska Department of Commerce and Economic Development, the Alaska Department of Fish & Game and the Alaska Energy Authority.

The following communities/areas have been determined by the Board to be non-rural. Communities which are grouped (below) are considered to be socially and economically integrated. All communities or areas not listed are determined to be rural.

Non-Rural Communities/Areas in Alaska for the Determination of Subsistence Priorities

Municipality of Anchorage
Kenai Area (including Kenai, Soldotna, Sterling, Nikiski, Salamatof, Kalifonsky, Kasilof and Clam Gulch)
Wasilla Area (including Palmer, Wasilla, Sutton, Big Lake, Houston and Bodenberg Butte)
Fairbanks North Star Borough
Juneau Area (including Juneau, West Juneau and Douglas)
Ketchikan Area (including Clover Pass, North Tongass Highway, Ketchikan East, Mountain Pass, Herring Cove, Saxman East, and parts of Pennock Island)
Homer Area (including Homer, Anchor Point, Kachemak City and Fritz Creek)
Seward Area (including Seward and Moose Pass)
Valdez Area, Valdez
Adak

Title VIII allows for reasonable regulations to provide access and to protect the viability of all wild renewable resources. The protection of wild renewable resources and the opportunity to utilize those resources on public lands by rural Alaskan residents for subsistence purposes are of

paramount importance to the Federal government and to the public as a whole.

Curtis V. McVee,

Chairman, Federal Subsistence Board, Department of the Interior.

Michael A. Barton,

Regional Forester, USDA—Forest Service.

[FR Doc. 91-11 Filed 1-2-91; 8:45 am]

BILLING CODE 4310-55-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Telecommunications Equipment Technical Advisory Committee; Partially Closed Meeting

A meeting of the Telecommunications Equipment Technical Advisory Committee will be held January 30, 1991, 9:30 a.m., in the Herbert C. Hoover Building, room 1629, 14th & Pennsylvania Avenue, NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions that affect the level of export controls applicable to telecommunications and related equipment and technology.

Agenda

General Session

1. Opening remarks by the Chairman.
2. Approval of minutes.
3. Presentation of papers or comments by the public.
4. Report on status of Core List 3 (Telecommunications).

Executive Session

5. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control program and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Lee Ann Carpenter, Technical Support Staff, OTPA/BXA, room 1600, U.S. Department of Commerce, 14th & Pennsylvania Ave., NW., Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on January 5, 1990, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C., 552b(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, room 6628, U.S. Department of Commerce, Washington, DC 20230. For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 377-2583.

Dated: December 28, 1990.

Betty Anne Ferrell,

Director, Technical Advisory Committee Unit.

[FR Doc. 91-52 Filed 1-2-91; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

[A-588-019]

Cyanuric Acid and Its Chlorinated Derivatives From Japan; Preliminary Results of AntiDumping Duty Administrative Reviews, and Intent to Revoke on Trichloro Isocyanuric Acid and to Revoke in Part on Dichloro Isocyanurates.

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of Preliminary results of antidumping duty administrative reviews, and intent to revoke on trichloro isocyanuric acid and to revoke in part on dichloro isocyanurates.

SUMMARY: In response to requests by both the petitioner and respondents, the Department of Commerce has conducted administrative reviews of the antidumping duty orders on cyanuric acid and its chlorinated derivatives from Japan. The reviews cover two manufacturers/exporters of this merchandise to the United States, Nissan Chemical Industries, Ltd., and Shikoku Chemicals Corporation, and two consecutive annual periods from April 1, 1987 through March 31, 1989, for the order on cyanuric acid, and from April 1, 1987 through November 20, 1988, for the orders on dichloro isocyanurates ("DCA") and trichloro isocyanuric acid ("TCA"). It also covers the two trading companies through which the respondents sell in the United States, Mitsubishi Corporation and Toyo Menka Kaisha, Ltd. We published a tentative determination to revoke the orders on DCA and TAC on November 21, 1988.

Our reviews indicate zero or *de minimis* weighted-average dumping margins for Nissan Chemical Industries for DCA and TCA for both review periods. They also indicate the existence of dumping margins for Shikoku Chemicals Corporation for DCA for both review periods, and either zero or *de minimis* weighted-average dumping margins for TCA for the review periods.

As a result of our reviews, we intend to revoke the order in its entirety on TCA, and to revoke the order on DCA only with respect to Nissan Chemical Industries. Because we found margins on DCA with respect to Shikoku Chemicals Corporation, we do not intend to revoke the order on DCA with respect to Shikoku.

We invite interested parties to comment on these preliminary results and intent to revoke in part.

EFFECTIVE DATE: January 3, 1991.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Robert Marenick, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 388-5255.

SUPPLEMENTARY INFORMATION:

Background

On April 7, 1988, the Department of Commerce ("the Department") published a notice of "Opportunity to Request an Administrative Review" (53 FR 11540) of the antidumping duty orders on cyanuric acid and its chlorinated derivatives from Japan (49 FR 18148; April 27, 1984). On April 29, 1988, the petitioner, Monsanto Company, and respondents, Shikoku Chemical Corporation and Nissan Chemical Industries, Ltd., requested administrative reviews of the antidumping duty orders. We initiated the reviews, covering the period April 1, 1987 through March 31, 1988, on May 23, 1988 (52 FR 18324). We published a tentative determination to revoke the orders on DCA and TCA on November 21, 1988 (53 FR 46896).

On March 31, 1989, the Department published a notice of "Opportunity to Request and Administrative Review" (54 FR 13211) of the antidumping duty order on cyanuric acid and its chlorinated derivatives from Japan (49 FR 18148;

April 27, 1984) for the period April 1, 1988 through March 31, 1989, for the order on cyanuric acid, and for the period April 1, 1988 through November 20, 1988, for the orders on DCA and TCA. On April 28, 1989, the petitioner, Monsanto Company, requested an administrative review of the antidumping duty orders for these periods. We initiated the reviews on May 24, 1989 (54 FR 22465). The Department has now conducted the administrative reviews in accordance with section 751 of the Tariff Act of 1930, as amended ("the Tariff Act"). The final results of the last administrative review were published in the **Federal Register** on January 18, 1990 (55 FR 1690).

Scope of the Reviews

Imports covered by the reviews are shipments of cyanuric acid (also known as isocyanuric acid) and its chlorinated derivatives, DCA and TCA, used in the swimming pool trade. We have categorized the merchandise as cyanuric acid, DCA, and TCA, which we consider to be separate classes or kinds of merchandise. These products are sold in three basic consistencies: powder, granular, and tablet. During the review period, such merchandise was classifiable under item 425.1050 of the Tariff Schedules of the United States Annotated ("TSUSA"). This merchandise is currently classifiable under Harmonized Tariff System ("HTS") item 2933.69.50.50. The TSUS and HTS item numbers are provided for convenience and Customs purposes only. The written description remains dispositive.

The review covers shipments of cyanuric acid and its chlorinated derivatives from Skikoku Chemicals Corporation ("Shikoku"), Nissan Chemical Industries ("Nissan"), Mitsubishi Corporation and Toyo Menka Kaisha, Ltd., and two consecutive periods from April 1, 1987 through March 31, 1989, for the order on cyanuric acid, and from April 1, 1987 through November 20, 1988, for the orders on DCA and TCA. The review does not cover cyanuric acid manufactured by Nissan because Nissan was exempted from the order on cyanuric acid. During the review periods Nissan exported all of its merchandise subject to the order through Toyo Menka Kaisha, Ltd., and Shikoku exported all of its merchandise covered by the order through Mitsubishi Corporation.

United States Price

In calculating United States price, the Department used purchase price as defined in section 772 of the Tariff Act. Purchase price was based on the packed f.o.b. or c.i.f. price from the manufacturers to the unrelated Japanese trading firms in Japan because the manufacturers knew that the merchandise was destined for the United States at the time of sale. We made adjustments, where applicable, for foreign inland freight, brokerage and handling, and insurance. No other adjustments were claimed or allowed.

Foreign Market Value

In calculating foreign market value, the Department used home market price as defined in section 773 of the Tariff Act, since there were sufficient sales of such or similar merchandise in the home market.

Home market price was based on the packed, delivered price to unrelated purchasers in the home market, exclusive of the trading companies Mitsubishi Corporation and Toyo Menka Kaisha, sales to which form the basis of United States price (see above). We made adjustment, where applicable, for inland freight, insurance, competitive discounts, rebates, advertising and promotion, and differences in credit and packing expenses.

We revised Shikoku's home market domestic packing expense to exclude those expenses attributable to the tablet form of the product.

Shikoku claimed an adjustment for certain rebates given in the home market that were based on changes in the dollar/yen exchange rate that occurred throughout the review period. At verification we determined that these rebates were given to home market customers of granular chlorinated derivatives when the company determined that significant changes in the exchange rate would result in dumping margins on its United States sales. There is no formula or "trigger mechanism" for determining when to grant this rebate, nor any written policy explaining the rebate. Home market customers are aware through past practice that such rebates may be given but do not know precisely how any rebate will be calculated on any specific sale. Because the terms and conditions are not fixed or known with certainty on or prior to the date of sale, we do not consider the rebate to be directly related to the sales under consideration, and therefore we denied this claim.

No other adjustments were claimed or allowed.

Preliminary Results of the Reviews

As a result of our reviews, we preliminarily determine that the following margins exist:

Manufacturer/exporter	Product	Time period	Margin (percent)
Nissan Chemicalindustries, Ltd.[1]	Dichloro isocyanurates	04/01/87–03/31/88	0.00
		04/01/88–11/20/88	0.29
	Trichloro isocyanuric acid	04/01/87–03/31/88	0.15
		04/01/88–11/20/88	0.01
Nissan Chemical Industries, Ltd./Toyo Menka Kaisha [1]	Dichloro isocyanurates	04/01/87–03/31/88	0.00
		04/01/88–11/20/88	0.29
	Trichloro isocyanuric acid	04/01/87–03/31/88	0.15
		04/01/88–11/20/88	0.01
Shikoku Chemicals Corporation	Cyanuric acid	04/01/87–03/31/88	0.00
		[2] 04/01/88–03/31/89	0.00
	Dichloro isocyanurates	04/31/87–03/31/88	1.35
		04/31/88–11/20/88	0.91
	Trichloro isocyanuric acid	04/01/87–03/31/88	0.00
		04/01/88–11/20/88	0.002
Shikoku Chemicals Corporation/Mitsubishi Corp	Cyanuric acid	04/01/87–03/31/88	0.00
		[2] 04/01/88–03/31/89	0.00
	Dichloro isocyanurates	04/31/87–03/31/88	1.35
		04/31/88–11/20/88	0.91
	Trichloro isocyanuric acid	04/01/87–03/31/88	0.00
		04/01/88–11/20/88	0.002

[1] The order on cyanuric acid excludes cyanuric acid manufactured by Nissan.
[2] No shipments of cyanuric acid during the period.

Interested parties may request disclosure within 5 days of the date of publication of this notice and may request a hearing within 10 days of publication. They may also request an administrative protective order for the fifth administrative review period (April 1, 1987 through March 31, 1988) within five days of publication. Any hearing, if requested, will be held 44 days after the date of publication, or the first workday thereafter. Case briefs and/or written comments from interested parties may be submitted not later than 30 days after the date of publication. Rubuttal briefs and rebuttals to written comments, limited to issues raised in those comments, may be filed no later than 37 days after the date of publication.

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 percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

On November 21, 1988, we tentatively determined to revoke the orders on DCA and TCA with respect to Nissan and Shikoku. Both firms agreed in writing to immediate suspension of liquidation and reinstatement of the order under circumstances specified in the written agreement. As a result of these reviews, we found no margins or *de minimis* margins with respect to TCA for both periods up to the date of our tentative determination to revoke the orders. However, our reviews indicate the existence of dumping margins on DCA with respect to Shikoku for both periods, and we do not intend to revoke the order on DCA for this firm.

If the revocation of the order on TCA is made final, it will apply to all unliquidated entries of this merchandise, entered, or withdrawn from warehouse, for consumption on or after November 21, 1988, the date of our tentative determination to revoke. If the partial revocation of the order on DCA with respect to Nissan is made final, it will apply to all unliquidated entries of DCA manufactured by Nissan and entered, or withdrawn from warehouse, for consumption on or after November 21, 1988, the date of our tentative determination to revoke. This revocation and partial revocation is in accordance with 19 CFR 353.54 (1985).

Further, as provided by section 751(a)(1) of the Tariff Act, a cash deposit of estimated dumping duties based on the above margins for the latest period reviewed will be required.

For any future entries of cyanuric acid from a new exporter, not covered in this or prior administrative reviews, and who is unrelated to any reviewed firm, no cash deposit shall be required.

For any furture entries of DCA from a new exporter, not covered in this or prior administrative reviews, and whose first shipment occurred after November 20, 1988, an estimated cash deposit of 0.91 percent shall be required.

These deposit requirements are effective for the specified merchandise on all shipments entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

These administrative reviews, intent to revoke, intent to revoke in part, and notice are in accordance with 19 U.S.C. 1675 (a)(1) and (c) and 19 CFR 353.22 and 19 CFR 353.54 (1985).

Dated: December 24, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 91-53 Filed 1-2-91; 8:45 am]

BILLING CODE 3510-DS-M

[A-570-803]

Final Determinations of Sales at Less Than Fair Value: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that heavy forged hand tools, with or without handles, (HFHTs) from the People's Republic of China (PRC) are being, or are likely to be sold in the United States at less than fair value. Furthermore, we determine that critical circumstances exist for imports of three classes or kinds of HFHTs.

We have notified the U.S. International Trade Commission (ITC) of our determinations and have directed the U.S. Customs Service to continue to suspend liquidation of all entries of HFHTs from the PRC, as described in the "Suspension of Liquidation" section of this notice.

EFFECTIVE DATE: January 3, 1991.

FOR FURTHER INFORMATION CONTACT: James Terpstra or Brad Hess, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 377-3965 or (202) 377-3773 respectively.

SUPPLEMENTARY INFORMATION:

Final Determinations

We determine that imports of HFHTs from the PRC are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735(a) of the Tariff Act of 1930, as amended (the Act). The estimated weighted-average margins are shown in the "Suspension of Liquidation" section of this notice. We also determine that critical circumstances exist for imports of the following three classes or kinds of HFHTs:

(1) Hammers and sledges with heads over 1.5 kg. (3.33 pounds);

(2) Bars over 18 inches in length, track tools and wedges; and

(3) Picks and mattocks.

Case History

Since the publication of the notice of preliminary determinations (55 FR 42420, October 19, 1990), the following events have occurred. Respondent, petitioner, and an interested party, the Coalition of American Tool Distributors, filed case and rebuttal briefs on October 29 and November 5, 1990, respectively. A public hearing was held on November 7, 1990.

On November 9, 1990, respondent requested a postponement of the Department's final determinations in these investigations until March 4, 1991, so that the Department would have ample time to verify the questionnaire response. Because we rejected the questionnaire response as incomplete and replete with many material deficiencies, we determined that we would not conduct verification. Because time for verification served as the basis for respondent's postponement request, we find that our determination not to verify constitutes a compelling reason not to postpone these final determinations.

Scope of Investigations

Imports covered by these investigations are HFHTs comprising the following classes or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg. (3.33 pounds) ("hammers/sledges"); (2) bars over 18 income in length, track tools and wedges ("bars/wedges"); (3) picks and mattocks ("picks/mattocks"); and (4) axes, adzes and similar hewing tools ("axes/adzes").

HFHTs include heads for drilling hammers, sledges, axes, mauls, picks and mattocks, which may or may not be painted, which may or may not be finished, or which may or may not be imported with handles; assorted bar products and track tools including

wrecking bars, digging bars and tampers; and steal woodsplitting wedges. HFHTs are manufactured through a hot forge operation in which steel is sheared to required length, heated to forging temperature and formed to final shape on forging equipment using dies specific to the desired product shape and size. Depending on the product, finishing operations may include shot blasting, grinding, polishing and painting, and the insertion of handles for handled products. HFHTs are currently provided for under the following Harmonized Tariff System (HTS) subheadings: 8205.20.60, 8205.59.30, 8201.30.00, and 8201.40.60. Specifically excluded from these investigations are hammers and sledges with heads 1.5 kg, (3.33 pounds) in weight and under, hoes and rakes, and bars 18 inches in length and under.

Period of Investigations

The period of these investigations is November 1, 1989, through April 30, 1990.

Best Information Available

For the reasons described in the DOC Position for Comment 2, we have determined that China National Machinery Import & Export Corporation (CMC) is the sole respondent in these investigations, and that the three CMC branches reported to have exported HFHTs to the United States during the period of investigations (*i.e.*, Shandong Machinery Import & Export Corporation (Shandong), Tianjin Machinery Import & Export Corporation (Tianjin), and Henan Machinery Import & Export Corporation (Henan)) constitute branches of the same exporting entity. Although we required that sales and cost data be reported for each of these branches, CMC provided no information for Henan. Furthermore, serious material deficiencies were found in the information provided for Shandong and Tianjin.

For each of the four classes or kinds of merchandise, the complete exclusion of the Henan branch from the questionnaire response and the serious material deficiencies in the information provided on behalf of Shandong and Tianjin branches, render CMC's response unuseable for purposes of these final determinations. The deficiencies in CMC's response for each class or kind are outlined below.

Hammers/Sledges

In its questionnaire response, CMC reported sales of hammers/sledges by both the Shandong and Tianjin branches. CMC also indicated that three factories produce hammers/sledges. Unless otherwise specified, the deficiencies and discrepancies noted below apply to both branches involved in selling, and all factories involved in producing hammers/sledges.

Much of the data submitted on computer diskette was not formatted in a way that would permit its use in margin calculations. For one factory, CMC also failed to provide requested product-specific information on steel, production quantity by product, specific distance from factory to port (necessary for calculating freight expenses), and packing. CMC failed to provide requested information for odd pieces and scrap (necessary to accurately calculate material costs). CMC also failed to resolve discrepancies in quantity and value of sales data reported in sections A and C of its response (off by 13 percent for Shandong and 19 percent for Tianjin) and failed to report or account for all payment dates, shipment dates, and loading and containerization expenses.

Bars/Wedges

In its questionnaire response, CMC reported sales of bars/wedges by both the Shandong and Tianjin branches. CMC also indicated that three factories produce bars/wedges. Unless otherwise specified, the deficiencies and discrepancies noted below apply to both branches involved in selling, and all factories involved in producing bars/wedges.

Much of the data submitted on computer diskette was not formatted in a way that would permit its use in margin calculations. For one factory, CMC also failed to provide requested product-specific information for steel, production quantity by product, the distance from factory to port (necessary for calculating freight expenses), and packing. For two factories, CMC provided only part of the packing information requested. CMC failed to provide information requested regarding odd pieces and scrap (necessary to accurately calculate material costs). CMC provided no information for the production process for one factory. CMC failed to resolve, albeit minor, discrepancies in quantity and value of sales data reported in Sections A and C of its response and failed to report or account for all payment dates, loading and containerization expenses. For the Shandong branch, CMC failed to report or account for all shipment dates.

Picks/Mattocks.

In its questionnaire response, CMC reported sales of picks/mattocks by both the Shandong and Tianjin branches. CMC also indicated that two factories produce picks/mattocks. Unless otherwise specified, the deficiencies and discrepancies noted below apply to both branches involved in selling, and both factories involved in producing picks/mattocks.

Much of the data submitted on computer diskette was not formatted in a way that would permit its use in margin calculations. For one factory, CMC also failed to provide requested product-specific information on steel, production quantity by product, packing, and the specific distance from factory to port (necessary for calculating freight expenses). CMC failed to provide requested information for odd pieces and scrap (necessary to accurately calculate material costs). CMC failed to resolve discrepancies in quantity and value of sales data reported in sections A and C of its response (off by 20 percent for Shandong and 44 percent for Tianjin) and failed to report or account for all payment dates, shipment dates, loading and containerization expenses.

Axes/Adzes

In its questionnaire response, CMC reported sales of axes/adzes by both the Shandong and Tianjin branches. CMC also indicated that two factories produce axes/adzes. Unless otherwise specified, the deficiencies and discrepancies noted below apply to both branches involved in selling, and both factories involved in producing axes/adzes.

Much of the data submitted on computer diskette was not formatted in a way that would permit its use in margin calculations. For one factory, CMC also failed to provide requested product-specific information for steel, and the specific distance from factory to port (necessary for calculating freight expenses). CMC also failed to provide requested information for packing, odd pieces and scrap (necessary to accurately calculate material costs). CMC failed to resolve discrepancies in quantity and value of sales data reported in sections A and C of its response (off by 18 percent for Shandong and 38 percent for Tianjin) and failed to report or account for all shipment dates, loading and containerization. For Shandong, CMC failed to report all shipment dates.

Because we determined that CMC's response was unusable for purpose of these final determinations, we have used the best information available in accordance with section 776(c) of the Act. For these determinations, we determined that the best information available was information submitted by the petitioner (see, Comment 4 and

Comment 5). For each class or kind of merchandise, we used an average of the margins contained in the petition, adjusted as follows. In its development of constructed value based on factors of production, petitioner had incorrectly included packing in the basis of its calculations of general expenses and profit. We recalculated constructed value excluding packing from the basis of the calculations of general expenses and profit. Additionally, the United States prices used by petitioner had been incorrectly calculated exclusive of credit. We corrected this error by including credit in the U.S. price.

Critical Circumstances

Petitioner alleged that "critical circumstances" exist with respect to imports of HFHTs from the PRC. Section 735(a)(3) of the Act provides that critical circumstances exist when we determine that;

(A)(i) There is a history of dumping in the United States or elsewhere of the class or kind of the merchandise which is the subject of the investigation, or

(ii) The person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and

(B) There have been massive imports of the merchandise which is the subject of the investigation over a relatively short period.

Pursuant to section 733(e)(1)(B) of the Act, we generally consider the following factors in determining whether imports have been massive over a relatively short period of time: (1) The volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of the domestic consumption accounted for by imports.

In determining knowledge of dumping we normally consider margins of 25 percent or more sufficient to impute knowledge of dumping under section 735(a)(3)(A). See, e.g., Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Italy (52 FR 24198, June 29, 1987). Because we are relying on the petition for purposes of our determinations regarding sales at less than fair value (see, the "Best Information Available" section of this notice), we have also relied on the petition as best information available in determining knowledge of dumping.

Average margins contained in the petition for hammers/sledges, bars/wedges, and picks/mattocks exceed 25 percent. Therefore, in accordance with section 735(a)(3)(A)(ii), we determine that knowledge of dumping existed for these three classes or kinds. Because dumping margins for CMC for axes/adzes are not sufficient to impute knowledge of dumping nor is there any evidence on the record of a history of dumping of axes/adzes, it was not necessary to determine if imports of axes/adzes had been massive.

Pursuant to 19 CFR 353.16(g), in making critical circumstances determinations the Department normally considers the period beginning on the date the proceeding begins and ending at least three months later. The Department considers this period because it is the period immediately prior to a preliminary determination in which exporters of the subject merchandise could take advantage of their knowledge of the dumping investigation to increase exports to the United States without being subject to antidumping duties. See, e.g., Final Determination of Sales at Less Than Fair Value; Certain Internal-Combustion, Industrial Forklift Trucks from Japan (53 FR 12552, April 15, 1988). For purposes of these determinations, however, we are using as our comparison period the five months following the month of the filing of the petition (*i.e.*, May through September 1990) because we recognize that, due to the lag between export and import, the import statistics for April reflect exports made prior to the date on which the proceeding began (*i.e.*, April 4, 1990).

Because of the unreliability of CMC's quantity and value data (see, the "Best Information Available" section of this notice), we had no reason to assume that similar quantity data, if requested for purposes of critical circumstances, would have been any more reliable. Consequently, we have relied upon the Commerce Department country-wide import data. Because the Commerce Department import statistics for picks/mattocks are based on a "basket" HTS category for which no quantity information is available, we have based our analysis of import levels for that class or kind of merchandise on Commerce Department import statistics for hammers/sledges and bars/wedges as best information available. We compared Commerce Department import statistics for the periods described above. Based on our analysis of this data, we have found that imports of hammers/sledges and bars/wedges have increased by at least 15 percent. Therefore, in accordance with 19 CFR 353.16(f)(2), we find that imports have been massive over a relatively short period of time. Because data on the quantity of imports for picks/mattocks are not available, we have relied upon the Commerce Department import data for hammers/sledges and bars/wedges as best information available and have assumed that imports of picks/mattocks have also been massive over a relatively short period of time.

We also examined Commerce Department import statistics for hammers/sledges and bars/wedges to ensure that the increase in imports did not simply reflect seasonal trends. The seasonal data did not indicate any seasonal increases in shipments.

Because the dumping margins for CMC for hammers/sledges, bars/wedges, and picks/mattocks are sufficient to impute knowledge of dumping, and because imports of these three classes or kinds have been massive, in accordance with sections 735(a)(3)(A)(ii) and 735(a)(3)(B) of the Act, we find that critical circumstances exist with respect to hammers/sledges, bars/wedges, and picks/mattocks exported by CMC. However, because dumping margins for CMC for axes/adzes are not sufficient to impute knowledge of dumping, we determine that critical circumstances do not exist with respect to axes/adzes.

Verification

Because we have rejected CMC's questionnaire response and are using best information available for our determinations, we did not verify CMC's questionnaire response.

Interested Party Comments

All comments raised by parties to the proceeding in these antidumping duty investigations of HFHTs from the PRC are discussed below.

Comment 1

CMC contends that the Department must make separate determinations for each of the four classes or kinds of merchandise in these investigations where sufficient information has been provided to make such determinations.

Petitioner argues that because of the magnitude of discrepancies and errors contained in the questionnaire response, the Department is justified in rejecting the entire response and using instead the best information available for all products under investigation.

DOC Position

We agree with CMC that determinations should be made separately for each class or kind. Based on our review of the questionnaire response, we have determined that the use of best information available is warranted for each of the four classes or kinds of merchandise (see, the "Best

Information Available" section of this notice).

Comment 2

CMC contends that the Department ignored substantive evidence that it consists of three independent companies and erroneously required it to provide a consolidated response encompassing all three entities. CMC also argues that because the Department has accorded separate treatment to multiple respondents from China in other cases, the Department should accord separate treatment to Shandong, Tianjin, and Henan as well. See, e.g., Final Determination of Sales at Less Than Fair Value; Certain Headwear From the People's Republic of China (Headwear) (54 FR 11983, March 23, 1989); Final Determination of Sales at Less Than Fair Value; Certain Iron Construction Castings From the People's Republic of China (Castings) (51 FR 9483, March 19, 1986).

Petitioner maintains that the Department's decision to treat CMC as one company is correct. Petitioner points out that extensive information on the record indicates that the branches have not split from CMC. For example, many source documents submitted on behalf of Shandong and Tianjin show that these two entities continue to conduct business as branches of CMC. Furthermore, before the International Trade Commission in this proceeding, respondent has appeared and filed briefs solely in CMC's name.

Regarding CMC's claim that it should be granted the separate treatment accorded other Chinese respondents in other cases, petitioner notes that none of the other Chinese cases cited by respondent involved CMC. Futhermore, petitioner argues that publicly available information from both the U.S. government and private research institutions indicates that reforms such as the alleged breakup of CMC in 1988, have begun to be rescinded. Therefore, even if Shandong, Tianjin, and Henan had once been independent, both the mechanism and policy of the Chinese government now exist to bind them back together.

Finally, petitioner maintains that CMC's inability to provide the Department with a copy of the government order proving separation further serves as justification for the Department of use best information available.

DOC Position

We have given CMC ample opportunity to document its claim that the three branches identified constitute legally and economically separate entities. In the absence of such documentation, we have repeatedly instructed CMC to submit a consolidated response. CMC has neither submitted the requested documentation of its claim nor has it submitted a consolidated response. Therefore, we have treated Shandong, Tianjin, and Henan as branches of the same exporting entity.

In a letter dated June 5, 1990, CMC stated that three exporters, Shandong, Tianjin, and Henan, were responsible for all exports of the subject merchandise to the United States during the period of investigations. On June 21, 1990, we sent a questionnaire to CMC, requesting that it provide a consolidated response on behalf of all related entities that made sales to the United States during the period of these investigations. In a letter dated June 28, 1990, CMC claimed that pursuant to a government order effective January 1, 1988, CMC was divided into seven independent corporations. On July 5, 1990, we requested a copy of this government order and instructed CMC that without it we would continue to consider CMC as the sole respondent in these investigations. In its July 16, 1990, response to our request, CMC provided a statement dated July 1990 by the China Council for the Promotion of International Trade, that the branches of CMC are now separate corporations.

In our July 23, 1990, meeting with CMC's counsel, we again requested a copy of the government order claimed by CMC as proof of its separation into independent corporations. In its August 3, 1990, submission, CMC provided a June 1990 statement by its company attorney attesting to the alleged separation of CMC into independent corporations. On August 23, 1990, we informed CMC that the documents previously submitted a proof of the alleged separation were unacceptable. We again requested that CMC submit a copy of the government order or other official Chinese government documentation contemporaneous with or prior to the date of the order. In its August 30, 1990, response, CMC submitted additional documents including a Shandong Foreign Trade Bureau notice dated December 1988, which simply required that all provincial corporations (presumedly those in Shandong province) he registered under new names by December 22, 1988. On September 5, 1990, we informed CMC that it had still not complied with our request to provide proof of the government order and that if it did not provide the requested proof it would be required to submit a consolidated response to our questionnaire. CMC's September 19, 1990, response did not include the requested proof of the government order.

As set forth above, CMC's failure to adequately support its claim that Shandong, Tianjin, and Henan are separate entities leaves us no alternative than to treat the three as branches of the same exporting entity, CMC. As for CMC's arguments that we should accord separate treatment to the three branches because we have done so in past cases, we note that the Headwear and Castings cases are distinguishable from these investigations. In Headwear, there was more information on the record regarding the claimed separateness of the exporting entities. As for Castings, the case cited by CMC is only the preliminary results of an administrative review. Because the final results for the Castings case have not been issued, there has been no determination in that case on the issue of whether it is appropriate to accord exporting entities separate treatment.

Comment 3

CMC contends verification of its submitted information would resolve any questions the Department has regarding the break-up of CMC. CMC points out that in Headwear the Department resolved its questions concerning the separation issue at verification.

Petitioner maintains that the Department appropriately resorted to best information available.

DOC Position

The purpose of conducting verification is to establish the accuracy and completeness of information submitted by a respondent. In these investigations, we have determined that substantial material deficiencies in CMC's submissions for each of the four classes or kinds of the subject merchandise warrants the use of best information available in these final determinations (see, the "Best Information Available" section of this notice). As noted in the decision by the Court of International Trade in *Chinsung Indus. Co., Ltd., et al.* v. *United States*, Slip Op. 89–15 (CIT, February 7, 1989), the burden of creating an adequate record rests with the respondent, not the Department. Because we have determined that CMC's response is inadequate, there is no reason for the Department to verify it.

Comment 4

CMC contends that the application of best information available as a penalty

in these investigations is without basis in law or Department policy. CMC states that even though the Department is not fully satisfied with its submissions, it has substantially complied with the Department's information request. Therefore, because CMC has not willfully withheld information, the Department is not justified in using only information most adverse to CMC as best information available.

In particular, CMC maintains that the failure of Henan to participate in the questionnaire response should not constitute grounds for resorting to best information available regarding Shandong and Tianjin because Henan is unrelated to those branches and because they have no control or influence over Henan. CMC claims that, as the Court of Appeals for the Federal Circuit held in U.H.F.C. Company, No. 89-1502, slip op. at 37 (Fed. Cir. Oct. 11, 1990), the Department may not resort to "best information" where "the party's failure to give information is because the information does not and could not exist."

Petitioner holds that in this case the Department should adopt its normal presumption that the data supplied by petitioner is the best information available. Citing the decision of the Federal Circuit Court in *Rhone Poulenc, Inc.* v. *United States*, 899 F.2d, at 1190 (Fed. Cir. 1990), petitioner argues that Department's practice of utilizing the most punitive information as best information is permissible under the Act because "it reflects a common sense inference that the highest margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less."

DOC Position

In deciding what to use as best information available, 19 CFR 353.37(b) provides that the Department may take into account whether a party refused to provide requested information. Thus, the Department determines on a case-by-case basis what is best information available. In these investigations, the only information on the record was that furnished by petitioner and by the respondent, CMC. We have already determined that CMC's questionnaire response is incomplete and unreliable both with regards to the two branches included in the response (Shandong and Tianjin), and the Henan branch. Because no other information exists on the record which would be more appropriate as best information available (*see* Comment 5), we have determined that petitioner's data is best information available.

In our determination of what constitutes best information available we did not simply resort to the use of information most adverse to CMC. Had we done so we could have used the highest margins for each such or similar category alleged in the petition, averaged for each class or kind as we have done in other cases (see, e.g., Final Determinations of Sales at Less Than Fair Value; Sodium Thiosulfate from the Federal Republic of Germany and the United Kingdom (Sodium) (55 FR 51749, December 17, 1990). For these determinations, we have used the average rather than the highest single, margin alleged in the petition because, although we found CMC's response to be substantially deficient and incomplete, we recognize that CMC did attempt to cooperate with the Department in these proceedings. In contrast, in the Sodium case, the producers/exporters received the highest single rate in the petition because they failed to respond to the questionnaire.

Comment 5

CMC contends that the information it submitted on labor and steel rates from India should not be dismissed when applying the best information available rule for calculating foreign market value. CMC claims that the labor rates it submitted for unskilled workers in India should be used in the Department's determinations rather than the labor rates for skilled workers in India included in the petition. CMC notes that, unlike petitioner, factories in China do not require the use of skilled labor.

CMC further argues that section 773(c)(4) of the Act (19 U.S.C. 1677b(c)(4)) requires that the Department value steel inputs at prices in the surrogate country, determined by the Department to be India for these investigations, rather than at Japanese export prices as set forth in the petition. CMC also contends that because it has not failed to comply with requests for steel and labor information, and because the information provided by CMC is useable, the Department should not dismiss its information.

Petitioner maintains that Indian labor rates contained in the petition represent the most accurate information on the record. Petitioner also holds that the steel price information contained in the petition represents the most accurate information on the record because the steel price information provided by CMC consists of unverified average Indian prices for unknown grades of steel bars.

DOC Position

We agree with petitioner. Petitioner's information regarding factors of production, including direct labor, is the best information available. We agree that the use of unskilled labor rates would be more appropriate in this case, but only if unskilled labor inputs were also used in the petitioner's factors of production model. However, apart from the questionnaire response, which we have already dismissed (see, the "Best Information Available" section of this notice), CMC failed to provide any publicly available information on the utilization of unskilled labor in the production of HFHTs. We have therefore applied skilled labor rates to the relatively low skilled labor input factor contained in the petition as the best information available.

Likewise, petitioner's data regarding steel inputs is the most accurate and reasonable and we have, therefore, relied on it as the best information available. Although we have rejected the response for purposes of this analysis, we note that CMC specified particular sizes and grades of steel in reporting steel input factors in its questionnaire response. Petitioner was also very specific, in valuing its steel input factors, using actual statistics for exports from Japan to the PRC of the same type and size of steel included in its description of the factor inputs. In contrast, CMC's proposal of applying an average rate comprising many different types and sizes of steel in India would result in a less accurate calculation, when applied to petitioner's specific factor inputs.

Additionally, because the petition was based on actual prices that would have been paid to market-economy suppliers, our reliance on the petition as best information available is consistent with our practice in other cases involving non-market economies. In such cases, we have an established preference for valuing the factors of production on the basis of prices paid to market-economy suppliers (see, e.g., Final Results of Antidumping Administrative Review: Tapered Roller Bearings from the Republic of Hungary (55 FR 21066, May 22, 1990)).

Comment 6

In challenging the Department's finding on critical circumstances, CMC contends that the Department erroneously concluded that there were unexplained inconsistencies concerning the quantity and value of data it submitted in response to the Department's request. As such, the

Department inappropriately resorted to best information available by using Bureau of Census import statistics which petitioner claims are notoriously inaccurate.

The Coalition of American Tool Distributors (CATD) argues that the time involved from the order of merchandise until entry in the United States is too long a period to allow importers or exporters to take advantage of their knowledge of the dumping investigations to increase exports to the United States without being subject to antidumping duties.

Petitioner argues that because of the unreliability of CMC's reported quantity and value data, it made no sense for the Department to request or use similar data simply because it was requested for use in determining critical circumstances. Petitioner also cites numerous other cases where the Department has relied upon import statistics as a source of best information available. Finally, petitioner notes that the Department was left with no choice but to assume that critical circumstances exist for picks/mattocks because this is the only possible conclusion the Department can draw based on the import statistics available for the other classes or kinds.

DOC Position

We agree with petitioner. We have relied on country-wide import statistics in our critical circumstances determinations (see, the "Critical Circumstances" section of this notice).

We cannot accept the claims by CATD that the time lag from order to entry is too long to allow importers to take advantage of knowledge of the dumping investigations because such information is unverified. However, we recognize that, due to the lag between export and import, the import statistics for April 1990 (the month the proceeding began) reflect exports made prior to April 1990. Therefore, as explained in the Critical Circumstances section of this notice, we have included April import statistics in our base period rather than in our comparison period.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the U.S. Customs Service to continue to suspend liquidation of all entries of HFHTs from the PRC as defined in the "Scope of Investigations" section of this notice, that are entered, or withdrawn from warehouse for consumption, on or after the date of publication of this notice in the **Federal Register.** The U.S. Customs Service shall require a cash deposit or posting of a bond equal to the final dumping margins, as shown below. This suspension of liquidation will remain in effect until further notice.

All exports of HFHTs from the PRC	Weighted-average margin percentage	Critical circumstances
Hammers/sledges	45.42	Yes.
Bars/wedges	31.76	Yes.
Picks/mattocks	50.81	Yes.
Axes/adzes	15.02	No.

ITC Notification

In accordance with section 735(c) of the Act, we have notified the ITC of our determinations and findings. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to these investigations. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms in writing that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Investigations, Import Administration.

The ITC will determine on or before February 4, 1991, whether these imports materially injure, or threaten material injury to, a U.S. industry. If the ITC determines that material injury, or threat of material injury, does not exist with respect to the product under investigation, the applicable proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing customs officials to assess antidumping duties on HFHTs from the PRC entered or withdrawn from warehouse, for consumption, on or after the effective date of the suspension of liquidation, equal to the amount by which the FMV exceeds the United States price.

These determinations are published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)).

Dated: December 24, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 91-54 Filed 1-2-91; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-087]

Portable Electric Typewriters From Japan; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to requests by the petitioner and one respondent, the Department of Commerce has conducted an administrative review of the antidumping duty order on portable electric typewriters from Japan. The review covers 5 manufacturers and/or exporters of this merchandise to the United States from May 1, 1986 through April 30, 1988. The review indicates the existence of dumping margins for certain firms during this period.

As a result of the review, the Department has preliminarily determined to assess dumping duties equal to the calculated differences between United States price and foreign market value.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: January 3, 1991.

FOR FURTHER INFORMATION CONTACT: Tom Prosser or Maureen Flannery, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2923.

SUPPLEMENTARY INFORMATION:

Background

On October 19, 1988, the Department of Commerce ("the Department") published in the **Federal Register** (53 FR 40926) the final results of its last administrative review of the antidumping duty order on portable electric typewriters ("PETs") from Japan (45 FR 30618; May 9, 1980). In May 1987, the petitioner and one respondent requested, in accordance with § 353.53a(a) (1987) of the Commerce Regulations, that we conduct an administrative review of the May 1, 1986 through April 30, 1987 period. We published a notice of initiation of review on June 19, 1987 (52 FR 23330). In May 1988, the petitioner also requested that we conduct an administrative review of the May 1, 1987 through April 30, 1988 period. We published a notice of initiation of review for that period on June 29, 1988 (53 FR 24470). The Department has now conducted this review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

The Department initiated reviews for Brother Industries, Ltd. ("Brother"), Canon, Inc. ("Canon"), Matsushita Electric Industrial Co. ("Matsushita"), Nakajima All Co., Ltd. ("Nakajima"), and Silver Seiko, Ltd. ("Silver Seiko"), for the period May 1, 1986 through April 30, 1987. The Department initiated reviews for Brother, Canon, Matsushita, and Silver Seiko for the period May 1, 1987 through April 30, 1988.

Scope of Review

Imports covered by the review are shipments of non-automatic portable electric typewriters from Japan that do not incorporate a calculating mechanism. The merchandise is currently classified under Harmonized Tariff System ("HTS") item numbers 8469.21.00 and 8469.29.00. During the review period, this merchandise was classifiable under Tariff Schedules of the United States Annotated ("TSUSA") item 676.0510, and some under TSUSA item 676.0540. TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers 5 manufacturers and/or exporters of Japanese portable electric typewriters to the United States and various periods between May 1, 1986 and April 30, 1988.

United States Price

In calculating United States price, the Department used purchase price or exporter's sales price ("ESP"), both as defined in section 772 of the Tariff Act, as appropriate. Purchase price and ESP were based on the packed f.o.b., c.i.f., or delivered price to unrelated purchasers in the United States. We made adjustments, where applicable, for ocean freight, insurance, U.S. and foreign inland freight, U.S. and foreign brokerage fees, handling charges, discounts, commissions, warranties, advertising, technical services, sales allowances, indirect selling expenses, and the U.S. subsidiary's selling expenses. No other adjustments were allowed.

Foreign Market Value

In calculating foreign market value for Brother and Silver Seiko, the Department used home market price, as defined in section 773 of the Tariff Act, since sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. Home market price was based on the packed delivered price to unrelated purchasers in the home market. We made adjustments, where applicable, for inland freight, commissions, rebates, warranty, advertising, credit costs, differences in physical characteristics of the merchandise, and differences in packing. We made further adjustments, where applicable, for indirect selling expenses to offset U.S. selling expenses deducted in ESP calculations. No other adjustments were allowed.

In calculating foreign market value for Nakajima and Canon, the Department used sales to third countries, since there were insufficient sales of such or similar merchandise in the home market to provide an adequate basis for comparison. Third country price was based on the packed, delivered price to unrelated purchasers in the third countries. We made adjustments, where applicable, for inland freight, brokerage fees, credit costs, differences in physical characteristics of the merchandise and differences in packing. We made further adjustments, where applicable, for indirect selling expenses to offset commissions, and to offset U.S. selling expenses deducted in ESP calculations. No other adjustments were claimed or allowed.

Preliminary Results of the Review

As a result of our comparison of United States price to foreign market value, we preliminarily determine that the following margins exist:

Manufacturer/exporter	Time period	Margin (percent)
Brother Industries Ltd.	05/01/86–04/30/87	13.36
	05/01/87–04/30/88	63.13
Canon Inc.	05/01/86–04/30/87	112.62
Matsushita (Panasonic)	05/01/86–04/30/87	[1] 4.92
	05/01/87–04/30/88	[1] 4.92
Nakajima All Co., Ltd.	05/01/86–04/30/87	0.00
Silver Seiko, Ltd.	05/01/86–04/30/87	81.39
	05/01/87–04/30/88	161.73

[1] No shipments during the period. Rate used is from the last review in which there were shipments.

Parties to the proceeding may request disclosure within 5 days of the date of publication of this notice. Any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication of this notice, or the first workday thereafter.

Case briefs and/or written comments from interested parties may be submitted not later than 30 days after the date of publication of this notice. Rebuttal briefs and rebuttals to written comments, limited to issues raised in the case briefs and comments, may be filed not later than 37 days after the date of publication. The Department will publish the final results of the administrative review, including the results of its analysis of issues raised in any such written comments or at a hearing.

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 shall be required for all shipments of Japanese portable electric typewriters by the reviewed firms. Since the dumping margin for Nakajima is zero, the Department shall not require a cash deposit of estimated antidumping duties for that firm. For any shipments of this merchandise manufactured or exported by any new manufacturer and/or exporter not covered in this or prior administrative reviews, whose first shipments occurred after April 30, 1988 and who is unrelated to any reviewed firm, or any previously reviewed firm, a cash deposit of 161.73 percent shall be required.

These deposit requirements are effective for all shipments of Japanese portable electric typewriters 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 § 353.22 of the Commerce Regulations (19 CFR 353.22) (1990).

Dated: December 24, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 91-55 Filed 1-2-91; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants; Draft Recovery Plans for Southeastern U.S. and Caribbean Populations of Leatherback Turtles

AGENCIES: National Marine Fisheries Service, NOAA, Commerce U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of availability and request for comments.

SUMMARY: The draft Recovery Plan for the leatherback sea turtle (*Dermochelys coriacea*) is now available for review and comment by interested parties prior to final approval and adoption by the National Maritime Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS). The plan was developed by the Leatherback/Hawksbill Sea Turtle Recovery Team which was appointed in 1989 by NMFS and USFWS. The recovery team is jointly supported by the USFWS and NMFS. These agencies share the responsibility for sea turtle recovery under the authority of the Endangered Species Act of 1973. Recovery team membership includes biologists and resource managers from the Virgin Islands Division of Fish and Wildlife, the Wider Caribbean Sea Turtle Recovery Team, the University of Georgia, the National Park Service, and USFWS.

DATES: Comments on the draft recovery plans must be received on or before February 19, 1991.

ADDRESSES: Comments should be addressed to Director, Office of Protected Resources, National Maritime Fisheries Service, 1335 East West Highway, Silver Spring, MD 20910. Copies of the Draft Leatherback Recovery Plan are available upon request from Charles Oravetz, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, FL 33702, or Phil Williams, Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Highway, room 8256, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Charles Oravetz NMFS, (813) 893-3366, or Earl Possardt at USFWS, (904) 791-2580.

SUPPLEMENTARY INFORMATION: The Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 et seq.) requires that the agencies responsible for listed species develop and implement recovery plans for the conservation and survival of threatened and endangered species, unless it is determined that such plans will not promote the conservation of the species. Accordingly, NMFS and USFWS appointed a Leatherback/Hawksbill Sea Turtle Recovery Team to assist in the development of the Draft Leatherback Sea Turtle Recovery Plan. The Recovery Plans discuss the natural history, current status of the populations, and the known and potential human impacts on the species. Actions that would promote the recovery of the leatherback sea turtle are identified and discussed in the draft plan. The Recovery Plan will be used to direct U.S. activities to promote the recovery of this endangered sea turtle.

Dated: December 21, 1990.

Nancy Foster,

Director, Office of Protected Resources.

[FR Doc. 91-62 Filed 1-2-91; 8:45 am]

BILLING CODE 3510-22-M

Endangered Marine Mammals

AGENCY: National Marine Fisheries Service NOAA, Commerce.

ACTION: Modification No. 3 to Permit No. 675 (P440).

SUMMARY: Notice is hereby given that pursuant to the provisions of § 216.33 (d) and (2) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216, and § 220.24 of the Regulations Governing Endangered Species (50 CFR part 217-222), Scientific Research Permit No. 675 was issued to Dr. C. Scott Baker, Department of Health and Human Services, Section of Genetics, Building 560, room 21-105, National Cancer Institute, Frederick, Maryland 21701-1013 on August 4, 1989 (54 FR 35220). The Permit was modified on November 15, 1989 (54 FR 47543), May 31, 1990 (55 FR 22067) and is further modified as follows:

Additions to Section A. *Number and Kind of Marine Mammals:*

3. The Permit Holder is authorized to collect skin biopsy samples from a maximum of 200 gray whales (*Enchrichtius robustus*), 200 bowhead whales (*Balaena mysticetus*), and 100 blue whales (*Balaenoptera musculus*) in the territorial waters of the United States. No more than 40 live animals from any population or possible subpopulation of each species may be taken until the need for and value of additional samples can be demonstrated.

4. The Permit Holder is provisionally authorized to collect skin biopsy samples from a maximum of 200 bowhead whales (*Balaena mysticetus*). Specific authorization to take biopsies from bowhead whales shall be withheld until the need for and value of samples that cannot be obtained from other sources can be demonstrated.

5. The Permit Holder is authorized to import into the United States biopsy tissue samples from gray, blue, and bowhead whales collected in territorial waters of other nations and to export, from the United States to New Zealand, biopsy tissue samples from humpback, minke, and southern right whales collected under Permit No. 675.

Modifications to Section B. *Special Conditions:*

1. After the word "Application" add: "and modifications."

3. Add to end of paragraph: "The conditions required for approaching and sampling humpback whales shall also be in effect for gray and blue whales."

5. Add at the beginning: "In so far as possible, the Permit Holder shall undertake efforts to document both the short- and long-term effects of biopsy sampling."

Add as a second paragraph: "In so far as possible, the Permit holder shall undertake efforts to obtain tissue samples from existing tissue banks, beached and stranded animals, animals taken for subsistence purposes, and animals taken during authorized studies being conducted by other investigators."

6. Replace current Special Condition with the following: "Any attempt to collect a biopsy sample from humpback, bowhead, or blue whales which is not successful shall be counted as part of the quota of authorized takings. Any strike with the biopsy dart, even if unsuccessful, of gray whales shall be counted as part of the quota of authorized takings."

9. Line 6, after "animals;" add: "for each sample collected, give the species and locality/population from which it came, the date it was collected, its identification number, and its destination and ultimate disposition;"

10. Add after the first sentence: "The request shall include anticipated dates and locations of the research."

All conditions currently contained in the Permit remain in effect.

This modification is effective upon publication in the **Federal Register.**

Documents submitted in connection with the above application are available for review in the following offices:

Office of Protected Resources, National Marine Fisheries Service, 1335 East West Highway, room 7330, Silver Spring, Maryland 20910;

Director, Alaska Region, National Marine Fisheries Service, NOAA, 709 West 9th Street, Federal Building, Juneau, Alaska 99802;
Director, Northeast Region, National Marine Fisheries Service, NOAA, One Blackburn Drive, Gloucester, Massachusetts 01930;
Director, Northwest Region, National Marine Fisheries Service, NOAA, 7600 Sand Point Way, NE., BIN C15700, Seattle, Washington 98115;
Director, Southeast Region, National Marine Fisheries Service, NOAA, 9450 Koger Boulevard, St. Petersburg, Florida 33702;
Director, Southwest Region, National Marine Fisheries Service, NOAA, 300 South Ferry Street, Terminal Island, California 90731–7415; and
Administrator, Western Pacific Program Office, National Marine Fisheries Service, NOAA, 2570 Dole Street, room 106, Honolulu, Hawaii 96822–2396.

Dated: December 28, 1990.

Nancy Foster,

Director, Office of Protected Resources, National Marine Fisheries Services.

[FR Doc. 91–60 Filed 1–2–91; 8:45 am]

BILLING CODE 3510–22–M

DEPARTMENT OF ENERGY

Support of Advanced Coal Research at U.S. Colleges and Universities; Restricted Eligibility

AGENCY: Pittsburge Energy Technology Center, DOE.

ACTION: Notice of Restricted Eligibility for the FY 91 Program Solicitation entitled: "Support of Advanced Coal Research at U.S. Colleges and Universities."

SUMMARY: The DOE announces that pursuant to 10 CFR 600.7(b)(1), it intends to conduct a competitive Program Solicitation No. DE–PS22–91PC91282, and to award, on a restricted eligibility basis, financial assistance (grants) to U.S. colleges, universities, and university-affiliated research institutions in support of advanced coal research. These grants will be awarded to a limited number of proposals selected on the basis of scientific merit, subject to the availability of funds.

TEXT: Since the inception of the University Coal Research Program in FY–80 (by Congressional direction) it has been DOE's intent to maintain and upgrade educational, training and research capabilities at U.S. universities and colleges in the fields of science and technology related to coal. Moreover, the involvement of professors and students to generate fresh research ideas and to ensure a future supply of coal scientists and engineers is a key purpose of this program. Therefore, U.S. colleges, universities, and university-affiliated research institutions may submit, in response to this solicitation, applications only if the Principal Investigator or a Co-Principal Investigator listed on the application is a teaching professor at the university *and* at least one student registered at the university is to receive compensation for work performed in the conduct of research proposed in the application, and proposals from the university-affiliated research institutions are submitted through the college or university with which they are affiliated. So long as all of these conditions are met, other participants, or Co-Principal Investigators or research staff who do not hold teaching or student positions may be included as part of the research team.

Eligibility for participation in this program in FY–91 is restricted to U.S. colleges and universities and university-affiliated research institutions as defined above.

All applications must be related to coal research in one of the following seven technical categories:

(1) Coal Science

Fundamental research on the structure, characteristics, and reactivity of coal and coal-derived materials; nature of the oxygen-, nitrogen-, and sulfur-bonding in coal; geochemical and geophysical properties of coal; techniques and instrumentation applicable to the analysis of coal, coal mineral matter, and coal derived materials.

(2) Coal Surface Science

Research on surface properties of coal and mineral matter pertinent to weathering, preparation (i.e., cleaning, surface enhanced beneficiation, dewatering, and pelletizing), conversion, utilization, and the rheology of coal-oil/coal-water slurries.

(3) Reaction Chemistry

Fundamental research directed toward an understanding of organic, inorganic, and biochemistry of coal with respect to catalyzed and uncatalyzed conversion and utilization; chemical and microbiological coal cleaning, gasification, liquefaction, denitrification, denitrogenation, and desulfurization; novel reactions for depolymerizing coal; chemical reaction in super-critical fluids; and fuel cell chemistry.

(4) Advanced Process Concepts

Research on concepts of improved coal conversion and utilization processes through novel chemistry, engineering, combined process steps, reactors, or components.

(5) Engineering Fundamentals and Thermodynamics

Research on the effect of temperature and/or pressure on transport phenomena with or without chemical reactions; measurement and correlation of thermodynamic and transport properties pertinent to coal conversion and utilization; and supercritical phase behavior.

(6) Environmental Science

Research on the formation, control, and elimination of pollutants arising from coal conversion and utilization reactions.

(7) High Temperature Phenomena

Investigation of the physical and chemical phenomena at high temperatures associated with combustion and gasification of coal with electromagnetic generation of power; vaporization of alkalis and ash fusion in coal conversion and utilization processes; and high temperature separation techniques.

AWARDS: DOE anticipates awarding financial assistance (grants) for each project. Approximately $5.73 million is available for the program solicitation, which should provide support for about thirty (30) proposals. The Program Solicitation is expected to be ready for mailing by December 7, 1990.

Applications must be prepared and submitted in accordance with the instructions and forms in the Program Solicitation. To be eligible, applications must be received by the Department of Energy by January 25, 1991.

For a copy of this solicitation or for further information, please write to: U.S. Department of Energy, Pittsburgh Energy Technology Center, Acquisition and Assistance Division, P.O. Box 10940, MS 921–118, Pittsburgh, PA 15236, Attn: Cynthia Y. Mitchell.

Issued in Washington, DC on December 29, 1990.

Gregory J. Kawalkin,

Acquisition and Assistance Division.

[FR Doc. 91–20 Filed 1–2–91; 8:45 am]

BILLING CODE 6450–01–M

Advisory Committee on Nuclear Facility Safety; Notice of Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub.

L. 92–463, 86 Stat. 770), notice is hereby given of the following advisory committee meeting:

Name: Advisory Committee on Nuclear Facility Safety.

Date and Time: Friday, February 1, 1991, 8 a.m. to 1 p.m.

Place: U.S. Department of Energy, Forrestal Building, Room 1E–257, 1000 Independence Avenue SW., Washington, DC 20585.

Contact: Wallace R. Kornack, Executive Director, ACNFS, AC–21, 1000 Independence Avenue SW., Washington, DC 20585, 202/586–1770.

Purpose of the Committee: The Committee was established to provide the Secretary of Energy with advice and recommendations concerning the safety of the Department's production and utilization facilities, as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014).

Tentative Agenda

February 1, 1991

8:00 a.m. Chairman John F. Ahearne Opens Meeting
8:05 a.m. Staff Presentation on Probabilistic Risk Assessment (PRA)
9:00 a.m. Selected Technical Issues
11:30 a.m. Subcommittee Reports
12:30 p.m. Public Comment Session
1:00 p.m. Meeting Ends.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Wallace Kornack at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. The Chairperson of the Committee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Transcripts: The transcript of the meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on December 28, 1990.

J. Robert Franklin,

Deputy Advisory Committee Management Officer.

[FR Doc. 91–49 Filed 1–2–91; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket Nos. QF90–88–000, et al.]

Bristol-Myers Squibb Co., Inc., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. Bristol-Myers Squibb Co., Inc.

[Docket No. QF90–88–000]

December 21, 1990.

On December 13, 1990, Bristol-Myers Squibb Co., Inc. (Applicant) of One Squibb Drive, P.O. Box 191, New Brunswick, NJ 08903–0191, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's Regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located at New Brunswick, New Jersey and will consist of one combustion turbine generator and one supplementary fired waste heat recovery boiler. Steam recovered from the facility will be used by the Applicant for processing. The maximum net electric power production capacity of the facility will be 10.45 MW. The primary energy source will be natural gas. Installation was scheduled to begin in April 1990.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

2. Oklahoma Municipal Power Authority v. Public Service Company of Oklahoma

[Docket No. EL90–43–000]

December 24, 1990.

Take notice that on December 12, 1990, Public Service Company of Oakland ("PSO") tendered for filing a rate schedule change pursuant to section 205 of the Federal Power Act and Part 35 of the Commission's Regulations. The filing provides superseding and new service agreements for the Interconnection and Power Supply Agreement between PSO and the Oklahoma Municipal Power Authority.

Comment date: January 8, 1991, in accordance with Standard Paragraph E end of this notice.

3. City of Camden, South Carolina v. Carolina Power & Light Co.

[Docket No. EL91–10–000]

December 24, 1990.

Take notice that on December 14, 1991, the City of Camden, South Carolina tendered for filing a petition for a declaratory order and motion for summary judgement or, in the alternative, for hearing. Camden seeks the declaratory order with regard to the term of Carolina Power & Light Company's Resale Service Schedule RS–89–2B and sections 11 and 12 of the General Terms and Conditions of its FPC Electric Tariff on file with the Commission. Camden also submitted a petition for exemption from the $10,720 filing fee required of persons seeking a declaratory order.

Comment date: January 23, 1991, in accordance with Standard Paragraph E at the end of this notice.

4. Idaho Power Co.

[Docket No. ER91–155–000]

December 24, 1990.

Take notice that on December 11, 1990, Idaho Power Company (IPC) tendered for filing the Agreement for the Purchase and Sale of Power and Energy between Idaho Power Company and Montana Power Company, dated October 15, 1990.

IPC has requested waiver of the notice provisions of § 35.3 of the Commission's regulations in order to permit the Agreement to become effective on December 1, 1990, the date deliveries are to commence under the Agreement.

IPC states that copies of the filing were served on Montana Power Company, Idaho Public Utilities Commission, Public Utility Commission of Oregon and Montana Public Service Commission.

Comment date: January 7, 1991, in accordance with Standard Paragraph E at the end of this notice.

5. American Electric Power Service Corp.

[Docket No. ER91–40–000]

December 24, 1990.

Take notice that American Electric Service Corporation on December 12, 1990 tendered for filing on behalf of its American Electric Power System affiliate, Ohio Power Company (OPCO), an amendment to OPCO's filing in Docket No. ER91–40–000.

The amendment clarifies certain provisions of the agreement filed in Docket No. ER91–40–000.

A copy of the filing was served upon the Public Utilities Commission of Ohio.

Comment date: January 7, 1991, in accordance with Standard Paragraph E at the end of this notice.

6. Tucson Electric Power Co.

[Docket No. ER91–154–000]

December 24, 1990.

Take notice that on December 10, 1990, Tucson Electric Power Company (Tucson) tendered for filing a notice of cancellation of the agreement entitled "1990 Short Term Power Sale Agreement Between Tucson Electric Power Company and Arizona Power Pooling Association, Inc. (APPA)," which was docketed under FERC Docket No. ER90–453–000, and designated as Rate Schedule FERC No. 80.

Tucson requests an effective date of December 1, 1990.

Comment date: January 8, 1991, in accordance with Standard Paragraph E at the end of this notice.

7. Central Vermont Public Service Corp. and Green Mountain Power Corp.

[Docket No. ER90–151–000]

December 24, 1990.

Take notice that on December 17, 1990, Central Vermont Public Service Corporation (CVPS) and Green Mountain Power Corporation (GMP) tendered for filing amendments to their rate schedules which impose a ceiling on the amounts that may be collected pursuant to the rate schedules; and additional information concerning their costs of providing service under the rate schedules.

CVPS and GMP request waiver of the Commission's notice of filing regulations to allow the rate schedules, as amended, to take effective retroactively as of July 1, 1989.

Comment date: January 8, 1991, in accordance with Standard Paragraph E at the end of this notice.

8. New England Power Pool

[Docket No. ER91–74–000]

December 24, 1990.

Take notice that on November 21, 1990, New England Power Pool (NEPOOL) tendered for filing and amendment in the above referenced docket.

Comment date: January 7, 1991, in accordance with Standard Paragraph E at the end of this notice.

9. Delmarva Power & Light Co.

[Docket No. ER91–156–000]

December 24, 1990.

Take notice that on December 13, 1990, Delmarva Power & Light Company (Delmarva) tendered for filing proposed Supplement No. 12 to its FERC Rate Schedule No. 71. This Supplement, filed with the approval and concurrence of The Easton Utilities Commission and the The Town of Easton (Easton), is being made to coordinate with similar internal accounting changes with respect to intra-pool installed capacity accounting between members of the Pennsylvania, New Jersey, and Maryland Interconnection (PJM).

Copies of this filing were served upon Easton Utilities Commission, the Mayor of the Town of Easton and the Maryland Public Service Commission.

Comment date: January 8, 1991, in accordance with Standard Paragraph E at the end of this notice.

10. Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin)

[Docket No. ER91–160–000]

December 26, 1990.

Take notice that on December 14, 1990, Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) jointly tendered for filing revised Exhibits VII, VIII and IX to the Agreement to Coordinate Planning and Operations and Interchange (Minnesota) and Northern States Power Company (Wisconsin).

Exhibit VII sets forth the specification of the rate of return on common equity to determine the overall cost of capital. The return on common equity for calendar year 1991 is the FERC generic rate of return effective November 1, 1990. A statement of the impact of the return on common equity on each Company has been filed.

Exhibit VIII sets forth the specification of average monthly coincident peak demands for calendar year 1991 for each of the Companies. A statement of the impacts of these coincident peak demands on each Company has been filed. These coincident peak demands were determined upon three year data consisting of 18 months actual and 18 months projected. The change from the use of the average of the 12 monthly peak demand allocation method to the use of the 36 months was approved in Docket No. ER87–279–000.

Exhibit XI sets forth a specification of depreciation rates certified by the Minnesota Public Utilities Commission and the Wisconsin Public Service Commission for NSP (Minnesota) and NSP (Wisconsin). A statement of the impact of the depreciation rates of each company has been filed.

NSP Companies request an effective date of January 1, 1991, for this filing. Copies of the filing letter and revised Exhibits VII, VIII and IX have been served upon the wholesale and wheeling customers of the Companies. Copies of the filing have been mailed to the State Commissions of Michigan, Minnesota, North Dakota, South Dakota and Wisconsin.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

11. Florida Power & Light Co.

[Docket No. ER91–157–000]

December 26, 1990.

Take notice that on December 13, 1990, Florida Power & Light Company (FPL) tendered for filing a document entitled Amendment Number Twenty-Two to Revised Agreement to Provide Specified Transmission Service Between Florida Power & Light Company and the Utility Commission, City of New Smyrna Beach, Florida (Rate Schedule FERC No. 59).

FPL states that under Amendment Number Twenty-Two, FPL will transmit power and energy for Utilities Commission, City of New Smyrna Beach, Florida as is required in the implementation of its interchange agreement with the Reedy Creek Improvement District, Fort Pierce Utilities Authority, City of Homestead, City of Lakeland, City of Tallahassee, Kissimmee Utility Authority, City of Starke, City of Sebring Utilities Commission, City of Gainesville, Utility Board of the City of Key West, City of Vero Beach and City of Lake Worth.

FPL request that waiver of § 35.3 of the Commission's Regulations be granted and that the proposed Amendment be made effective December 15, 1990. FPL states that a copy of the filing was served on the Utilities Commission, City of New Smyrna Beach, Florida.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

12. Pennsylvania Power & Light Co.

[Docket No. ER91–158–000]

December 26, 1990.

Take notice that Pennsylvania Power & Light Company (PP&L) tendered for filing on December 17, 1990, a Power Supply Agreement dated December 13, 1990, which supersedes the Power Supply Agreement dated as of the 4th day of April 1966 between PP&L and the borough of Blakely, presently on file with the Commission as PP&L Rate Schedule FPC No. 35. The new Agreement changes PP&L's service voltage from 23 kV to 12 kV, which will: accommodate the Borough's conversion of its electric distribution system to 12 kV, improve operating efficiencies, and serve growth within the Borough more effectively. The filed Power Supply Agreement does not change any of the rates or billing determinants applicable to service to Blakely, nor any other provisions of the superseded power supply agreement, as amended, except those provisions relating to service at 23 kV.

Copies of PP&L's filing have been served upon the Borough of Blakely and the Pennsylvania Public Utility Commission.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

13. Florida Power & Light Co.

[Docket No. ER91-159-000]

December 26, 1990.

Take notice that on December 17, 1990, Florida Power & Light Company (FPL), tendered for filing a document entitled Amendment Number Seven to Contract for Interchange Service Between Florida Power Corporation and Florida Power & Light Company (FERC Rate Schedule No. 81). FPL's filing includes a Certificate of Concurrence executed by Florida Power Corporation (CORP) in lieu of an independent filing.

FPL states that under Amendment Number Seven, FPL and CORP have agreed to modify, on a temporary basis, an existing 230 kV interconnection between their electric systems so as to increase the inter-system power transfer capability of the interconnection facilities and to improve the reliability of the bulk power supply system for both CORP and FPL customers.

FPL requests that waiver of § 35.3 of the Commission's Regulations be granted and that the proposed Amendment be made effective December 17, 1990. FPL states that a copy of the filing was served on Florida Power Corporation.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

14. CEI-MP-OHIO

[Docket No. ER91-161-000]

December 26, 1990.

Take notice that December 24, 1990, the Cleveland Electric Illuminating Company filed, on behalf of the above listed parties to the CEI-AMP-Ohio Agreement an initial rate schedule between the Cleveland Electric Illuminating Company and American Municipal Power-Ohio, Inc.

The Agreement provides for Short Term Power supplied by CEI. The parties have requested an effective date of December 1, 1990 for this schedule.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

15. Niagara Mohawk Power Corp.

[Docket No. ER91-162-000]

December 26, 1990.

Take notice that on December 17, 1990, Niagara Mohawk Power Corporation (Niagara) tendered for filing an extension to Niagara Mohawk Rate Schedule No. 138, an agreement between Niagara Mohawk and the New York Power Authority (Authority).

Rate Schedule No. 138 provides for the wheeling of certain loads by Niagara Mohawk to certain customers of Authority. The proposed change extends the term of Rate Schedule 138, which expired on December 31, 1989. Niagara Mohawk proposes an effective date of January 1, 1990, and requests waiver of the Commission's notice requirements. In support thereof, Niagara Mohawk states that Authority has consented to this proposed effective date.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

16. Interstate Power Co.

[Docket No. ER91-163-000]

December 26, 1990.

Take notice that on December 18, 1991, Interstate Power Company (IPW) tendered for filing a new Electric Service Agreement between the City of Mountain Lake and Company. This agreement contains a revision to reflect a change in one of the City's Firm Suppliers.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

17. Entergy Services, Inc.

[Docket No. ER91-165-000]

December 26, 1990.

Take notice that Entergy Services, Inc. (Entergy Services), as agent for Arkansas Power & Light Company (AP&L), Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (MP&L), and New Orleans Public Service Inc. (NOPSI), on December 19, 1990, tendered for filing an Interchange Agreement with Oglethorpe Power Corporation (Oglethorpe Power) (Interchange Agreement).

Entergy Services requests an effective date of November 12, 1990, for the Interchange Agreement. Entergy Services requests waiver of the Commission's notice requirements under § 35.11 of the Commission's regulations.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

18. Nantahala Power & Light Co.

[Docket No. ER91-166-000]

December 26, 1990.

Take notice that on December 19, 1991, Nantahala Power & Light Company (Nantahala) tendered for filing an Interconnection Agreement Between Tennessee Valley Authority and Nantahala Power & Light Company (Agreement). The Agreement will supercede the Interconnection Agreement, dated 1982, between TVA and Nantahala. The Agreement provides for interconnected operations between the two systems as well as transactions involving Energy Assistance, Energy Interchange, Short Term Power and Term Energy Exchange services.

Nantahala asks that the sixty (60) day notice requirement be waived so that the Agreement may be permitted to become effective on January 1, 1991.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

19. Central Vermont Public Service Corp.

[Docket No. ER91-167-000]

December 26, 1990.

Take notice that Central Vermont Public Service Corporation (CVPS) on December 19, 1990, tendered for filing four contracts under which CVPS has agreed to sell short term power and energy to several utilities. CVPS states that the price for each

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

20. Northern States Power Co.

[Docket No. ER91-169-000]

December 26, 1990.

Take notice that on December 20, 1990, Northern States Power Company, Eau Claire, Wisconsin (NSPW) tendered for filing: amendment No. 1 to the January 14, 1981, Wholesale Agreement between NSPW and the City of Barron (Barron); and proposed changes in its currently effective Experimental Control Period Demand Rider—City of Barron. NSPW states that it and Barron have executed Amendment No. 1 in order to enable Barron to take service from NSPW under the experimental rider. NSPW also states that it and Barron have agreed to certain changes in the rider to revise and clarify the arrangements under which the experimental service will be provided to Barron.

NSPW requests an effective date of January 1, 1991, for Amendment No. 1 and the revised rider.

A copy of the filing was served upon the City of Barron, Wisconsin.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

21. Century Power Corporation

[Docket No. ER91-170-000]

December 26, 1990.

Take notice that on December 20, 1990, Century Power Corporation (Century) tendered for filing an executed 1991 Power Sale Agreement between Century and San Diego Gas & Electric Company (San Diego). The 1991 Power Sale Agreement provides for the sale to San Diego of up to 228 MW of capacity

and associated energy during calendar year 1991 and establishes a framework for the negotiation of short-term transactions in subsequent years. Power sales under the 1991 Power Agreement are contingent on the availability of the San Juan Unit No. 3.

Century asks that the filing become effective as anticipated in the parties' agreement on January 1, 1991. Accordingly, waiver of notice is requested.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

22. Georgia Power Co.

[Docket No. ER91-171-000]

December 26, 1990.

Take notice that on December 21, 1990, Georgia Power Company ("Georgia Power") tendered for filing Revised and Restated Integrated Transmission System Agreements (the "Agreements") between Georgia Power and Oglethorpe Power Corporation (An Electric Membership Generation & Transmission Corporation), the Municipal Electric Authority of Georgia and the City of Dalton, Georgia. Georgia Power also filed a revised form of service agreement to its generic Integrated Transmission System tariff (Georgia Power's FERC Electric Tariff, First Revised Volume No. 3).

Georgia Power states that the Agreements include serveral refinements or improvements reflecting the four participants' experience in operating under the original ITSA for fifteen years. Georgia Power seeks an effective date of March 1, 1991.

Comment date: January 11, 1991, in accordance with Standard Paragraph E end of this notice.

23. Oklahoma Gas and Electric Co.

[Docket No. ER91-172-000]

December 26, 1990.

Take notice that on December 21, 1990, Oklahoma Gas and Electric Company (OG&E) tendered for filing an Offer of Settlement to Watonga, Oklahoma under which OG&E would reduce its rates contained in Rate Schedule WM-1 for a period of five years and guarantee no increase in base rates. As a result, OG&E and Watonga have entered into a new ten year Electric Service Agreement.

Copies of this filing have been served on each municipality to whom the Company supplies wholesale electric service, the Oklahoma Corporation Commission and the Arkansas Public Service Commission.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

24. Nantahala Power & Light Co.

[Docket No. ER91-173-000]

December 26, 1990.

Take notice that on December 21, 1990, Nantahala Power & Light Company (Nantahala) tendered for filing a Service Agreement Between Duke Power Company and Nantahala Power & Light Company (Service Agreement) and a Certificate of Concurrence submitted on behalf of Duke Power Company (Duke). The Service Agreement includes four service schedules for transactions involving Emergency Assistance, Energy Interchange, Short Term Power and Term Energy services.

Nantahala and Duke ask that the sixty (60) day notice requirement be waived so that the Agreement may be permitted to become effective on January 1, 1991.

Comment date: January 11, 1991, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the Comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 91-15 Filed 1-2-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP91-687-000, et al.]

ANR Pipeline Co., et al.; Natural Gas Certification Filings

Take notice that the following filings have been made with the Commission:

1. ANR Pipeline Co.

[Docket No. CP91-687-000]

December 20, 1990.

Take notice that on December 14, 1990, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP91-687-000 for a certificate of public convenience and necessity pursuant to section 7(c) of the Natural Gas Act for authority to enable ANR to implement a restructuring of its existing sales services, by replacing those services with a market based array of new sales, delivery, transportation and storage service alternatives, and for authority pursuant to section 7(b) to abandon ANR's existing sales services, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

ANR states that each of its sales customers would have the opportunity either to maintain or terminate its current sales service entitlement, or to structure a new combination of firm sales, transportation, storage and delivery services. ANR also proposes to establish a gas inventory charge (GIC) to compensate ANR for the cost of maintaining gas supplies to meet its new sales service obligations. ANR states that the proposed GIC pricing formula is a two-part, demand/commodity design and would replace ANR's current purchased gas adjustment mechanism, which ANR proposes to eliminate. ANR explains that the GIC would be at a negotiated level and would be paid only by customers that choose to remain sales customers, and only for that level of entitlement that they voluntarily request. ANR further explains that the gas commodity price would be individually negotiable on a monthly basis, but would always be capped by reference to a spot price index. ANR states the spot price cap would be derived from independent publications that reflect the cost of competitive alternate supplies in Louisiana, Oklahoma and Canada.

ANR explains that there are also options to negotiate a fixed commodity price, based upon certain purchase level commitments. Subject to the conditions set forth in it's restructuring proposal, ANR states that this GIC pricing mechanism would be the only means by which ANR would recover the inventory costs associated with its continuing requirement to maintain gas supply for its customers.

ANR also states that it is proposing to implement two new sales services, comprising Rate Schedules CD-1 and SGS-1, to replace its existing Rate Schedules CD-1, MC-1, SGS-1 and OS-1. ANR explains that Rate Schedules CD-1 and SGS-1 would incorporate an Annual Contract Quantity and a Winter Contract Quantity. ANR further explains that the new Rate Schedule CD-1 service would be available to any resale

customer, whereas the new Rate Schedule SGS–1 service would be available only to existing SGS–1 customers, and would be limited to a maximum contract demand of 6,138 dekatherms per day. ANR is requesting abandonment authorization for all existing Rate Schedules CD–1, MC–1, and SGS–1 sales service agreements, concurrent with the effective date of the new sales service agreements. ANR states that existing customers under Rate Schedules CD–1, MC–1 and SGS–1 have an initial right either to terminate all of their existing sales services from ANR, or to nominate the new Rate Schedules CD–1 or SGS–1 services in their place. In addition, those customers may nominate firm transportation under Rate Schedule FTS–1, and firm contract storage under Rate Schedule FSS (with associated firm transportation service under Rate Schedule FTS–1) Finally, ANR states that such customers may nominate the proposed firm Comprehensive Delivery Service under new Rate Schedule CDS. Although the existing sales service agreements are currently scheduled to expire on October 31, 1992, ANR is requesting that the new sales services (and abandonment of the existing sales services) become effective one year earlier, i.e., on November 1, 1991.

ANR states that Exhibit Z–1 to the application demonstrates that divertible gas supplies are sufficiently available for the Commission to find that ANR's firm sales markets are workably competitive. ANR also states that Exhibit Z–2 to the application describes in detail how the combination of ANR's firm transportation, firm storage and the proposed Rate Schedule CDS firm delivery service have been structured so as to constitute reasonable firm service substitutes for the transmission and storage services that are currently "embedded" in ANR's existing firm sales services.

ANR states that the new Rate Schedule CD–1 will incorporate a "firm standby transportation" feature. ANR explains that each month, any Rate Schedule CD–1 sales customer may elect to convert a specified level of its sales contract demand to firm standby transportation service. ANR further explains that this firm standby transportation service would allow customers to obtain third party gas supplies and have them delivered on a firm basis. ANR states that the non-gas rates and fuel use percentage for the delivery of gas purchased from ANR under Rate Schedule CD–1, and for gas purchased from others and delivered under Rate Schedule CD–1 firm standby transportation, are identical. ANR further states that the level of firm standby transportation capacity available from each geographic area on ANR's system in any year would be equivalent to the space reserved by ANR for peak day purchases of gas supply (i.e., exclusive of gas delivered from storage) to support its firm peak day sales service obligation.

Under the circumstances that are more specifically described in its tariff, ANR states that it has agreed to warrant the delivery of its sales gas, in recognition of the GIC demand charge payment being agreed to by its customers. ANR explains that pursuant to such warranty, if ANR fails to deliver sales gas, ANR has agreed to certain refunds and to the payment of liquidated damages in certain defined circumstances.

ANR states that each initial Rate Schedule CD–1 service agreement (which must be a term of at least 5 to 10 years) would incorporate an annual release quantity (ARQ) feature, which ARQ would be equal to the initial contract demand divided by the number of years in the initial term. ANR further states that this feature would enable ANR and Rate Schedule CD–1 customers to negotiate, on a good faith basis, the GIC demand charge that would be applicable therafter to the ARQ, and would also provide the customers with certain conversion and termination rights relative to the ARQ.

ANR also requests all necessary authorizations to implement certain transitional billing mechanisms. ANR states that such billing mechanisms relate to (a) The demand charges ANR incurs from its existing upstream gas suppliers, which ANR proposes to bill directly to its customers until it converts such sales services to transportation services, and if permitted by the Commission to include such converted costs in its Account No. 858; (b) requested authorization by ANR to refund or direct bill its sales customers for amounts up to the total balance in its FERC Account No. 191 as of the date ANR implements its GIC (subject to a one time adjustment to recover any out of the period costs), based on such customers' contract demand entitlements as such entitlements existed on October 31, 1990, limited to an aggregate total of $72 million; (c) requested authority by ANR to direct bill its current sales customers for actual gas costs incurred by ANR, to resolve, whether by settlement or by court order, all of ANR's pending billing disputes with its producers; and (d) the recovery, in ANR's non-gas rates, of the cost-of-service effect associated with the rate treatment of prepayments (Account No. 165) as finally determined by the Commission in ANR's pending rate proceeding in Docket No. RP89–161–000.

ANR states that it would be at risk for all gas costs or take-or-pay costs after the effective date of the GIC, except that ANR would continue to be entitled to collect take-or-pay related charges after the effective date of its GIC, either as a direct bill/surcharge, or as a component of ANR's non-gas rates, relative to litigation-exception buyout/buydown costs filed pursuant to Order No. 500, and other buyout/buydown costs included in filings submitted to the Commission pursuant to Order Nos. 500 and 528 prior to the effective date of the GIC.

ANR explains that it would continue to provide transportation services to its customers on an open access, non-discriminatory basis under its Rate Schedules FTS–1 and FTS–2 (firm transportation), and Rate Schedule ITS (interruptible transportation). In order to enhance the flexibility of its firm transportation service, ANR requests authority in its application to provide firm transportation customers with a new "point-to-point" receipt point option, in addition to the "catalog" receipt point option that is currently utilized. ANR explains that to enhance the flexibility of ANR's open access transportation services for all transportation customers, ANR is also proposing to reduce the notice period for a change in nominations from 48 hours to 24 hours. ANR explains that it would also continue to offer firm and interruptible contract storage services on an open access basis to its customers under Volume No. 3 of its FERC Gas Tariff (Rate Schedule FSS and DDS, respectively). ANR's sales customers would have conversion rights to Rate Schedule FTS–1 transportation service and to Rate Schedule FSS storage service under the ARQ options as described in its application, it is explained.

As part of the instant proposal, ANR proposes to offer to its Rate Schedule CD–1 customers a new comprehensive delivery service under Rate Schedule CDS to converting sales customers. ANR explains that Rate Schedule CDS is a bundled firm transportation and firm storage service, and is designed to provide an operational substitute for sales service for those customers who nominate such service. It is explained that Rate Schedules CDS customers

would have a year-round firm transportation access from ANR's supply areas and firm storage rights at specified levels.

ANR states that if either (a) A settlement of Docket No. RP89–161–000 or (b) the litigated outcome or settlement of any rate filing reflects the impact of the restructured services, then ANR would make a general rate filing not later than five years after the effective date of the RP89–161–000 settlement or the effective date of any such new rate filing, as applicable. Otherwise, ANR states that ANR has agreed with its customers that it will make a general rate filing not more than nineteen months after implementation of the restructured sales services. Thereafter, ANR states that it would make a rate filing to be effective not less than five years after the effective date of each of the immediately preceding rate filing(s). It is explained that such rate filing(s) would be limited to a review of only non-gas costs, including demand charges from upstream pipeline suppliers.

In addition to abandonment of its existing sales service agreements, ANR also requests pregranted abandonment of its new sales service obligations upon termination or conversion of the ARQ portion of the new service agreements. ANR states that customers would not be exposed to unwanted termination of their services, since under its new restructuring proposal, a sales customer has the right to convert the expiring ARQ portion of its sales service to a combination of firm transportation, firm storage or firm comprehensive delivery services. Furthermore, ANR states that all customers have one-way evergreen rights for such converted services, provided that any renewal periods are at least five years long.

Comment date: January 10, 1991, in accordance with Standard Paragraph F at the end of this notice.

2. United Gas Pipe Line Co.

[Docket No. CP91–682–000]

December 20, 1990.

Take notice that on December 13, 1990, United Gas Pipe Line (United), P.O. Box 1478, Houston, Texas 77251–1478, filed in Docket No. CP91–682–000 a request pursuant to §§ 157.205 and 157.211 of the Commission's Regulations for authorization to construct and operate an eight-inch tap and related facilities for transportation service to Valero Transmission Company (Valero), under United's blanket certificate issued in Docket No. CP82–430–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

United proposes to install the tap in Panola County, Texas. United estimates that it would deliver up to 100 Mcf per day to Valero at the proposed tap. United states that it is authorized in Docket No. ST88–209 to provide all of Valero's natural gas requirements for resale and distribution through Valero's billing area and the adjoining area. It is indicated that the effective service agreement for such service is dated September 14, 1987, and that the agreement provides for transportation to Valero under United's Rate Schedule ITS. United estimates that the tap would cost $44,500 and states that Valero would reimburse United for all costs resulting from the proposed installation.

United states that the proposed tap for Valero would not have an impact on United's curtailment plan since interruptible service is being provided to Valero pursuant to United's blanket certificate in Docket No. CP88–6–000 and under United's Rate Schedule ITS. United states that it has sufficient capacity to provide the service to Valero without detriment or disadvantage to United's existing customers and that United's tariff does not prohibit the addition of new delivery points.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of the notice.

3. Colorado Interstate Gas Co.

[Docket Nos. CP91–696–000, CP91–697–000, CP91–698–000]

December 20, 1990.

Take notice that Applicants filed in the respective dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[1]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicants and is summarized in the attached appendix.

Applicants state that each of the proposed services would be provided under an executed transportation agreement, and that Applicants would charge the rates and abide by the terms and conditions of the referenced transportation rate schedules.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

Applicant: Colorado Interstate Gas Company, Post Office Box 1087, Colorado Springs, Colorado 80944.

Blanket Certificate issued in Docket No. CP86–589–000.

[1] These prior notice requests are not consolidated.

Docket number (date filed)	Shipper name (type shipper)	Peak day [1] avg. annual	Points of		Start up date rate schedule	Related [2] dockets
			Receipt	Delivery		
CP91–696–000 (12–17–90)	Synder Oil Corp., d/b/a Roggen Gas Processing Company (Producer).	300 100 36,000	CO	CO	10–02–90, TI–1	ST91–2915–000
CP91–697–000 (12–17–90)	Interenergy Transmission Partners (Marketer).	10,000 5,000 1,825,000	WY	WY	09–17–90, TI–1	ST90–4966–000
CP91–698–000 (12–17–90)	Rangeline Corporation (Marketer).	10,000 1,000 365,000	OK	CO	09–01–90, TI–1	ST91–2950–000

[1] Quantities are shown in Mcf unless otherwise indicated.
[2] If an ST docket is shown, 120-day transportation service was reported in it.

4. U–T Offshore System, High Island Offshore System, High Island Offshore System, High Island Offshore System, High Island Offshore System,

Docket Nos. CP91–664–000, CP91–670–000, CP91–671–000, CP91–672–000, CP91–673–000

December 20, 1990.

Take notice that U–T Offshore System, P.O. Box 1396, Houston, Texas 77251, and High Island Offshore System, 500 Renaissance Center, Detroit, Michigan 48243, (Applicants) filed in the above-referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under the blanket certificates issued by the Commission's Order No. 509 corresponding to the rates, terms and conditions filed in Docket No. RP89–99–000 and Docket No. RP89–82–000, respectively, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[2]

[2] These prior notice requests are not consolidated.

Information applicable to each transaction, including the identify of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120–day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicants and is summarized in the attached appendix.

Comment date: February 4, 1991, in accordance with Standard Paragraph C at the end of this notice.

Docket number (date filed)	Shipper name (type)	Peak day, averge day, annual Mcf	Receipt [1] points	Delivery points	Contract date, rate schedule, service type	Related docket start up date
CP91–664–000 (12–13–90)	Tenngasco Corporation (Marketer).	580,000 580,000 211,700,000	OLA	LA	7–1–90 IT, Interruptible	ST91–3947–000, 10–17–90
CP91–670–000 (12–13–90)	Louis Dreyfus Energy Corp., (Producer).	566,892 566,892 206,915,580	OLA, OTX	OLA, OTX	5–1–90 IT, Interruptible	ST91–2982–000, 10–24–90
CP91–671–000 (12–13–90)	Philadelphia Electric Company, (Distributor).	565,000 565,000 206,225,000	OLA, OTX	OLA	4–1–90 IT, Interruptible	ST91–2985–000, 10–18–90
CP91–672–000 (12–13–90)	Consolidated Edison Co. of N.Y., Inc., (Distribution).	1,837,500 1,837,500 670,687,500	OLA, OTX	OLA, OTX	4–1–90 IT, Interruptible	ST91–2981–000, 10–17–90
CP91–673–000 (12–13–90)	Midwest Gas, (Distributor)	290,000 290,000 105,850,000	OLA, OTX	OLA, OTX	4–1–90 IT, Interruptible	ST91–2983–000, 10–27–90

[1] Offshore Louisiana and offshore Texas are shown as OLA and OTX.

5. Columbia Gulf Transmission Co.

[Docket No. CP91–681–000]

December 20, 1990.

Take notice that on December 13, 1990, Columbia Gulf Transmission Company (Columbia Gulf), 3805 West Alabama, Houston, Texas 77027, filed in Docket No. CP91–681 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Marathon Oil Company, a producer, under the blanket certificate issued in Docket No. CP86–239–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Columbia Gulf states that, pursuant to an agreement dated August 10, 1990, under its Rate Schedule ITS–2, it proposes to transport up to 1,500 MMBtu per day equivalent of natural gas. Columbia Gulf indicates that the gas would be received offshore Louisiana, and would be redelivered in Louisiana. Columbia Gulf further indicates that it would transport 1,000 MMBtu on an average day and 547,500 MMBtu annually.

Columbia Gulf advises that service under § 284.223(a) commenced September 1, 1990, as reported in Docket No. ST91–2741.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

6. United Gas Pipe Line Co.

[Docket No. CP91–683–000]

December 20, 1990.

Take notice that on December 13, 1990, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251–1478 filed in Docket No. CP91–683 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Louisiana State Gas Corporation, an intrastate pipeline, under the blanket certificate issued in Docket No. CP88–6–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

United States that, pursuant to an agreement dated October 1, 1988, under its Rate Schedule ITS, it proposes to transport up to 309,000 MMBtu per day equivalent of natural gas. United indicates that the gas would be transported from various receipt points and would be redelivered to various delivery points on its system. United further indicates that it would transport 309,000 MMBtu on an average day and 112,785,000 MMBtu annually.

United advises that service under § 284.223(a) commenced October 29, 1990, as reported in Docket No. ST91–3943.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

7. CNG Transmission Corp., Texas Gas Transmission Corp.

[Docket No. CP91–694–000]

December 20, 1990.

Take notice that on December 14, 1990, CNG Transmission Corporation (CNG), 445 West Main Street, Clarksburg, West Virginia 26301 and

Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP91–694–000 an application pursuant to sections 7(b) and (c) of the Natural Gas Act for an order granting permanent assignment of transportation rights, abandonment of CNG's sales services and abandonment of Texas Gas' sales services, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

More specifically, CNG and Texas Gas request: (1) An order granting the necessary certificate authorization to permit CNG to assign part of CNG's firm transportation rights on Texas Gas to certain of CNG's sales customers; (2) permission and approval of the abandonment of a part of the sales service currently rendered by CNG to these same customers; and (3) permission and approval of the abandonment of the sales service rendered by Texas Gas to CNG.

CNG and Texas Gas state that as an essential element of CNG's Settlement in Docket No. RP88–211, *et al.*, CNG agreed to assign part of its firm transportation capacity on Texas Gas to certain of its current Rate Schedule RQ customers, Niagara Mohawk Power Corporation, Rochester Gas and Electric Corporation, New York State Electric and Gas Corporation, The East Ohio Gas Company, The Peoples Natural Gas Company, The River Gas Company and Hope Gas, Inc. CNG and Texas Gas state that Texas Gas has agreed to this assignment.

CNG and Texas Gas state that CNG proposes to convert its remaining sales capacity on Texas Gas and assign a total of 147,620 dt per day to the above referenced customers. CNG states that these customers would then convert corresponding quantities on CNG to firm transportation. CNG requests authorization to make the assignment and abandon Rate Schedule RQ sales service for the converted quantities. Texas Gas further requests that the Commission grant authorization for Texas Gas to abandon its sales service to CNG, upon CNG's conversion.

CNG and Texas Gas state that the permanent capacity assignments would would permit the restructuring of services to CNG's customers. CNG and Texas Gas further state that the abandonment authorization for Rate Schecule RQ service is necessary for CNG to effect the assignments to its customers and their conversions on CNG, and that the abandonment of the Texas Gas service obligation is appropriate once CNG has elected to convert

Comment date: January 10, 1991, in accordance with Standard Paragraph F at the end of this notice.

8. Natural Gas Pipeline Co. of America

[Docket No. CP91–706–000]

December 20, 1990.

Take notice that on December 18, 1990, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP91–706 a request pursuant to § 157.205 f the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Marathon Oil Company, a producer, under the blanket certificate issued in docket No. CP86–582–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Natural states that, pursuant to an agreement dated October 1, 1990, under its Rate Schedule ITS, it proposes to transport up to 5,000 MMBtu per day equivalent of natural gas. Natural indicates that the gas would be transported from various receipt points on its system and would be redelivered to various delivery points on its system. Natural further indicates that it would transport 3,000 MMBtu on an average day and 1,095,000 MMBtu annually. Natural advises that service under § 284.223(a) commenced October 5, 1990, as reported in Docket No. ST91–2706.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

9. CanWest Gas Supply U.S.A., Inc.

[Docket No. CI91–5–000]

December 21, 1990.

Take notice that on November 6, 1990, CanWest Gas Supply U.S.A., Inc. (CanWest), c/o CanWest Gas Supply Inc., 1199 W. Hastings Street, Vancouver, British Columbia, Canada V6E 3T5, filed an application pursuant to sections 4 and 7 of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder for an unlimited-term blanket certificate with pregranted abandoment to authorize the sale for resale in interstate commerce of (1) All NGPA categories to NGA gas, (2) imported natural gas or liquified natural gas, and (3) natural gas sold under any existing or subsequently approved pipeline blanket certificate authorizing interruptible sales of surplus system supply, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Comment date: January 10, 1991, in accordance with Standard Paragraph J at the end of this notice.

10. Hadson Gas Systems, Inc.

[Docket No. CI86–255–003]

December 21, 1990.

Take notice that on December 11, 1990, Hadson Gas Systems, Inc. (Hadson) of 1001 30th Street, Northwest, Suite 340, Washington, DC 20007, filed an application pursuant to sections 4 and 7 of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder to amend its blanket certificate with pregranted abandonment previously issued by the Commission in Docket No. CI86–255–002 to authorize the sale for resale of any gas purchased from "non-first-sellers" including, to the extent necessary, sales for resale of gas purchased from intrastate pipelines and gas purchased from gas utility companies (LDC's), all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Comment date: January 10, 1991, in accordance with Standard Paragraph J at the end of this notice.

11. Shell Gas Pipeline Co.

[Docket No. CI91–16–000]

December 21, 1990.

Take notice that on November 30, 1990, Shell Gas Pipeline Company (Shell Gas), P.O. Box 2463, Houston, Texas 77002, filed in Docket No. CI91–16–000 a petition pursuant to rule 207 of the Commission's Rules of Practice and Procedure (18 CFR 385.207) for a declaratory order, requesting that the Commission disclaim jurisdiction over certain natural gas facilities that Shell Gas proposes to contruct in Mobile County, Alabama. Shell Gas states that the proposed facilities will be used to gather to the nearest interstate pipeline connection the natural gas to be produced by Shell Offshore, Inc. (Shell Offshore) and Amoco Production Company (Amoco) from their jointly-owned production facilities offshore Alabama, all as more fully set forth in the petition which is on file with the Commission and open to public inspection.

Shell Gas states that it is a wholly-owned subsidiary of Shell Oil Company and that its sole commercial activity thus far has been the development of several non-jurisdictional gathering lines, each connecting offshore production platforms operated by its

corporate affiliate, Shell Offshore, to jurisdictional transmission lines.

The proposed gathering line, the Yellowhammer Spur, will consist of (1) A 30-inch diameter line which will extend 2.9 miles from an interconnection on Transcontinental Gas Pipe Line Corporation's (Transco) existing 30-inch pipeline downstream of a Mobil Oil Exploration & Producing Southeast, Inc. gas processing plant in Coden, Mobile County, Alabama; and (2) a 0.2 mile 16-inch diameter plant residue line which will extend from the tailgate of the Yellowhammer gas processing plant (Yellowhammer plant), owned by Shell Offshore and Amoco, to a point just north of the plant.

Shell Gas states that design capacity for the 16-inch plant residue line will be 300,000 Mcf per day, while the 30-inch diameter segment will have a design capacity of 740,000 Mcf per day. It is stated that both segments have been designed for future expansion of the Yellowhammer plant and to accommodate additional gas production both from developments in Alabama state waters as well as the Outer Continental Shelf. Shell Gas states further that the design is also intended to preclude the need for additional construction projects as reserves are developed.

Shell Gas submits that initial gas production, which will flow to the Yellowhammer plant and through the Yellowhammer Spur, will come from reserves produced from the Norphlet formation underlying Blocks 113 and 132 in the Northwest Gulf Unit area in Alabama state waters (Fairway Field). Shell Gas states that these initial reserves will be delivered to the Yellowhammer plant via four parallel gathering lines which the Commission has previously declared non-jurisdictional gathering facilities.[3] Moreover, Shell Gas states that the reserves transported through these lines as well as the Yellowhammer Spur will initially be Shell Offshore and Amoco reserves exclusively. No compression facilities will be situated along the Fairway Field gathering lines or the Yellowhammer Spur. Initial compression will take place on the existing Transco pipeline. The maximum allowable operating pressure of the line will be 1200 psig, although initial operating pressure as gas leaves the plant will be purely a function of the pressure necessary to deliver gas on the Transco system. Thus, Shell Gas states that the operating pressure will be considerably less than 1200 psig. Finally, Shell Gas states that the Yellowhammer Spur will be located downstream of the Yellowhammer plant and that there will be no wells situated along the Yellowhammer Spur.

Comment date: January 18, 1991, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

[3] Shell Offshore Inc., 48 FERC ¶ 61,228 (1989).

12. Natural Gas Pipeline Co. of America

[Docket Nos. CP91-721-000, CP91-722-000, and CP91-723-000]

December 21, 1990.

Take notice that Natural Gas Pipeline Company of America, 701 East 22nd Street, Lombard, Illinois 60148 (Applicant) filed in the above-referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate issued in Docket No. CP86-582-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open for public inspection.[1]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicant and is summarized in the attached appendix.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

[1] These prior notice requests are not consolidated.

Docket number (date filed)	Shipper name (type)	Peak day average day annual MMBtu	Receipt points	Delivery points	Contract date rate schedule service type	Related docket start up date
CP91-721-000 (12-20-90)	Torch Energy Marketing, Inc. (Marketer).	100,000 50,000 18,250,000	Various	Various	07-19-89, ITS, Interruptible.	ST91-5579-000, 10-25-90.
CP91-722-000 (12-20-90)	Coastal Gas Marketing Company (Marketer).	50,000 25,000 9,125,000	Various	Various	10-25-90, ITS, Interruptible.	ST91-4255-000, 10-28-90.
CP91-723-000 (12-20-90)	Colony Natural Gas Corporation (Marketer).	100,000 40,000 14,600,000	Various	Various	03-27-90, ITS, Interruptible.	ST91-5212-000, 11-01-90.

13. Citrus Industrial Sales Co., Inc., Citrus Trading Corp., Citrus Marketing, Inc.

[Docket Nos. CI89-483-001, CI90-71-001, CI90-149-001 [5]]

December 21, 1990.

Take notice that on December 11, 1990, Citrus Industrial Sales Company, Inc., Citrus Trading Corp. and Citrus Marketing, Inc. (Applicants) of P. O. Box 1188, Houston, Texas 77551-1188, each filed an application pursuant to section 7 of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder to amend their blanket limited-term certificates with pregranted abandonment previously issued by the Commission in Docket Nos. CI89-483-000, CI90-71-000, and CI90-149-000, for terms expiring March 31, 1991, (1) To extend such authorizations for unlimited terms or for not less than one year from March 31, 1991, (2) to remove the conditions that the certificates are subject to the final rule in Docket No. RM87-5, and (3) to remove the rate restrictions applicable to sales for resale of surplus system supply gas purchased from Applicants' affiliated pipeline, all as more fully set forth in the application which are on file with the Commission and open for public inspection.

Comments date: January 10, 1991, in accordance with Standard Paragraph J at the end of this notice.

[5] This notice does not provide for consolidation for hearing of the several matters covered herein.

14. Trunkline Gas Co.

[Docket Nos. CP91-714-000, CP91-715-000]

December 21, 1990.

Take notice that on December 19, 1990, Trunkline Gas Company (Trunkline), P. O. Box 1642, Houston, Texas 77251-1642, filed in the above-referenced prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of two shippers under its blanket certificate issued in Docket No. CP86-586-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[6]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 84.223 of the Commission's Regulations, has been provided by Trunkline and is summarized in the attached appendix.

Comments date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

[6] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual Mcf	Receipt [1] points	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-714-000	Graham Energy Marketing (Marketer).	50,000 50,000 18,250,000	OLA, OTX, IL, LA, TN, TX.	IL	5-17-90, PT, Interruptible.	ST91-4347-000, 11-4-90.
CP91-715-000	Catamount Natural Gas, Inc. (Marketer).	150,000 25,000 54,750,000	OLA, OTX, IL, LA, TN, TX.	IL	4-20-90, PT, Interruptible.	ST91-4345-000, 11-1-90.

[1] Offshore Louisiana and offshore Texas are shown as OLA and OTX.

15. Texas Gas Transmission Corp.

[Docket Nos. CP91-710-000, CP91-711-000, and CP91-712-000]

December 2, 1990.

Take notice that Texas Gas Transmission Corporation, 3800 Frederica Street, Owensboro, Kentucky 42301, (Applicant) filed in the above-referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate issued in Docket No. CP88-686-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[1]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicant and is summarized in the attached appendix.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

[1] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual MMBtu	Receipt points [1]	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-710-000 (12-19-90)	Stellar Gas Company	20,000 12,000 5,110,000	OLA	OLA	11-6-90, IT, Interruptible.	ST91-5481, 11-9-90.
CP91-711-000 (12-19-90)	PSI Gas Marketing, Inc. (Marketer).	100,000 50,000 36,500,000	LA, IN, KY, TX, TN, OLA, OTX, IL, AR, OH.	KY, TN	5-31-90, IT, Interruptible.	ST91-5483, 11-15-90.
CP91-712-000 (12-19-90)	PSI Gas Marketing, Inc. (Marketer).	100,000 50,000 36,500,000	LA, IN, KY, TX, TN, OLA, OTX, IL, AR, OH.	KY, TN	5-31-90, IT, Interruptible.	ST91-5484, 11-9-90.

[1] Offshore Louisiana and offshore Texas are shown as OLA and OTX.

16. Texas Eastern Transmission Corp.

[Docket No. CP91-699-000]

December 21, 1990.

Take notice that on December 17, 1990, Texas Eastern Transmission Corporation (Texas Eastern), Post Office Box 2521, Houston, Texas 77252-2521 filed in Docket No. CP91-699-000 a request pursuant to §§ 157.205 an 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to provide a transportation service for Yankee Gas Services Company (Yankee), a local distribution company, under Texas Eastern's blanket certificate issued in Docket No. CP88-136-000, as amended in Docket No. CP88-136-007, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open for public inspection.

Texas Eastern states that pursuant to a service agreement dated October 1, 1991, under its Rate Schedule IT-1, it proposes to transport up to 400,000 MMBtu of natural gas per day on an interruptible basis for Yankee. Texas Eastern states that it would receive the gas at Texas Eastern's existing points of receipt on its system offshore and onshore Louisiana, Alabama, Arkansas, Illinois, Indiana, Kentucky, Missouri, Mississippi, New Jersey, New York,

Ohio, Pennsylvania, Tennessee, Texas and West Virginia. Texas Eastern states that it would then transport and redeliver subject gas, less applicable shrinkage, to an existing delivery point located in Westmoreland County, Pennsylvania and Clinton County, Pennsylvania. Texas Eastern indicates that the total volume of gas to be transported for Yankee on an average day would be 400,000 MMBtu and on an annual basis 146,000,000 MMBtu.

Texas Eastern states that it commenced service for Yankee on October 11, 1990, under # 284.223(a) as reported in Docket No. ST91-3051-000.

Comment date: February 4, 1991, in accordance with Standard Paragraph G at the end of this notice.

17. Encor Energy (America) Inc.

[Docket No. CI91-20-000]

December 21, 1990.

Take notice that on December 19, 1990, Encor Energy (America) Inc. (Encor), c/o Encor Inc., 645-7th Avenue SW., P.O. Box 2670, Station M, Calgary, Alberta, Canada T2P 3X9, filed an application pursuant to sections 4 and 7 of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder for an unlimited-term blanket certificate with pregranted abandonment to authorize the sale for resale in interstate commerce of (1) all NGPA categories of NGA gas, (2) imported natural gas or liquified natural gas, and (3) natural gas sold under any existing or subsequently approved pipeline blanket certificate authorizing interruptible sales of surplus system supply, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Comment date: January 10, 1991, in accordance with Standard Paragraph J at the end of this notice.

18. United Gas Pipe Line Co.

[Docket No. CP91-678-000]

December 24, 1990.

Take notice that on December 13, 1990, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP91-678-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation service on behalf of Endevco Oil & Gas Company (Endevco), under United's blanket certificate issued in Docket No. CP88-6-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

United requests authorization to transport, on an interruptible basis, up to a maximum of 36,050 MMBtu of natural gas per day for Endevco from receipt points located in Mississippi to delivery points located in Mississippi. United anticipates transporting 36,050 MMBtu on an average day and an annual volume of 13,158,250 MMBtu.

United states that the transportation of natural gas for Endevco commenced November 10, 1990, as reported in Docket No. ST91-4366-000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations and the blanket certificate issued to United in Docket No. CP88-6-000.

Comment date: February 7, 1991, in accordance with Standard Paragraph G at the end of this notice.

Texas Gas Transmission Corp., Texas Gas Transmission Corp., Colorado Interstate Gas Co.

[Docket Nos. CP91-725-000, CP91-726-000, and CP91-727-000]

December 24, 1990.

Take notice that Texas Gas Transmission Corporation, 3800 Frederica Street, Owensboro, Kentucky 42301, and Colorado Interstate Gas Company, P.O. Box 1087, Colorado Springs, Colorado 80944 (Applicants), filed in the above-referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under the blanket certificates issued in Docket No. CP88-686-000 and Docket No. CP86-589, *et al.*, respectively, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[1]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicants and is summarized in the attached appendix.

Comment date: February 7, 1991, in accordance with Standard Paragraph G at the end of this notice.

[1] These prior notice requests are not consolidated.

Docket number (date filed)	Shipper name (type)	Peak day, average day, annual MMBtu	Receipt points [1]	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-725-000 (12-20-90)	Polaris Pipeline Corporation (Intrastate Pipeline).	100,000 30,000 10,950,000	Various	various	ITS Interruptible	ST91-5482 11-16-90
CP91-726-000 (12-20-90)	Citrus Industrial Sales Company (end user).	50,000 50,000 18,250,000	Various	various	ITS Interruptible	ST91-5598 11-12-90
CP91-727 000 (12-20-90)	PSI, Inc.	25,000 5,000 18,250,000	WY	OK	ti-1 Interruptible	ST91-5334 11-1-90

[1] Offshore Louisiana and offshore Texas are shown as OLA and OTX.

20. United Gas Pipe Line Co.

[Docket Nos. CP91-637-000, CP91-638-000, CP91-639-000, CP91-640-000, CP91-641-000, and CP91-642-000]

December 24, 1990.

Take notice that on December 11, 1990, United Gas Pipe Line Company, P.O. Box 1478, Houston, Texas 77251-1478, filed in the respective dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under its blanket certificate issued in Docket No. CP88-6-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the prior notice requests which are on file with the Commission and open to public inspection.[9]

A summary of each transportation service which includes the shippers identity, the peak day, average day and annual volumes, the receipt point(s), the delivery point(s), the applicable rate schedule, and the docket number and service commencement date of the 120-day automatic authorization under § 284.223 of the Commission's Regulations is provided in the attached appendix.

Comment date: February 7, 1991, in accordance with Standard Paragragph G at the end of this notice.

[9] These prior notice requests are not consolidated.

Docket number (date filed)	Applicant	Shipper name	Peak day [1] avg. annual	Points of		Start up date, rate schedule	Related [2] dockets
				Receipt	Delivery		
CP91-637-000 (12-11-90)	United Gas Pipe Line Company.	Midcon Marketing Corporation.	721,000 721,000 263,165,000	AL, LA, MS, Offshore LA, OK, UT.	AL, LA, MS, Offshore, LA FL, TX.	11-8-90, ITS	CP88-6-000 ST91-3944-000
CP91-638-000 (12-11-90)	United Gas Pipe Line Company.	Penzoil Gas Marketing Company.	309,000 309,000 112,785,000	LA, MS, TX	AL, FL, LA, MS, TX	10-26-90, ITS	CP88-6-000 ST91-2964-000
CP91-639-000 (12-11-90)	United Gas Pipe Line Company.	Texaco Gas Marketing Company.	206,000 206,000 75,190,000	AL, LA, MS, Offshore LA.	AL, FL, LA, MS	11-5-90, ITS	CP88-6-000 ST91-3946-000
CP91-640-000 (12-11-90)	United Gas Pipe Line Company.	Rally Pipeline Corporation.	58,710 58,710 21,429,150	LA, TX	LA, MS, TX	10-1-90, ITS	CP88-6-000 ST91-2970-000
CP91-641-000 (12-11-90)	United Gas Pipe Line Company.	Oryx Gas Marketing Ltd Partnership.	61,800 61,800 22,557,000	LA, MS, TX	LA, MS, TX, AL, FL	10-3-90, ITS	CP88-6-000 ST91-1762-000
CP91-642-000 (12-11-90)	United Gas Pipe Line Company.	Segull Marketing Services, Inc..	515,000 515,000 187,975,150	AL, LA, MS, Offshore LA, TX.	AL, LA, MS, FL, TX	11-8-90, ITS	CP88-6-000 ST91-3945-000

[1] Quantities are shown in MMBtu unless otherwise indicated.
[2] The CP docket corresponds to applicant's blanket transportation certificate. If an ST docket is shown, 120-day transportation service was reported in it.

21. Green Canyon Pipe Line Co., Green Canyon Pipe Line Co., Transcontinental Gas Pipe Line Corp. Mid Louisiana Gas Co.

[Docket Nos. CP91-717-000, CP91-718-000, CP91-719-000, CP91-720-000]

December 24, 1990.

Take notice that the above referenced companies (Applicants) filed in the respective dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of various shippers under blanket certificates issued pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the prior notice requests which are on file with the Commission and open to public inspection.[10]

Information applicable to each transaction including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day, and annual volumes, and the docket numbers and initiation dates of the 120-day transactions under § 284.223 of the Commission's Regulations has been provided by the Applicants and is included in the attached appendix.

The Applicants also state that they would provide the service for each shipper under an executed transportation agreement, and that the Applicants would charge rates and abide by the terms and conditions of the referenced transportation rate schedules.

Comment date: February 7, 1991, in accordance with Standard paragraph G at the end of this notice.

[10] These prior notice requests are not consolidated.

Docket number (date filed)	Applicant	Shipper name	Peak day [1] avg. annual	Points of		Start up date, rate schedule	Related [2] dockets
				Receipt	Delivery		
CP91-717-000 12-19-90	Green Canyon Pipe Line Co. P.O. Box 1396, Houston, TX 77251.	Consolidated Edison Company of New York, Inc.	219,000Dt 219,000Dt 79,935,000Dt	Off LA	Off LA	10-18-90, IT	CP89-515-000 ST91-5223-000
CP91-718-000 12-19-90	Green Canyon Pipe Line Co. P.O. Box 1396, Houston TX 77251.	Texaco Gas Marketing, Inc..	60,000Mcf 60,000Mcf 21,900,000Mcf	Off LA	Off LA	10-18-90, ET	CP89-515-000 ST91-5225-000

Docket number (date filed)	Applicant	Shipper name	Peak day [1] avg. annual	Points of		Start up date, rate schedule	Related [2] dockets
				Receipt	Delivery		
CP91-719-000 12-19-90	Transcontinental Gas Pipe Line Corp. P.O. Box 1396, Houston, TX 77251.	Williams Gas Marketing Company.	500,000Dt 100,000Dt 36,500,000Dt	Off LA, Off TX, TX	LA	10-26-90, IT	CP88-328-000 ST91-4980-000
CP91-720-000 12-20-90	Mid Louisiana Gas Company, Inc. Five Post Oak Park, Suite 800, Houston, TX 77027.	Chevron USA Inc.	15,000 15,000 5,475,000	Off LA	LA	11-1-90, IT	CP86-214-000 ST91-5469-000

[1] Quantities are shown in MMBtu unless otherwise indicated.
[2] The CP docket corresponds to applicant's blanket transportation certificate. If an ST docket is shown, 120-day transportation service was reported in it.

22. Tennessee Gas Pipeline Co.

[Docket No. CP91-716-000]

December 24, 1990.

Take notice that on December 19, 1990, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed an application with the Commission in Docket No. CP91-716-000 pursuant to section 7(b) of the Natural Gas Act (NGA), requesting permission and approval to abandon a natural gas transportation service for Columbia Gas Transmission Corporation (Columbia), all as more fully set forth in the application which is open to public inspection.

Tennessee states that a Commission order issued February 6, 1963, in Docket No. CP62-14 (29 FPC 244) authorized it to transport and deliver up to 35,000 Mcf of natural gas per day to Manufacturers Light and Heat Company, now succeeded in interest by Columbia, at Tennessee's Unionville, Pennsylvania, delivery point. Tennessee transported natural gas under a May 1, 1963, contract filed as its FERC Rate Schedule T-5. Tennessee states that this contract had a November 1, 1979, expiration date and that Columbia notified Tennessee via a July 3, 1985, letter that it wished to terminate the contract. Tennessee also states that it has not made any natural gas deliveries for Columbia under this rate schedule since some time prior to the July 3, 1985, letter. No facilities would be affected by Tennessee's proposed abandonment.

Comment date: January 14, 1991, in accordance with Standard Paragraph F at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

J. Any person desiring to be heard or make any protest with reference to said filings should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426 a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, .214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 91-16 Filed 1-2-91; 8:45 am]

BILLING CODE 6717-01-M

Establishment of Performance Review Board; Names of Board Members

Section 4314(c) of title 5, United States Code (as amended by the Civil Service Reform Act of 1978), requires that the Federal Energy Regulatory Commission establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more Performance Review Boards to review, evaluate, and make final recommendations on performance appraisals assigned to members of the Senior Executive Service in the Commission. The Performance Review

Board also makes written recommendations to the Chairman, Federal Energy Regulatory Commission, regarding Senior Executive Service performance bonuses, awards and performance-related actions.

Section 4314(c) of title 5, United States Code requires that notices of appointment of Performance Review Board members be published in the Federal Register. The following persons have been appointed to serve on the Performance Review Board standing register for the Federal Energy Regulatory Commission: Card, Kathleene B.; Springer, Fred E.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 91-17 Filed 1-2-91; 8:45 am]

BILLING CODE 6717-01-M

Office of Fossil Energy

[FE Docket No. 90-74-NG]

Goetz Energy Corp.; Conditional Order Granting Authorization To Export and Import Natural Gas to and From Canada

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of a conditional order granting authorization to export and import natural gas to and from Canada.

SUMMARY: The Office of Fossil Energy of the Department of Energy gives notice that it has issued a conditional order in FE Docket No 90-74-NG granting authorization to Goetz Energy Corporation (Goetz) to export to Canada at St. Clair, Michigan, up to 25,000 Mcf per day of natural gas plus such additional gas as may be required for fuel use, and to import from Canada at Grand Island, New York, up to 25,000 Mcf per day of natural gas over a fifteen year period. The company intends to utilize firm transportation service on the proposed Empire State Pipeline, whose applications for construction currently are pending before the New York State Public Service Commission and the Federal Energy Regulatory Commission (FERC). A final opinion and order will be issued when the final environmental analysis being prepared by the FERC is completed and the DOE has independently reviewed this analysis according to its National Environmental Policy Act (NEPA) responsibilities.

A copy of this order is available for inspection and copying in the Office of Fuels Program Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, December 28, 1990.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 91-50 Filed 1-2-91; 8:45 am]

BILLING CODE 6450-01-M

[ERA Docket No. 87-11-NG]

Thermal Exploration, Inc.; Order Amending Authorization To Import Natural Gas

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of an order amending blanket authorization to import natural gas to Canada.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice that it has issued an order amending Thermal Exploration, Inc.'s (Thermal) authorization to import natural gas from Canada. DOE/ERA Opinion and Order No. 168, issued on April 27, 1987, in Docket No. 87-11-NG was amended to authorize Thermal to import up to 9,000 Mcf of liquefied natural gas which would be transported by truck from Vancouver, British Columbia, Canada, to Tacoma, Washington.

A copy of this order is available for inspection and copying in the office of Fuels Programs Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, December 28, 1990.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 91-51 Filed 1-2-91; 8:45 am]

BILLING CODE 6450-01-M

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

Supervisory Policy Statement Concerning Selection of Securities Dealers, Securities Portfolio Policies and Strategies and Unsuitable Investment Practices, and Stripped Mortgage-Backed Securities, Certain CMO Tranches, Residuals, and Zero-Coupon Bonds

AGENCY: Federal Financial Institutions Examination Council.

ACTION: Request for comment.

SUMMARY: The five member agencies of the Federal Financial Institutions Examination Council (the "FFIEC"), which include the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), the Office of the Comptroller of the Currency ("OCC"), and the Office of Thrift Supervision ("OTS") (collectively, the "Agencies"), are proposing to update and revise the Supervisory Policy on the "Selection of Securities Dealers and Unsuitable Investment Practices" which was approved in April 1988 (the "April 1988 Supervisory Policy"). The proposed revised policy addresses the selection of securities dealers, requires depository institutions to establish prudent policies and strategies for securities transactions, defines securities trading or sales practices that are viewed by the Agencies as being unsuitable when conducted in an investment portfolio, indicates characteristics of loans held for sale or trading, and denotes certain types of securities with volatile price or other high risk characteristics that are generally not suitable investments for depository institutions.

The FFIEC's April 1988 Supervisory Policy was adopted by the FRB, FDIC, NCUA, and OCC. The OTS has issued guidance with respect to these issues in Thrift Bulletin 12, "Mortgage Derivative Products and Mortgage Swaps" and Thrift Bulletin 41, "Interim Guidelines for Securities Portfolio Policies and Strategies." If approved by the FFIEC, the revised Supervisory Policy would supersede the earlier version and the FFIEC would recommend to its member agencies that they adopt the revised policy. In the meantime, the member agencies will continue to apply their current supervisory policies on securities to the institutions they examine. In the interest of achieving uniformity among the member agencies in this area, the FFIEC is soliciting comments on the proposed changes to the April 1988 Supervisory Policy.

DATES: Comments must be received by February 4, 1991.

ADDRESSES: Comments should be directed to Robert J. Lawrence, Executive Secretary, Federal Financial Institutions Examination Council, 1776 G Street, NW., suite 850B, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: At the FRB: Rhoger H. Pugh, Manager, Policy Development, Division of Banking Supervision and Regulation (202) 728-

5883; Charles H. Holm, Senior Accountant, Division of Banking Supervision and Regulation (202) 452–3502. At the FDIC: Robert F. Storch, Chief, Accounting Section, Division of Supervision, (202) 898–8906; William A. Stark, Assistant Director, Division of Supervision, (202) 898–6972. At the NCUA; Charles Felker, (202) 682–9640. At the OCC: Owen Carney, Senior Advisor for Investment Securities, (202) 447–1901. At the OTS: John M. Frech, Senior Accountant, Accounting Policy, (202) 906–5649.

SUPPLEMENTARY INFORMATION: The principal revisions and additions that the FFIEC is proposing to its April 1988 Supervisory Policy are summarized as follows:

Section I: Selection of Securities Dealers

Management of depository institutions must have sufficient knowledge about the securities firms, and personnel with whom they are doing business in order to conduct safe and sound securities transactions. The revised policy statement adds guidance providing that the board should also establish and periodically review dollar limits and limits on the types of transactions to be executed with each authorized securities firm.

Section II: Securities Portfolio Policies and Strategies and Unsuitable Investment Practices

The April 1988 Supervisory Policy described characteristics of trading and gains trading, and stated that such activities were not suitable when conducted in a depository institution's investment portfolio. The revised Supervisory Policy adds guidance for safe and sound management of securities portfolios and activities, adds and defines a held for sale supervisory reporting classification and revises and adds to the list of unsuitable investment practices. The additions are described in more detail as follows:

(1) The additions provide that the board of directors should understand and approve the securities portfolio policy and review management's strategies and securities activities. Safety and soundness guidance for securities activities was added that increases the oversight responsibility of the board of directors. The strategies and securities activities must be reviewed no less than quarterly by the board of directors for consistency with the institution's portfolio policy and strategies. Also, the board of directors should establish appropriate systems and internal controls to ensure that securities activities are consistent with its policies and management's strategies.

(2) Safety and soundness documentation requirements were added that require the board of directors to document its approval of the overall portfolio policy, and require management to document its strategies for significant security portfolios.

(3) The additions describe the proper supervisory reporting of securities activities and describes the characteristics of securities trading, held for sale, and investment activities. The additions require securities holdings that do not meet the supervisory reporting criteria for either investment or trading portfolios to be reported as held for sale. Also, securities held for sale must be reported at the lower of cost or market value. The additions further provide that it is an unsafe and unsound practice to report securities held for sale using reporting standards applicable to securities held for investment.

(4) The additions provide that the substance of an institution's securities activities will determine whether securities reported as held for investment are, in reality, held for trading or for sale. Seven factors have been added to the policy statement that must be considered when evaluating whether the reporting of a depository institution's securities holdings is consistent with management's intent and actions. The examiner is instructed to scrutinize the pattern of securities activities to determine whether securities reported as held for investment are, in reality, held for sale or for trading.

(5) The policy statement was revised to include loans and provides that loans are required to be reported at the lower of cost or market value when an institution holds the loans for resale, or demonstrates a pattern of sales transactions that indicates that management does not have the intent or ability to hold the loans for investment purposes.

(6) In the list of nine unsuitable investment practices;

Item 5. Repositioning Repurchase Agreements: was clarified to allow for safe and sound use of repurchase agreements to fund securities held for investment;

Item 7. "Adjusted Trading" or "Bond Swapping": was added;

Item 8. Delegation of Discretionary Investment Authority: was added; and

Item 9. Covered Calls: was added.

Section III: Stripped Mortgage-Backed Securities, Certain CMO Tranches, Residuals, and Zero-Coupon Bonds

Section III incorporates substantial additions to the April 1988 Supervisory Policy. That policy statement provided that the acquisitions of the various forms of zero coupon, stripped obligations, and asset backed securities residuals will receive increased regulatory attention and may be considered unsuitable. The following items describe the additions to the April, 1988 Supervisory Policy:

(1) High-risk collateralized mortgage obligation ("CMO") tranches, as defined in this section, have been added to the types of securities that are generally not suitable investments for depository institutions.

(2) Depository institutions that own or plan to purchase stripped mortgage-backed securities ("SMBSs"), high-risk CMO tranches, and residuals must be able to perform interest rate risk and price sensitivity analyses. It is unsafe and unsound for management to rely on analyses and documentation obtained from an outside party without preparing independent internal analyses.

(3) SMBSs, high-risk CMO tranches, and residuals that have not been purchased to reduce the interest rate risk of the institution and of designated assets or that failed to reduce the interest rate risk of the institution and of designated assets will be considered speculative holdings. The examiner will review the institution's documentation of the internal analyses prepared prior to purchase and prepared quarterly thereafter to demonstrate that the securities were effective in reducing interest rate risk.

(4) The purchase or retention of speculative holdings of SMBSs, high-risk CMO tranches, and residuals and disproportionately large holdings of long-term zero-coupon bonds is contrary to safe and sound practices. Examiners may criticize such holdings and seek their orderly divestiture, resulting in the reporting of the securities at the lower of cost or market value until their disposal.

Although the FFIEC invites comments on all aspects of the proposed updates to its April 1988 Supervisory Policy, the FFIEC particularly requests comments on the following specific issues relating to section III of the Supervisory Policy. The FFIEC is not soliciting comments on any guidance in the proposed policy statement that reiterates guidance in the April 1988 Supervisory Policy.

(1) Whether section III of the Supervisory Policy should define certain CMO tranches and residuals in precise

quantitative terms. In this regard, the FFIEC is inviting commenters to submit quantitative criteria that could be used to separate "high-risk" CMO tranches from all other CMO tranches. If possible, commenters should estimate the effect that these criteria will have on depository institutions and financial markets.

(2) Whether the policy statement should be expanded to prohibit depository institutions from holding SMBSs, high-risk CMO tranches and residuals as investments due to their extreme price volatility and other factors.

(3) If the policy statement permits depository institutions to hold SMBSs, high-risk CMO tranches and residuals as interest rate risk reduction tools, what statistical or analytical methods can be employed by examiners and depository institutions to determine whether, prior to its purchase, a security will reduce the interest rate risk of the institution and of designated assets and whether, subsequent to its purchase, the security has actually accomplished that objective?

(4) What will be the economic and financial impact on financial markets and depository institutions of implementing the changes in Section III of the proposed policy statement?

The text of the proposed revised Supervisory Policy follows.

Purpose

This supervisory policy informs insured depository institutions about:

- Recommended procedures to be used in the selection of a securities dealer;
- The need to document and implement prudent policies and strategies for securities, whether they are held for investment, for sale or for trading purposes;
- Securities trading or sales practices that are viewed by the federal financial institution regulators as being unsuitable when conducted in an investment portfolio. Securities held for trading must be reported at market value and securities held for sale must be reported at the lower of cost or market value; and
- Types of securities with volatile price or other high risk characteristics that *are generally not* suitable investments for depository institutions. Such securities may be subject to supervisory criticism, and depository institutions may be directed to establish a plan for disposal.

The guidance set forth in this supervisory policy statement with respect to securities held for sale or trading is also applicable to loans held for sale or trading.

Background

This supervisory policy supersedes an April 1988 supervisory policy statement on the "Selection of Securities Dealers and Unsuitable Investment Practices" that was developed by the Federal Financial Institutions Examination Council ("FFIEC"). The earlier policy statement dealt with certain regulatory concerns pertaining to speculative and other inappropriate activities improperly carried out in a depository institution's investment portfolio. This supervisory policy statement updates its predecessor by providing additional information on securities practices that are inappropriate for an investment account and emphasizes the requirement that securities held for sale, as well as loans held for sale, should be reported at the lower of cost or market value. It also incorporates guidance for stripped mortgage backed securities, certain CMO tranches, residuals, and zero coupon bonds.

In a number of cases where depository institutions engaged in speculative or other non-investment activities in their investment portfolios, the portfolio managers seemed to place undue reliance on the advice of a securities sales representative. Some depository institutions have failed because of their speculative securities activities. Other institutions have had their earnings or capital impaired and the practical liquidity of their securities eroded by market value depreciation. Many of the investment and speculative problems may have avoided had sound procedures been followed before using certain securities dealers.

Depository institutions must document prudent portfolio policies and strategies for loans and debt securities held as assets (hereinafter referred to as portfolio policy or strategies). The depository institution's board of directors is responsible for establishing and approving the portfolio policy. Securities must be recorded and reported in accordance with generally accepted accounting principles (GAA) [1] consistent with the institution's intent to trade, to hold for sale or to hold for investment, and the use of amortized cost is prohibited for certain transactions.

Stripped mortgage backed securities, certain CMO Tranches, and residuals *are generally not* suitable investments *for depository institutions.* When holdings of these securities are not used to reduce interest rate risk, they should be disposed of in an orderly manner and reported on a lower of cost or market value basis.

Similarly, disproportionately large holdings of long-term zero coupon bonds are not suitable investments. Accordingly, they should be disposed of in an orderly manner and reported on a lower of cost or market value basis.

Detailed guidance is provided in the following three sections.

Section I: Selection of Securities Dealers

Many depository institutions rely on the expertise and advice of a securities sales representative for recommendations concerning proposed investments and investment strategies and for the timing and pricing of securities transactions. Many of the investment problems experienced by depository institutions may have been avoided had sound procedures been followed before using certain securities dealers.

It is essential that the management of depository institutions have sufficient knowledge about the securities firms and personnel with whom they are doing business. A depository institution should not engage in securities transactions with any securities firm that is unwilling to provide complete and timely disclosure of its financial condition. Management should review the securities firm's financial statements and evaluate the firm's ability to honor its commitments before entering into transactions with the firm and periodically thereafter. An inquiry into the general reputation of the dealer also is necessary. The board of directors (or an appropriate committee of the board [2]) should develop a list of securities firms with whom management is authorized to do business. The board should also establish and periodically review dollar limits and limits on the types of transactions to be executed with each authorized securities firm. At a minimum depository institutions should consider the following in selecting and retaining a securities firm:

(1) The ability of the securities dealer and its subsidiaries or affiliates to fulfill commitments as evidenced by capital strength, liquidity and operating results. This evidence should be gathered from current financial data, annual reports, credit reports, and other sources of financial information.

[1] In those cases where a difference in the interpretation of GAAP arises between an institution and its primary supervisory agency, the supervisory agency will require the institution to prepare its supervisory reports in accordance with the agency's interpretation.

[2] An appropriate committee of the board is a committee whose membership includes outside directors or whose actions are subject to review and ratification by the board of directors.

(2) The dealer's general reputation for financial stability and fair and honest dealings with customers. Other depository institutions that have been or are currently customers of the dealer should be contacted.

(3) Information available from State or Federal securities regulators and securities industry self-regulatory organizations, such as the National Association of Securities Dealers, concerning any formal enforcement actions against the dealer, its affiliates or associated personnel.

(4) The background of the dealer's sales representative with whom business will be conducted to determine their expertise.

In addition, the board of directors (or an appropriate committee of the board) must determine that the depository institution has established appropriate procedures to obtain and maintain possession or control of securities purchased. In this regard, purchased securities and repurchase agreement collateral should only be left in safekeeping with selling dealers when: (1) The board of directors is completely satisfied as to the credit worthiness of the securities dealer and (2) the aggregate market value of securities held in safekeeping in this manner is within credit limitations that have been approved by the board of directors (or an appropriate committee of the board) for unsecured transactions (see the October 1985 FFIEC Policy Statement entitled "Repurchase Agreements of Depository Institutions with Securities Dealers and Others"). Federal credit unions, when entering into a repurchase agreement with the broker/dealer, are not permitted to maintain the collateral with the broker/dealer (see part 703 of the National Credit Union Administration rules and regulations).

As part of the process of managing a depository institution's relationships with securities dealers, the board of directors may wish to consider prohibiting employees who are directly involved in purchasing and selling securities for the depository institution from engaging in personal securities transactions with these same securities firms without the specific prior approval of and periodic review by the board. The board may also wish to adopt a policy applicable to directors, officers, and employees concerning the receipt of gifts, gratuities, or travel expenses from approved securities dealer firms and their personnel (also see in this connection the Bank Bribery Act, 18 U.S.C. 215, and interpretive releases).

Section II: Securities Portfolio Policies and Strategies and Unsuitable Investment Practices

Securities activities must be conducted in a safe and sound manner. The depository institution's board of directors should understand and approve the portfolio policy and review management's strategies and securities activities. Securities activities should be carried out consistently with the portfolio policy and strategies. The institution's board of directors or an appropriate committee of the board of directors should also oversee the establishment of appropriate systems and internal controls that will ensure that securities activities are consistent with the board-approved portfolio policy and management's strategies.

Policies and Strategies

A portfolio policy is a written description of authorized securities activities and the goals and objectives the institution expects to achieve through its securities activities. A strategy is a written description of the way management intends to achieve these goals and objectives. The portfolio policy and strategies should be consistent with the institution's overall business plan which may involve trading, held for sale, and investment activities. However, securities trading activity should only be conducted in a closely supervised trading account by institutions *with* strong capital and earnings. Each institution's portfolio policy and strategies must describe anticipated investment activities and either identify anticipated trading and held for sale activities or state that the institution will not enter into any trading or held for sale activities.

The board of directors must document its approval of the overall portfolio policy for the institution. Management must also document its strategies for significant security portfolios. The policy must be approved periodically (but no less than annually) by the institution's board of directors. Furthermore, the institution's strategies and securities activities must be reviewed no less than quarterly by the institution's board of directors or an appropriate committee thereof to ensure that securities activities are consistent with the strategies of the institution and that the strategies remain consistent with the portfolio policy.

The portfolio investment policy should take into account such factors as the institution's asset/liability position, asset concentrations, interest rate risk and market volatility, liquidity, credit risk, management's capabilities and desired rate of return. If the board of directors of a depository institution fails to establish clear policies and strategies related to securities and lending activities or if an institution fails to adhere to the policies and strategies established by its board of directors, examiners may determine that some or all securities and loans are held for sale or held for trading. Held for sale securities must be reported at the lower of cost or market value and trading activities must be marked to market.

Proper Reporting of Securities Activities

Depository institution investment portfolios are maintained to provide earnings consistent with the safety factors of quality, maturity, marketability, and risk diversification. Securities that are purchased with these objectives may be reported at their amortized cost only when the depository institution has both the intent and ability to hold the assets for investment purposes. Transactions entered into in anticipation of taking gains or short-term price movements are not suitable as investment portfolio practices. Such transactions should only be conducted in a closely supervised securities trading account (by institutions that have strong capital and earnings). Securities holdings that do not meet the reporting criteria for either investment or trading portfolios must be designated as held for sale.

Trading in the investment portfolio is characterized by a high volume of purchase and sale activity that, when considered in light of a short holding period for securities, clearly demonstrates management's intent to profit from short-term price movements. In such situations, a failure to follow accounting and reporting standards applicable to trading accounts may result in a misstatement of the depository insitution's income and other published financial data and the filing of inaccurate regulatory reports. It is an unsafe and unsound practice to report securities holdings that result from trading transactions using reporting standards that are intended for securities held for investment purposes. Securities held for trading must be reported at market value, with unrealized gains and losses recognized in current income. Price used in periodic re-valuations should be obtained from sources that are independent of the securities dealer doing business with the depository institution. When prices are internally estimated by and obtained from the portfolio manager (when reliable external price quotations are not available), they should be reviewed

by persons independent of the portfolio management function.

In other cases, a pattern of intermittent sales transactions in the investment portfolio may suggest that securities ostensibly held as long-term portfolio assets are actually held for sale. Securities held for sale must be reported at the lower of cost or market value with unrealized losses (and recoveries of unrealized losses) being recognized in current income. It is an unsafe and unsound practice to report securities held for sale using reporting standards that are intended for securities held for investment purposes. It is the substance of an institution's securities activities that deremines whether securities reported as being held as investment portfolio assets are, in reality, held for trading or for sale. Examiners will particulary scrutinize institutions that exhibit a pattern or practice of reporting significant amounts of realized gains on sales from their investment portfolio and that have significant amounts of unrecognized losses. If in the examiner's judgment such a practice has occurred, some or all of the securities reported as held for investment will be designated as held for sale or for trading. On the other hand, infrequent investment portfolio restructuring activities that are carried out in conjunction with a prudent overall business plan and that do not result in a pattern of gains being realized and losses being deferred will generally be viewed as an acceptable practice and thus would not result in the re-designation of securities held for investment as securities held for trading or for sale.

A number of factors must be considered when evaluating whether the reporting of a depository institution's securities holdings is consistent with management's intent for such holdings. Some of the factors for each reporting period include:

(1) The dollar amount of gains realized from sales in relation to the dollar amount of losses realized from sales and in relation to unrealized losses for other investment portfolio securities;

(2) The dollar amount of gains and losses realized from sales in relation to net income and capital;

(3) The number of sales transactions resulting in gains and the number resulting in losses;

(4) The gross dollar volume of securities purchases and sales;

(5) The rapidity of turnover, including consideration of the length of time securities are owned prior to sale, and the length of time securities are held after an unrealized gain is evident; and

(6) The reasons for the depository institution engaging in specific transactions, and whether these reasons are consistent with the portfolio policy and strategies.

Some of the factors that also must be considered to evaluate the depository institution's ability to continue to hold the securities include:

(1) The source and availability for funding for commitments;

(2) The ability to meet margin calls and over-collateralization requirements related to leveraged holdings;

(3) Limitations such as capital requirements, the legality of certain securities holdings, liquidity requirements, legal lending limits, and prudential concentration limits; and

(4) The ability to continue as a going-concern and to liquidate assets in the normal course of business.

Reporting of Loans Held for Sale or Trading

Historically, depository institutions have tended to hold loans until maturity. Consequently, the application of lower of cost or market accounting to portions of the loan portfolio has not been an issue except in those depository institutions that have regularly originated loans for purposes of subsequent resale. Nevertheless, as with debt securities, reporting loans at the lower of cost or market is required when the institution does not have both the intent and ability to hold these loans for investment purposes.

The factors listed above should also be considered when evaluating whether the reporting of loans is consistent with management's intent and ability to hold the loans. A pattern of originating loans at yields below market and subsequent sale at par once the yield approximates market is another factor that should also be considered when evaluating management's intent.

Unsuitable Investment Practices

The following activities raise specific supervisory concerns. The first six practices are considered unsuitable when they occur in a depository institution's investment portfolio. Such practices should only be conducted in an appropriately controlled and segregated trading or held-for-sale portfolio. The seventh practice is wholly unacceptable under all circumstances. Practices eight and nine involve an institution's transfer of control over individual assets, segments of the portfolio, or the entire portfolio to persons or companies unaffiliated with the institution. In such situations, the depository institution clearly no longer has the ability to hold the affected securities for investment purposes and such securities should be reported as held for sale. In addition, certain of the following practices may violate state law in certain states. State-chartered depository institutions are therefore cautioned to consult with their state supervisors.

1. "Gains Trading"

"Gains trading" is characterized by the purchase of a security as an investment portfolio asset and the subsequent sale of that same security at a profit after a short-term holding period. Securities that cannot be sold at a profit are retained as investment portfolio assets. These "losers" are retained in the investment portfolio because investment portfolio holdings are accounted for at amortized cost, and losses are normally not recognized unless the security is sold. Gains trading often results in a portfolio of securities with *one or more of the following characteristics*: extended maturities, lower credit quality, high market depreciation, and limited practical liquidity. Frequent purchase and sale activity, combined with a short-term holding period for securities, clearly demonstrates management's intent to profit from short-term price movements. This indicates that other securities held in the investment portfolio may also be held for trading or for sale.

In many cases, "gains trading" involves the trading of "when-issued" securities, the use of "pair-off" transactions (including transactions involving off-balance sheet contractual commitments), or " corporate" or "extended settlements" because these speculative practices afford an opportunity for substantial price changes to occur before payment for the securities is due.

2. "When-Issued" Securities Trading

"When-issued" securities trading is the buying and selling of securities in the period between the announcement of an offering and the issuance and payment date of the securities. A purchaser of a "when-issued" security acquires all the risks and rewards of owning a security and may sell the "when-issued" security at a profit before having to take delivery and pay for it. Purchases and subsequent sales of securities during the "when-issued" period may not be conducted in a bank's investment portfolio, but are regarded instead as a trading activity.

3. "Pair-Offs"

A "pair-off" is a security purchase transaction or other contractual

commitment that is closed-out or sold at, or prior to, settlement date or expiration date. For example, an investment portfolio manager will commit to purchase a security. Then, prior to the predetermined settlement date, the portfolio manager will "pair-off" the purchase with a sale of the same security prior to, or on, the original settlement date. Profits or losses on the transactions are settled by one party to the transaction remitting to the counterparty the difference between the purchase and sale price. Like "when-issued" trading, "pair-offs" permit an institution to speculate on securities price movements without having to pay for the securities. Such transactions are regarded as a trading activity. "Pair-offs" involving financial instruments with off-balance sheet risk such as swaps and other interest rate exchange agreements and optional forward commitments are also indicative of unsuitable investment activities.

4. Corporate or Extended Settlements

Regular-way settlement for transactions in U.S. Government and Federal agency securities (other than mortgage-backed and derivative products) is one business day after the trade date. Regular-way settlement for corporate and municipal securities and stripped U.S. Treasury securities and similar products is five business days after the trade date. The use of an extended or corporate settlement method for U.S. Government securities purchases and an extended settlement period (more than 5 business days) for stripped U.S. Treasury securities and similar products appear to be offered by securities dealers in order to facilitate speculation on the part of the purchaser, similar to the profit opportunities available in a "pair-off" transaction. The use of corporate or extended settlements to facilitate speculation is a trading activity.

Regular-way settlement for transactions in mortgage backed and mortgage derivative products varies and can be up to 30 days after trade date. Transactions with settlements in excess of 30 days following trade date are considered forward contracts and are to be reported accordingly.

5. Repositioning Repurchase Agreements

A repositioning repurchase agreement is a funding technique often used by dealers who encourage speculation through the use of "gains trading," "pair-off," "when-issued," and "corporate or extended settlement" transactions for securities which cannot be sold at a profit. The repurchase agreement is a service provided by the dealer so the buyer can hold the position until it can be sold at a gain, but it imprudently funds a longer-term, typically fixed-rate asset with dealer supplied short-term, variable-rate source funds. The buyer purchasing the security pays the dealer a small "margin" that approximates the actual loss in the security. The dealer then agrees to fund the purchase of the security by buying it back from the purchaser under a resale agreement. Any dealer financing technique such as repositioning repurchase agreements that are used to fund the purchase of securities may be indicative of securities that were acquired with the intent to resell at a profit at or prior to settlement or after a short-term holding period. This activity is inherently speculative and is a wholly unsuitable investment practice for depository institutions. Securities acquired in this manner should be reported as either trading account assets or as securities held for sale. The safe and sound use of repurchase agreements to fund securities held for investment is not typical of repositioning repurchase agreements.

6. Short Sales

A short sale is the sale of a security that is not owned. The purpose of a short sale generally is to speculate on the fall in the price of the security. Short sales are speculative transactions that should be conducted as a trading activity and when conducted in the investment portfolio, they are considered to be unsuitable.

A short sale that involves the delivery of the security sold short by borrowing it from the depository institution's investment portfolio should not be reported as a short sale. Instead, it should be reported as a sale of the underlying security with gain or loss recognized.

Short sales are not permissible activities for Federal credit unions.

7. "Adjusted Trading" or "Bond Swapping"

"Adjusted trading" or "bond swapping" is a practice involving the sale of a security to a broker at a price above the prevailing market value and the simultaneous purchase and booking of a different security, frequently a lower grade issue or one with a longer maturity, at a price greater than its market value. Thus, the broker is reimbursed for losses on the purchase from the institution and ensured a profit. Such transactions inappropriately defer the recognition of losses on the security sold and establish an excessive reported value for the newly acquired security. Consequently, such transactions are prohibited and may be in violation of 18 U.S.C. sections 1001—False Statements or Entries and 1005—False Entries.

8. Delegation of Discretionary Investment Authority

Some depository institutions have delegated the purchase and sale authority for all or a portion of their investment securities portfolio to either an individual who is not an employee of the institution or one of its affiliates, or to a non-affiliated firm. Such a delegation of authority is intended to obtain a higher total return on the portfolio than the institution would realize if it managed the portfolio itself. When an institution has delegated such authority to individuals who are not employees of the depository institution, or its affiliates, then the depository institution no longer has the ability to control its own securities and all holdings where such authority has been delegated must be reported as held for sale.

9. Covered Calls

The writing of covered calls is an option strategy that, for a fee, grants the buyer of the call option the right to purchase a security owned by the option writer at a predetermined price before a specified future date. The option fee [3] received by the writing (selling) depository institution provides income and has the effect of increasing the effective yield on the portfolio asset "covering" the call.

Covered call programs have been promoted as hedging strategies because the fee received by the writer can be used to offset a limited amount of potential loss in the price of the underlying security. If interest rates rise, the call option fee can be used to partially offset the decline in the market value of a fixed rate security or the increased cost of market rate liabilities used to carry the security. However, there is no assurance that an option fee will completely offset the price decline on the security or the increased cost of liabilities and the resulting reduced spread between the institution's return on assets and funding costs.

As a practical matter, gains on the securities covered by the written call are limited to the amount of the difference between the carrying value of the security and the strike price at which the security will be called away. The potential for losses on the covered security is not limited. In an effort to

[3] Recognition of option fee income should be deferred until the option is exercised or expires. The covered call writer shall value the option at the lower of cost or market value at each report date.

obtain higher yields, some portfolio managers have mistakenly relied on the theoretical hedging benefits of covered call writing, and have purchased extended maturity U.S. government or Federal agency securities. This practice can significantly increase risks taken by the depository institution by contributing to a maturity mismatch between assets and funding.

Institutions should only initiate a covered call program for securities when the board of directors or an appropriate board committee has specifically approved a policy permitting this activity. That policy must set forth specific procedures for controlling covered call strategies, including record keeping, reporting, and review of activity, as well as providing for appropriate management information systems to report the results. Since the purchaser of the call acquires the ability to call the security away from the institution that writes the option, the ability of that institution to continue to hold the securities rests with an outside party. Securities held for investment where call options have been written are therefore held for sale and reported at the lower of cost or market value.

Covered call writing is not a permissible activity for Federal credit unions.

Section III: Stripped Mortgage Backed Securities, Certain CMO Tranches, Residuals, and Zero-Coupon Bonds

Due to the significant price and yield volatility caused in part by the substantial prepayment and average life variability of stripped mortgage-backed securities ("SMBSs"), certain CMO tranches (high-risk CMO tranches [4]), and residuals, these securities are *generally* not suitable investments for *depository institutions.* However, SMBSs, high-risk CMO tranches, and residuals may be used as interest rate risk reduction tools by depository institutions with well managed securities portfolios that have specific interest rate risk policies and procedures governing the acquisition, retention and disposal of such instruments. Similarly, long term zero-coupon bonds exhibit significant price volatility and disproportionately large holdings of these securities are not suitable investments. Depository institutions that currently own or plan to purchase SMBSs, high-risk CMO tranches, residuals, and long-term zero-coupon bonds should possess appropriate managerial and financial controls and analytical models to effectively measure and monitor the risks associated with these instruments.

Overview of the Securities

A. SMBSs consist of two classes of securities with each class receiving a different portion of the monthly interest and principal cash flows from the underlying mortgage-backed securities ("MBS"). In its purest form, an MBS is converted into an interest-only ("IO") strip, where the investor receives all of the interest cash flows and none of the principal, and a principal-only ("PO) strip, where the investor receives all of the principal cash flows and none of the interest.

IOs and POs have highly volatile price characteristics based, in part, on the prepayment variability of the underlying mortgages and consequently on the maturity of the stripped securities. Generally, IOs will increase in value when interest rates rise, as contrasted to POs, which decrease in value. Accordingly, the purchase of an IO strip may serve theoretically, to offset the interest rate risk associated with mortgages and mortgage-backed securities held by a depository institution. Similarly, a PO may be useful to offset the effect of interest rate movements on the value of mortgage servicing. The uncertainty regarding the timing and amount of cash flows from the underlying the timing and amount of cash flows from the underlying mortgage collateral makes it difficult to use SMBSs as long-term risk reduction tools. SMBSs without a government or government-sponsored agency guarantee of payment for principal and interest have the added characteristic of potential credit risk.

B. Collateralized Mortgage Obligations ("CMOs") or Real Estate Mortgage Investment Conduits (REMICs, hereafter called CMOs) have been developed in response to investor concerns regarding the uncertainty of cash flows associated with the prepayment option of the underlying mortgagor. A CMO can be collateralized directly by mortgages, but more often is collateralized by MBSs issued or guaranteed by GNMA, FNMA or FHLMC and held in trust for CMO investors. In contrast to MBSs in which cash flow is received pro rata by all security holders, the principal cash flow from the mortgages underlying a CMO is segmented and paid in accordance with a predetermined priority to investors holding various CMO tranches (but not necessarily to those holding certain residuals). By prioritizing the principal cash flow from the underlying collateral among the separate CMO tranches, different classes of bonds are created, each with their own stated maturity, estimated average life, coupon rates, and unique prepayment risk characteristics. Many CMOs are designed to have one or more Planned Amortization Class ("PAC") tranches. PAC tranches commonly have a fixed monthly principal amortization which does not change over a range of prepayments on the underlying mortgages; thus, to a certain extent, limiting the prepayment risk to investors. This limiting process allows investors to more accurately predict the average life of the asset and, in general, reduces the potential price volatility that would be assumed if the underlying MBSs themselves had been purchased. Although a CMO tranche, such as a PAC, is designed to reduce the uncertainty associated with the prepayment risk of the MBSs collateralizing a CMO, the presence of a PAC bond in a CMO will result in the transfer of prepayment risk to one or more of the other tranches. These non-PAC tranches are sometimes referred to as "CMO support tranches" or "companion bonds." Unlike a PAC tranche that has been designed to provide a high degree of comfort regarding expected average life and final maturity, non-PAC CMO tranches have a more volatile expected average life, rate of return, and market price.

C. Residuals are claims on any excess cash flows from a CMO issue or an asset-backed security remaining after the payments due to bondholders and after trust administrative expenses have been met. The economic value of a residual is a function of the present value of the anticipated excess cash flows under assumed prepayment speeds. This cash flow is highly sensitive to prepayments and existing levels of market interest rates. Other factors affecting the market value of residuals include a lack of liquidity and a wide bid-offer price spread.

Certain CMO residuals, for example, may be acceptable as risk management tools to reduce variations in the value of a fixed-rate mortgage or MBS portfolio in a period of changing interest rates. However, the uncertainly regarding prepayments on the underlying collateral makes it very difficult to use these securities as an effective risk reduction tool. Under an environment of

[4] For purposes of this supervisory policy statement, high-risk CMO tranches" are generally defined to include any tranche that contractually is responsible for a greater than normal share of the risk (such as prepayment or interest rate risk) inherent in the specific collateral supporting the CMO structure; for example, support/companion bonds, z-bonds, super POs, inverse floaters, and other CMO tranches, however labeled, with similar characteristics.

rapidly falling interest rates, the market value of a residual can disappear completely. In addition, the complexity of some CMO structures (e.g., multiple numbers or types of tranches) or unusual collateral characteristics (e.g., a blend of fixed and floating rates or unique demographic traits) can make evaluating and forecasting future cash flows of residuals even more difficult. Thus, it is extremely unlikely that a residual can be used as a long-term interest rate risk reduction tool.

D. Long-term (generally, maturities over ten years from date of purchase) Zero-coupon, "stripped" or Original Issue Discount ("OID") securities are priced at large discounts to their face value prior to maturity and exhibit significant price volatility. "Stripped" securities are the interest and/or principal portions of U.S. Government obligations, which are separated and sold to depository institutions in the form of stripped coupons, stripped bonds (principal), STRIPS, or such proprietary products as CATs or TIGRs. Also, OID bonds have been issued by a number of municipal entities.

Supervisory Policy

SMBSs, high-risk CMO tranches, and residuals are *generally* not suitable investments for *depository institutions* because of their substantial prepayment risk and interest rate risk which can cause significant price, yield, and average life volatility. Over time, these instruments may cause unintended changes in an institution's earnings and its interest rate, liquidity, and funding risk profiles. SMBSs, high-risk CMO tranches, and residuals that have not been purchased to reduce the interest rate risk of the institution and of designated assets or that did not perform as intended (i.e., the position failed to reduce the interest rate risk of the institution and of the designated assets) will be considered speculative holdings for all depository institutions. In addition, disproportionately large holdings of long-term zero-coupon/OID bonds will be considered an imprudent investment practice for all depository institutions. In such circumstances, the purchase or retention of these securities is contrary to safe and sound depository institution practices and may result in criticism by examiners. Examiners may also seek the orderly divestiture of such securities which will result in the reporting of the securities at the lower of cost or market value until their disposal.

SMBSs, High-risk CMO Tranches, and Residuals

Dud to the high degree of interest rate risk and price volatility exhibited by SMBSs, high-risk CMO tranches, and residuals, depository institutions that currently own or plan to purchase these securities must have the ability to internally perform interest rate risk and price sensitivity analyses.

Prior to purchase, the institution must conduct and document an analysis that showns that the proposed purchase of the security will reduce the interest rate risk of the institution and of the designated assets. In demonstrating whether the purchase of the security will reduce interest rate risk, the institution must show that over a wide range of plausible interest rate scenarios, the combined market value of the instrument to be purchased and the designated assets will be less variable than the market value of the designated assets alone. The institution must also demonstrate that the purchase will reduce enterprise risk (i.e., the overall interest rate risk of the institution). Subsequent to purchase, the institution must evaluate and document at least quarterly whether the securities have actually reduced the interest rate risk of the institution and of the previously designated assets. In determining the effectiveness of the security in reducing interest rate risk, the institution must show that since the time of he security's purchase, the combined market value of the security and the designated assets has been less variable than the market value of the designated assets alone. The institution must also show that over this same time period, the cumulative change in the market value of the security purchased has substantially offset the change in the market value of the designated assets. These analyses should include appropriate consideration of cash flows received since purchase of the security. The institution must also demonstrate that the security purchased has reduced and will continue to reduce enterprise risk.[5]

The institution's analyses performed prior to purchase and subsequently thereafter will be subject to examiner review. Analyses performed and records constructed to justify purchases on a post-acquisition basis are insufficient, are considered unacceptable management tools, and will be subject to examiner criticism. Reliance on analyses and documentation obtained from a securities dealer or other outside party without internal analyses by the institution are also considered unacceptable and will be subject to examiner criticism. In addition, a depository institution must document the following: (1) Written portfolio policies approved by the board of directors addressing the goals and objectives the institution expects to achieve through its securities activities, including interest rate risk reduction objectives with respect to SMBSs, high-risk CMO tranches, or residuals; (2) accounting and reporting policies for its SMBS's, high-risk CMO tranches, and residuals consistent with the provisions of Section II of this supervisory policy statement; (3) limits on the amount of funds that may be committed to these securities; (4) diversification policies; (5) specific financial officer responsibility and authority; (6) adequate information systems; (7) procedures for periodic evaluation; and (8) appropriate internal controls. The board of directors or an appropriate committee thereof and the institution's senior management should regularly (at least quarterly) review all securities pursuant to the portfolio policy to determine whether these instruments are adequately satisfying their objectives and to concur with the results of the analyses performed. The depository institution's senior management should be fully knowledgeable about the risk associated with prepayments and their subsequent impact on the securities.

Other Zero-Coupon, Stripped or Original Issue Discount (OID) Products

Although considered free from credit risk if issued directly by the U.S. Government, longer maturities of these instruments (generally, maturities exceeding ten years from the date of purchase) have displayed extreme volatility. Therefore, disproportionately large long-maturity holdings of these instruments, in relation to the total investment portfolio or total capital of the depository institution, are considered an imprudent investment practice. Such holdings will be subject to criticism by examiners who may seek the orderly disposal of such securities. Such action will result in the reporting of these securities at the lower of cost or market value until their disposal.

Other Considerations

The exercise of extreme caution is urged for investment portfolio owners and prospective purchasers of SMBSs, residuals, high-risk CMO tranches, long-term zero-coupon bonds, and other securities and financial derivatives with similar characteristics. It is the responsibility of each depository institution's management to continue exercising care and prudence in the

[5] Purchases *of SMBS, residuals and high risk CMO tranches* prior to the date of this supervisory policy statement *generally* will be *reviewed* in accordance with the previously existing policies.

selection of suitable investment products, irrespective of brand names and labels. Before purchasing any new or unfamiliar investment instrument, senior management should at the very least internally produce a detailed independent analysis of the security, in order to fully understand the performance characteristics, price volatility, and potential hazards inherent in owning the security under various interest rate scenarios. A prospectus supplement that fully details the cash flows covering each of the securities held by the institution should be obtained prior to purchase and retained for examiner review. Securities with characteristics similar to the types of securities detailed in this surpevisory policy will be treated in the same manner by the financial regulatory agencies.

Several states have adopted, or are considering, regulations that prohibit state-chartered banks from purchasing IO strips or other securities discussed above. Accordingly, state-chartered institutions should consult with their state regulator concerning the permissibility of these purchases.

Dated: December 28, 1990.

Robert J. Lawrence,

Executive Secretary, Federal Financial Institutions Examination Council.

[FR Doc. 91-48 Filed 1-2-91; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No. 224-200209-002.

Title: Port of Portland/Oregon Terminal Company Terminal Agreement.

Parties: Port of Portland Oregon Terminal Company.

Synopsis: The Agreement amends the basic agreement to extend its term through January 2, 1994, and to restate the exception to the license fee due under the revenue sharing formula for Pacific Commerce Line.

Agreement No. 224-200452.

Title: Maryland Port Administration/ Sea Search, Inc. Terminal Agreement.

Parties: Maryland Port Administration (MPA) Sea Search, Inc. (SSI).

Synopsis: The Agreement provides for SSI's 5-year lease of MPA's Pier 5 at its Fairfield Automatic Terminal for the layberthing of Ready Reserve Fleet vessels.

By Order of the Federal Maritime Commission.

Dated: December 27, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 91-9 Filed 1-2-91; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 121090 AND 122190

Name of acquiring person, name of acquired person, name of acquired entity	PMN Number	Date terminated
Fiat S.p.A., Nylon Corporation of America, Nylon Corporation of America	91-0219	12/10/90
Geodyne Resources, Inc., Oryx Energy Company, Sun Operating Limited Partnership, Radep Pipeline, L.P.	91-0223	12/10/90
N.V. Phillips' Gloeilampenfabrieken, E. I. du Pont de Nemours and Company, Phillips and du Pont Optical Company	91-0238	12/10/90
American Exploration Company, Conquest Exploration Company, Conquest Exploration Company	91-0243	12/10/90
Atlantic Equity Partners, L.P., Jack M. Berry, Sr., Berry Plastics, Inc	91-0260	12/10/90
General Electric Company, Henry L. Hillman, TNL Financial, Inc	91-0298	12/10/90
Stichting Algemeen Pensioenfonds der KLM, Provident Life & Accident Insurance Company of America, University Mall Shopping Center Company	91-0299	12/10/90
Stichting Pensioenfonds Voor hetVliegendPersoneelderKLM, Provident Life & Accident Insurance Company of America, University Mall Shopping Center Company	91-0300	12/10/90
E. I. du Pont de Nemours and Company, Forest Oil Corporation, Forest Oil Corporation	91-0302	12/10/90
Corporate Property Investors, Corporate Property Investors, Rockaway Center Associates	91-0306	12/10/90
The Rouse Company, Carlyle Real Estate Limited Partnership—VI, Faneuil Phase III Partnership	91-0313	12/10/90
The Rouse Company, The Rouse Company, Faneuil Phase III Partnership	91-0314	12/10/90
The Rouse Company, Carlyle Real Estate Limited Partnership—75, Faneuil Hall Marketplace Associates	91-0315	12/10/90
The Rouse Company, The Rouse Company, Faneuil Hall Marketplace Associates	91-0316	12/10/90
William A. Goldring, The Marley Family Subchapter S Trust, United Liquor, Wine & Beer Company	91-0317	12/10/90
Carena Holdings Inc., American General Corporation, American General Life and Accident Insurance Company	91-0323	12/10/90
Valley National Corporation, Lincoln National Corporation, Western Security Life Insurance Company	91-0326	12/10/90
Scott A. Lefky, Dana Corporation, Dana Corporation and Unitron, Incorporated	91-0331	12/10/90
The May Department Stores Company, Carter Hawley Hale Stores, Inc., Thalhimer Brother Incorporated	91-0034	12/11/90
Valio Finnish Co-operative Dairies' Association, Dean Foods Company, McCadam Cheese Company, Inc	91-0290	12/11/90

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 121090 AND 122190—Continued

Name of acquiring person, name of acquired person, name of acquired entity	PMN Number	Date terminated
NYCOR, Inc., Zenith Electronics Corporation, Zenith Electronics Corporation	91-0237	12/12/90
The B.F. Goodrich Company, Hercules Incorporated, Simmonds Precision Products, Inc., Hercules Aerospace	91-0241	12/12/90
Thomas H. Lee Equity Partners, L.P., Lee-GN Holding Corp., Lee-GN Holding Corp	91-0274	12/12/90
Wiggins Teape Appleton p.l.c., Arjomari-Prioux, Arjomari-Europe S.A	91-0291	12/12/90
General Electric Company, R.H. Macy & Co., Inc, R.H. Macy & Co., Inc	91-0297	12/12/90
Aachener und Muenchener Beteiligungs-AG, Academy Insurance Group, Inc., Academy Insurance Group, Inc	91-0321	12/12/90
Lohja Corporation, Oy Wartsila Ab, Oy Wartsila Ab	91-0330	12/12/90
Consolidated TVX Mining Corporation, Inco Limited, American Copper & Nickel Company, Inc	91-0336	12/12/90
Collecting Bank, National Association, CILCORP Inc., CLM Inc.—IX	91-0338	12/12/90
Kmart Corporation, PSWW Inc., PSWW Inc	91-0341	12/12/90
Lyda Hunt-Bunker Trust-Mary Moreland Hunt, Oryx Energy Company, Sun Operating Limited Partnership	91-0246	12/13/90
Royal Dutch Petroleum Company, The Columbia Gas System, Inc., Columbia LNG Corporation	91-0255	12/13/90
Kuraya Pharmaceutical Co., Ltd., Institute for Biological Research and Development, Inc., Institute for Biological Research and Development, Inc	91-0259	12/13/90
Koch Industries, Inc., Sun Company, Inc., Sun Pipe Line Company	91-0279	12/13/90
BellSouth Corporation, Georgia-Pacific Corporation, Georgia-Pacific Corporation and Nekoosa Papers Inc	91-0335	12/13/90
American Telephone and Telegraph Company, Georgia-Pacific Corporation, Georgia-Pacific Corporation and Nekoosa Papers Inc	91-0337	12/13/90
Land Free II Investment Limited, William Farley, Fruit of the Loom, Inc	91-0239	12/14/90
Safeguard Scientifics, Inc., The Computer Factory Inc., The Computer Factory Inc	91-0289	12/14/90
Otsuka Pharmaceutical Co., Ltd., Crystal Geyser Water Company, Crystal Geyser Water Company	91-0310	12/14/90
John Hancock Mutual Life Insurance Company, Georgia-Pacific Corporation, Georgia-Pacific Corporation	91-0333	12/14/90
Storebrand A/S, Belvedere Corporation, Belvedere Corporation	91-0349	12/14/90
The Rouse Company, General Electric Company, Geape II, Inc	91-0357	12/14/90
Society Corporation, Deposit Guaranty Corp., Deposit Guaranty National Bank	91-0358	12/14/90
Mellon Bank Corporation, The Chase Manhattan Corporation, Chase Commercial Corporation	91-0363	12/14/90
David Geffen, MCA, Inc., MCA Sub Inc	91-0368	12/14/90
The Oklahoma Publishing Company, James William Guercio, Country Music Television, Inc	91-0258	12/17/90
The Oklahoma Publishing Company, O&W Corporation, O&W Corporation	91-0267	12/17/90
MAPCO, Inc., Seminole Pipeline Company, Seminole Pipeline Company	91-0275	12/17/90
The Penn Central Corporation, American Financial Corporation, Atlanta Casualty Company, Windsor Insurance Company and	91-0285	12/19/90
CTC Trust, Adco Equities, Cedar Capital Corp	91-0311	12/19/90
Sonat Inc. Sunshine Mining Company, Argent Energy, Inc. and Woods Resources, Inc	91-0371	12/19/90
NYMAGIC, Inc., Mutual Marine Office Inc., Mutual Marine Office Inc	91-0373	12/19/90
Olan Mills, II, Olan Mills Incorporated of Texas, Olan Mills Incorporated of Texas	91-0375	12/19/90
J. Baker, Inc., The Casual Male Corporation, The Casual Male Corporation	91-0376	12/19/90
Seagull Energy Corporation, Mesa Limited Partnership, Mesa Operating Limited Partnership	91-0378	12/19/90
Daimler-Benz AG, Siliconix Incorporated, Debtor in Possession, Siliconix Incorporated, Debtor in Possession	91-0388	12/19/90
FAG KGaA, The Barden Corporation, The Barden Corporation	90-2202	12/20/90
FAG Kugelfischer Georg Schafer Kommanditgesellschaft, The Barden Corporation, The Barden Corporation	90-2264	12/20/90
Household International, Inc., State Street Boston Corporation, State Street Boston Corporation	91-0312	12/20/90
Torchmark Corporation, Placid Oil Company, Placid Oil Company	91-0329	12/20/90
CSK Corporation, Control Data Corporation, Micrognosis, Inc	91-0364	12/20/90
W.R. Grace & Co., W.R. Grace & Co., Grace Cocoa, L.P	91-0367	12/20/90
Research Health Services, Baptist Health Systems, Baptist Health Systems	91-0293	12/21/90
Matshushita Electric Industrial Co., Ltd., National Semiconductor Corporation, National Semiconductor Corporation	91-0307	12/21/90
The Jean Coutu Group (JCG), Inc., S. John Haronian, Douglas Drug, Inc	91-0356	12/21/90
NIKE, Inc., F. Lee Hawes, Tetra Plastics, Inc	91-0377	12/21/90
La Confederation des caisses populaires et d'economie, Rock Capital Partners, L.P., Drake Bakeries, Inc	91-0380	12/21/90
Harleysville Mutual Insurance Company, Phoenix Mutual Life Insurance Company, Phoenix General Insurance Company	91-0381	12/21/90
Peter B. Bedford, Jeffrey H. Smulyan, KYUU, Inc	91-0383	12/21/90
Intergraph Corporation, Jack Kenney, Trustee for Daisy Systems Corporation, Daisy Systems Corporation	91-0385	12/21/90
American Management Association, H&R Block, Inc., Path Management Industries, Inc	91-0393	12/21/90
Household International, Inc., Banque Nationale de Paris, Bank of the West	91-0395	12/21/90
Aon Corporation, Reliance Group Holdings, Inc., Cananwill Inc	91-0398	12/21/90

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay or Renee A. Horton, Contact Representatives. Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room 303, Washington, DC 20580 (202) 326-3100.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 91-58 Filed 1-2-91; 8:45 am]

BILLING CODE 6750-01-M

[File No. 882 3199]

Richard Crew and Robert Francis; Proposed Consent Agreements With Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreements.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, these consent agreements, accepted subject to final Commission approval, would prohibit, among other things, two individuals that formed a company, AmEuro Sciences International, Inc., to distribute the Diet Patch from making unsubstantiated efficacy claims for any product or service and from misrepresenting that a paid advertisement is an independent program. In addition, the agreements would prohibit the respondents from disseminating or broadcasting "The Michael Reagan Show".

DATES: Comments must be received on or before March 4, 1991.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Tracy Thorleifson, Seattle Regional Office, Federal Trade Commission, 2806

Federal Bldg., 915 Second Ave., Seattle, Wa. 98174. (206) 442–4656.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreements containing consent orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, have been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Agreement Containing Consent Order to Cease and Desist

In the matter of RICHARD CREW, an individual.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Richard Crew, an individual, hereinafter sometimes referred to as proposed respondent, and it now appearing that proposed respondent is willing to enter into an agreement containing an order to cease and desist from the acts and practices being investigated,

It is hereby agreed by and between Richard Crew, an individual proceeding *pro se*, and counsel for the Federal Trade Commission that:

1. Proposed respondent is an individual residing at 7968 Via Costa, Scottsdale, Arizona 85258.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

d. All claims under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of complaint contemplated hereby and related material pursuant to Rule 2.34 of the Commission's Rules, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by the proposed respondent that he has violated the law as alleged in the draft of complaint here attached or has engaged in any other unlawful conduct.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any rights he may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. He understands that once the order has been issued, he will be required to file one or more compliance reports. Proposed respondent further understands that he may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

I

It is ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole the 30-minute television advertisement for the EuroTrym Diet Patch described in the complaint and sometimes known as "The Michael Reagan Show."

II

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the EuroTrym Diet Patch or any other substantially similar weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

(1) Use of such product or service prevents feelings of hunger;

(2) Use of such product or service enables users to lose substantial amounts of weight;

(3) Use of such product or service enables users to lose weight in a large majority of cases; or

(4) Any competent and reliable test or study establishes that such product or service promotes weight loss.

For purposes of this Part II a "substantially similar weight control or weight reduction product" shall be defined as any product that is advertised to cause or aid weight loss through acupressure, acupathy or homeopathy that uses a bandaid or patch to apply a solution to the skin or that purportedly contains as its active ingredient clacarea carbonica.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

(1) Use of the product or service prevents or reduces feelings of hunger;

(2) Use of the product or service enables users to lose substantial amounts of weight;

(3) Use of the product or service enables users to lose weight in a substantial number of cases; or

(4) Any competent and reliable test or study establishes that use of the product or service promotes weight loss,

unless the representation is true and, at the time of making the representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation. Competent and reliable scientific evidence shall mean for purposes of this Order any test, analysis, research, study, survey or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

C. Failing to disclose clearly and prominently in any advertisement for any weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that dieting and/or exercise is required in order to lose weight; provided, however, that this disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product or service in question is effective without dieting and/or exercise.

III

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making the representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

B. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under subpart III.A above), unless at the time of making the representation respondent possesses and relies upon a reasonable basis for each such representation.

IV

It is further ordered, That respondent, an individual, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Using, publishing, or referring to any endorsement (as "endorsement" is defined in 16 CFR 255(b)), unless respondent has good reason to believe that at the time of such use, publication or reference, the endorsement reflects the honest opinions, findings, beliefs or experience of the endorser and contains no representation that would be false or unsubstantiated if made directly by respondent.

B. Failing to disclose, clearly and prominently, a material connection, where one exists, between an endorser of any product or service and respondent. For purposes of this Part IV, a "material connection" shall mean any relationship between an endorser of any product or service and any individual or other entity advertising, promoting, offering for sale, selling or distributing such product or service, which relationship might materially affect the weight or credibility of the endorsement and which relationship would not reasonably be expected by consumers.

C. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless the representation is true.

V

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product of service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

A. Any commercial or other advertisements, for any such product or service that misrepresents, directly or by implication, that it is an independent program and not a paid advertisement;

B. Any commercial or other advertisement for any such product or service fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE].

VI

It is further ordered, That, within fifteen (15) days after the date this Order becomes final, respondent shall submit a truthful sworn statement, in the form shown in Exhibit A to this Order that shall reaffirm and attest to the truth, accuracy, and completeness of respondent's financial statements and the related documents ("Financial Statement") that were dated July 17, 1990, and previously submitted to the Commission.

It is further ordered, That this Order is expressly premised upon respondent's financial condition as represented in the sworn Financial Statement referenced above, which contains material information upon which the Commission relied in negotiating and agreeing to the lack of a redress payment in this Order. If the Commission determines that respondents failed to file the truthful sworn statement required by part VI of this Order, or failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in his Financial Statement, the Commission may reopen the proceeding and take such action as the Commission deems appropriate. Proceedings instituted under this Paragraph are in addition to and not in lieu of any other remedies as may be provided by law, including any proceedings the Commission may initiate to enforce this Order.

VIII

It is further ordered, That respondent shall, for a period of five (5) years from the date of entry of this Order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or

employment. Each notice of affiliation with any new business or employment shall include the respondent's new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities. The expiration of the notice provision of this Part VIII shall not affect any other obligation arising under this Order.

IX

It is further ordered, That for three (3) years from the date that the practices to which they pertain are last employed, respondent shall maintain and upon reasonable request make available to the Federal Trade Commission, at a place designated by Commission staff for inspection and copying:

A. All advertisements and promotional materials subject to this Order;

B. All materials relied on as substantiation for any representation covered by this Order;

C. All test reports, studies or other materials in respondent's possession or control at any time that contradict, qualify or call into question any representation of respondent covered by this Order or the basis on which respondent relied for such claim or representation; and

D. All other materials and records that relate to respondent's compliance with this Order.

This Part IX shall expire five (5) years after the date of entry of this Order.

It is further ordered, That respondent shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this Order.

Exhibit A

Declaration of Richard Crew

In the mater of Richard Crew, an individual.

I, Richard Crew, do hereby affirm and attest that the financial statements and related documents dated July 17, 1990, that I submitted to the Federal Trade Commission, copies of which are attached hereto, were truthful, accurate and complete. I understand that should the Commission determine the value of any asset, materially misrepresented the value of any asset, or made any other material misrepresentations, the Commission may reopen this proceeding, initiate an enforcement proceeding against me, or take other appropriate action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ 1990.

_____

Richard Crew

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order concerning Richard Crew. The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action, or make final the proposed order contained in the agreement.

This matter concerns claims made for the EuroTrym Diet Patch, a weight loss product marketed by AmEuro Sciences International, Inc. Richard Crew was president of AmEuro Sciences International, Inc.

The Diet Patch was advertised in a program-length television commercial, "The Michael Reagan Show." The commercial was produced and distributed by Twin Star Productions, Inc., a company that recently entered into a consent agreement with the Commission as a result, in part, of its role in marketing the Diet Patch (see Docket No. C–3307, October 2, 1990).

The Commission's complaint in this matter charges respondent with deceptively representing the efficacy of the Diet Patch. According to the complaint, respondent falsely claimed that the Diet Patch prevents feelings of hunger, enables users to lose substantial amounts of weight, and enables users to lose weight in a large majority of cases. The complaint also alleges that respondent falsely claimed that competent and reliable tests or studies established the efficacy of the Diet Patch.

Further, the complaint alleges that respondent represented that "The Michael Reagan Show" was an independent consumer program that discusses a variety of topics. In fact, the complaint alleges, "The Michael Reagan Show" was not an independent program that discusses a variety of topics.

The complaint also alleges that respondent falsely represented that endorsements appearing in the Diet Patch commercial reflect endorsers' honest opinions or experiences, reflect the typical experience of members of the public who have used these products, and were obtained from persons who were independent from those marketing these products.

The consent order contains provisions designed to remedy the advertising violations charged and to prevent respondent from engaging in similar acts and practices in the future. Part I of the order prohibits respondent from disseminating the television advertisement known as "The Michael Reagan Show."

Part II of the order prohibits respondent from making specified representations regarding the efficacy of the Diet Patch or any substantially similar product. Part II also prohibits respondent from making specified claims regarding the efficacy of any weight loss product or service unless the representation is true and respondent relies upon competent and reliable scientific evidence that substantiates those representations. Part II also requires respondent to disclose in any advertisement for any weight control or weight reduction product or service that dieting and/or excercise is required to lose weight, unless there is competent and reliable scientific evidence demonstrating otherwise.

Part III of the order prohibits respondent from making representations about the performance, benefits, efficacy or safety of any food, drug or device without competent and reliable scientific evidence for the representations. Part III of the order also prohibits respondent from making any representations about the performance, benefits, efficacy or safety of any product without a reasonable basis for the representations.

Part IV of the order prohibits respondent from using any endorsement without having reason to believe that it reflects the honest opinion, finding, belief or experience of the endorser and contains no representation that would be false or unsubstantiated if made directly by respondent. Part IV also requires respondent to disclose material connections between an endorser and the respondent and prohibits respondent from misrepresenting the typicality of any endorsement.

Part V of the order prohibits respondent from creating, producing, selling or disseminating any advertisement that misrepresents that it is an independent program and not a paid advertisement. Part V also requires respondent to include, in any

advertisement 15 minutes long or longer, a disclosure indicating that the program is a paid advertisement. The order sets out the specific language for the disclosure and the times it must appear.

Parts VI and VII of the order provide the Commission the right to reopen the proceeding if respondent made any material misrepresentations in the respondent's sworn financial statement previously provided to the Commission.

Parts VIII—X of the order contain provisions relating to compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Agreement Containing Consent Order to Cease and Desist

In the matter of Robert Francis, an individual.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Robert Francis, an individual, hereinafter sometimes referred to as proposed respondent, and it now appearing that proposed respondent is willing to enter into an agreement containing an order to cease and desist from the acts and practices being investigated,

It is hereby agreed by and between Robert Francis, an individual proceeding *pro se,* and counsel for the Federal Trade Commission that:

1. Proposed respondent is an individual residing at 4975 Viceroy Street, Apartment #204, Cape Coral, Florida 33904.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

d. All claims under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of complaint contemplated hereby and related material pursuant to Rule 2. 34 of the Commission's Rules, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by the proposed respondent that he has violated the law as alleged in the draft of complaint here attached or has engaged in any other unlawful conduct.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to-order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any rights he may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. He understands that once the order has been issued, he will be required to file one or more compliance reports. Proposed respondent further understands that he may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

I

It is ordered, That respondent, an individual, and respndent's agent, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale of distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole the 30-minute television advertisement for the EuroTrym Diet Patch described in the complaint and sometimes known as "The Michael Reagan Show."

II

It is further ordered, That respondent, an individual, and respondent's agent, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the EuroTrym Diet Patch or any other substantially similar weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

(1) Use of such product or service prevents feelings of hunger;

(2) Use of such product or service enables users to lose substantial amounts of weight;

(3) Use of such product or service enables users to lose weight in a large majority of cases; or

(4) Any competent and reliable test or study establishes that such product or service promotes weight loss.

For purposes of this part II a "substantially similar weight control or weight reduction product" shall be defined as any product that is advertised to cause or aid weight loss through acupressure, acupathy or homeopathy that uses a bandaid or patch to apply a solution to the skin or that purportedly contains as its active ingredient calcarea carbonica.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, that:

(1) Use of the product or service prevents or reduces feelings of hunger;

(2) Use of the product or service enables users to lose substantial amounts of weight;

(3) Use of the product or service enables users to lose weight in a substantial number of cases; or

(4) Any competent and reliable test or study establishes that use of the product or service promotes weight loss,

unless the representation is true and, at the time of making the representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation. Competent and reliable scientific evidence shall mean for purposes of this Order any test, analysis, research, study, survey or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

C. Failing to disclose clearly and prominently in any advertisement for any weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that dieting and/or exercise is required in order to lose weight; provided, however, that this disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product or service in question is effective without dieting and/or exercise.

III

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making the representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

B. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under subpart III.A above), unless at the time of making the representation respondent possesses and relies upon a reasonable basis for each such representation.

IV

It is further ordered, That respondent, an individual, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Using, publishing, or referring to any endorsement (as "endorsement" is defined in 16 CFR 255(b)), unless respondent has good reason to believe that at the time of such use, publication or reference, the endorsement reflects the honest opinions, findings, beliefs or experience of the endorser and contains no representation that would be false or unsubstantiated if made directly by respondent.

B. Failing to disclose, clearly and prominently, a material connection, where one exists, between an endorser of any product or service and respondent. For purposes of this part IV, a "material connection" shall mean any relationship between an endorser of any product or service and any individual or other entity advertising, promoting, offering for sale, selling or distributing such product or service, which relationship might materially affect the weight or credibility of the endorsement and which relationship would not reasonably be expected by consumers.

C. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experiences of members of the public who use the product or service, unless the representation is true.

V

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

A. Any commercial or other advertisement for any such product or service that misrepresents, directly or by implication, that it is an independent program and not a paid advertisement;

B. Any commercial or other advertisement for any such product or service fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE].

VI

It is further ordered, That, within fifteen (15) days after the date this Order becomes final, respondent shall submit a truthful sworn statement, in the form shown in Exhibit A to this Order that shall reaffirm and attest to the truth, accuracy, and completeness of respondent's financial statements and the related documents ("Financial Statement") that were dated June 26, 1990, and previously submitted to the Commission.

VII

It is further ordered, That this Order is expressly premised upon respondent's financial condition as represented in the sworn Financial Statement referenced above, which contains material information upon which the Commission relied in negotiating and agreeing to the lack of a redress payment in this Order. If the Commission determines that respondent failed to file the truthful sworn statement required by part VI of this Order, or failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in his Financial Statement, the Commission may reopen the proceeding and take such action as the Commission deems appropriate. Proceedings instituted under this paragraph are in addition to and not in lieu of any other remedies as may be provided by law, including any proceedings the Commission may initiate to enforce this Order.

VIII

It is further ordered, That respondent shall, for a period of five (5) years from

the date of entry of this Order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities. The expiration of the notice provision of this part VIII shall not affect any other obligation arising under this Order.

IX

It is further ordered, That for three (3) years from the date that the practices to which they pertain are last employed, respondent shall maintain and upon reasonable request make available to the Federal Trade Commission, at a place designated by Commission staff for inspection and copying:

A. All advertisements and promotional materials subject to this Order;

B. All materials relied on as substantiation for any representation covered by this Order;

C. All test reports, studies or other materials in respondent's possession or control at any time that contradict, qualify or call into question any representation of respondent covered by this Order or the basis on which respondent relied for such claim or representation; and

D. All other materials and records that relate to respondent's compliance with this Order.

This part IX shall expire five (5) years after the date of entry of this Order.

X

It is further ordered, That respondent shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this Order.

Exhibit A

Declaration of Robert Francis

In the matter of Robert Francis, an individual.

I, Robert Francis, do hereby affirm and attest that the financial statements and related documents dated June 26, 1990, that I submitted to the Federal Trade Commission, copies of which are attached hereto, were truthful, accurate and complete. I understand that should the commission determine that I failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentations, the Commission may reopen this proceeding, initiate an enforcement proceeding against me, or take other appropriate action.

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, 1990.

Robert Francis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order concerning Robert Francis. The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action, or make final the proposed order contained in the agreement.

This matter concerns claims made for the EuroTrym Diet Patch, a weight loss product marketed by AmEuro Sciences International, Inc. Robert Francis was vice-president of AmEuro Sciences International, Inc.

The Diet Patch was advertised in a program-length television commercial, "The Michael Reagan Show." The commercial was produced and distributed by Twin Star Productions, Inc., a company that recently entered into a consent agreement with the Commission as a result, in part, of its role in marketing the Diet Patch (see Docket No. C–3307, October 2, 1990).

The Commission's complaint in this matter charges respondent with deceptively representing the efficacy of the Diet Patch. According to the complaint, respondent falsely claimed that the Diet Patch prevents feelings of hunger, enables users to lose substantial amounts of weight, and enables users to lose weight in a large majority of cases. The complaint also alleges that respondent falsely claimed that competent and reliable tests or studies established the efficacy of the Diet Patch.

Further, the complaint alleges that respondent represented that "The Michael Reagan Show" was an independent consumer program that discusses a variety of topics. In fact, the complaint alleges, "The Michael Reagan Show" was not an independent program that discusses a variety of topics.

The complaint also alleges that respondent falsely represented that endorsements appearing in the Diet Patch commercial reflect endorsers' honest opinions or experiences, reflect the typical experience of members of the public who have used these products, and were obtained from persons who were independent from those marketing these products.

The consent order contains provisions designed to remedy the advertising violations charged and to prevent respondent from engaging in similar acts and practices in the future. Part I of the order prohibits respondent from disseminating the television advertisement known as "The Michael Reagan Show."

Part II of the order prohibits respondent from making specified representations regarding the efficacy of the Diet Patch or any substantially similar product. Part II also prohibits respondent from making specified claims regarding the efficacy of any weight loss product or service unless the representation is true and respondent relies upon competent and reliable scientific evidence that substantiates those representations. Part II also requires respondent to disclose in any advertisement for any weight control or weight reduction product or service that dieting and/or exercise is required to lose weight, unless there is competent and reliable scientific evidence demonstrating otherwise.

Part III of the order prohibits respondent from making representations about the performance, benefits, efficacy or safety of any food, drug or device without competent and reliable scientific evidence for the representations. Part III of the order also prohibits respondent from making any representations about the performance, benefits, efficacy or safety of any product without a reasonable basis for the representations.

Part IV of the order prohibits respondent from using any endorsement without having reason to believe that it reflects the honest opinion, finding, belief or experience of the endorser and contains no representation that would be false or unsubstantiated if made directly by respondent. Part IV also requires respondent to disclose material connections between an endorser and the respondent and prohibits respondent from misrepresenting the typicality of any endorsement.

Part V of the order prohibits respondent from creating, producing, selling or disseminating any

advertisement that misrepresents that it is an independent program and not a paid advertisement. Part V also requires respondent to include, in any advertisement 15 minutes long or longer, a disclosure indicating that the program is a paid advertisement. The order sets out the specific language for the disclosure and the times it must appear.

Parts VI and VII of the order provide the commission the right to reopen the proceeding if respondent made any material misrepresentations in the respondent's sworn financial statement previously provided to the commission.

Parts VIII–X of the order contain provisions relating to compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 91–59 Filed 1–2–91; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[BPD–695–N]

RIN 0938–AE54

Medicare Program; Medicare Economic Index Update for 1991

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice.

SUMMARY: This notice updates the Medicare Economic Index (MEI), which is used to calculate the prevailing charge levels that help to determine reasonable charges for certain physician services under the Medicare Supplementary Medical Insurance (part B) program. As mandated by section 4105 of Public Law 101–508, for physician services furnished on or after January 1, 1991, and before January 1, 1992, the increase for primary care services will be 2 percent. There will be no increase for all other physician services.

EFFECTIVE DATE: This update applies to services furnished on or after January 1, 1991.

FOR FURTHER INFORMATION CONTACT: Stanley Weintraub (301) 966–4498.

SUPPLEMENTARY INFORMATION:

I. Background and Provisions

Payment under the Medicare Supplementary Medical Insurance (part B) program for certain physician services is based on a reasonable charge which, under section 1842(b) of the Social Security Act (the Act), may not exceed the lowest of: (1) The physician's actual charge for the service, (2) his or her customary charge for that service, (3) the prevailing charge of physicians for similar services in the locality adjusted for the Medicare Economic Index (MEI), or (4) a special reasonable charge limit that applies if HCFA determines that applying the above criteria to a particular service or category of services would result in grossly excessive charges. (When the use of the customary and prevailing charges results in a payment that is grossly deficient, a higher reasonable charge may be recognized.) The prevailing charge for a service, before adjustment for the MEI, is calculated at the 75th percentile of physicians' customary charges for a similar service in the same locality. In computing prevailing charges, the carrier uses the customary charges of physicians in the locality weighted by frequency.

The basic methodology for the calculation of the MEI is set forth in 42 CFR 405. 504(a)(3)(i) and can be reviewed in detail in the September 30, 1985 notice (50 FR 39941).

However, the MEI increase for fee screen year (FSY) 1991 is mandated by legislation, specifically, section 4105 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508, enacted on November 5, 1990). The MEI increase for FSY 1991 will be:

- For primary care services, 2 percent.
- For all other physician services, no increase.

This increase is effective for the twelve-month period beginning January 1, 1991.

Section 4042(b) of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100–203) enacted a new section 1842(b)(4)(E)(iii) of the Act to define primary care services as physician services that constitute office medical services, emergency department services, home medical services, skilled nursing, intermediate care and long-term care medical services, or nursing home, boarding home, domiciliary or custodial care medical services.

In addition, before the enactment of Public Law 100–203, section 1842(b)(4)(A)(iv) of the Act provided that for payment purposes, the prevailing charge for physician services furnished by a nonparticipating physician on or after January 1, 1987 would be 96 percent of the computed MLI adjusted prevailing charge. As amended by section 4042(c)(2) of Public Law 100–203, the differential is 95 percent for services furnished by a nonparticipating physician on or after January 1, 1989.

II. Regulatory Impact Statement

This notice announces the MEI charges prescribed by section 1852(b)(4) of the Act, as amended by section 4042 of Public Law 100–203, section 6107 (a) and (b) of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101–239), and section 4105 of Public Law 101–508. We have determined, and the Secretary certifies, that no analyses are required under Executive Order 12291, the Regulatory flexibility Act (5 U.S.C. 601 through 612) or section 1102(b) of the Act.

III. Other Required Information

A. Paperwork Reduction Act

The changes in this notice do not impose information collection requirements. Consequently, they need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3511).

B. Public Comment Period

We are not publishing this notice for public comment prior to its taking effect since it merely announces the rate of change in the MEI as required by legislation. As noted above, the basic methodology for the calculation of the figures has not changed. Thus, we find it unnecessary to public this document in proposed form with a prior comment period.

Authority: Section 1842(b)(4) of the Social Security Act (42 U.S.C. 1395u(b) and 42 CFR 405.504(a)(3)(i)).

(Catalog of Federal Domestic Assistance, Program No. 93.774, Medicare-Supplementary Medical Insurance)

Dated: December 16, 1990.

Gail R. Wilensky,

Administrator, Health Care Financing Administration.

[FR Doc. 91–56 Filed 1–2–91; 8:45 am]

BILLING CODE 4120–01–M

Office of Human Development Services

Runaway and Homeless Youth; Final Priorities for Fiscal Year 1991

AGENCY: Office of Human Development Services (OHDS), Department of Health and Human Services (DHHS).

ACTION: Notice of final fiscal year 1991 Runaway and Homeless Youth Program priorities for the Office of Human Development Services.

SUMMARY: The Runaway and Homeless Youth Act requires the Department of Health and Human Services (DHHS) to publish annually for public comment a proposed plan specifying priorities that will be utilized in making grants under title III of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended. The final priorities, as presented below, take into consideration the comments received from the field in response to that public notice. The actual solicitations of grant applications will be published separately, at a later date, in the **Federal Register**. No proposals, concept papers, or other forms of application should be submitted at this time.

FOR FURTHER INFORMATION CONTACT: Carol J. Behrer, Associate Commissioner, Family and Youth Services Bureau, telephone (202) 245–0102.

SUPPLEMENTARY INFORMATION:

I. Purpose

The purpose of the Runaway and Homeless Youth Act (the Act) is to improve services for and to increase knowledge about runaway and homeless youth and their families. This Act is administered by the Family and Youth Services Bureau (FYSB) of the Administration for Children, Youth and Families (ACYF).

The Act authorizes financial assistance to establish or strengthen community-based programs (Basic Centers) designed to address the immediate service needs of runaway and homeless youth and their families; to fund a national communication system; to provide grants to statewide and regional non-profit organizations for the provision of training and technical assistance to agencies eligible to establish and operate runaway and homeless youth centers; to make grants for research, demonstration, and service projects; and to provide informational assistance to potential grantees interested to establishing runaway and homeless youth centers.

The Act also authorizes the Transitional Living Grant Program for Homeless Youth which provides shelter and services to older homeless youth, ages 16 through 21, for up to 18 months.

II. Background

The Family and Youth Services Bureau (FYSB) is located within the Administration for Children, Youth and Families (ACYF), Office of Human Development Services (HDS), Department of Health and Human Services. The Family and Youth Services Bureau is responsible for administering the Runaway and Homeless Youth Act at the Federal level.

To carry out the purposes of the Act, ACYF is currently providing financial support to 339 Basic Centers that address the crisis needs of runaway and homeless youth and their families by providing temporary shelter, food, clothing, counseling, and related services. The Administration for Children, Youth and Families also supports coordinated networks designed to share information, expertise, and resources among service providers; a toll-free 24-hour hotline (the National Runaway Switchboard), which serves as a neutral channel of communication between young people and their families and as a source of referrals to needed services; and grants for research, demonstration, and service projects related to runaway and homeless youth.

The Administration for Children, Youth and Families also supports 45 transitional living projects across the country. These projects provide shelter, skills training, and support services to older homeless youth ages 16 through 21. The purpose of the program is to help youth achieve self-sufficiency and avoid long-term dependency on social service.

III. Proposed Priorities, Comments, and Final Priorities

Section 364 of the Act requires that a notice of final program priorities be published each year after taking into consideration comments received from a public notice of proposed priorities. On October 3, 1990, the Department published a notice of proposed priorities for fiscal year 1991 in the **Federal Register** (55 FR 40443–46) and requested comments and recommendations from the field. Comments on topics not covered in that notice, but which were timely and related to the specific needs of runaway and homeless youth, were also solicited.

As indicated in the earlier **Federal Register** notice, no acknowledgement is being made of specific comments. All comments received by the deadline have been considered in preparing the final runaway and homeless youth funding priorities.

One hundred forty-five comments from individuals and organizations were received in response to the proposed priorities published in October. In general, the comments were supportive of the proposed priorities. However, in response to two proposed policies—a proposal to place all Basic Center grantees within a given State in the same competitive funding cycle and proposal to provide systematic training and technical assistance to service providers through contracts as an alternative to the current system of grants to coordinated Regional networks—the comments were either mixed or largely non-supportive.

Based on these public comments, the Department will not implement, at this time, the proposal to place all Basic Center grantees within a given State in the same competitive funding cycle, but will further review the advantages and disadvantages of such a policy.

Comments received were overwhelmingly supportive of the proposal to allow Basic Center continuation grantees (that is, grantees entering the second and third years of their three-year project periods) to apply for expansion funds. Given the increase in funds available this year for Basic Center grants, ACYF will allow certain continuation grantees (those currently receiving Basic Center grants of less than $75,000 annually) to compete for permanent supplements to their grants. The Administration for Children, Youth and Families anticipates that many of the current problems of perceived inequity and unfairness among grantees and the problems associated with a given grant being insufficient to support the full range of required Basic Center activities, will be at least partially alleviated by this policy.

The Administration for Children, Youth and Families has decided further that training and technical assistance to service providers will continue to be provided through grants rather than through contracts. Statewide and Regional non-profit agencies will be eligible to apply for grants to provide such services through the fiscal year 1991 HDS Coordinated Discretionary Funds Program.

A detailed statement of each final program priority follows.

IV. Annual Program Priorities for Fiscal Year 1991

A. Priorities for Runaway and Homeless Youth Basic Centers

Part A, section 311 of the Act authorizes the Department to make grants to public and private entities to establish and operate local runaway and homeless youth centers to provide services to deal primarily with the immediate needs of runaway or otherwise homeless youth and their families in a manner which is outside the law enforcement structure and the juvenile justice system.

Approximately 360 Basic Center grants, of which one-third will be competitive new awards and two-thirds will be non-competitive continuation

awards, will be funded during fiscal year 1991 to support organizations which provide services to fulfill the four goals of the Runaway and Homeless Youth Program. These goals are to:

1. Alleviate the problems of runaway and homeless youth;
2. Reunite youth with their families and encourage the resolution of intrafamily problems through counseling and other services;
3. Strengthen family relationships and encourage stable living conditions for youth; and
4. Help youth decide upon a future course of action.

To attain these goals, community-based centers that address the immediate needs (e.g., outreach, temporary shelter, food, clothing, counseling, aftercare and related services) of runaway and homeless youth and their families will be established or strengthened through the conduct of a competitive grant review process.

Funds for Basic Center grants are allotted annually among the States and other qualifying jurisdictions on the basis of their relative population of individuals who are less than 18 years of age. For the past several years, Basic Center grants have been awarded for three-year project periods. Approximately one-third of the grants expire each year, requiring these agencies to compete for new awards. The remaining two-thirds of the Basic Center grants receive non-competitive continuation awards. This practice will be maintained during fiscal years 1991.

In previous years, agencies eligible to receive continuation awards under the Basic Center program have been excluded from competing for available funds to permanently increase their approved three-year funding levels. During fiscal year 1991, some continuation grantees (those currently receiving grants of under $75,000 annually) will be allowed to compete for supplemental funds (expansion funds) to their existing grants in all States and jurisdictions in which competitive funds are available. Such supplemental funding will be for the purposes of expanding and/or strengthening Basic Center services to runaway and homeless youth and their families.

Applications for competitive new-start awards and for competitive expansion awards for Basic Centers will be solicited through an announcement in the **Federal Register**. This announcement is scheduled for publication in January 1991, and will contain the review criteria and all required application forms.

Applications for non-competitive continuation awards for Basic Centers will not be solicited in the **Federal Register**, but will be handled by direct communications between the grantees and the respective Regional offices.

B. Priorities for a National Communication System

Part A, section 313 of the Runaway and Homeless Youth Act, as amended, mandates support for a national communication system to assist runaway and homeless youth in communicating with their families and with service providers, and earmarks $750,000 in fiscal year 1991 for this purpose. The current grant for this system, which was awarded in 1986 to Metro-Help, Inc., of Chicago to operate the National Runaway Switchboard, expires this fiscal year.

Applications for a new competitive grant to provide the mandated services will be solicited through an announcement in the **Federal Register**. The announcement is scheduled for publication in January, 1991.

C. Priorities for Transitional Living Grants

Part B, section 321 of the Runaway and Homeless Youth Act, as amended, authorizes grants to establish and operate transitional living projects for homeless youth. The Transitional Living Program is structured to help older homeless youth achieve self-sufficiency and avoid long-term dependency on social services. Transitional living projects provide shelter, skills training, and support services to homeless youth ages 16 through 21.

Forty-five transitional living grants were awarded in September, 1990, for three-year project periods and 15-month budget periods. Approximately 30 additional transitional living grant awards are expected to be made in fiscal year 1991.

Applications for these competitive new start awards will be solicited through an announcement in the **Federal Register**. This announcement will contain the review criteria and all required application forms, and is scheduled for publication in March, 1991.

D. Priorities for Technical Assistance and Training

Both the Runaway and Homeless Youth Act, section 314, and the Drug Abuse Prevention Program for Runaway and Homeless Youth, seciton 3511 of the Anti-Drug Abuse Act of 1988, also administered by ACYF, authorize support to nonprofit organizations for the purpose of providing training and technical assistance to runaway and homeless youth service providers. For the past several years, these general services have been provided through coordinated networking grantees in each of the ten Federal regions. Each of the ten current grants will expire in fiscal year 1991.

The Administration for Children, Youth and Families anticipates that responsibilities in this area will be carried out by statewide or Regional nonprofit agencies with experience in providing services to runaway and homeless youth. Competitive grants will be awarded through the fiscal year 1991 Coordinated Discretionary Funds Program of the Office of Human Development Services. (See below, section E(3): "Enhancing the Proficiency of Youth Service Workers and Runaway and Homeless Youth Service Providers.")

E. Priorities for Research, Demonstration and Service Projects

Section 315 of the Act authorizes the Department to make grants to States, localities, and private entities to carry out research, demonstration, and service projects designed to increase knowledge concerning, and to improve services for, runaway and homeless youth. In the proposed priorities published on October 3, 1990, comments were solicited regarding seven potential research, demonstration, and service priority areas. Although favorable comments were received regarding each of the seven areas, lack of funds has prevented ACYF from extending support to all seven areas. Accordingly through an announcement scheduled for publication in the **Federal Register** in February 1991, the Coordinated Discretionary Funds Program (CDP) of the Office of Human Development Services will solicit proposals to carry out projects in three related priority areas, as follows:

(1) Home-Based Services—An Alternative to Out-of-Home Shelter

This priority area will focus on the development of home-based intervention models, including mediation, designed to meet the needs of at-risk youth and their families. Grantees will develop, demonstrate, and document innovative home-based models to prevent initial runaway behavior as well as to address runaway episodes once they occur.

It is anticipated that up to four projects will be funded with project periods up to 36 months. The maximum Federal share of a project will not exceed $200,000 per 12-month budget period, with a minimum matching requirement of at least 25 percent of the annual project budget.

(2) Transitional Living/Independent Living Collaboration

This priority area will focus on the development, testing, and evaluation of models of collaboration between transitional living and independent living programs at the State and local levels. The transitional living projects, authorized under Part B of the Runaway and Homeless Youth Act, are designed to prepare older homeless youth, ages 16 through 21, to lead self-sufficient lives and to prevent long-term dependency on social services. The independent living projects, authorized under title IV–E of the Social Security Act, are designed to assist youth ages 16 or older, currently or formerly in foster care, to make the transition to independent living.

It is anticipated that up to four projects will be funded with project periods of up to 24 months and an initial budget period of 17 months. The maximum Federal share of a project will be $200,000 for the entire 24-month project period, with a minimum non-Federal matching requirement of 25 percent of the total project costs.

(3) Enhancing the Proficiency of Youth Service Workers and Runaway and Homeless Youth Service Providers

This priority are will focus on improving the capacity of public and private agencies to provide services to runaway and homeless youth by assisting such agencies to establish and operate runaway and homeless youth centers and by enhancing the proficiency of professional youth service workers. A central responsibility of the recipients of these grants will be to promote the collaborative exchange of professional knowledge, skills, and experience among the youth service staff and programs in the grantee areas).

It is anticipated that a sufficient number of grants will be awarded to provide services in each of the ten Federal Regions. Project periods will not exceed 36 months. The maximum Federal share of project costs will not exceed $125,000 per Federal Region, with a non-Federal matching requirement of at least 10 percent of the Federal share.

F. Priorities for Evaluation

Third party evaluations are important means of identifying and measuring the outcomes of Federally-supported programs. Information from such evaluations can be used to improve program quality and to determine program effectiveness. The following two evaluation projects, to be funded through contracts, are planned for fiscal year 1991:

(1) Evaluation of the Transitional Living program

The first grants under the new Transitional Living program were awarded during fiscal year 1990, and a design for the evaluation of these projects is being developed. The focus of the evaluation will be the effectiveness of the services provided by the projects, primarily in terms of client outcomes.

(2) Evaluation of Services provided by Basic Centers for Runaway and Homeless Youth

This project will use a pretested instrument to study approximately 2,000 youth who have been served by the Basic Centers funded under the Runaway and Homeless Youth Act. Findings from a project funded during fiscal year 1989 indicate that establishing contact with runaway and homeless youth is a difficult task. Under this project, it is anticipated that a national network of center staff will be used to track and contact individual youth and to conduct follow-up interviews. The findings from the study will provide updated information on the effectiveness of the services provided to runaway and homeless youth and their families for use at the Federal and service provider levels.

Applications for contracts to carry out these two evaluations will be solicited in the *Commerce Business Daily*.

(Catalog of Federal Domestic Assistance, Program Number 13.623, Runaway and Homeless Youth Program)

Dated: December 24, 1990.

Wade F. Horn,

Commissioner, Administration for Children, Youth and Families.

Approved: December 27, 1990.

[FR Doc 91–57 Filed 1–2–91; 8:45 am]

BILLING CODE 4130–01–M

DEPARTMENT OF THE INTERIOR

Office of The Secretary

Steering Committee for the "Protecting Our National Parks" Symposium; Establishment

This notice is published in accordance with section 9(a)(2) of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (1988). Following consultation with the General Services Administration, notice is hereby given that the Secretary of the Interior is establishing as an Advisory Committee the Steering Committee for the "Protecting Our National Parks" Symposium.

The Symposium is to be held in October, 1991 as a central element of the 75th Anniversary Celebration of the National Park Service. It is being undertaken in cooperation with the World Wildlife Fund/The Conservation Foundation, Harvard University's Kennedy School of Government, and the National Park Foundation. The Steering Committee will guide specific aspects of the Symposium, which will focus on National Park issues and opportunities for improved park stewardship. It will utilize a working group process which will engage prominent professionals in focusing on issues for deliberation, and later distilling the recommendations of the Symposium into a final report. The leaders of the working groups will be members of the Steering Committee, which will be chaired by the Deputy Regional Director, Pacific Northwest Region, National Park Service.

The purpose of the Steering Committee is to advise the Director of the National Park Service. Its duties are solely advisory and are as stated above. In carrying out its duties, the Steering Committee, or subcommittee of the Steering Committee, may seek the views of various citizen groups and members of the public.

The Steering Committee will be composed of the following members, who shall be appointed by the Director of the National Park Service: (a) One representative from the World Wildlife Fund/The Conservation Foundation; (b) one representative from the John F. Kennedy School of government, Harvard University; (c) one representative of the National Park Foundation; (d) the Symposium Program Subcommittee Coordinator; (e) the leaders of the working groups; (f) one member of the National Park System Advisory Board; (g) one member designated by the Secretary of the Interior; and (h) four National Park Service representatives. The Director will make every effort to ensure that the Steering Committee reflects balanced and diverse perspectives and viewpoints and that working group leaders possess strong academic, technical and professional credibility in the specific topic areas to be included in the final report. It is presently anticipated that the committee will be terminated two years from the date of establishment.

The Steering Committee will function solely as an advisory body, and in compliance with provisions of FACA. The Charter will be filed under the Act, fifteen days from the date of publication of this notice.

Further information regarding the Steering Committee may be obtained from Mr. William J. Briggle, Deputy Regional Director, Pacific Northwest Region, National Park Service, 83 South King Street, suite 212, Seattle, WA 98104

(telephone 206–442–4653). The Certification of Establishment is published below.

Certification

I hereby certify that the establishment as a Advisory Committee of the Steering Committee for the "Protecting Our National Parks" Symposium is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by law by the Act of August 25, 1916 (16 U.S.C. 1, *et seq.*), as amended and supplemented, and other statutes relating to the administration of the National Park System.

Dated: December 27, 1990

Manuel Lujan, Jr.,

Secretary of the Interior.

[FR Doc. 91–14 Filed 1–2–91; 8:45 am]

BILLING CODE 4310–10–M

Bureau of Land Management

[WY–040–01–4111–08]

Big Piney-LaBarge Area Coordinated Activity Plan; Availability of Environmental Assessment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability of an Environmental Assessment (EA) for the Big Piney-LaBarge Area Coordinated Activity Plan (CAP).

SUMMARY: The BLM has prepared an Environmental Assessment (EA) to analyze the environmental impacts from six alternative Coordinated Activity Plans for resource development opportunities in the Big Piney-LaBarge area of southwestern Wyoming. The alternative Activity Plans analyzed include those recommended by the Rocky Mountain Oil and Gas Association (RMOGA) and the Wildlife Federation/Sierra Club. The EA is tiered to the Pinedale RMP/EIS. The EA will aid in determining which CAP Alternative will be selected, whether an amendment of the Pinedale RMP is necessary and whether an environmental impact statement (EIS) must be prepared.

DATES: The closing date for public comment on the EA is Friday, February 15, 1991. The Decision Record is scheduled for completion in April 1991. If the Pinedale RMP must be amended, a 30-day protest period will be provided as required under the planning regulations, 43 CFR parts 1600–1610. A 30-day appeal period, per 43 CFR part 4, will be provided prior to implementing the CAP decision. A Governor's consistency review will also be provided before CAP implementation begins. Public meetings and other public involvement activities during the evaluation process will be announced in local media and through mailings to the public and interest groups.

ADDRESSES: A copy of the CAP EA may be obtained from the following BLM offices: Pinedale Resource Area Office, P.O. Box 768, Pinedale, Wyoming 82941; Rock Springs District Office, P.O. Box 1869, Rock Springs, Wyoming 82902–1869; and Wyoming State Office, P.O. Box 1828, Cheyenne, Wyoming 82003. A limited number of copies of the supporting Technical Report is also available.

FOR FURTHER INFORMATION CONTACT: If you wish to be placed on the mailing list, contact Bill Daniels, Chief Branch of Planning & Environmental Coordination, Wyoming State Office, at the above address or phone (307) 775–6105.

SUPPLEMENTARY INFORMATION: The Pinedale RMP noted that there could be areas where additional detailed, site-specific management plans for one or more land use activities might be needed. The CAP area which is comprised of approximately 197,000 acres in Sublete and Lincoln counties is identified as one of these areas of concern because of land and resource use conflicts among oil and gas, wildlife, watershed, livestock grazing, and water quality. These conditions create a complex management situation that makes it difficult to implement any single resource management program independently.

The alternative CAPs would integrate the management of identified resource program to achieve the goals and objectives in the Pinedale RMP and provide specific guidance for the development, restoration, reclamation, and abandonment of surface disturbing activities.

The BLM Pinedale Resource Area circulated a draft CAP for public comment in March 1990. The draft CAP was based on the Pinedale RMP and on input from the public, governmental agencies, and user groups including oil and gas and livestock operators, and the Wyoming Game and Fish Department.

The EA analyzes alternative solutions to the issues raised in the CAP scoping process, e.g. implementation of oil and gas infield development; wildlife seasonal and surface disturbing restrictions; vegetation manipulation treatments to improve wildlife crucial winter habitat; livestock grazing treatments to improve livestock and wildlife vetetation resources; socioeconomic implications; and watershed condition and protection. The EA also anlayzes the cumulative impacts of human activities in the CAP area.

Ray Brubaker,

State Director, Wyoming.

[FR Doc. 91–1 Filed 1–2–91; 8:45 am]

BILLING CODE 4310–22–M

Fish and Wildlife Service

Intent To Prepare a Supplemental Programmatic Environmental Impact Statement (SPEIS) on Administration and Management of the Federal Aid in Wildlife Restoration Program and the Federal Aid in Sport Fish Restoration Program; Request for Comments; and Notification of Public Scoping Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Preparation of supplemental environmental impact statement.

SUMMARY: In 1978, the U.S. Fish and Wildlife Service (Service) published a programmatic Environmental Impact Statement (EIS) on the above-referenced Federal Aid Programs. Exceeding the planning horizon of the 1978 EIS and changes in funding levels and project activities, along with widespread and continuing interest in new initiatives since 1978, necessitate re-evaluation of the Federal Aid Programs' effect on the human environment. The Service intends to prepare a SPEIS for the Federal Aid in Wildlife Restoration Program and the Federal Aid in Sport Fish Restoration Program as amended by the Deficit Reduction Act of 1984 and affected by the Coastal Wetlands Planning, Protection and Control Act (Pub. L. 101–646). The area involved includes all 50 States, five Territories, and the District of Columbia. A Public Scoping Meeting will be held in Washington, DC, to help define the scope of study for the SPEIS. Written comments are requested.

DATES: The Public Scoping Meeting will be held on February 8, 1991, at 9 a.m., in the Ramada Renaissance Hotel, 950 North Stafford, Arlington, Virginia. The Hotel is located a the Ballston Metro station at the intersection of North Stafford and Fairfax Drive. Persons with disabilities needing special accommodation should contact the Division of Federal Aid, Fish and Wildlife Service at 703/358–2156 by February 1, 1991.

Written comments must be received no later than February 21, 1991. Comments should be addressed to the following:

ADDRESSES: Director, U.S. Fish and Wildlife Service, Department of the Interior, 1849 C Street, NW., Mail Stop 322, Arlington Square, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Columbus H. Brown, Chief, Division of Federal Aid, or Thomas W. Taylor, Wildlife Biologist, U.S. Fish and Wildlife Service, Division of Federal Aid, Mail Stop 322, Arlington Square, 1849 C Street, NW. Washington, DC 20240, Telephone: 703/358–2156.

SUPPLEMENTARY INFORMATION: In 1978, the U.S. Fish and Wildlife Service published an EIS entitled "Environmental Impact Statement—Operation of the Federal Aid in Sport Fish and Wildlife Restoration Program." The EIS evaluated impacts on the human environment resulting from actions to be carried out by the 50 States, Guam, Puerto Rico, the Virgin Islands, the Northern Mariana Islands and American Samoa (the States) with funding assistance by the Federal Aid in Wildlife Restoration Act, as Amended (16 U.S.C. 669–669i) and the Federal Aid in Sport Fish Restoration Act, as amended (16 U.S.C. 777–777k). The existing regulations for implementing these Acts are found in 50 CFR part 80.

Federal funds utilized in this program are derived from excise taxes and fees which are levied on products employed in hunting, fishing, shooting, and boating. The resulting revenue is allocated annually among the States in conformance with statutory formulae based on geographic areas, population and numbers of licensed hunters and fishermen, and among the Territories and Insular Possessions listed above based on statutory shares.

The States' average annual use of funds from these two assistance programs during recent years (1985, 1986 and 1987) is summarized below.

Activity	Funds ($1000) and percent of total expended			
	Wildlife restoration		Fishing & boating	
Hunter Education	$23,242	9%		
Land Acquisition	15,891	6%	3,463	2%
Development	30,185	11%	31,055	20%
Surveys & Investigations	45,940	17%	50,899	36%
Research	28,230	11%	82,139	24%
Technical Guidance	9,773	4%	6,725	5%
Operation & Maintenance	87,240	33%	10,508	5%
Planning	3,221	1%	2,544	2%
Administration	22,698	8%	9,524	6%

The environmental impacts produced by these programs are believed to be primarily beneficial. Such impacts include the maintenance of lands in a more or less natural state, the restoration and maintenance of fish and wildlife species, and providing for a sustained program of public recreation and education. However, the execution of these programs may result in other impacts, such as altering certain habitats and animal populations, flooding or burning certain vegetation areas, and effecting changes in local economic activity by altering the status of availability of fish and wildlife.

Many of the fish and wildlife species given management attention under this program are subject to harvest by hunters, fishermen and trappers. Such harvests, properly conceived and carried out, are considered legitimate and biologically defensible parts of fish and wildlife management. However this activity is under State jurisdiction and is performed by authority of the State's policymaking body. Hence, hunting, fishing and trapping are not program activities and will not be addressed in any analysis.

Since their inception in 1937 and 1950, the Wildlife Restoration and Sport Fish Restoration Acts, respectively, have been primary forces in the recovery of numberous wildlife and fish species. During the early years, managers focused almost exclusively on species of interest to hunters and fishermen. Nevertheless, these activities benefitted non-game species as well.

In the period since publication of the existing EIS, the Wildlife Restoration Program has undergone little substantial changes in program direction. Activities have kept pace with advanced scientific techniques through the years, and revenue has grown from $67.8 million in 1978 to $126.5 million in 1989. There were refinements, but no major changes in its administration during that period. However, substantial changes have occurred in the Sport Fish Restoration Program as a result of the 1984 Wallop-Breaux amendment. This amendment was responsible for expanding the list of fishing equipment subject to the manufacturers' excise tax and the capturing of gasoline used in motorboats, of import duties on pleasure boats, and of interest earned by these funds prior to their allocation. Hence, revenues under this Act increased from about $26.3 million in 1978 to $186.7 million in 1989.

The Wallop-Breaux amendment also expanded the range of activities undertaken by the States. These changes emphasize developing and upgrading boating access factilities, include aquatic education, and contain a requirement to allocate funds for marine sport fisheries projects.

On July 14, 1989, the Service published a **Federal Register** Notice advising of its intention to issue a revised and updated EIS for the Federal Aid in Wildlife and Sport Fish Restoration Programs (54 FR 29789). A revised notice was published on August 28, 1989, wshich extended the public comment period by 30 days, expanded and clarified the alternatives listed in the previous notice, and provided additional explanation (54 FR 35537).

As a result of comments received in response to these notices, the Service decided to prepare a supplement to the 1978 EIS. In accordance with the Council on Environmental Quality's (CEQ's) regulations which implement the procedural provisions of the National Environmental Policy Act (NEPA), the SPEIS will be prepared as an entirely new EIS utilizing those portions of the 1978 EIS which are currently applicable and updating other portions as appropriate.

The scope for the SPEIS includes a proposed action defined as execution of the Federal Aid in Wildlife Restoration and Federal Aid in Sport Fish Restoration Programs as envisioned into the next century consistent with current legislative mandates and policies. It should be noted that the proposed action is not necessarily the Service's preferred alternative. In accordance with CEQ regulations, the Service's preferred alternative(s) will be identified in the draft SPEIS (40 CFR 1502.14(e)).

It is impossible and unnecessary to precisely predict the specific activities that will occur within each of the above categories under the Federal Aid Program into the next century. The States are the primary determinants in the selection of these activities which they propose annually for approval by the Service. it is also inappropriate or impractical for a programmatic EIS to evaluate a proposed action and alternatives at this level of detail. The precise locations in addition to the specific actions are unknown at this time, precluding any meaningful analysis at the specific activity level. It must be recognized further that under the Federal Aid Program, each project when proposed for funding is subjected to environmental analysis in compliance with NEPA, CEQ regulations, and Department of the Interior and the Service's regulations and policies.

Alternatives under consideration for evaluation in the SPEIS include:

Alternative #1. Federal requirements would mandate that at least 50 percent

of each year's Wildlife Restoration funds expended by the State be on waterfowl habitat or in pursuit of the North American Waterfowl management Plan, and at least 50 percent of each year's Sport Fish Restoration funds expended by the State be on the protection, maintenance and improvement of aquatic habitats, including water quality.

Alternative #2. At least 50 percent of each year's Wildlife Restoration funds would be expended on restoring and enhancing terrestrial ecosystems without reference to hunted/non-hunted status. At least 50 percent of each year's Sport Fish Restoration funds would be expended on restoring and enhancing aquatic ecosystems.

Alternative #3. All projects would be required to show primary benefits to harvested species of fish and/or wildlife or to sportsmen.

Alternative #4. By 1995, all States would be required to have in place a comprehensive plan or other systematic process for setting work priorities consistent with human needs and the status of the resource base. Thereafter, all requirements and prohibitions on activities would be repealed legislatively, and the Federal role would be limited to allocating funds and monitoring compliance with Federal statutes.

Alternative #5. All limitations and restrictions in the Federal Aid Acts and related regulations and policies would be removed legislatively to permit the States unimpeded pursuit of their own priorities.

Alternative #6—No Action Alternative. The Sport Fish and Wildlife Restoration Programs would proceed with "no change" from current management direction or level of management activity. This alternative is described in CEQ's "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (46 FR 18026).

The evaluation of environmental consequences will be conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4331, et seq.), National Environmental Policy Act regulations (40 CFR parts 1500–1506), other appropriate Federal laws and regulations, and Service procedures for compliance with those regulations.

The Service requests comments from the public regarding this Notice. Of specific interest will be comments consistent with the scoping provisions of CEQ's Regulations which:

- Propose changes, deletions, or additions to the above list of alternatives and which provide supporting reasons for their consideration as well as others that may be proposed;
- Address the environmental impacts, either individually or cumulatively, of the proposed action or any of the alternatives;
- Identify ways to mitigate anticipated impacts of the proposed action and alternatives;
- Identify significant issues that should be analyzed in depth;
- Identify issues that are not significant;
- Identify other environmental review and consultation requirements that should be considered in preparation of the SPEIS; and
- Identify other studies and documentation that may be available that would assist the Service in preparation of the SPEIS.
- Address whether changes in the Wildlife Restoration Program have been (and are anticipated to be into the next century) significant enough since publication of the 1978 EIS to merit re-evaluation of the SPEIS.

The public is encouraged to participate in this process by providing comments on the above or any other items related to preparation of the SPEIS. Comments will be accepted in writing until February 21, 1991, at the above address. Comments may also be provided verbally at the Public Scoping Meeting identified above.

One Public Scoping Meeting will be held. Based on comments received in response to earlier notices, no substantial support was identified for additional Public Scoping Meetings, nor was it determined that additional Public Scoping Meetings would contribute significantly to written comments.

Sign-in sheets will be provided at the entrance to the Public Scoping Meeting. Participants are requested to provide their name, address, affiliation, and to indicate if they will be presenting comments. Presentations will be scheduled in order of sign-in and will be limited to five minutes. Longer presentations should be summarized and written comments provided. Organizations are requested to select one representative to speak for the organization.

A meeting with representatives from the State fish and wildlife management agencies is also proposed after the Public Scoping Meeting. At this time, public input will be reviewed to help refine the scope for the SPEIS. The representatives will primarily help to identify reasonable and feasible alternatives and possible mitigation measures based on their past experience in implementation of the program.

It is anticipated that the draft SPEIS will be made available to the public on or about March 20, 1992. The final SPEIS will be distributed on January 1, 1993.

Dated: December 27, 1990.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 91–8 Filed 1–2–91; 8:45 am]

BILLING CODE 4310–55–M

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731–TA–483 and 484 (Preliminary)]

Certain Personal Word Processors From Japan and Singapore

Determinations

On the basis of the record [1] developed in the subject investigations, the Commission determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry in the United States is materially injured, or threatened with material injury, by reason of imports from Japan of certain personal word processors,[2] provided for in subheadings 8469.10.00 and 8473.10.00 of the Harmonized Tariff Schedule of the United States (previously under items 676.07 and 676.50 of the former Tariff Schedules of the United States), that are alleged to be sold in the United States at less than fair value (LTFV).

Further, the Commission determines that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Singapore of certain personal word processors that are alleged to be sold in the United States at LTFV.

Background

On November 6, 1990, a petition was filed with the Commission and the Department of Commerce by Smith Corona Corporation, New Canaan, CT, alleging that an industry in the United States is materially injured by reason of LTFV imports of certain personal word processors from Japan and Singapore.

[1] The record is defined in sec. 207.2(h) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(h)).

[2] For a comprehensive description of the merchandise subject to these investigations, see, e.g., *Department of Commerce, Initiation of Antidumping Duty Investigation: Personal Word Processors from Japan*, 55 FR 49662, Nov. 30, 1990.

Accordingly, effective November 6, 1990, the Commission instituted preliminary antidumping investigations Nos. 731–TA–483 and 484 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of November 14, 1990 (55 FR 47544). The conference was held in Washington, DC, on November 28, 1990, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on December 21, 1990. The views of the Commission are contained in USITC Publication 2344 (December 1990) entitled "Certain Personal Word Processors from Japan and Singapore: Determinations of the Commissions in Investigations Nos. 731–TA–483 and 484 (Preliminary) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

By order of the Commission.

Issued: December 21, 1990.

Kenneth R. Mason,

Secretary.

[FR Doc. 91–33 Filed 1–2–91; 8:45 am]

BILLING CODE 7020–02–M

[Investigations Nos. 701–TA–305 and 306, and 731–TA–476 through 482 (Preliminary)]

Steel Wire Rope From Argentina, Chile, India, Israel, Mexico, the People's Republic of China, Taiwan, and Thailand

Determinations

On the basis of the record [1] developed in the subject investigations, the Commission determines,[2] pursuant to section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) (the Act), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from India of steel wire rope,[3] that are alleged to be subsidized by the Government of India. The Commission also determines that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Israel of steel wire rope, that are alleged to be subsidized by the Government of Israel.

The Commission determines,[2] pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Argentina, India, Mexico, the People's Republic of China, Taiwan and Thailand of steel wire rope, provided for in subheadings 7312.10.60 and 7312.10.90 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV). The Commission also unanimously determines that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Chile of steel wire rope, that are alleged to be sold in the United States at LTFV.

Background

On November 5, 1990, a petition was filed with the Commission and the Department of Commerce by The Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers, alleging that an industry in the United States is materially injured and threatened with material injury by reason of subsidized imports from India, Israel, and Thailand, and by reason of LTFV imports of steel wire rope from Argentina, Chile, India, Mexico, the People's Republic of China, Taiwan and Thailand. Accordingly, effective November 5, 1990, the Commission instituted preliminary countervailing duty investigations Nos. 701–TA–305 and 306, and preliminary antidumping investigations Nos. 731–TA–476–482.[4]

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of November 16, 1990 (55 FR 11917). The conference was held in Washington, DC, on November 27, 1990, and all persons who timely requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on December 20, 1990. The views of the Commission are contained in USITC Publication 2343 (December 1990), entitled "Steel wire rope from Argentina, Chile, India, Israel, Mexico, the People's Republic of China, Taiwan and Thailand: Determinations of the Commission in Investigations Nos. 701–TA–305 and 306, and 731–TA–476–482 (Preliminary) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

By Order of the Commission.

Issued: December 24, 1990.

Kenneth R. Mason,

Secretary.

[FR Doc. 91–34 Filed 1–2–91; 8:45 am]

BILLING CODE 7020–02–M

[332–299 Supplement]

United States-Canada Free-Trade Agreement; Probable Economic Effect on U.S. Industries and Consumers of Immediate Elimination of U.S. Tariffs on Certain Articles From Canada (Second Annual Report—Supplement)

AGENCY: United States International Trade Commission.

ACTION: Notice of additional articles under consideration and request for comments.

SUMMARY: Following receipt on December 14, 1990, of a supplemental request for advice from the U.S. Trade Representative (USTR), the Commission amended the scope of its investigation No. 332–299 and will provide advice to the President, with respect to each of the 15 additional articles listed in the notice published by the USTR in the **Federal Register** of December 17, 1990 (55 FR 51780), of its judgment as to the probable economic effect of the immediate elimination of the U.S. tariff, under the United States-Canada Free-Trade Agreement (FTA), on domestic

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[1] The record is defined in sec. 207.2(h) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(h)).

[2] Vice Chairman Brunsdale dissenting.

[3] The imported steel wire rope covered by these investigations consists of ropes, cables and cordage, of iron or steel, other than stranded wire, not fitted with fittings or made into articles, and not made of brass plated wire. Such steel wire rope is provided for in subheadings 7312.10.60 and 7312.10.90 of the Harmonized Tariff Schedule of the United States (HTS) (previously in items 642.14 and 642.16 of the former Tariff Schedules of the United States (TSUS)).

[4] The Commission's notice of institution was amended to remove reference to countervailing duty investigation No. 303–TA–21 involving Thailand (55 FR 52108, December 19, 1990). Effective July 1, 1990, imports from Thailand of steel wire rope are no longer duty free under GSP, and therefore, are no longer entitled to an injury determination under section 303 of the Act (19 U.S.C. 1303).

industries producing like or direct competitive articles and on consumers. The Commission will provide the advice on the additional articles by February 27, 1991.

EFFECTIVE DATE: December 21, 1990.

FOR FURTHER INFORMATION CONTACT: The Project Leader, Laura V. Rodriguez-Archila (202–252–1486), General Manufactures Division, Office of Industries, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. For information on legal aspects of the investigation, contact William Gearhart of the Commission's Office of General Counsel (202–252–1091). The media should contact Lisbeth Godley, Acting Director, Office of Public Affairs (202–252–1822).

Hearing impaired persons can obtain information on the study by contacting our TDD terminal on (202–252–1810).

Background

The USTR requested advice on articles covered by 15 subheadings of the *Harmonized Tariff Schedule of the United States* (HTS) that are in addition to the several hundred articles for which it requested similar advice in a letter received by the Commission on October 15, 1990. The latter articles are listed in Annex 1 (and supplement) of a notice issued by the USTR and published in the **Federal Register** of October 5, 1990 (55 FR 40964). In response to that USTR request, the Commission instituted investigation No. 332–299 under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)) to advise the President, with respect to each dutiable article listed in Annex 1 (and supplement), of its judgment as to the probable effect of the immediate elimination of the U.S. tariff, under the FTA, on domestic industries producing like or directly competitive articles, and on consumers. Notice of institution of the investigation was published in the **Federal Register** of November 8, 1990 (55 FR 47014).

The 15 additional articles for which the USTR requests that the Commission provide advice are as follows—

Article	U.S. HTS subheading
Lingonberries (partridgeberries), frozen.	0811.90.80(pt)
Cottonseed oil, crude	1512.21.00
Cottonseed oil, other than crude.	1512.29.00
Bitumen	2714.90.00
Sodium metasilicates, anhydrous.	2839.11.00(pt)
Hexamethylene diamine, not derived from adipic acide.	2921.22.50(pt)
Indomethacin pellets	3003.90.00(pt)
Lignin	3813.90.50(pt)
Polyvinyl chloride edgebanding, used to cover exposed particleboard edges.	3919.10.20(pt)
Polyvinyl chloride edgebanding, used to cover exposed particleboard edges.	3920.41.00(pt)
Nonwovens, whether or not impregnated, coated, covered or laminated.	5603.00 [1]
Machine-tufted, rubber-backed floor mats.	5703.20.20(pt)
Cat litter	6815.99.40(pt)

[1] Consists of 3 subheadings.

The FTA which entered into force on January 1, 1989, provides that all products of Canada imported into the United States and all products of the United States imported into Canada are to be free of duty by January 1, 1998. In the United States, the FTA was approved and implemented by the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note).

Article 401(5) of the FTA provides that at the request of either government, the two governments are to undertake consultation to consider agreeing to accelerate the elimination of the duties on specific products in the schedule of each government. Section 201(b) of the FTA Implementation Act grants the President, subject to certain requirements, the authority to proclaim any such agreed acceleration of elimination of a U.S. duty. As required by section 103(a)(1)(B) of the FTA Implementation Act, the USTR requested that the Commission provide the probable economic effect advice.

Written Submissions

Interested parties are invited to submit written statements concerning the probable economic effect of immediate elimination of the U.S. tariffs on imports from Canada of the 15 articles added to the list of articles that may be considered by the USTR and the Government of Canada for negotiations on accelerated tariff elimination. Written statements should be received by the close of business on January 18, 1991. Commercial or financial information which a submitter desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submission requesting confidential treatment must conform with the requirements of § 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). All written submissions, except for confidential business information, will be made available for inspection by interested persons. All submissions should be addressed to the Secretary at the Commission's office in Washington, DC

Public Hearing

A public hearing in connection with this investigation is currently scheduled to begin at 9:30 a.m. on January 30, 1991, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. All persons have the right to appear by counsel or in person, to present information, and to be heard. Requests to appeal at the hearing should be filed in writing with the Secretary, United States International Trade Commission, at the Commission's office in Washington, D.C., not later than the close of business (5:15 p.m.) on January 18, 1991. The deadline for filing prehearing briefs (original and copies) is January 18, 1991. The deadline for filing post hearing briefs is the close of business on February 4, 1991. In the event that no requests to appear at the hearing are received by the close of business on January 18, the hearing will be cancelled. Any person interested in attending the hearing as an observer or non-participant should call the Secretary of the Commission (202–252–1808) after January 18 to determine whether the hearing will be held.

By order of the Commission.

Issued: December 27, 1990.

Kenneth R. Mason,

Secretary.

[FR Doc. 91–32 Filed 1–2–91; 8:45 am]

BILLING CODE 7020–02–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31773]

The Mahoning Valley Railway Co.—Trackage Rights Exemption—Consolidated Rail Corp.; Exemption

Consolidated Rail Corporation (Conrail) has agreed to grant overhead trackage rights to The Mahoning Valley Railway Company (MVRY) between approximately milepost 59.5 and approximately milepost 61.4 in Conrail's Hazelton Yard, Youngstown, OH, including the Youngstown Secondary Track, the Graham Running Track, and all sidings, yard tracks, and industrial lead tracks connecting thereto as may be necessary to afford MVRY an access route between the welded and seamless mills of LTV Steel Tubular Products Company, Inc. The trackage rights were to become effective on December 21, 1990.

This notice is filed under 49 CFR 1180.2(d)(7). 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: Suzanne M. Te Beau, Esq., suite 800, 1350 New York Avenue, NW., Washington, DC 20005–4797.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Dated: December 26, 1990.

By the Commission, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 91–12 Filed 1–2–91; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 31797]

Southrail Corporation—Acquisition Exemption—Brookho Company, Inc. Line Between Brookwood and Holt, AL

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission exempts from the prior approval requirements of 49 U.S.C. 11343, *et seq.*, the purchase of SouthRail Corporation from Brookho Company, Inc., of a 19.1-mile line of railroad between Brookwood and Holt in Tuscaloosa County, AL, subject to standard labor protective conditions.

DATES: This exemption will be effective on February 2, 1991. Petitions for stay must be filed by January 18, 1991. Petitions for reconsideration must be filed by January 28, 1991.

ADDRESSES: Send pleadings referring to Finance Docket No. 31797 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

(2) Petitioner's representative: Stephen W. McVearry, Weiner, McCaffrey, Brodsky, Kaplan & Levin, P.C., Suite 800, 1350 New York Avenue, NW., Washington, DC 20005–4797.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar (202) 275–7245. (TDD for hearing impaired (202) 275–1721).

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. (Assistance for the hearing impaired is available through TDD services (202) 275–1721).

Decided: December 21, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Emmett, and McDonald. Commissioner Emmett did not participate in the disposition of this proceeding.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 91–45 Filed 1–2–91; 8:45 am]

BILLING CODE 7035–01–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (90–109)]

NASA Advisory Council; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a forthcoming meeting of the NASA Advisory Council (NAC).

DATES: January 30, 1991, 8:30 a.m. to 2:30 p.m.

ADDRESSES: National Aeronautics and Space Administration, room 7002, Federal Office Building 6, 400 Maryland Avenue SW., Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Sylvia D. Fries, Code ADA–2, National Aeronautics and Space Administration, Washington, DC 20546, 202/453–8766.

SUPPLEMENTARY INFORMATION: The NAC was established as an interdisciplinary group to advise senior management on the full range of NASA's programs, policies, and plans. The Council is chaired by Mr. Caleb B. Hurtt and is composed of 25 members. Standing committees containing additional members report to the Council and provide advice in the substantive areas of aeronautics, aerospace medicine, space science and applications, space systems and technology, space station, commercial programs, and history, as they relate to NASA's activities.

The meeting will be open to the public up to the seating capacity of the room, which is approximately 50 persons including Council members and other participants. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the participants. Visitors will be requested to sign a visitor's register.

Type of meeting: Open.

Agenda

January 30, 1991

8:30 a.m.—Opening Remarks.

9 a.m.—Discussion: Recommendations of the Advisory Committee on the Future of the United States Space Program.

1 p.m.—NASA Education Programs.

2:30 a.m.—Adjourn.

Dated: December 26, 1990.

John W. Gaff,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 91–26 Filed 1–2–91; 8:45 am]

BILLING CODE 7510–01–M

[Notice (90–110)]

NASA Advisory Council (NAC), Commercial Programs Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NAC, Commercial Programs Advisory Committee.

DATES: January 29, 1991, 8:30 a.m. to 3 p.m.

ADDRESSES: Nassau Bay Hilton Hotel, Marina Suite, 3000 NASA Road 1, Houston, TX 77058.

FOR FURTHER INFORMATION CONTACT: Dr. Barbara Stone, Office of Commercial Programs, National Aeronautics and Space Administration, Washington, DC 20546, 703/271–5500.

SUPPLEMENTARY INFORMATION: The Commercial Programs Advisory Committee is concerned with the overall NASA program supporting the commercial development of space, both relevant policies and program scope and content. The Committee is chaired by Mr. James K. Baker and is currently composed of 14 members.

The meeting will be closed to the public from 2:30 p.m. to 3 p.m. for a discussion of the qualifications of additional candidates for membership. Such a discussion would invade the privacy of the candidates and other individuals involved. Since this

discussion will be concerned with matters listed in 5 U.S.C. 552b(c)(6), it has been determined that the meeting be closed to the public for this period of time. Prior to the closed session, the meeting will be open to the public up to the seating capacity of the room, which is approximately 40 persons including the Committee members and other participants.

Type of meeting: Open—except for a closed session as noted in the agenda below.

Agenda

January 29, 1991

8:30 a.m.—Welcome.

8:40 a.m.—Chairman's Opening Remarks/Introduction of the Members.

8:55 a.m.—Commercial Programs Update.

10:30 a.m.—Space Vacuum Epitaxy Center Presentation.

1 p.m.—Planning/Organization for 1991 Activities.

2:30 p.m.—Closed Session.

3 p.m.—Adjourn.

Dated: December 27, 1990.

John W. Gaff,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 91–27 Filed 1–2–91; 8:45 am]

BILLING CODE 7510–01–M

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Agency Information Collection Activities Under OMB Review

AGENCY: National Endowment for the Arts.

ACTION: Notice.

SUMMARY: The National Endowment for the Arts (NEW) has sent to the Office of Management and Budget (OMB) the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Comments on this information collection must be submitted by February 4, 1991.

ADDRESSES: Send comments to Mr. Dan Chenok, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., room 3002, Washington, DC 20503; (202–395–7316). In addition, copies of such comments may be sent to Mrs. Anne C. Doyle, National Endowment for the Arts, Administrative Services Division, room 203, 1100 Pennsylvania Avenue, NW., Washington, DC 20506; (202–682–5401).

FOR FURTHER INFORMATION CONTACT: Mrs. Anne C. Doyle, National Endowment for the Arts, Administrative Services Division, room 203, 1100 Pennsylvania Avenue, NW., Washington, DC 20506; (202–682–5401) from whom copies of the documents are available.

SUPPLEMENTARY INFORMATION: The Endowment requests the extension of a currently approved collection of information. This entry is issued by the Endowment and contains the following information:

(1) The title of the form; (2) how often the required information must be reported; (3) who will be required or asked to report; (4) what the form will be used for; (5) an estimate of the number of responses; (6) the average burden hours per response; (7) an estimate of the total number of hours needed to prepare the form. This entry is not subject to 44 U.S.C. 3504(h).

Title: Arts Administration Fellows Program FY 1992 Guidelines.

Frequency of Collection: Possible three times per year.

Respondents: Individuals or hourseholds.

Use: Guideline instructions and applications elicit relevant information from arts administrators, individual artists, and graduate students who apply for the Arts Administration Fellows Program.

Estimated Number of Respondents: 350.

Average Burden Hours per Response: 4.

Total Estimated Burden: 1,350.

Anne C. Doyle,

Administrative Services Division, National Endowment for the Arts.

[FR Doc. 91–13 Filed 1–2–91; 8:45 am]

BILLING CODE 7537–01–M

OFFICE OF PERSONNEL MANAGEMENT

Proposed Information Collection Submitted to OMB for Clearance

AGENCY: Office of Personnel Management.

ACTION: Notice of proposed information collection; correction.

SUMMARY: The Office of Personnel Management published a notice of proposed information collections on November 15, 1990, 55 FR 47819. This correction includes two pages that were inadvertently omitted from the survey documents found in the published notice. It also extends the comment period for the original notice.

DATES: The comment period for the original notice is being extended until January 14, 1991.

FOR FURTHER INFORMATION CONTACT: Donald Paquin (202) 606–2848.

SUPPLEMENTARY INFORMATION: On November 15, 1990, the Office of Personnel Management published a notice of proposed information collections submitted to the Office of Management and Budget for clearance. The request for expedited clearance involved two new information collections: Nonforeign Area Cost–of–Living Allowance Background Survey and Nonforeign Area Cost–of–Living Allowance Price Survey. Two information collections were involved, one having one page and the other having three pages. Two pages were inadvertently omitted from the **Federal Register** notice. This correction contains the two missing pages.

U.S. Office of Personnel Management

Constance Berry Newman,

Director.

BILLING CODE 6325–01–M

Nonforeign Area Cost-of Living Price Information Collection

Survey Date: _____ Allowance Area: _____

Survey Item: _____

Description:

Outlet	Price	Quantity	Comments

Remarks:

Nonforeign Area Cost-of-Living
Housing Component - Rental Information Collection

Location: _____ Community: _____ Date: _____

Complex Address Phone #	Rental Type	Bedroom Count	Monthly Rent	Total Room Count	Square Feet	Security Deposit	Utilities	Monthly Heating Cost	Amenities	Restrictions	Total Units	Other

Remarks:

[FR Doc. 91–4 Filed 1–2–91; 8:45 am]

BILLING CODE 6325–01–C

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301-82]

Initiation of Section 302 Investigation; Thailand Copyright Enforcement

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of initiation of an investigation under section 302(a) of the Trade Act of 1974, as amended, request for written comments.

SUMMARY: Pursuant to 19 U.S.C. 2412(a), the United States Trade Representative (USTR) has determined to initiate an investigation of the Royal Thai Government's policies and practices with respect to the enforcement of copyright in that country. USTR invites written comments on these policies and practices.

EFFECTIVE DATE: December 21, 1990.

FOR FURTHER INFORMATION CONTACT: Peter Collins, Director for Southeast Asian Affairs (202) 395–6813, or Catherine Field, Associate General Counsel (202) 395–3432, Office of the U.S. Trade Representative, 600 17th Street NW., Washington, DC, 20506.

SUPPLEMENTARY INFORMATION: On November 15, 1990, the International Intellectual Property Alliance (IIPA), Motion Picture Export Association of America, Inc. (MPEAA), and the Recording Industry Association of America (RIAA) filed a petition under section 302(a) of the Trade Act of 1974, as amended, 19 U.S.C. 2412(a), alleging that the acts, policies and practices of the Royal Thai Government deny or limit their members' fair and equitable opportunities to market their products in Thailand, deny them opportunities to establish enterprises to distribute their products in Thailand and fail to provide adequate and effective protection of their intellectual property rights. Specifically, the petition alleges that these adverse effects flow from Thailand's failure to enforce, adequately, its laws prohibiting the piracy of copyrighted works.

The petition further alleges that Thailand's acts, policies and practices are unjustifiable and burden or restrict U.S. commerce and are unreasonable or discriminatory. The petition alleges that the Thai market for U.S. motion pictures and sound recordings is between 90 and 95 percent piratical and that infringers of copyright operate openly and unopposed in the Thai market and often identify themselves publicly as sources of pirated products. The wide availability of pirated products make it difficult to market legitimate products in Thailand. The industry estimates that the Thai government's failure to enforce its copyright laws has resulted in losses of between $70–$100 million per year.

Petitioners have undertaken enforcement efforts in the Thai judicial system which they contend have largely been difficult and ineffective due to prosecutorial obstacles. Specific practices complained of include: (1) Difficulties in obtaining police searches for infringing product; (2) overly burdensome and unreasonable requests for documents to establish copyright ownership and authority to file complaints; (3) burdensome requirements regarding personal appearances by copyright owner's corporate personnel to present duplicative evidence; (4) lack of consistency in requirements to obtain prosecution of cases; and (5) inadequate sanctions for copyright piracy that do not deter further infringements.

On December 21, the USTR initiated an investigation of the Thai government's acts, policies and practices relating to the enforcement of copyrights. The USTR has also requested consultations with the Royal Thai Government.

The USTR will seek information and advice from the petitioner and the appropriate representatives provided for under section 135 of the Trade Act in preparing the U.S. presentations for such consultations. Any interested person is invited to submit comments on the issues raised in the petition. Comments should be filed in accordance with the regulations published at 15 CFR part 2006 (55 FR 20593) and are due no later than January 24, 1991. Comments must be in English and provided in twenty (20) copies to: Chairman, Section 301 Committee, room 223, USTR, 600 17th Street NW., Washington, DC, 20506.

A. Jane Bradley,

Chairman, Section 301 Committee.

[FR Doc. 91–98 Filed 1–2–91; 8:45 am]

BILLING CODE 3190–01–M

SELECTIVE SERVICE SYSTEM

Form Submitted to the Office of Management and Budget for Extension of Clearance

The following form has been submitted to the Office of Management and Budget (OMB) for extension of clearance in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35):

SSS–401

Title: Potential Board Member Information Sheet.

Need and/or Use: Is used to identify individuals willing to serve as members of local, appeal or review boards in the Selective Service System.

Respondents: Potential board members.

Burden: A burden of 15 minutes or less on the individual respondent.

Copies of the above identified form can be obtained upon written request to the Selective Service System, Reports Clearance Officer, Washington, DC 20435.

Written comments and recommendations for the proposed extension of clearance of the form should be sent within 30 days of publication of this notice to the Selective Service System, Reports Clearance Officer, Washington, DC 20435.

A copy of the comments should be sent to Office of Information and Regulatory Affairs, Attention: Desk Officer, Selective Service System, Office of Management and Budget, New Executive Office Building, Room 3235, Washington, DC 20503.

Dated: December 21, 1990.

Samuel K. Lessey, Jr.,

Director.

[FR Doc. 91–19 Filed 1–2–91; 8:45 am]

BILLING CODE 8015–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Security Advisory Subcommittee; Meeting

AGENCY: Federal Aviation Administration.

ACTION: Notice of Aviation Security Advisory Subcommittee Meeting.

SUMMARY: Notice is hereby given of a meeting of the Policy and Procedures Subcommittee of the Aviation Security Advisory Committee.

DATES: The meeting will be held January 16, 1991, from 9 a.m. to 12 p.m.

ADDRESSES: The meeting will be held in the Management Operations Center, 10th Floor, Federal Aviation Administration headquarters, 800 Independence Avenue, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: The Office of the Assistant Administrator for Civil Aviation Security, ACS, 800 Independence Avenue, SW., Washington, DC 20591, telephone 202–267–7107.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. II), notice is hereby given of a meeting of the Policy and Procedures Subcommittee of the Aviation Security Advisory Committee to be held January 16, 1991, in the Management Operations Center, 10th Floor, Federal Aviation Administration Headquarters, 800 Independence Avenue, SW., Washington, DC.

The Policy and Procedures Subcommittee is co-chaired by the Airport Operators Council International (AOCI), the American Association of Airport Executives (AAAE), and the Air Transport Association of America (ATA). The agenda for the meeting will focus on a review of the previous Subcommittee recommendation on implementation of background checks for employees having unescorted access to aircraft and secure areas of airports in view of the specific requirements contained in Section 105 of the Aviation Security Improvement Act of 1990, Public Law 101–604, for employment investigations.

Recommendations arising from this meeting will be reported back to the full Aviation Security Advisory Committee no later than January 25, 1991.

Attendance at the January 16, meeting is open to the public, but limited to space available. Oral statements are not anticipated, but written statements may be submitted anytime. Persons wishing to present statements or information should contact the Office of the Assistant Administrator for Civil Aviation Security, ACS, 800 Independence Avenue, SW., Washington, DC 20591, telephone 202–267–7107.

Interested parties who wish to suggest additional agenda items, or make suggestions as to working group topics or other matters, should submit them in writing to one of the co-chair organizations no later then January 10, 1991.

AOCI, 1220 19th Street, NW., suite 200, Washington, DC 20036 telephone 202–293–8500

AEEE, 4212 King Street, Alexandria, VA 22302 telephone 703–824–0500

ATA, 1709 New York Avenue, NW., Washington, DC 20006 telephone 202–626–4000

Issued in Washington, DC on December 27, 1990.

O.K. Steele,

Assistant Administrator for Civil Aviation Security.

[FR Doc. 90–25 Filed 1–2–91; 8:45 am]

BILLING CODE 4910–13–M

Federal Highway Administration

Environmental Impact Statement: Marathon and Shawano Counties, WI

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in Marathon and Shawano Counties, Wisconsin.

FOR FURTHER INFORMATION CONTACT: Ms. Jacki Lawton, Environmental Coordinator, Federal Highway Administration, 4502 Vernon Boulevard, Madison, Wisconsin 53705; telephone: (608) 264–5967. You may also contact Ms. Carol Cutshall, Director, Office of Environmental Analysis, Wisconsin Department of Transportation, 4802 Sheboygan Avenue, Madison, Wisconsin 53705; telephone: (608) 266–9826.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Wisconsin Department of Transportation, will prepare an Environmental Impact Statement (EIS) on a proposal to improve State Truck Highway (STH) 29 between Ringle in Marathon County, and Thornton in Shawano County, Wisconsin, a distance of about 36 miles.

Improvements to the corridor are considered necessary to provide for existing and projected traffic demand including a high percentage of truck traffic. Alternatives under consideration include (1) taking no action; (2) widening the existing two-lane roadway to a four-lane, divided facility along its present location; and (3) consideration of a bypass around the Village of Wittenberg. Study of the various build alternatives will include design variations of grade and alignment.

Information describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed, or are known to have interest in this proposal. A series of public meetings will be held in the project corridor throughout data gathering and development of alternatives. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing. As part of the scoping process, an inter-agency coordination meeting will be held. Agencies having an interest in, or jurisdiction regarding the proposed action will be contacted regarding the date and location of the meeting, and will be contacted individually throughout development of project alternatives.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments, and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to FHWA or the Wisconsin Department of Transportation at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program).

Issued on December 24, 1990.

Robert W. Cooper,

District Engineer, Madison, Wisconsin.

[FR Doc. 91–10 Filed 1–2–91; 8:45 am]

BILLING CODE 4910–22–M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 2
Thursday, January 3, 1991

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).

CONSUMER PRODUCT SAFETY COMMISSION

COMMISSION MEETING

DATE: Wednesday, January 2, 1991.

TIME: 10:00 a.m.

LOCATION: Room 437, Westwood Towers, 5401 Westbard Avenue, Bethesda, Maryland.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED:

FY 1992 Budget

The Commission will consider issues related to the Budget for Fiscal Year 1992

The Commission decided that agency business required scheduling this meeting without the normal advance notice.

Dated: December 28, 1990.

Sheldon D. Butts,

Deputy Secretary.

[FR Doc. 90-30636 Filed 12-31-90; 1:18 pm]

BILLING CODE 6355-01-M

FEDERAL ELECTION COMMISSION

* * * * *

DATE AND TIME: Tuesday, January 8, 1991, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

DATE AND TIME: Thursday, January 10, 1991, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Correction and Approval of Minutes
Draft Advisory Opinion 1990-26
Committee to Re-elect Virginia Smith
Administrative Matters

* * * * *

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 376-3155.

Hilda Arnold,

Administrative Assistant, Office of the Secretariat.

[FR Doc. 90-30631 Filed 12-31-90; 8:45 am]

BILLING CODE 6715-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 11:00 a.m., Monday, January 7, 1991.

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 PERSONS 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.

Dated: December 28, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-30585 Filed 12-28-90; 4:43 pm]

BILLING CODE 6210-01-M

federal register

Thursday
January 3, 1991

Part II

Department of Labor

Employment and Training Administration

Job Training Partnership Act (JTPA); Policy Interpretation, Contracting and Implementation Guidelines for JTPA Program Coordination with Department of Education Pell Grants and Other Programs; Notice

DEPARTMENT OF LABOR

Employment and Training Administration

Job Training Partnership Act (JTPA); Policy Interpretation, Contracting and Implementation Guidelines for JTPA Program Coordination with Department of Education Pell Grants and Other Programs

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice; request for comments.

SUMMARY: The Department of Labor is proposing an official policy interpretation of section 141(b) of the Job Training Partnership Act (JTPA), and other provisions, as it relates to coordination with the Department of Education's (DOED's) Pell Grant Program and other DOED programs. This Policy Interpretation also sets forth program and contracting guidelines for Service Delivery Areas (SDAs) to assure implementation of contracting choices consistent with JTPA policy. By publishing for comment this interpretative guidance the policy choices entail, the Department wishes to encourage a thorough discussion involving all the partners in the JTPA system, and to provide the opportunity for commenters to suggest additional options or pose questions that the Department has not considered.

DATES: Comments must be submitted on or before February 4, 1991. Following the completion of the comments period, the Department will analyze the information received and prepare the final policy interpretation, to be published in the **Federal Register**. The effective date of this final policy interpretation will be the date of its publication in the **Federal Register**.

ADDRESSES: Submit comments to: Administrator, Office of Job Training Programs, Employment and Training Administration, room N–4459, 200 Constitution Avenue, NW., Washington, DC 20210.

The Department is interested in comments regarding contracting and monitoring issues raised by the requirements of performance-based and cost-reimbursable contracts. Additionally, the Department asks commenters to focus on the importance of ascertaining the participant's Pell eligibility, if applicable, before entering into contracts and obligating JTPA funds.

Commenters are asked to address one official copy of their comments to the Administrator, Office of Job Training Programs, as indicated above. To expedite the review and analysis of all responses, it would be helpful if commenters wishing to address individual copies to other Department of Labor officials clearly identify such additional sets as "copies" of the commenters' official submission.

FOR FURTHER INFORMATION CONTACT: Bonnie Naradzay, Office of Employment and Training Programs, Telephone: (202) 535–0525.

SUPPLEMENTARY INFORMATION: The Department of Labor is proposing the following official interpretation of the requirements of JTPA sections 141(b), 107(b) and 107(c), as they relate in particular to coordination with DOED's Pell Grant program and other DOED programs, including Supplemental Educational Opportunity Grants (SEOGs) and College Work Study (CWS).

This notice follows Training and Employment Information Notice (TEIN) 25–89, issued April 9, 1990, which provided additional information on Pell Grants to the partners in the JTPA system. The publication of this proposed policy interpretation presents an opportunity to highlight areas of concern regarding the systematic contractual interface between JTPA and DOED programs.

TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 90

From: Roberts T. Jones, Assistant Secretary of Labor

Subject: Job Training Partnership Act (JTPA) Program Coordination with Department of Education (DOED) Pell Grants

1. *Purposes.* (1) To transmit the Department's policy interpretation in relation to Pell Grants regarding the provisions in sections 141(b), 107(b) and 107(c). Sections 141(b) and 107(b) stipulate that Job Training Partnership Act (JTPA) funds be used only for activities in addition to those which would otherwise be available in the area in the absence of such funds and, with some exceptions, for activities which do not duplicate facilities or services available in the area. Section 107(c) states that appropriate education agencies be given the opportunity to provide educational services to the extent possible. (2) To set forth procedures for JTPA program coordination with Pell-eligible institutions and for service provider contracting and monitoring. This Training and Employment Guidance Letter (TEGL) follows Training and Employment Information Notice (TEIN) No. 25–89, which provided information on the Pell Grant Program.

2. *References.* JTPA Sections 107(b) and (c) and 141(b); title IV of the Higher Education Act (HEA) of 1965, as amended; TEIN Nos. 28–86, 17–87, and 25–89, and General Administration Letter (GAL) No. 1–88.

3. *Background.* The Office of the Inspector General (OIG), U.S. Department of Labor, conducted an audit of the management of JTPA funding in relation to Pell Grants during Program Years 1985 and 1986 and found instances of overlapping funding, double billing by institutions, and inequitable treatment of JTPA participants. To provide more comprehensive information on how Pell Grants work and how they interface with JTPA-funded programs, the Employment and Training Administration (ETA) issued TEIN No. 25–89 on April 9, 1990. ETA also sent out, for general distribution, a State-by-State alphabetical listing of all Pell-eligible institutions.

In response to TEIN No. 25–89, service delivery areas, substate grantees and State JTPA liaisons have asked about issues related to Pell Grants, such as accounting for Pell Grants in JTPA contracts (both cost-reimbursable and performance-based), serving JTPA-eligible individuals who have defaulted on guaranteed student loan (GSL) payments (and who are thereby ineligible for Pell Grants), referring JTPA participants only to Pell-eligible institutions, and choosing among public schools, such as community colleges and technical institutes, rather than proprietary, for-profit institutions. These issues are addressed later in this document.

To ensure complementary policy and procedures for coordinating Pell Grants with JTPA funding, including compliance with the terms of performance-based contracts, ETA staff has met with DOED's Pell policy staff. DOED will distribute a "Dear Colleague" letter to its regional offices and to Pell-eligible institutions to spell out financial aid coordination procedures regarding JTPA.

The discussion section below summarizes aspects of the Pell Grant Program delineated more fully in TEIN 25–89. Policy guidance for this TEGL begins with section 5, immediately following this description of the Pell Grant Program.

4. *Discussion.* The Pell Grant Program, administered by the Office of Student Financial Assistance (OSFA) within the Department of Education, is the largest grant program of the Federal student financial assistance program. For example, DOED expects to award its

1990–91 appropriations of over $4.5 billion to over 3 million eligible students.

Pell Grants are entitlements at the student level that provide funds to needy post-secondary students (who have not received their first baccalaureate degree) to assist in the payment of costs associated with their education, including the cost components of tuition and fees, room and board, books, supplies, transportation, various miscellaneous expenses, child care, and special costs for handicapped students. Pell Grants are limited to high school graduates, GED recipients or those who are over a State's compulsory school attendance age and can demonstrate the "ability to benefit" as defined in section 484(d) of the Higher Education Act of 1965, as amended (i.e., pass an admissions test recognized by the school's accrediting organization, enroll in and complete a remedial or developmental program of not more than one academic year, or receive a GED by the end of the student's first academic year or graduation, whichever comes first).

Pell Grant funds are administered by Pell-eligible education and training institutions on behalf of those students enrolled in eligible post-secondary education or training programs. Eligible programs must lead to a certificate, degree, or other recognized educational credential and must be baccalaureate, associate degree, or two-year transfer programs or programs that are at least 6 months long (600 clock hours, 16 semester or trimester credits, or 24 quarter credits) and designed to prepare students for gainful employment in a recognized occupation or profession, which are offered in institutions participating in the Pell Grant program. Many of these institutions are also education and training service provider contractors of the JTPA system, particularly at the SDA level.

The Pell Grant program recognizes that a limited amount of remedial coursework may be considered a part of the student's postsecondary program, even though the remedial coursework is not at the postsecondary level. However, the student must have already been accepted into an eligible program, and must be taking the remedial courses as a part of that program. The remedial coursework must meet the requirements of the regulations governing non-credit and reduced credit remedial coursework. A school must include these non-credit or reduced credit remedial hours in the student's enrollment status, and the tuition paid for remedial hours may be included in the student's cost of attendance. The school may not take into account more than one academic year's worth of non-credit or reduced credit remedial coursework.

When remedial courses are in English as a Second Language (ESL), they do not count against the one-year limit. A school is permitted to pay a Pell Grant to a student who is enrolled in an eligible program that consists solely of ESL coursework (provided the program meets all other applicable regulatory requirements for an eligible program) only if the school determines that the program enables the student to utilize already existing knowledge, training, or skills. If this is not the case, a student may only be paid for courses in ESL if those courses meet the conditions described above for remedial coursework (i.e., are part of an eligible postsecondary program.)

Students awarded Pell Grants must not be in default on any title IV, HEA student loans or owe overpayment refunds on any title IV, HEA grants. In particular, a student who never begins attending class or attending all of his or her classes or who withdraws from school after receiving a cash disbursement for living expenses must have his or her Pell Grant award recalculated to determine any overpayment. The student is responsible for refunding this overpayment to the school, which then remits the payment to DOED.

The maximum amount for a Pell-eligible student for the 1990–91 academic year is $2300. The statute limits the award to 60 percent of the student's total costs, so at no time is Pell expected to cover all the expenses the student incurs. Pell Grant amounts are based on a statutory formula—the Pell Grant Family Contribution Schedule—which evaluates a student's financial need and produces the Pell Grant Index (PGI). The student reports the necessary information on a Federal or Multiple Data Entry financial aid application. This application is transmitted to the Department of Education's Central Processing contractor, which computes the student's PGI number (which ranges from 0 to 2300 and is based on a variety of financial factors, including the expected Family Contribution). The PGI, along with other information, is then transmitted to the student in the form of a Student Aid Report (SAR). The school calculates the Cost of Attendance (COA) and the scheduled award (by applying the PGI number to the COA).

Processing time for determining a student's Pell eligibility and the amount of the award varies, but for the increasing number of schools which maintain computer access to DOED's processing system, this information can be verified within a few days. As soon as the school has a copy of the student's SAR, the school calculates the award and either credits the award to the student's outstanding account balance and/or pays the student directly. Payments are made to the student at least once per term, semester, trimester, or quarter or, where nontraditional designations are used, at least twice per academic year. Students may be paid only for those periods when they are making satisfactory academic progress.

Most JTPA participants would meet the financial criteria for obtaining the maximum Pell Grant award if enrolled in a Pell eligible program. In addition, it is important to note that the 1986 HEA Amendments, including the 1986 JTPA amendments relating to Title III eligibility, permit dislocated workers, their spouses, and their children to receive special consideration in applying for Federal student financial aid. Specifically, they are not required to count their homes as assets and may use expected income rather than their previous year's income in calculating family earnings. To qualify, dislocated workers must meet the same eligibility criteria as under title III of the JTPA. (See TEIN No. 17–87.) Finally, because of the interface between the Trade Adjustment Assistance (TAA) and Pell Grant Programs, it is important for SDAs and substate grantees to contact local Employment Service offices to review coordination procedures for these programs as outlined in GAL 1–88: Trade Adjustment Assistance (TAA) Program—Payment of Costs of Training and Trade Readjustment Allowances (TRA) When a Certified Worker Also Receives Grant Assistance to Participate in a Training Program.

The Department of Education intends the Pell Grant to be the foundation of a student's financial aid, to which other Federal and non-Federal sources are added. To guarantee this use of the Pell Grant, the 1986 HEA amendments have required that students applying for most Federal Student Loans for use at Pell-eligible schools must first determine their Pell eligiblity before qualifying for those loans. For the same reason, and consistent with JTPA Section 141(b), TEIN No. 25–89 recommended that all SDAs and substate grantees work with Pell-eligible institutions and determine the Pell eligibility and award amounts for potential JTPA participants who may be enrolled in Pell-eligible programs (see discussion of eligible programs above) before JTPA funds are obligated.

5. *Policy.* SDAs which propose longer term educational training should, where appropriate, seek to use existing Pell-eligible programs and to maximize the effectiveness of JTPA funds in these relationships. Consequently, the basic responsibilities of the States and their SDAs are to establish procedures to:

(a) Identify all instances in which Pell Grant entitlements can either reduce JTPA costs or provide additional necessary services to participants;

(b) Maximize the effectiveness of JTPA funds and assure institutional maintenance of effort;

(c) Assure institutions do not receive double payment, and

(d) Obtain prior participant approval for the release of necessary confidential student aid information.

The following policy guidance should facilitate SDAs' ability to maximize the effectiveness of JTPA funds:

(1) Establishing Pell Eligibility and Determining the Mix of Pell with JTPA Funded Activities and Services. Where appropriate and whenever longer-term training is an objective, Private Industry Councils (PICs) and Service Delivery Areas (SDAs) should consider using existing Pell-eligible programs, since most JTPA participants would meet the financial eligibility criteria for maximum Pell Grant awards. JTPA participants who may already be enrolled in Pell-eligible programs should be assisted by their school's financial aid officers in applying for Pell Grants as soon as possible. To avoid the possibility of double billing and duplication of Federal funds, contracts with Pell-eligible schools need to stipulate that the school is responsible for informing the SDAs of the amounts and dispositions of Pell Grant awards to JTPA participants. Through these requirements, PICs and SDAs can ensure that JTPA funds supplement, rather than supplant, Pell Grant awards and other types of financial aid.

In conjunction with JTPA contracts where Pell Grants are involved, SDAs should establish a process for determining both the participant's training-related needs and the proper mix of JTPA and Pell funds. This is necessary because a Pell Grant, depending on the type of JTPA contract utilized, can be used for tuition and fees as well as applicable living expenses. Since ETA wishes to encourage more significant intervention for JTPA participants, it is appropriate to consider all these expenses (training-related as well as supportive service costs) to provide optimum support for the participant's successful training and education. It is important to note that one of the factors contributing to participant's dropping out of programs is the lack of adequate living expenses.

(2) Information Required To Coordinate with Pell Policy Requirements. To ensure that there is no duplication or overlap of either services or funding, JTPA agreements with Pell-eligible schools should include three types of requirements. These include assurances to obtain: (a) Pre-determination of the JTPA participants' Pell Grant eligibility, (b) pre-agreed adjustments in contract charges to the SDA based on Pell award levels if Pell Grant eligibility is not established until after the JTPA contract is negotiated, and (c) reporting requirements sufficient to monitor the occurrence of such adjustments and the reduction of costs billed to the SDA reflecting all funds received in excess of contract determined costs. In addition, agreements for individual JTPA participants should include provisions to enable SDAs to verify the school's charges made to the student as well as the amount of the Pell award and the manner of disbursement.

(a) The agreement should document that the gross cost of the educational or training program contracted, before reduction for the Pell Grant entitlement, is not in excess of the institution's standard tuition and fee charges for that program. If the cost exceeds such charges, the added costs should reflect additional services specifically identified and established to be necessary, reasonable, and allocable (§ 629.37 of the JTPA Regulations). As a means of ensuring that a JTPA participant taking a pre-existing course is charged the same tuition and fees as other students, the contracting process should require that the school provide a catalog with the current tuition and fee rates (and other charges) or some other documentation of these costs—such as records of billings. This does not preclude negotiation of reduced costs for larger numbers of JTPA participants.

(b) The agreement should also ensure that the school provide the SDA with a copy of the Student Aid Report (SAR) received from the Department of Education.

(c) Finally, the contracting process should assure that the school will inform the SDA of the amount of the Pell award and the manner of disbursement. Because disclosure of this information to the SDA is necessary to ensure compliance with the JTPA statutory provisions, the school should obtain any needed disclosure releases from students who are JTPA participants receiving Pell Grants.

(3) Contracting Method and Choice of Training Institution. Like other public sector or non-profit service providers, some Pell-eligible community colleges, public technical schools, and State universities may not be willing to enter into performance-based contracts because, as public institutions, they may be unable to accept the inherent risk. Such schools do, of course, agree to other forms of contracting for JTPA participants. Thus, when SDAs decide what type of contract to use to purchase longer-term institutional training, they should consider the constraints of the institution, so that the contracting choice does not preclude using public sector schools, and JTPA participants are not foreclosed from participating in non-profit institutions' programs. In contracting, it is important to note that tuition and entrance fees can be charged wholly to the training category in instances where these accredited institutions are involved as service providers.

(4) Performance-Based Contracts. Performance-based contracts must comply with both the provisions of the JTPA regulations on full payment (20 CFR 629.38(e)(2)) and the Department of Labor's March 13, 1989 policy on such contracts regarding the underlying concept of contractor risk. To preserve the integrity of the performance-based contract, the liability for meeting the performance benchmarks must remain with the school as training provider. In other words, if the contract conditions payment on the student's successful completion of the program and placement in the occupation trained for at the specified wage, the student shall not be liable to the school for JTPA funds withheld, under its JTPA performance-based contract, for the institution's failure to deliver the agreed-upon outcomes. For the same reason, the school should be prohibited by the terms of the performance-based contract from using Pell funds, or any other Federal funding sources, to recoup the amount of JTPA funds withheld when outcomes are not met.

DOED's Federal Student Financial Aid Handbook stipulates that "* * * if the school does not actually charge the student for tuition and fees *(either because it is prohibited from doing so under the JTPA contract, or for some other reason),* then no tuition and fee component would exist for the Pell Grant cost of attendance. Even if there is no tuition and fee component, the student's cost of attendance includes the standard allowance for living expenses * * *" (Emphasis added.) Thus, in order that the school remain liable for tuition and fees withheld when outcomes are not met, pursuant to a

performance-based contract, the tuition and fees charge must be omitted from the Cost of Attendance calculation when the JTPA participant applies for the Pell Grant. In this case, the Pell Grant would be awarded for living expenses (room and board, books, supplies, transportation, and miscellaneous costs) and, if applicable, child care costs and handicap-related expenses. Consistent with the DOED policy above and with JTPA regulations regarding performance-based contract liability, the school must agree not to use the student's Pell award or any other Federal funds to recoup any funds withheld by JTPA for lack of performance.

(5) Tuition and Fee Fixed Unit Price Contracts. Fixed unit price tuition-based contracts which are not performance-based allow Pell-eligible students to access the maximum Pell Grant awards to which they are entitled. (These contracts may be stand alone fixed unit price contracts or fixed unit price components of larger cost reimbursement contracts.) The reason is that when such a contract is utilized, the school can normally charge the student for tuition and fees, since the potential for the SDA to withhold payments because of lack of performance does not apply in this instance. Consequently, tuition and fee charges can be included in the COA calculations, and the resulting Pell Grant award can be applied to tuition and fees. This is consistent with DOED's policy (again, as stated in its Student Financial Aid Handbook): "A school may only include a tuition and fee charge in the cost of attendance for a Pell Grant recipient if that charge is actually made to the student, and *is paid either by the student or by some type of student financial assistance (such as JTPA).*"

(6) Specialized Training Programs and Courses. Where existing programs or courses cannot meet a participant's needs and the SDA designs or tailors a course or program which is extensive enough to meet Pell criteria, the SDA should seek to conform the training to requirements both for Pell eligibility—as established by statute and ED regulations—and for pertinent accrediting agencies. By stipulating that such training meet these requirements, SDAs will enable JTPA participants in these programs to apply for Pell Grants. In addition, because DOED relies on the accreditation and State licensure process for most measures of educational quality and outcomes, conforming to its requirements will help guarantee the quality of the institution offering the program as well as the ultimate value of the training.

(7) Serving JTPA-Eligible Individuals Who Defaulted on ED Grants and Loans. In response to TEIN No. 25–89, some SDAs have reported that a sizeable number of JTPA-eligible individuals are barred from receiving Pell Grants because they defaulted on earlier DOED loans. Typically, these individuals graduated from high school 10 to 15 years ago, were counseled into signing on for grants and loans to continue their education, and then dropped out of their programs, defaulting on loans advanced for educational costs or neglecting to repay the resulting grant overpayments. These individuals are now entering the JTPA system without an employment history or significant job skills and with several dependents to support, yet they are barred from receiving Pell Grants because of their having defaulted on financial commitments made years earlier. As an example of how widespread the default problem is, recent DOED data on the Stafford Loan program (the largest title IV, HEA loan program) suggests that about 51 percent of those who entered proprietary, for-profit schools and 33 percent entering 2-year, public institutions have defaulted on these loans.

The issue has been raised as to whether JTPA-eligible individuals who defaulted on earlier DOED loans can be served. Although DOED has instituted various collection procedures, it has not placed these individuals on the government-wide debarment list (as provided by Executive Order 12549). Accordingly, it is appropriate to serve these individuals through JTPA programs. Where the SDA wishes to access Pell Grants for such participants, however, individuals must clear up their payment records in order to re-establish their Pell eligibility. In any event, PIC's and SDAs should assure that participants are fully assessed and are provided with the range of services necessary to help them not only to complete their programs successfully but also to become economically self-sufficient.

(8) Title IV, HEA Student Loans and Other Loans. While some participants default on loans when they drop out of educational programs, others who successfully complete their courses may still become delinquent on loan payments if they are faced with high living expenses. For those individuals who secure entry-level jobs when they complete their training, meeting timely repayments on loans soon after graduating can be a severe burden and may ultimately threaten their success at achieving long-term financial independence. Consequently, SDAs should consider these implications in putting together a program of financial assistance which may result in burdensome obligations for the participant upon program completion.

(9) Coordinating with Department of Education Campus-Based Programs: Supplementary Educational Opportunity Grants and the College Work-Study Program. At no time can Pell Grants cover more than 60 percent of the student's educational costs, and the annual award limit for the full-time independent student has been set at $2,300 for 1990–91. However, DOED administers 2 campus-based programs other than the Federal educational loan programs at thousands of participating post-secondary schools. SDAs should apprise themselves of the availability funds from these programs for their JTPA participants before JTPA funds are obligated. These programs are:

Supplemental Educational Opportunity Grant Program (SEOG). Although the funding level for the SEOG is about 10 percent of the Pell Grant program (1990–91 appropriations for the SEOG slightly exceed $400 million), the maximum individual award can be up to $4,000 for a full academic year. However, because this entitlement is campus-based, the school can reduce the maximum award in order to distribute the SEOGs to a greater number of eligible students. In determining the priority for awarding SEOG funds to students, the school must first choose those students with exceptional financial need (those with the lowest Family Contributions) who will also receive Pell Grants. The school awards the remaining SEOG funds to those eligible students with the lowest Family Contributions who will not receive Pell Grants. In 1988–89, SEOGs averaging $622 each went to a total of 678,647 full-time students, while SEOGs averaging $455 were awarded to over 52,000 part-time students, for a total of nearly $450 million.

The *College Work-Study Program* (CWS), on the other hand, provides payments for part-time employment for undergraduate and graduate students who need the income to help meet the costs of postsecondary education. In addition, a student may receive academic credit for the work performed in a job that qualifies under CWS. A school may also use part of its CWS allocation to employ students in a Community Service Learning (CSL) Program to develop, improve, or expand community services for low-income persons and to provide students with

work-learning opportunities related to their educational or career goals. Finally, the school may use part of its CWS allocation to develop off-campus job opportunities for students, with an emphasis on community services jobs. During the 1988–89 school year, 672,692 full-time students earned an average of $930 and 44,363 part-time students earned an average of $883, for a total of over $650 million. When a JTPA participant accesses CWS for a job directly related to his or her education or training, this "work-based learning" is valuable preparation for achieving career goals.

6. *Necessary Action.* States are requested to review their policies in light of this information and, if necessary, to revise them, as appropriate, to reflect this policy guidance. Liaisons should ensure that PICs and SDAs are aware of the information and policy concerning Pell Grants set forth in the this TEGL. SDAs should adapt their procurement procedures and standard contract provisions to reflect SDA choices in designing and financing agreements with Pell institutions.

Contracting: Contracts, regardless of whether they are performance-based or tuition and fee reimbursable, should ensure that (among other requirements): (1) The contractor cannot bill or be paid twice for the same expenses, (2) costs paid for by JTPA and by the Pell entitlement are clearly identified, and (3) access is guaranteed to the JTPA participant's Pell records.

Monitoring: The SDA should carefully monitor all service provider agreements where Pell awards are involved. These reviews should be conducted at least once per Program Year and should include examination of the participant school's financial data, particularly an individual student's Pell records, sufficient to determine that contract specifications on the application of JTPA and Pell funds have been met.

(7) *Effective Date.* The effective date of the Department's interpretations and policy is the date of the final publication of this Guidance Letter. The States are expected to make adjustments to conform their policies to the above interpretations as soon as practicable and to apply them to all new participants and contracts.

(8) *Inquiries.* Direct questions regarding this TEGL to Bonnie Naradzay, Office of Employment and Training Programs, at (202) 535–0525.

Signed at Washington, DC this 24th day of December 1990.

Roberts T. Jones,

Assistant Secretary of Labor.

[FR Doc. 91–3 Filed 1–2–91; 8:45 am]

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federal register

Thursday
January 3, 1991

Part III

Department of the Treasury

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 53

Firearms and Ammunition Excise Taxes; Final Rule

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 53

[T.D.-308]

Firearms and Ammunition Excise Taxes

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

ACTION: Treasury decision, final rule.

SUMMARY: On November 5, 1990, the Secretary of the Treasury signed Treasury Order No. 120–03 (55 FR 47422, Nov. 13, 1990) which transferred the authority of the Commissioner, Internal Revenue Service (IRS), to administer the excise tax on firearms and ammunition imposed by 26 U.S.C. 4181 to the Director, ATF. This final rule establishes regulations to require firearms and ammunition excise tax returns, claims and related documents previously filed with the IRS to be filed with ATF. The Treasury decision will also transfer from IRS to ATF the functions associated with the deposit of such excise taxes. All domestic excise tax returns will be mailed to a special purpose post office box (lockbox) indicated on the return form, while Puerto Rican and Virgin Islands excise tax returns will be filed with the Chief, Puerto Rico Operations, ATF. All claims will be filed with the appropriate regional director (compliance).

EFFECTIVE DATE: January 1, 1991.

FOR FURTHER INFORMATION CONTACT: Robert Trainor, ATF Coordinator, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 189, Washington, DC 20044–0189, (202–789–3033).

SUPPLEMENTARY INFORMATION:

Background

On November 5, 1990, the Secretary of the Treasury signed Treasury Order No. 120–03, which transferred the authority of the Commissioner, IRS, to administer this excise tax to the Director, ATF. Paragraph 3 of the order gives the Director the authority to issue regulations for the purposes of carrying out the functions, powers, and duties delegated to him under the Treasury Order. Until the regulations become effective, the IRS will continue to administer and enforce the tax. This final rule publishes the applicable regulations of the IRS at 26 CFR part 48 in a new 27 CFR part 53. Minor technical and editorial changes to the regulations have also been made.

Pursuant to 26 U.S.C. 4181, a tax is imposed on the sale by the manufacturer, producer, or importer of pistols and revolvers, firearms (other than pistols and revolvers), and shells and cartridges. The tax is 10 percent of the sale price for pistols and revolvers, 11 percent for firearms (other than pistols and revolvers), and 11 percent for shells and cartridges.

Prior to December 19, 1989, 26 U.S.C. 6091, required all returns of tax, except for returns under Subtitle E (relating to alcohol, tobacco, and certain firearms) to be filed in an internal revenue district or at an internal revenue service center serving an internal revenue district. Public Law No. 101–239, 103 Stat. 2429 (December 19, 1989) amended 26 U.S.C. 6091(b)(6) to authorize regulations to specify other locations for the filing of tax returns under section 4181. This final rule provides that returns for firearms and ammunition excise tax shall be filed with ATF. The instructions on the return will include the address to which the return is to be mailed.

Executive Order 12291

In compliance with Executive Order 12291, 46 FR 13193 (1981), ATF has determined that this rule is not a "major rule" since the regulations established in this final rule merely make nonsubstantive technical corrections to previously published regulations of the IRS. Additionally, this rule is not a "major rule" since it will not result in:

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

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

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

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a final regulatory flexibility analysis (5 U.S.C. 604) are not applicable to this final rule because the agency was not required to publish a general notice of proposed rulemaking under 5 U.S.C. 553 or any other law. A copy of this final rule has been submitted to the Administrator of the Small Business Administration for comment on the impact of such regulation on small business, pursuant to 26 U.S.C. 7805(f).

Administrative Procedure Act

This final rule merely reissues existing Internal Revenue Service regulations in Title 26, CFR, relating to firearms and ammunition excise taxes, to ATF regulations in Title 27, CFR, and makes minor technical and editorial changes. Accordingly, it is found to be unnecessary to issue this Treasury Decisions with notice and public procedure thereon under 5 U.S.C. 553(b) or subject to the effective date limitation of 5 U.S.C. 553(d).

Paperwork Reduction Act

All information collection/recordkeeping requirements imposed by this regulation have been submitted to the Office of Management and Budget for review in accordance with Public Law 96–511. Because these regulations reissue regulations of the IRS, OMB control numbers previously approved for the IRS are listed in § 53.187 of these regulations.

Regulatory and Forms Changes

The change in the location for filing firearms and ammunition excise tax returns, claims, and related documents required numerous regulatory changes. Taxpayers incurring tax under 26 U.S.C. 4181 who previously filed returns on IRS Form 720 will now use ATF Form 5300.26, Federal Firearms and Ammunition Excise Tax Return. (IRS Forms 720 and 8807 have been combined into a single ATF Form 5300.26 for purposes of the excise tax on firearms and ammunition.) Remittances not accompanying a return will be made using ATF Form 5300.27, Federal Firearms and Ammunition Excise Tax Deposit.

Drafting Information

The principal author of this document is Robert Trainor, ATF Coordinator, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects 27 CFR Part 53

Administrative practice and procedure, Arms and munitions, Authority delegations, Exports, Imports, Penalties, Reporting and recordkeeping requirements.

Authority and Issuance

Paragraph 1. Title 27 is amended by the addition of part 53 to read as follows:

PART 53—MANUFACTURERS EXCISE TAXES—FIREARMS AND AMMUNITION

Subpart A—Introduction

Sec.
53.1 Introduction.
53.2 Attachment of tax.
53.3 Exemption certificates.

Subpart B—Definitions

53.11 Meaning of terms.

Subpart C—Administrative and Miscellaneous Provisions

53.21 Forms prescribed.
53.22 Employer identification number.

Subparts D–F—[Reserved]

Subpart G—Tax Rates

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Authority: 26 U.S.C. 4181, 4182, 4216–4219, 4221–4223, 4225, 6001, 6011, 6020, 6021, 6061, 6071, 6081, 6091, 6101–6104, 6109, 6151, 6155, 6161, 6301–6303, 6311, 6402, 6404, 6416.

Subpart A—Introduction

§ 53.1 Introduction.

The regulations in this part (part 53, subchapter C, chapter I, title 27, Code of Federal Regulations) are designated "Manufacturers Excise Taxes—Firearms and Ammunition." The regulations relate to the tax on the sale of firearms and ammunition imposed by section 4181 of the Internal Revenue Code of 1986, and to certain related administrative provisions of chapter 32, subchapter F, of the Code. Chapter 32, subchapter D of the Code imposes taxes on the sale or use by the manufacturer, producer, or importer of certain recreational equipment specified in that chapter. References in the regulations in this part to the "Internal Revenue Code" or the "Code" are references to the Internal Revenue Code of 1986 (United States Code of 1986), as amended, unless otherwise indicated. References to a section or other provision of law are references to a section or other provision of the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

§ 53.2 Attachment of tax.

(a) For purposes of this part, the manufacturers excise tax generally attaches when the title to the article sold passes from the manufacturer to a purchaser.

(b) When title passes is dependent upon the intention of the parties as gathered from the contract of sale and the attendant circumstances. In the absence of expressed intention, the legal rules of presumption followed in the jurisdiction where the sale is made govern in determining when title passes.

(c) In the case of a sale on credit, the tax attaches whether or not the purchase price is actually collected.

(d) Where a consignor (such as a manufacturer) consigns articles to a consignee (such as a dealer), retaining ownership in them until they are disposed of by the consignee, title does not pass, and the tax does not attach until sale by the consignee. Where the relationship between a manufacturer and a dealer is that of principal and agent, title does not pass, and the tax does not attach, until sale by the dealer.

(e) In the case of a lease, an installment sale, a conditional sale, or a chattel mortgage arrangement or similar arrangement creating a security interest, a proportionate part of the tax attaches to each payment. See section 4217 and §§ 53.103 and 53.104 for a limitation on the amount of tax payable on lease payments.

(f) In the case of use by the manufacturer, the tax attaches at the time the use begins.

§ 53.3 Exemption certificates.

Several sections of the regulations in this part, relating to sales exempt from

manufacturers excise tax, require the manufacturer to obtain an exemption certificate from the purchaser to substantiate the exempt character of the sale. Many of these sections also contain specimen forms of acceptable exemption certificates. However, any form of exemption certificate will be acceptable if it includes all the information required to be contained in such a certificate by the pertinent sections of the regulations in this part. If it contains all the required information, a form of exemption certificate that is processed by data processing equipment is acceptable.

Subpart B—Definitions

§ 53.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this part.

Calendar quarter. A period of 2 calendar months ending on March 31, June 30, September 30, or December 31.

Chapter 32. For purposes of this Part Chapter 32 means section 4881, Chapter 32, of the Internal Revenue Code of 1986, as amended.

Code. Internal Revenue Code of 1986, as amended.

Director. The Director, Bureau of Alcohol, Tobacco and Firearms, the Department of the Treasury, Washington, DC 20226.

Exportation. The severance of an article from the mass of things belonging within the United States with the intention of uniting it with the mass of things belonging within some foreign country or within a possession of the United States.

Exporter. The person named as shipper or consignor in the export bill of lading.

Firearms. Any portable weapons, such as rifles, carbines, machine guns, shotguns, or fowling pieces, from which a shot, bullet, or other projectile may be discharged by an explosive.

Importer. Any person who brings a taxable article into the United States from a source outside the United States, or who withdraws such an article from a customs bonded warehouse for sale or use in the United States. If the nominal importer of a taxable article is not its beneficial owner (for example, the nominal importer is a customs broker engaged by the beneficial owner), the beneficial owner is the "importer" of the article for purposes of chapter 32 of the Code and is liable for tax on his sale or use of the article in the United States. See section 4219 of the Code and 27 CFR 53.121 for the circumstances under which sales by persons other than the manufacturer or importer are subject to the manufacturers excise tax.

Manufacturer. Includes any person who produces a taxable article from scrap, salvage, or junk material, or from new or raw material, by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles. The term also includes a "producer" and an "importer." Under certain circumstances, as where a person manufactures or produces a taxable article for another person who furnishes materials under an agreement whereby the person who furnished the materials retains title thereto and to the finished article, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition is liable for the tax as a manufacturer. Whether the person who buys such component parts or accessories and assembles a taxable article from them will be liable for tax as a manufacturer of a taxable article will depend on the relative amount of labor, material, and overhead required to assemble the completed article and on whether the article is assembled for business or personal use.

Pistols. Small projectile firearms which have a short one-hand stock or butt at an angle to the line of bore and a short barrel or barrels, and which are designed, made, and intended to be aimed and fired from one hand. The term does not include gadget devices, guns altered or converted to resemble pistols, or small portable guns erroneously referred to as pistols, as, for example, Nazi belt buckle pistols, glove pistols, or one-hand stock guns firing fixed shotgun or fixed rifle ammunition.

Possession of the United States. Includes Guam, the Midway Islands, Palmyra, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

Purchaser. Includes a lessee where the lessor is also the manufacturer of the article.

Region. A Bureau of Alcohol, Tobacco and Firearms Region.

Regional director (compliance). The principal ATF regional official responsible for administering regulations in this part.

Revolvers. Small projectile firearms of the pistol type, having a breech-loading chambered cylinder so arranged that the cocking of the hammer or movement of the trigger rotates it and brings the next cartridge in line with the barrel for firing.

Sale. An agreement whereby the seller transfers the property (that is, the title or the substantial incidents of ownership in goods) to the buyer for a consideration called the price, which may consist of money, services, or other things.

Secretary. The Secretary of the Treasury or his delegate.

Shells and cartridges. Include any article consisting of a projectile, explosive, and container that is designed, assembled, and ready for use without further manufacture in firearms, pistols or revolvers. A person who reloads used shell or cartridge casings is a manufacturer of shells or cartridges within the meaning of section 4181 if such reloaded shells or cartridges are sold by the reloader. However, the reloader is not a manufacturer of shells or cartridges if, in return for a fee and expenses, he reloads casings of shells or cartridges submitted by a customer and returns the reloaded shells or cartridges with the identical casings provided by the customer to that customer. Under such circumstances, the customer would be the manufacturer of the shells or cartridges and may be liable for tax on the sale of articles. See section 4218 of the Code and § 53.112.

Taxable article. Any article taxable under section 4181 of the Code.

Vendor. Includes a lessor where the lessor is also the manufacturer of the article.

Subpart C—Administrative and Miscellaneous Provisions

§ 53.21 Forms prescribed.

(a) The Director is authorized to prescribe all forms required by this part. All of the information called for in each form shall be furnished as indicated by the headings on the form and the instructions on or pertaining to the form. In addition, information called for in

each form shall be furnished as required by this part.

(b) "Public Use Forms" (ATF Publication 1322.1) is a numerical listing of forms issued or used by the Bureau of Alcohol, Tobacco and Firearms. This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(c) Requests for forms should be mailed to the ATF Distribution Center, 7943 Angus Court, Springfield, Virginia 22153.

§ 53.22 Employer identification number.

(a) *Requirement of application.* (1) An application on Form SS–4 for an employer identification number shall be made by every person who makes a sale or use of an article with respect to which a tax is imposed by section 4181 of the Code, but who has not earlier been assigned an employer identification number or has not applied for one.The application and any supplementary statement accompanying it shall be prepared in accordance with the applicable form, instructions, and regulations and shall set forth fully and clearly the data therein called for. Form SS–4 may be obtained from any internal revenue district office, internal revenue service center or ATF regional office. The application shall be filed with the internal revenue officer designated in the instructions applicable to Form SS–4. The application shall be signed by:

(i) The individual if the person is an individual;

(ii) The president, vice-president, or other principal officer, if the person is a corporation;

(iii) A responsible and duly authorized member or officer having knowledge of its affairs, if the person is a partnership or other unincorporated organization; or

(iv) The fiduciary, if the person is a trust or estate.

An employer identification number will be assigned to the person in due course upon the basis of information reported on the application required under this section.

(2) *Time for filing Form SS–4.* The application for an employer identification number shall be filed no later than the seventh day after the date of the first sale or use of an article with respect to which a tax is imposed by chapter 32 of the Code. However, the application should be filed far enough in advance of the first required use of such number to permit issuance of the number in time for compliance with such requirement.

(b) *Use of employer identification number.* The employer identification number assigned to a person liable for a tax imposed by chapter 32 of the Code shall be shown on any return, statement, or other document submitted to ATF by the person.

Subparts D–F—[Reserved]

Subpart G—Tax Rates

§ 53.61 Imposition and rates of tax.

(a) *Imposition of tax.* Section 4181 of the Code imposes a tax on the sale of the following articles by the manufacturer, producer, or importer thereof:

(1) Pistols;

(2) Revolvers;

(3) Firearms (other than pistols and revolvers); and

(4) Shells and cartridges.

(b) *Parts or accessories.* No tax is imposed by section 4181 of the Code on the sale of parts or accessories of firearms, pistols, revolvers, shells, and cartridges when sold separately, or when sold with a complete firearm. Thus, no tax attaches to the sale of telescopic mounts, rubber recoil pads, rifle sights, and similar parts for firearms when sold separately, or when sold with complete firearms for use as spare parts or accessories. The tax does attach, however, to sales of completed firearms, pistols, revolvers, or to sales of such articles which, although in a knockdown condition, are complete as to all component parts.

(c) *Rates of tax.* Tax is imposed on the sale of the articles specified in section 4181 of the Code at the rates indicated below.

	Percent
(1) Pistols	10
(2) Revolvers	10
(3) Firearms (other than pistols and revolvers)	11
(4) Shells and cartridges	11

(d) *Computation of tax.* The tax is computed by applying to the price for which the article is sold the applicable rate. For definition of the term "price" see section 4216 of the Code and the regulations contained in Subpart J of this part.

(e) *Liability for tax.* The tax imposed by section 4181 of the Code is payable by the manufacturer, producer, or importer making the sale.

§ 53.62 Exemptions.

(a) *Firearms subject to the National Firearms Act.* Section 4182(a) provides that the tax imposed by section 4181 of the Code shall not attach to the sale of any firearms on which the tax imposed by section 5811 of the Code (relating to tax on the transfer of machine guns, short-barreled firearms, and other weapons) has been paid. Any manufacturer, producer, or importer claiming such an exemption from the tax imposed by section 4181 of the Code must maintain such records and be prepared to produce such evidence as will establish the right to the exemption.

(b) *Sales to Defense Department or to U.S. Coast Guard*—(1) *Military department.* Section 4182(b) of the Code provides that the tax imposed by section 4181 of the Code shall not attach to the sale of firearms, pistols, revolvers, shells, or cartridges that are purchased with funds appropriated for a military department of the United States. For this purpose, the term "military department" means the Department of the Army, the Department of the Navy, and Department of the Air Force. Included in the Department of the Navy are naval aviation and the Marine Corps.

(2) *Coast Guard.* Section 655, title 14, U.S.C., provides that no tax on the sale or transfer of firearms, pistols, revolvers, shells, or cartridges may be imposed on such articles when bought with funds appropriated for the United States Coast Guard.

(3) *Supporting evidence.* Any manufacturer, producer, or importer claiming an exemption from the tax imposed by section 4181 of the Code by reason of section 4182(b) of the Code must maintain such records and be prepared to produce such evidence as will establish the right to the exemption. Generally, clearly identified orders or contracts of a military department signed by an authorized officer of the military department will be sufficient to establish the right to the exemption. In the absence of such orders or contracts, a statement, signed by an authorized officer of a military department or the Coast Guard, that the prescribed articles were purchased with funds appropriated for that military department or the Coast Guard will constitute satisfactory evidence of the right to an exemption.

§ 53.63 Other tax-free sales.

For provisions relating to tax-free sales of firearms and ammunition see:

(a) Section 4221 and 27 CFR 53.131, "Tax-free sales; general rule".

(b) Section 4223 and 27 CFR 53.132, "Tax-free sale of articles to be used for, or resold for, further manufacture".

(c) Section 4222 and 27 CFR 53.140, "Registration".

Subparts H–I—[Reserved]

Subpart J—Special Provisions Applicable to Manufacturers Taxes

§ 53.91 Charges to be included in sale price.

(a) *In general.* The "price" for which an article is sold includes the total consideration paid for the article, whether that consideration is in the form of money, services, or other things. However, for purposes of the taxes imposed under chapter 32 of the Code, certain collateral charges made in connection with the sale of a taxable article must be included in the taxable sale price, whereas others may be excluded. Any charge which is required by a manufacturer, producer, or importer to be paid as a condition of its sale of a taxable article and which is not attributable to an expense falling within one of the exclusions provided in section 4216 of the Code or the regulations thereunder is includable in the taxable sale price. It is immaterial for this purpose that the charge may be paid to a person other than the manufacturer, producer, or importer, or that it may be separately billed to the purchaser as a charge earmarked for expenses incurred or to be incurred in his behalf, such as charges for demonstration or display of the article, for sales promotion programs, or otherwise. With respect to the rules relating to exclusion of charges for local advertising of a manufacturer's products, see section 4216(e) of the Code and § 53.100. In the case of sales on credit, a carrying, finance, or service charge is excludable from the sale price if it is reasonably related to the costs of carrying the deferred portion of the sale price (such as interest on the deferred portion of the sale price, expenses of bookkeeping necessary to keep the records of such sales, and expenses of correspondence and other communication in connection with collection).

(b) *Tools and dies.* Separate charges for tools and dies used in the manufacture or production of a taxable article are to be included, in whole or in part, in the sale price on which the tax is based. It is immaterial whether the charges for such items are billed in a lump sum or are amortized or allocated to each of the taxable articles. If, at the termination of a contract to manufacture taxable articles, the tools and dies used in production pass to the purchaser, only the amount of depreciation of the tools and dies incurred in production, computed on a "production output" basis, should be included in the sale price. If the purchaser furnishes the tools and dies, the amount of the cost thereof, to the extent that such cost has been depreciated in the production of the taxable articles (computed on a "production output" basis), shall be included in determining the sale price of the articles for purposes of computing the tax.

(c) *Charges for warranty.* A charge for a warranty of an article which the manufacturer, producer, or importer requires the purchaser to pay in order to obtain the article shall be included in the sale price of the article on which the tax is computed. On the other hand, a charge for a warranty of a taxable article paid at the purchaser's option shall not be included in the sale price for purposes of computing tax thereon.

(d) *Charges for coverings, containers, and packing.* Any charge by the manufacturer, producer, or importer for coverings and containers of whatever nature used to pack an article for shipment shall be included as part of the sale price for the purpose of computing the tax, whether or not the charges are identified as such on the invoice or are billed separately. Even though there is an agreement that the manufacturer, producer, or importer will repay all or a portion of the charge for the coverings or containers upon the return thereof, the full charge nevertheless shall be included in the sale price. It is immaterial whether the charge made at the time of sale is more or less than the actual value of the covering or container. See § 53.173(b)(4) for provisions relating to the claiming of a credit or refund in the case of a price readjustment due to the return or repossession of a covering or container. Packing charges are to be included in the sale price whether the charges cover normal packing or special packing services, such as for extra protection of the article or for odd-lot quantities. This rule shall apply whether the packing services are initiated by the manufacturer, producer, or importer or are furnished at the request of the purchaser and whether the packing is performed by the manufacturer, producer, or importer or by another person at his request. If the purchaser supplies packing materials, the fair market value of such materials must be included in the tax base when computing tax liability on the sale of the article.

(e) *Taxable and nontaxable articles sold as a unit.* Where a taxable article and a nontaxable article are sold by the manufacturer as a unit, the tax attaches to that portion of the manufacturer's sale price of the unit which is properly allocable to the taxable article. Normally, the taxable portion of such a unit may be determined by applying to the manufacturer's sale price of the unit the ration which the manufacturer's separate sale price of the taxable article bears to the sum of the sale prices of both the taxable and nontaxable articles, if such articles are sold separately by the manufacturer. Where the articles (or either one of them) are not sold separately by the manufacturer and do not have established sale prices, the taxable portion is to be determined from a comparison of the actual costs of the articles to the manufacturer. Thus, if the cost of the taxable article represents four-fifths of the total cost of the complete unit, the tax applies to four-fifths of the price charged by the manufacturer for the unit.

§ 53.92 Exclusions from sale price.

(a) *Tax.*—(1) *Tax not part of taxable sale price.* The tax imposed by chapter 32 of the Code on the sale of an article is not part of the taxable sale price of the article. Thus, if a manufacturer computes the tax on a sale price which is determined without regard to the tax, and it charges the proper tax as a separate item, the amount of tax so charged does not become a part of the taxable sale price and no tax is due on the tax so charged. Where no separate charge is made as tax, it will be presumed that the price charged to the purchaser for the article includes the proper tax, and the proper percentage of such price will be allocated to the tax.

(2) *Computation of tax.* If an article subject to tax at the rate of 10 percent is sold for $100 and an additional item of $10 is billed as tax, $100 is the taxable selling price and $10 is the amount of tax due thereon. However, if the article is sold for $100 with no separate billing or indication of the amount of the tax, it will be presumed that the tax is included in the $100, and a computation will be necessary to determine what portion of the total amount represents the sale price of the article and what portion represents the tax. The computation is as follows:

$$\text{Taxable sale price} = \frac{\text{sale price including tax}}{100 + \text{rate of tax}}$$

Thus, if the tax rate is 10 percent and the sale price including tax is $100, the taxable sale price is $90.91 (that is, $100 divided by (100+10)), and the tax is 10 percent of $90.91, or $9.09.

(b) *Transportation, delivery, insurance, or installation charges.* (1)

Charges incurred pursuant to sale. Charges for transportation, delivery, insurance, installation, and other expenses actually incurred in connection with the delivery of an article to a purchaser pursuant to a bona fide sale shall be excluded from the sale price in computing the tax. Such charges include all items of transportation, delivery, insurance, installation, and similar expense incurred after shipment to a customer begins, in response to the customer's order, pursuant to a bona fide sale. However, costs of such nature incurred by a manufacturer, producer, or importer in transporting, in the normal course of business and for its benefit and convenience, articles from a factory or port of entry to a warehouse or other facility (regardless of the location of such warehouse or facility) are not considered as being incurred in connection with the delivery of an article to a purchaser pursuant to a bona fide sale, and charges therefor cannot be excluded from the sale price in computing tax liability. Similarly, an allowance granted by a manufacturer as reimbursement for expenses incurred by the purchaser in shipping used articles to the manufacturer for credit against the purchase price of taxable articles shall not be excluded from the sale price when computing tax due on the sale of the taxable articles. In any event, no charge may be excluded from the sale price unless the conditions set forth in paragraph (b)(2) of this section are complied with. Said conditions are prescribed under the authority granted the Secretary in section 4216(a) of the Code.

(2) *Only actual expenses to be excluded.* Where a separate charge is made for transportation or other expenses incurred in connection with the delivery of an article to the purchaser pursuant to a bona fide sale, there shall be excluded in arriving at the sale price subject to tax only that portion of the charge which represents the actual expenses incurred for the transportation or other excludable expenses. Where a separate charge is less than the actual expense, the difference is presumed to be included in the billed price. Such difference, together with the separate charge, shall be excluded in arriving at the sale price on which the tax is computed. Similarly, where no separate charge is made but the manufacturer, producer, or importer incurs an expense of the type to which this paragraph has application, the amount of such expense actually incurred shall be excluded from the sale price on which the tax is computed. Where transportation expense is incurred in conjunction with a shipment composed of both taxable and nontaxable articles, only the portion of the expense allocable to the taxable articles shall be excludable. In general, unless the taxpayer establishes to the satisfaction of the regional director that another method reasonably apportions such freight expense between taxable and nontaxable articles, such expense should be apportioned on the basis of the relative weights (or, if available, the relative published tariff rates) applicable to the taxable and nontaxable articles. Where it is not feasible to apportion such expense on the basis of relative weights or tariff rates, the expense shall be apportioned on another reasonable basis; for example, in the case of a shipment including both taxable and nontaxable articles which are subject to the same tariff rate, it may be appropriate to apportion the transportation expense on the basis of the relative sale prices. A charge for insurance in connection with the delivery of an article to a purchaser is considered to represent an expense actually incurred only to the extent that an amount equivalent to such charge is paid or payable by the manufacturer to a person authorized to assume such insurance risk.

(3) *Transportation, delivery, or installation services performed by manufacturer.* For purposes of computing the taxable sale price of articles, it is immaterial whether the transportation, delivery, or other services of the type to which this paragraph has application are performed by a common carrier or independent agency for or on behalf of the manufacturer, producer, or importer, or are performed by the manufacturer, producer, or importer with the use of its own vehicles or other facilities. Thus, where a manufacturer, producer, or importer performs the transportation, delivery, or other services with its equipment, tools, employees, etc., the cost of such services allocable to the sale of the taxable article shall be excluded. In determining whether an expense is an excludable transportation or delivery expense, only those expenses incurred by reason of the fact that the purchaser accepts delivery at some point other than the manufacturer's place of business shall be considered excludable transportation or delivery expenses. All expenses incurred in placing an article packed, ready for shipment on the loading dock at the manufacturer's factory are not excludable transportation or delivery expenses. An allowance granted by the manufacturer, producer, or importer to the purchaser for transportation, delivery, or other expenses incurred or to be incurred by the purchaser in connection with the sale shall be excluded in computing the taxable sale price, if charges for similar expenses would be excludable if incurred by the manufacturer.

(4) *Records in support of exclusion.* Every manufacturer, producer, or importer making sales of taxable articles shall keep records which will disclose the amount of transportation, delivery, insurance, installation or other expense actually incurred by it in connection with the delivery of a taxable article to a purchaser pursuant to a bona fide sale.

(c) *Other charges.* A charge or expense not within the scope of paragraph (a) or (b) of this section, whether or not separately stated, may not be excluded in computing the taxable sale price unless it can be shown by adequate records that the charge or expense is not properly included as a manufacturing or selling expense or is in no way incidental to placing the article in condition packed ready for shipment. Commissions to manufacturers' agents, or allowances, payments, or adjustments made to, and for the benefit of, persons other than the purchaser may not be excluded or deducted, under any condition, in computing the sale price upon which the tax is computed.

§ 53.93 Other items relating to tax on sale price.

(a) *Exchanges.* If, in connection with the sale of an article subject to a tax imposed under chapter 32 of the Code on the price for which sold, a manufacturer receives from its vendee another article in exchange, the tax on the manufacturer's sale shall be computed on the basis of the amount allowed for the article received from the vendee, plus any additional amount charged the vendee.

(b) *Replacements under warranty.* If an article, subject to a tax imposed under chapter 32 of the Code on the price for which sold, is returned to the manufacturer by reason of the failure of the article under a warranty as to its quality or service, and a new article is given by the manufacturer, free, or at a reduced price, the tax on the new article shall be computed on the actual amount, if any, to be paid to the manufacturer for the new article. See § 53.134(b)(2) for the circumstances under which the allowance made by the manufacturer, producer, or importer upon the return of the first article constitutes a price readjustment of the sale price of the first article and the extent, if any, to which a

credit may be allowed, or refund made, of the tax paid by the manufacturer, producer, or importer on the sale of the first article.

(c) *Readjustments in sale price.* Readjustment in sale price (such as allowable discounts, rebates, bonuses, etc.) cannot be anticipated. The tax must be based upon the original price unless the readjustments have actually been made prior to the close of the period for which the tax upon the sale is returned. However, if the price upon which the tax was computed is subsequently readjusted, credit may be taken against the tax due on a subsequent return or a claim for refund filed as provided by section 6416(b)(1) of the Code and §§ 53.174–53.176.

§ 53.94 Constructive sale price; scope and application.

(a) *In general.* Section 4216(b) of the Code pertains to those taxes imposed under chapter 32 of the Code that are based on the price for which an article is sold, and contains the provisions for constructing a tax base other than the actual sale price of the article, under certain defined conditions.

(b) *Specific applications.* (1) Section 4216(b)(1) of the Code applies to:

(i) Arm's-length sales at retail or on consignment, other than those sales at retail and to retailers to which section 4216(b)(2) of the Code and § 53.96 apply; and

(ii) Sales otherwise than at arm's length, and at less than fair market price.

(2) Section 4216(b)(2) of the Code applies generally to arm's-length sales of an article at retail or to retailers, or both, where the manufacturer also sells the same article to wholesale distributors.

(3) Section 4216(b)(3) of the Code provides a formula for determining a constructive sale price for sales of taxable articles between members of an affiliated group of corporations (as "affiliated group" is defined in section 1504(a) of the Code) in those instances where the purchasing corporation regularly resells to retailers but does not regularly resell to wholesale distributors, and except for situations where section 4216(b)(4) of the Code applies.

(4) Section 4216(b)(4) of the Code provides a special method for computing a constructive sale price for sales of taxable articles between affiliated corporations where the purchasing corporation sells only to retailers, and the normal method of selling within the industry is for manufacturers to sell to wholesale distributors.

(c) *Definitions.* For purposes of section 4216(b) of the Code and §§ 53.94–53.97 and unless otherwise indicated:

(1) *Sale at retail.* A "sale at retail," or a "retail sale", is a sale of an article to a purchaser who intends to use or lease the article rather than resell it. The fact that articles are sold in wholesale lots, or at wholesale prices, will not change the character of such sales as "sales at retail" if the purchaser is not engaged in the business of reselling such articles, and acquires them for the purpose of using them rather than reselling them.

(2) *Retail dealers.* A "retail dealer", or "retailer", is a person engaged in the business of selling articles at retail.

(3) *Wholesale distributor.* The term "wholesale distributor" means a person engaged in the business of selling articles to persons engaged in the business of reselling such articles.

§ 53.95 Constructive sale price; basic rules.

(a) *In general.* Section 4216(b)(1) of the Code sets forth the conditions that require the Secretary to construct a sale price on which to compute a tax imposed under chapter 32 of the Code on the price for which an article is sold. The section requires a constructive sale price to be established where a taxable article is:

(1) Sold at retail;

(2) Sold while on consignment; or,

(3) Sold otherwise than through an arm's-length transaction at less than fair market price.

(b) *Sales at retail.* Section 4216(b)(1)(A) of the Code relates to the determination of a constructive sale price for sales of taxable articles sold at arm's-length and at retail. In the case of such sales, the constructive sale price is the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary. If the constructive sale price is less than the actual sale price, the constructive sale price shall be used as the tax base. If the constructive sale price is not less than the actual sale price, the actual sale price shall be considered as not less than fair market, and shall be used as the tax base. In determining the highest price for which articles are sold by manufacturers to wholesale distributors, there must be taken into consideration the normal industry practices with respect to inclusions and exclusions under section 4216(a) of the Code. However, once a constructive sale price has been determined by the Secretary, no further adjustment of such price shall be made. The provisions of section 4216(b)(1)(A) of the Code and this paragraph shall not apply in those instances where the provisions of section 4216(b)(2) of the Code and § 53.96 apply.

(c) *Sales on consignment.* As in the case of sales at retail, the constructive sale price for sales on consignment shall be the price for which such articles are sold, in the ordinary course for trade, by manufacturers or producers thereof, as determined by the Secretary. For purposes of section 4216(b)(1)(B) of the Code and this paragraph, an article is considered to be sold on consignment if it is sold while it is on consignment to a person which has the right to sell, and does sell, such article in its own name, but never receives title to the article from the manufacturer. Ordinarily, the constructive sale price of an article sold on consignment is the net price received by the manufacturer from the consignee. The provisions of section 4216(b)(1)(B) of the Code and this paragraph shall not apply if the provisions of section 4216(b)(2) of the Code and § 53.96 apply.

(d) *Sales not at arm's-length.* For purposes of section 4216(b)(1)(C) of the Code and this paragraph, a sale is considered to be made under circumstances otherwise than at "arm's-length" if:

(1) One of the parties is controlled (in law or in fact) by the other, or there is common control, whether or not such control is actually exercised to influence the sale price, or

(2) The sale is made pursuant to special arrangements between a manufacturer and a purchaser.

In case of an article sold otherwise than at arm's-length, and at less than fair market price, the constructive sale price shall be the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary. Once such a constructive sale price has been determined, no further adjustment of such price shall be made. See sections 4216(b) (3) and (4) of the Code, and § 53.97, for specific methods for determining constructive sale prices for intercompany sales under certain defined conditions.

§ 53.96 Constructive sale price; special rule for arm's-length sales.

(a) *In general.* Section 4216(b)(2) of the Code provides a special rule under which a manufacturer shall determine a constructive sale price for this sales of taxable articles at retail, and to retail dealers, under conditions. The rule is applicable where:

(1) The manufacturer regularly sells such articles at retail, or to retailers, or both, as the case may be,

(2) The manufacturer also regularly sells such articles to one or more wholesale distributors in arm's-length transactions, and the manufacturer establishes that its prices in such cases are determined without regard to any benefit to be derived under section 4216(b)(2) of the Code, and

(3) The transactions are arm's-length transactions. A manufacturer meeting the foregoing requirements shall base its tax liability for sales at retail and sales to retailers on the lower of its actual sale price or the highest price for which it sells the same articles under the same conditions to wholesale distributors.

(b) *Definitions.* For purposes of section 4216(b)(2) of the Code and this section:

(1) *Actual sale price.* "Actual sale price" means the actual selling price for an article determined in the same manner as sale price is determined for a taxable sale. Accordingly, such price must reflect the inclusions and exclusions set forth in section 4216(a) of the Code, and any price adjustments described in section 6416(b)(1) of the Code.

(2) *Highest price to wholesale distributors.* The "highest price" charged wholesale distributors for an article by a manufacturer, producer, or importer thereof, is the highest price at which the manufacturer, producer, or importer sells the article to wholesale distributors, determined without regard to quantity. Such price shall be determined in the same manner as sale price is determined for a taxable sale with respect to the inclusions and exclusions under section 4216(a) of the Code; however, since the price is to be a "highest" price, no further adjustment may be made for price readjustments under section 6416(b)(1) of the Code.

(3) *Regular sales.* An article is considered to be sold "regularly" at retail or to retailers if sales are made at retail or to retailers periodically and recurringly as a regular part of the seller's business. If a seller makes only isolated or casual sales of an article at retail or to retailers, it is not considered to be selling "regularly" at retail or to retailers. Similarly, a manufacturer is considered to be making regular sales of an article to one or more distributors if it sells the article to at least one distributor periodically and recurringly as a regular part of its business.

(4) *Normal method of sales in industry.* In the absence of a showing to the Director of a more appropriate manner of determining the normal method of sales within an industry which is practical in application, the normal method of sales within an industry shall be regarded as not being at retail or to retailers, or both, if the industry dollar volume of sales which are at retail or to retailers, or both, is less than half the total industry dollar volume of sales at all levels of distribution by manufacturers, producers, or importers, including sales to other manufacturers, producers, or importers.

§ 53.97 Constructive sale price; affiliated corporations.

(a) *In general.* Sections 4216(b) (3) and (4) of the Code establish procedures for determining a constructive sale price under section 4217(b)(1)(C) of the Code for sales between corporations that are members of the same "affiliated group", as that term is defined in section 1504(a) of the Code.

(b) *Sales to which section 4216(b)(3) of the Code applies.* Section 4216(b)(3) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instances where:

(1) A manufacturer, producer or importer regularly sells a taxable article to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producers or importer, and

(2) The wholesale distributor regularly sells such article to one or more independent retailers, but does not regularly sell to wholesale distributors. Under such circumstances the constructive sale price for the article shall be an amount equal to 90 percent of the lowest price for which the distributor regularly sells the article in arm's-length transactions to such independent retailers. Once the constructive sale price has been determined, no adjustment shall be made for inclusions or exclusions under section 4216(a) of the Code or price readjustments under section 6416(b)(1) of the Code. If both sections 4216(b)(3) and 4216(b)(4) of the Code apply with respect to the sale of an article, the constructive sale price for such article shall be the lower of the prices computed under sections 4216(b)(3) and 4216(b)(4).

(c) *Sales to which section 4216(b)(4) of the Code applies.* Section 4216(b)(4) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instance where:

(1) A manufacturer, producer, or importer regularly sells (except for tax-free sales) a taxable article only to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producer, or importer,

(2) The distributor regularly sells (except for tax-free sales) such article only to retail dealers, and

(3) The normal method of sales for such articles within the industry is to sell such articles in arm's-length transactions to wholesale distributors. Under section 4216(b)(4) of the Code, the constructive sale price of such article shall be the median price at which the distributor, at the time of the sale by the manufacturer, resells the article to retail dealers, reduced by a percentage of such price equal to the percentage which:

(i) The difference between the median price for which comparable articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers of producers thereof, and the median price at which such wholesale distributors in arm's-length transactions sell such comparable articles to retailers, is of

(ii) The median price at which such wholesale distributors in arm's-length transactions sell such comparable articles to retailers. For purposes of this paragraph, the "median price" for which an article is sold at a particular level of distribution is the price midway between the highest and lowest prices charged vendees at the particular level of distribution. Where only one price is charged at a level of distribution, "median price" is equivalent to "actual price". All sale prices referred to in paragraphs (c) and (d) of this section are prices that must reflect the inclusions and exclusions set forth in section 4216(a) of the Code. However, once a constructive sale price has been determined under these paragraphs, no further adjustment of such price is allowed.

(d) *Application of section 4216(b)(4) of the Code.* The application of section 4216(b)(4) of the Code and paragraph (c) of this section may be illustrated by the following example:

Example. M, a corporation engaged in the manufacture of article X, sold 100 of such articles at $10.00 per article to a wholesale distributor N, a corporation engaged in the business of selling X articles to independent retail dealers. N is a member of the same affiliated group of corporations as M. M sells X articles only to N. The normal method of manufacturers' sales of X articles in the industry is to sell to independent wholesale distributors. N corporation sells X articles to retailers for $15.00 each. The price for which comparable X articles are sold to wholesale distributors in the ordinary course of trade by manufacturers thereof is $12.00 per article. Wholesale distributors sell X articles to retailers in the ordinary course of trade for $16.00 per article. Under the foregoing facts

the constructive sale price determined under section 4216(b)(4) of the Code and this paragraph is $11.25, computed as follows:

$$\$15.00-(\$15.00\times\frac{\$16.00}{(\$16.00)}-\$12.00)=\$11.25$$

(e) *Determination of "lowest price".* In addition to other considerations, in determining a "lowest price" for purposes of sections 4216(b) (1) and (3) of the Code and § 53.97, such price shall be determined:

(1) Without requiring that a given percentage of sales be made at that price (provided that the volume of sales made at that price is great enough to indicate that those sales have not been engaged in primarily to establish a lower tax base), and

(2) Without including any charge for a fixed amount that the purchaser has an unconditional right to recover on the basis of a contractual arrangement existing at the time of sale.

(f) *Definitions.* For purposes of this section and paragraphs (3) and (4) of section 4216(b) of the Code, the term "regularly sells" has the same meaning as that accorded the term "regular sales" in § 53.96(b)(3), and the term "normal method of sales in the industry" has the same meaning as accorded that term in § 53.96(b)(4).

§ 53.98 Computation of tax on leases and installment sales.

(a) *Leases.* When a taxable article is leased by a manufacturer, producer, or importer, liability for tax is incurred, except as provided by section 4217(b) of the Code and § 53.104, on each payment made with respect to such lease. Tax is payable on each lease payment as long as the article is leased by the manufacturer, producer, or importer. The tax payable with respect to each lease payment is a percentage of each payment based on the rate of tax, if any, in effect on the date the lease payment is due. If the article is subsequently sold by the manufacturer, producer, or importer, the tax applies also to such sale, without regard to the tax paid when the article was leased. For definition of the term "lease", see § 53.103.

(b) *Installment sales.* When a taxable article is sold under an installment payment contract with title reserved in the seller, or under a conditional sale contract, chattel mortgage arrangement or other arrangement creating a security interest with payments to be made in installments, tax shall be computed and paid on each payment made by the purchaser. The tax payable with each payment is a percentage of each payment based on the rate of tax, if any, in effect on the date the payment is due. The part of each payment that is subject to tax is that portion of the payment equal to the percentage of the total portion of the payment equal to the percentage of the total charge for the article that is subject to tax. For example, if the total charge for the article is $1,000, and of the total amount charged only 90 percent thereof, or $900, is subject to tax by reason of exclusions, then only 90 percent of the installment payment is subject to tax. If the tax base is a constructive sale price computed under section 4216(b) of the Code that is less than the actual sale price of the article, the portion of each payment subject to tax is the percentage of such payment equal to the percentage that the constructive sale price bears to the actual sale price. For example, if an article is sold at retail for $100, and the constructive sale price for such an article computed under the provisions of section 4216(b)(1)(A) of the Code is $75, the percentage which the constructive sale price bears to the actual sale price is 75 percent. Accordingly, only 75 percent of each installment payment is subject to tax.

(c) *Sales on credit.* Where articles are sold on credit under conditions other than those specified in paragraph (b) of this section, the entire tax shall be reported and paid with the return covering the period in which the sale is made, even though the price may not be paid to the manufacturer, producer, or importer until a later date, or not paid at all.

§ 53.99 Sales of installment accounts.

(a) *In general.* Except as provided in paragraph (d) of this section, in case of a sale or other disposition by a manufacturer, producer, or importer of an installment account of the type specified in section 4216(c) of the Code, the tax shall not apply to subsequent installment payments on such account. Instead, there shall be paid an amount equal to the difference between the tax previously paid on such installment account and the total tax computed by applying:

(1) To each installment due before the sale of the installment account, the rate of tax applicable at the time payment thereof was due, and

(2) To each installment, the time for payment of which has not arrived, the rate of tax which, under the provisions of chapter 32 of the Code as in effect on the date of the sale of the installment account, is (or is to be) in effect on the date such installment is due. However, see paragraph (b) of this section if the sale is made in a bankruptcy or insolvency proceeding. The tax due under this paragraph shall be included in the return for the period in which the account is sold.

(b) *Sale in bankruptcy or insolvency proceeding.* In the case of a sale of an installment account of a manufacturer, producer, or importer pursuant to the order of, or subject to the approval of, a court of competent jurisdiction in a bankruptcy or insolvency proceeding, the amount of tax due shall be computed and paid as provided in paragraph (a) of this section but shall not exceed the amount of tax computed by multiplying:

(1) The proportionate share of the amount for which such accounts are sold which is allocable to each unpaid installment payment, by

(2) The rate of tax which, under the provisions of chapter 32 of the Code as in effect on the date of the sale of the installment account, is (or is to be) in effect on the date such payment is due.

(c) *Collection of installment accounts on behalf of the manufacturer.* Where a manufacturer, producer, or importer retains title to an installment account but turns it over to another person for collection on a fee basis, no sale of such account (or other disposition as contemplated in section 4216(d) of the Code) has been made. The tax shall continue to be paid as provided by section 4216(c) of the Code.

(d) *Returned installment accounts.* Where an installment account which has been sold or otherwise disposed of is returned to the manufacturer, producer, or importer who sold it under an agreement under which the account was sold, and credit or refund has been allowed under section 6416(b)(5) of the Code and § 53.183, the manufacturer, producer, or importer shall pay tax as provided by section 4216(c) of the Code and § 53.98 on any subsequent payments made on such returned installment

account until such time as there shall have been paid the total tax liability with respect to the account as computed under paragraph (a) of this section.

(e) *Limitation.* The sum of the amounts payable under this section and § 53.98 or an installment account shall not exceed the total amount of tax which would be payable if such installment account had not been sold or otherwise disposed of (computed as provided in subsection (c)).

§ 53.100 Exclusion of local advertising charges from sale price.

(a) *In general.* Section 4216(e) of the Code deals with the treatment to be accorded charges made by a manufacturer for, and reimbursements by a manufacturer or expenditures in connection with the advertising of certain articles subject to excise tax under chapter 32 of the Code. Section 4216(e) of the Code provides an exclusion (which is in addition to the exclusions provided by section 4216(a) of the Code and § 53.92) in respect of charges for local advertising, as defined in paragraph (b) of this section, for purposes of determining the price for which an article is sold. See paragraph (c) of this section. The exclusion provided by section 4216(e) of the Code and paragraph (c) of this section has application only if the advertising is broadcast over a radio or television station, appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster. Section 4216(e) of the Code also provides an overall limitation in respect of the sum of the amount of the exclusions from price as charges for local advertising and the amount of the readjustments authorized under section 6416(b)(1) of the Code (relating to credits or refunds for price readjustments) in respect of reimbursements by a manufacturer of expenditures for local advertising. See § 53.101. For provisions prohibiting exclusion from price or readjustment of price in respect of charges for, and reimbursements of expenditures for, advertising other than local advertising, see § 53.102.

(b) *Definition of local advertising.*— (1) *In general.* For purposes of the regulations under sections 4216(e) and 6416(b)(1) of the Code (§§ 53.100–53.102 and 53.173–53.176), the term "local advertising" means advertising which relates to an article with respect to which tax is imposed under chapter 32 of the Code on the price for which sold and which:

(i) Is initiated or obtained by the purchaser or any subsequent vendee,

(ii) Names the article for which the price is determinable under section 4216 and states the location at which such article may be purchased at retail, and

(iii) Is broadcast over a radio station or television station, appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster.

(2) *Initiating or obtaining advertising.* For purposes of paragraph (b)(1) of this section, the advertising must be initiated or obtained by one or more of the persons in the chain of distribution of the article (wholesale distributor, jobber, dealer, etc.) who purchased the article for resale. For purposes of this subparagraph, the manufacturer is not considered to be one of the persons in the chain of distribution of the article. In general, advertising of an article is considered to be initiated or obtained by one or more persons in the chain of distribution of the article if any such person:

(i) Takes an active part in the actual planning and development, or in the arrangements or negotiations leading to the development, of the form and content of the advertising, or

(ii) Contracts for the placement of the advertising.

The participation of the manufacturer of the article in the planning, development, or placement of the advertising is immaterial provided the advertising is in fact initiated or obtained by one or more persons in the chain of distribution of the article. Furthermore, it is immaterial whether or not the advertising is subject to the approval of the manufacturer of the article. However, if no person in the chain of distribution of the article takes an active part in the actual planning and development, or in the arrangements or negotiations leading to the development, of the form and content of the advertising, but, rather, all such planning, development, arrangements, and negotiations are accomplished by the manufacturer of the article, then such manufacturer is considered to have initiated the advertising, and if he also contracts for the placement of the advertising, such advertising does not qualify as "local advertising".

(3) *Identification of article and sales location.* To meet the requirements of paragraph (b)(1) of this section, the advertising must identify the article for which the price is determinable under section 4216 of the Code and give the location or locations at which the article may be purchased at retail. All products taxable at the same rate under the same section of chapter 32 of the Code shall be considered to be an "article" for purposes of the preceding sentence. No specific method or means of identification is prescribed. The identification of the article may be made through the use of the name of the manufacturer or the use of an established trade-mark, such as a seal, picture, letter or letters, etc., or a combination thereof. The advertising must identify the particular retail establishment or establishments at which the article may be purchased at retail but need not specify the location of any such establishment in terms of the number by which the premises are designated or the name of the street on which the retail premises are situated. However, the location of the retail premises must be described sufficiently, as, for example, by reference to a particular named shopping area or shopping center, to enable customers to find the retail establishment.

(4) *Determination of costs of local advertising.* Where an advertisement identifies more than one article, and all such articles are not taxable, or are not taxable at the same rate under the same section of chapter 32 of the Code, a reasonable allocation of the cost of the advertisement must be made among:

(i) Articles taxable at the same rate under the same section of the Code, and

(ii) Articles which are not taxable under chapter 32 of the Code.

For example, in the case of a single page newspaper or magazine advertisement, an allocation of costs reflecting the lineage or space devoted to the specified categories will be considered to reflect a reasonable allocation of the cost of advertising the different articles. As a general rule, only the cost of the "spot" portion identifying the retail establishment is considered "local advertising" in the case of national television or radio programs.

(5) *Meaning of "newspaper".* The term "newspaper", as used in paragraph (b)(1) of this section, is limited to those publications which are commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character and of a general interest. The term does not include handbills, circulars, flyers, or the like, unless printed and distributed as a part of a publication which constitutes a newspaper within the meaning of this subparagraph. Neither does the term include any publication which is issued to supply information on certain subjects of interest to particular groups unless such publication otherwise qualifies as a newspaper within the meaning of this subparagraph. For purposes of this subparagraph, advertising is not considered to be news

of a general character and of a general interest.

(6) *Meaning of "magazine".* The term "magazine", as used in paragraph (b)(1) of this section, is limited to those publications which are:

(i) Commonly understood to be magazines,

(ii) Printed and distributed periodically at least twice a year, and

(iii) Published for the dissemination of information of a general nature or of special interest to particular groups.

(iv) The term does not include handbills, circulars, flyers or the like, unless printed and distributed as a part of a publication which constitutes a magazine within the meaning of this subparagraph. For purposes of this subparagraph, advertising is not considered to be information of a general nature or information of special interest to particular groups within the contemplation of paragraph (b)(6)(iii) of this section.

(7) *Meaning of "outdoor advertising sign or poster".* The term "outdoor advertising sign or poster", as used in paragraph (b)(1) of this section, means a sign or poster displaying advertising matter, which is located outside of a roofed enclosure. This term includes both signs or posters on billboards, whether placed on or affixed to land, buildings, or other structures, and those which are displayed on or attached to moving objects, provided the signs or posters are located outside of a roofed enclosure. The term "roofed enclosure" means a roof structure which is enclosed on more than one-half of its sides by walls, fences, or other barriers.

(c) *Exclusion*—(1) *Conditions and limitations.* A charge for local advertising which is required by a manufacturer to be paid as a condition to his sale of an article is not a part of the taxable price of the article, to the extent that such charge meets each of the following conditions and limitations:

(i) Such charge does not exceed 5 percent of the difference between:

(A) An amount which would constitute the taxable price of the article (computed at the time of the sale of the article) if no part of any charge for local advertising were excludable in computing taxable price, and

(B) The amount of any separate charge for local advertising, whatever the amount of such charge may be,

(ii) Such charge is specifically shown as a separate charge for local advertising on the invoice or statement covering the sale of the article.

(iii) Such charge is billed by the manufacturer with the intention on his part of repaying the amount of the charge to the person purchasing the article from him, or to any person who subsequently purchases the article for resale, in reimbursement of costs incurred for local advertising of such article or some other article or articles taxable at the same rate under the same section of the Code. In the absence of evidence to the contrary, the fact of such intention will be assumed in all cases where the manufacturer and his vendees are parties to an advertising plan which calls for such repayments, or the manufacturer can otherwise establish that the vendees to whom he bills such charges understand and expect that such repayments will be made.

(2) *When exclusion ceases to apply.* To the extent that charges for local advertising meet the conditions and limitations stated in paragraph (c)(1) of this section, such charge is excludable in computing the taxable price of the article in respect of which the charge was made. However, the exclusion will cease to apply in respect of any part of such charge which the manufacturer fails to repay before May 1 of the calendar year following the calendar year in which the article was sold, to the person who purchased the article from him, or to some other person who subsequently purchases the article for resale, in reimbursement of costs incurred for local advertising of such article or some other article or articles taxable at the same rate under the same section of the Code. If, before such May 1, any part of the charge so excluded has not been so repaid, the manufacturer becomes liable for tax on such May 1 in the same manner as if an article taxable under such section of the Code had been sold by him on such May 1 at a taxable price equivalent to that part of the charge not so repaid. However, see paragraph (b)(2) of § 53.175, relating to price readjustments in cases where local advertising charges are not repaid before such May 1 but are subsequently paid over by the manufacturer to his vendees in reimbursement of costs for local advertising. For provisions relating to the method of determining whether a payment by a manufacturer is or is not attributable to an excluded local advertising charge, see paragraph (b)(3) of § 53.101. In any case where the payment is determined to be attributable to such a charge, the date of the sale in connection with which the charge was made shall be determined on a first-in-first-out basis in respect of the vendee to whom the charge was billed by the manufacturer.

§ 53.101 Limitation on aggregate of exclusions and price readjustments.

(a) *In general.* The sum of the amount excluded from taxable price in respect of charges for local advertising, as provided in section 4216(e)(1) of the Code and § 53.100, plus the amount of the readjustments for which credits or refunds may be claimed in respect of local advertising, as provided in section 6416(b)(1) of the Code and § 53.175, is subject to an overall 5 percent limitation. This limitation applies to each manufacturer, as of the close of each calendar quarter, in respect of all articles taxable under the same section of chapter 32 of the Code which were sold by such manufacturer in such quarter (and the preceding quarter or quarters, if any, in the calendar year).

(b) *Computation of overall 5 percent limitation.*—(1) *In general.* The limitation prescribed by section 4216(e)(2) of the Code (the "overall 5 percent limitation" referred to in paragraph (a) of this section) as to the total of the exclusions from price and readjustments of price which may be claimed for local advertising in respect of all articles taxable under the same section of Chapter 32 of the Code shall be computed as of the close of each calendar quarter of the calendar year. The overall 5 percent limitation is 5 percent of the difference between:

(i) The amount which would constitute the total taxable price (computed at the time of sale) of all articles taxable under the same section of chapter 32 of the Code sold by the manufacturer during the elapsed calendar quarters of the calendar year, if no part of any charge for local advertising were excludable in computing taxable price, and

(ii) The total of all amounts billed as separate charges for local advertising of such articles (whatever the amount of any single charge of the total of all charges).

(iii) In making the computations under paragraphs (b)(1) (i) and (ii) of this section, credits or refunds under section 6416(b) of the Code of tax paid on the sale of any such articles are to be disregarded and articles sold tax-free by the manufacturer are to be excluded. The amount by which the overall 5 percent limitation computed as of the close of a particular calendar quarter in respect of articles taxable under the same section of chapter 32 of the Code exceeds the sum of the charges for local advertising excluded in computing the taxable price and the amount of reimbursements for local advertising of such articles made during the elapsed calendar quarters of the calendar year, in respect of which credit or refund has been claimed, represents the unused portion of the overall 5 percent limitation. Such unused portion is the

maximum amount of reimbursements for local advertising in respect of which credit or refund may be claimed at the close of the particular calendar quarter, subject to the applicable conditions and limitations governing the right to claim a credit or refund in respect of local advertising (see § 53.175). The unused portion of the overall 5 percent limitation as of the close of the fourth calendar quarter of a calendar year in respect of which credit or refund may not be claimed as of the close of such quarter must be disregarded in computing the overall 5 percent limitation for any subsequent calendar quarter. Moreover, the amount of any reimbursements for local advertising made by a manufacturer in a calendar year which is in excess of the amount of such reimbursements in respect of which credit or refund may be claimed, within the overall limitation, as of the close of the calendar year, may not subsequently serve as the basis for a credit or refund.

(2) *Alternative method of computation in certain cases.* If during the portion of the calendar year ending with the date as of which the overall 5 percent limitation is being computed the amount of the local advertising charge separately billed by the manufacturer has not, in respect of any sale of any articles taxable under the same section of chapter 32 of the Code, exceeded the amount excludable pursuant to § 53.100 in computing taxable price, the overall 5 percent limitation as of the close of a particular calendar quarter in respect of articles taxable under such section is 5 percent of the total taxable price (computed at the time of the sale) of all such articles sold taxpaid during the calendar year.

(3) *Allocation of amounts paid in reimbursement of expenditures for local advertising.* If a manufacturer makes contributions to a local advertising program in connection with which he makes excludable local advertising charges, it is necessary that reimbursements by the manufacturer for local advertising be attributed to the charges for local advertising, to the manufacturer's contributions, or allocated between them. Whether an amount paid by a manufacturer in reimbursement of expenses for local advertising is or is not a repayment of a local advertising charge which was excluded from taxable price under section 4216(e)(1) of the Code and § 53.100, shall be determined on the basis of an allocation made under the agreement between the manufacturer and his vendee (or any subsequent vendee).

(c) *Examples.* The application of paragraphs (a) and (b) of this section may be illustrated by the following examples:

Example (1). During the first and second calendar quarters of the year, a manufacturer makes sales of articles taxable under section 4181 of his distributors. The total charges of such sales, exclusive of the tax, transportation charges, delivery charges, or other charges which are excludable, pursuant to section 4216(a) of the Code, in computing taxable price, are as follows:

First Quarter:	
Articles taxable under Section 4181	$100,000
Local advertising charges	3,000
Total Charges	103,000
Second Quarter:	
Articles taxable under Section 4181	$150,000
Local advertising charges	4,000
Total Charges	154,000

Assume further that the manufacturer contributes to the advertising plan and that the manufacturer pays $5,500 and $1,000 during the first and second calendar quarters of the year, respectively, to his distributors in reimbursement of expenses incurred by them for local advertising of the articles purchased from the manufacturer.

Computation as of close of first calendar quarter:	
1. Amount which would constitute total taxable price (computed at time of sale) if no part of any charge for local advertising were excludable in computing taxable price	$103,000
2. Amounts billed as separate charges for local advertising	−3,000
3. Difference	100,000
4. Overall 5 percent limitation (5 percent of item 3)	$5,000
5. Amount excluded in computing taxable price	−3,000
6. Unused portion of limitation	2,000
7. Allocation, pursuant to agreement, of $5,500 paid to distributors:	
Charges for local advertising	$3,000
Contributions by manufacturer	$2,500

Readjustment may be claimed in respect of that portion of the total amount repaid to the distributors which is allocated to the manufacturer's contribution ($2,500) to the extent that such portion does not exceed the unused portion of the overall 5 percent limitation ($2,000). Accordingly, as of the close of the first calendar quarter the manufacturer may claim credit or refund in respect of a readjustment of price in the amount of $2,000.

Computation as of close of second calendar quarter:	
1. Amount which would constitute total taxable price (computed at time of sale) if no part of any charge for local advertising were excludable in computing taxable price ($103,000+$154,000)	$257,000
2. Amounts billed as separate charges for local advertising ($3,000+$4,000)	−7,000
3. Difference	250,000
4. Overall 5 percent limitation (5 percent of item 3)	$12,500
5. Amount excluded in computing taxable price ($3,000+$4,000) plus readjustment claimed at end of first calendar quarter ($2,000)	−9,000
6. Unused portion of limitation	3,500
7. Allocation, pursuant to agreement, of $6,500 ($5,500+$1,000) paid to distributors:	
Charges for local advertising	$3,500
Contributions by manufacturer	$3,000

Although the total reimbursements for local advertising expenses attributable to contributions by the manufacturer ($3,000) does not exceed the unused portion of the overall 5 percent limitation ($3,500), the manufacturer, having taken, at the close of the first calendar quarter, a price readjustment in the amount of $2,000 in respect to his contributions, is entitled at the close of the second calendar quarter to claim credit or refund in respect of a price readjustment in the amount of $1,000 ($3,000−$2,000).

Example (2). During the first calendar quarter of the year, a manufacturer sold articles taxable under section 4181 to his distributors at a total charge of $106,000, exclusive of the tax, transportation charges, delivery charges, or other charges which are excludable, pursuant to section 4216(a) of the Code, in computing taxable price. This total charge of $106,000 was billed as follows:

Total Charge:	
Articles taxable under Section 4181	$100,000
Local advertising charges	6,000
Total charges	106,000

Assume further that the manufacturer contributes to the advertising plan and that the manufacturer pays $3,000 during the first

calendar quarter of the year to his distributors in reimbursement of expenses incurred by them for local advertising of the articles purchased from the manufacturer.

Computation as of close of first calendar quarter:	
1. Amount which would constitute total taxable price (computed at time of sale) if no part of any charge for local advertising were excludable in computing taxable price	$106,000
2. Amounts billed as separate charges for local advertising	−6,000
d. Difference	100,000
4. Overall 5 percent limitation (5 percent of item 3)	5,000
5. Amount excluded in computing taxable price (see paragraph (c) of § 53.100	−5,000
6. Unused portion of limitation	0
7. Allocation, pursuant to agreement, of $3,000 paid to distributors:	
Charges for local advertising	2,000
Contributions by manufacturer	1,000

Credit or refund may not be claimed in respect of that portion of the total amount repaid to the distributors ($3,000) which is allocated to the manufacturer's contribution ($1,000) since the amount excluded in computing taxable price is equal to the overall 5 percent limitation.

§ 53.102 No exclusion or readjustment for other advertising charges or reimbursements.

(a) *Exclusions from price.* No exclusion in computing the taxable price of any article sold by the manufacturer may be allowed in respect of any charge for advertising if, and to the extent that, such charge:

(1) Is for advertising which does not qualify as local advertising within the meaning of section 4216(e)(4) of the Code and paragraphs (a) and (b) of § 53.100, or

(2) Does not satisfy all of the conditions and limitations stated in section 4216(e)(1) of the Code and paragraph (c) of § 53.100.

(b) *Readjustment of price.* No credit or refund under section 6416(b)(1) of the Code may be allowed in respect of any amount which was included in the taxable price of an article sold by the manufacturer and which was later paid by him to his vendee in reimbursement of costs incurred for advertising, if, and to the extent that, the amount so paid:

(1) Is for advertising which does not qualify as local advertising within the meaning of section 4216(e)(4) of the Code and paragraph (b) of § 53.100, or

(2) Is not within the limitation provided in section 4216(e)(2) of the Code, as computed in accordance with § 53.101, as of the close of the calendar quarter in which the amount is so paid over or as of the close of any subsequent calendar quarter in the same calendar year. See, however, § 53.175, relating to determinations of price readjustments in cases where local advertising charges excluded from taxable price in one calendar year become taxable as of May 1 of the following calendar year.

§ 52.103 Lease considered as sale.

For purposes of chapter 32 of the Code, the lease of an article by a manufacturer, producer, or importer shall be considered a sale of the article. The term "lease" means a contract or agreement, written or verbal, which gives the lessee and exclusive, continuous right to the possession or use of a particular article for a period of time. The term includes any renewal or extension of a lease or any subsequent lease of the article.

§ 53.104 Limitation on amount of tax applicable to certain leases.

(a) *Conditions for eligibility.* Section 4217(b) of the Code provides for a limitation on the amount of tax that shall apply to the lease, any renewal, or further lease, of an article which, if sold, would be subject to tax on the basis of sale price. Such limitation on the amount of the tax applies with respect to the lease of an article only if, at the time of making the lease, the lessor is engaged in the business of selling in arm's length transactions the same type and model of article. In case of a lease to which section 4217(b) of the Code does not apply, tax shall be computed and paid as provided in section 4216(c) of the Code and paragraph (a) of § 53.98.

(b) *Lessor engaged in business of selling.* The lessor will be regarded as being engaged in the business of selling in arm's length transactions the same type and model of an article as the one being leased if it periodically and recurringly makes bona fide offers for sale of such articles in the regular course of operation of its business, which offers if accepted would constitute sales at arm's length. Whether the offers are bona fide shall be determined on the basis of the facts in each case, such as sales actually made, the nature of the advertising, sales literature, and other means used to effectuate sales. It is not necessary that the offers for sale be made to the same class of purchasers as those to whom the article is being leased.

(c) *Same type and model of article.* To qualify as the "same type and model of article", the article offered for sale must be an unused article essentially the same in size, design, and function as the article being leased. Slight differences in appearance or accessories will not render articles dissimilar which are identical in all other respects.

(d) *Basis for tax.*—(1) *Tax payable until total tax in paid.* In case of a lease of an article to which section 4217(b) of the Code applies, tax shall be paid on each lease payment in an amount computed by applying to such lease payment a percentage equal to the rate of tax in effect on the date of the lease payment. Such tax payments shall continue to be made under such lease, or any subsequent lease of the article, until the cumulative total of the tax payments equals the total tax. Lease payments made thereafter with respect to that article shall not be subject to tax. For definition of the term "total tax," see paragraph (e) of this section.

(2) *Changes in tax rates.* If the rate of tax is increased or decreased during a lease period, the new rate shall apply to the lease payments made on and after the date of the change, but the amount of the total tax shall remain the same.

(e) *Total tax.* For purposes of this section, the term "total tax" means the amount of tax, computed at the rate in effect on the date of the first lease of the article to which section 4217(b) of the Code applies, which would be due on the constructive sale price of the article as determined under section 4216(b) of the Code and § 53.95, as if the article had been sold by a manufacturer at retail on such date.

(f) *Sale of article before total tax becomes payable.* If the lessor sells the article before the total tax has become payable, the tax payable on the sale shall be the lesser of the following amounts:

(1) The difference between:

(i) The total tax, and

(ii) The aggregate tax applicable to lease payments already received; or

(2) A tax computed, at the rate in effect on the date of the sale, on the price for which the article is sold. For purposes of (f)(2) of this section, the provisions of section 4216(b) of the Code for determining a constructive sale price shall not apply if the sale is at arm's length. If the sale is not at arm's length, the tax referred to in (f)(2) of this section shall be computed on a constructive sale price as provided in § 53.95.

(g) *Sale of article after total tax has become payable.* If the lessor sells an article after the total tax has become payable, the tax imposed under chapter

32 of the Code shall not apply to such sale.

Use by Manufacturer or Importer Considered Sale

§ 53.111 Tax by use by manufacturer, producer, or importer.

(a) *In general.* Section 4218 of the Code imposes tax in respect of certain uses of articles by the actual manufacturer, producer, or importer thereof. This section also applies in respect of the use of articles by any other person who, pursuant to a provision of chapter 32 of the Code, is considered to be, or is treated as, the manufacturer or producer of the articles. See, for example, section 4223 of the Code relating to articles purchased tax free for use in further manufacture.

(b) *Taxable articles in general.*—(1) *Application of tax.* If the manufacturer, producer, or importer of an article taxable under chapter 32 of the Code uses the article for any purpose other than that indicated in paragraph (b) (3) of this section, he shall be liable for tax with respect to the use of such article in the same manner as if the article were sold by him.

(2) *Taxable use in manufacturer of nontaxable articles.*—(i) *In general.* In the case of an article to which paragraph (b)(1) of this section applies, tax attaches when the manufacturer, producer, or importer of the articles uses it as material in the manufacture or production of, or as a component part of, another article which is not taxable under chapter 32 of the Code, regardless of the disposition made of such other article. (See paragraph (c) of § 53.115 for computation of tax on such use.)

(ii) *Types of use in manufacture of nontaxable articles.* Taxable use may consist of the incorporation of a taxable article into a nontaxable article. Taxable use may also result from the combining of a taxable article (or the components thereof) with a nontaxable article (or the components of a nontaxable article) resulting in a combination end article which itself is not taxable. Although the taxable article may not be a completely separable unit, within the contemplation of the law a taxable article has been produced and incorporated in the combination end article.

(3) *Nontxable use in manufacturer of taxable articles.* The tax on the use of an article to which paragraph (b)(1) of this section has application shall not apply if the article is used by the manufacturer, producer, or importer thereof as material in the manufacturer or production of, or as a component part of, another article taxable under chapter 32 of the Code to be manfactured or produced by him. It is immaterial what disposition is made of such other article.

(c) *Use after lease.* If the manufacturer, producer, or importer of a taxable article leases such article and thereafter uses the article, he incurs liability for tax on such use as provided in these regulations to the same extent as if the article were sold after being leased. See section 4217 of the Code and the regulations thereunder in this subpart for application and computation of tax in case of leased articles.

(d) *Time of application of tax.* In the case of a taxable use of an article by the manufacturer, producer, or importer thereof, the tax attaches at the time such use begins. If tax applies by reason of the sale of an article by the manufacturer, producer, or importer thereof on or in connection with his sale of another article, the tax attaches at the time of the sale of such other article.

(e) *Exemptions because of other statutory provisions.* Tax does not apply on the use of an article by the manufacturer, producer, or importer thereof if under the applicable provisions of the Code the sale of the article for a similar use would not be subject to tax. Also, tax need not be paid with respect to the use of an article by the manufacturer, producer, or importer thereof if such use would qualify, under the provisions of section 6416(b) of the Code, for credit or refund of the tax paid.

§ 53.112 Business or personal use of articles.

(a) *Business use.* Section 4218 of the Code applies to the use by a person, in the operation of any business in which he is engaged, of a taxable article which has been manufactured, produced, or imported by him or his agent.

(b) *Personal use.* The tax on use of a taxable article does not attach in cases where an individual incidentially manufacturers, produces, or imports a taxable article for his personal use or causes a taxable article to be manufactured, produced, or imported for his personal use.

§ 53.113 Events subsequent to taxable use of article.

Liability for tax incurred on the use of an article is not extinguished or reduced because of any subsequent sale or lease of the article even if such sale or lease would have been exempt if the article had been so sold or leased prior to use. If a manufacturer, producer, or importer of an article incurs liability for tax on his use thereof, and thereafter sells or leases the article in a transaction which otherwise would be subject to tax, liability for tax is not incurred on sale or lease.

§ 53.114 Use in further manufacture.

For purposes of section 4218 and § 53.111, an article is used as material in the manufacture or production of, or as a component part of, another article, if it is incorporated in, or is a part or accessory of, the other article. In addition, an article is considered to be used as material in the manufacturer of another article if it is partly or entirely consumed in testing such other article; for example, shells or cartridges used in testing new firearms. Similarly, if an article is partly or wholly consumed in quality testing a production run of like articles, such article is also considered to have been used as material in the manufacture of another article. However, if a taxable article that has been used tax free and only partly consumed in testing is later sold, or put to a taxable use by the manufacturer, tax attaches to such sale or use. An article that is consumed in the manufacturing process other than in testing, so that it is not a physical part of the manufactured article, is not used as material in the manufacture or production of, such other article.

§ 53.115 Computation of tax.

(a) *Tax based on price.* Tax liability incurred on the use of an article shall be computed on the price at which such or similar articles are sold in the ordinary course of trade by manufacturers, producers, or importers thereof and in the absence of special arrangements. For additional provisions applicable in computing the tax in the case of the use of an article by a manufacturer and producer who purchased the article free of tax under section 4221(a)(1) of the Code for use by him in further manufacturer, see section 4223(b) of the Code and the regulations thereunder (§ 53.143).

(b) *Articles regularly sold by manufacturer.* If the manufacturer, producer, or importer of an article regularly sells such articles at wholesale in arm's length transactions, tax liability on his use of any such article shall be computed on his lowest established wholesale price for such articles in effect at the time of the taxable use. In establishing such price, there shall be included and excluded, as applicable, the charges and readjustments specified in sections 4216(a) and 6416(b)(1) of the Code, as in effect at the time tax liability on the use of the article is incurred, and the regulations thereunder contained in this subpart and subpart L (§§ 53.91–53.94 and 53.173–53.176). If the

manufacturer, producer, or importer of an article does not regularly sell such articles at wholesale in arm's length transactions, a constructive price on which the use tax shall be computed will be determined by the Director. This price will be established after considering the selling practices and price structures of manfacturers, producers, and importers of similar articles.

(c) *Articles governed by section 4218(a) used in manufacture of nontaxable combination articles.* If the manufacturer, producer, or importer of an article to which section 4218(a) of the Code applies does not regularly sell such article separately but uses it as material in the manufacture or production of, or as a component part of, a nontaxable combination article consisting of a taxable and nontaxable article, liability for tax on his use shall be computed on the constructive price of the taxable article at the time of use. To determine the constructive price of the taxable article in such case, the combination article is considered to be composed of:

(1) Parts used exclusively in the functioning of the taxable article in the combination;

(2) Parts used exclusively in the functioning of the nontaxable article in the combination, and

(3) Parts, called common parts, which serve a dual function in connection with the parts in both paragraphs (c) (1) and (2) of the section.

The ratio which the cost of the parts in paragraph (c)(1) of this section bears to the sum of the cost of such parts and the parts in paragraph (c)(2) of this section is applied to the lowest established wholesale price for which like combination articles are at the time of the taxable use being sold by the manufacturer or producer in the ordinary course of trade. The resulting amount is the constructive sale price for the taxable article on which tax is to be computed. The cost of the common parts is allocable to the parts in paragraphs (c) (1) and (2) of this section in the same ratio, and, therefore, need not be taken into account in the computation since the inclusion and allocation of the cost of such parts in the determination would not result in a different ratio. In determining the lowest establishment wholesale price for the combination article, there shall be included and excluded, as applicable, the charges and readjustments specified in sections 4216(a) and 6416(b)(1) of the Code, as in effect at the time tax liability on the use of the taxable article is incurred, and the regulations thereunder contained in this subpart and Subpart L of this part (§§ 53.91–53.94 and §§ 53.173–53.176). The tax applicable to the use of the article for which a constructive sale price has been computed is not affected by any charges or readjustments of the price for which the nontaxable combination article is sold, whether by reason of the return or repossession of the nontaxable article or its covering or container, or by a bona fide discount, rebate, allowance, or other factor.

Application of Tax in Case of Sales by Other Than Manufacturer or Importer

§ 53.121 Sales of taxable articles by a person other than the manufacturer, producer, or importer.

(a) *General rule.* If the title to, or ownership of, an article taxable under chapter 32 of the Code is transferred from the manufacturer, producer, or importer thereof, and, under the law, no tax attaches to such transfer, the subsequent sale, lease, or use of such article by the transferee is subject to tax to the same extent and manner as if such transferee were the manufacturer, producer, or importer of the article. The following examples illustrate this rule:

(1) The surviving spouse, child or children, executors or administrators, or other legal representatives, as the case may be, of a deceased manufacturer, producer, or importer of taxable articles, incur liability for tax on all such articles sold by them.

(2) A receiver or trustee in bankruptcy who under a court order conducts or liquidates the business of a manufacturer, producer, or importer of taxable articles, incurs liability for tax on all taxable articles sold by him, regardless of whether the articles were manufactured, produced, or imported before or after he took charge of the business.

(3) An assignee for the benefit of creditors of a manufacturer, producer, or importer incurs liability for tax with respect to all taxable articles sold by him as such assignee.

(4) If one or more member of a partnership withdraw, or if new partners are admitted, the new partnership so constituted incurs liability for tax on all taxable articles sold by it regardless of when such articles were manufactured, produced, or imported.

(5) A person who acquires title to taxable articles as a result of default of the manufacturer, producer, or importer pursuant to an agreement under the terms of which the articles were pledged as collateral incurs liability for tax with respect to his sale of the articles so acquired.

(6) A person who succeeds to the business of a manufacturer, producer, or importer of taxable articles, such as:

(i) A corporation which results from a consolidation, merger, or reorganization;

(ii) A corporation which acquires the business of an individual or partnership; or

(iii) A stockholder in a corporation who, after its dissolution, continues the business;

incurs liability for the tax on all taxable articles sold by such person. However, where a manufacturer, producer, or importer sells only his assets, rather than ownership of his business, he incurs liability for tax on the sale of any taxable articles included in such assets.

(b) *Transfer of title to damaged articles.* If title to a damaged taxable article is transferred by the manufacturer, producer, or importer thereof to a carrier or insurance company in adjustment of a damage claim, such transfer is not considered a taxable sale of the article. If the article is usable, even though damaged, the carrier or insurance company incurs liability for tax on its sale, lease, or use of the article. Where the article has been damaged to the extent that its only value is as scrap, and it is not restored to usable condition, sale thereof by the carrier or insurance company is not subject to tax.

Subpart K—Exemptions, Registration, etc.

§ 53.131 Tax-free sales; general rule.

(a) *In general.* Section 4221(a) of the Code sets forth the following exempt purposes for which an article subject to tax under chapter 32 of the Code may be sold tax-free by the manufacturer, producer, or importer:

(1) For use by the purchaser for further manufacture, or for resale by the purchaser to a second purchaser for use by such second purchaser in further manufacture,

(2) For export, or for resale by the purchaser to a second purchaser for export,

(3) For use by the purchaser as supplies for vessels or aircraft,

(4) To a State or local government for the exclusive use of a State or local government, and

(5) To a nonprofit educational organization for its exclusive use.

Section 4221(a) of the Code applies only in those cases where the exportation or use referred to is to occur before any other use, and where the seller, first purchaser, and second purchaser, as may be appropriate, have registered as required under section 4222 of the Code

and paragraph (a) of § 53.140. See paragraphs (c) and (d) of this section for provisions relating to evidence required in support of tax-free sales. See § 53.141 for exceptions to the requirement for registration.Where tax is paid on the sale of an article, but the article is used or resold for use for an exempt purpose, a claim for credit or refund may be filed in accordance with and to the extent provided in sections 6402(a) and 6416 of the Code, and the regulations thereunder (§§ 53.161 and 53.171–53.186).

(b) *Manufacturer relieved of liability in certain cases.*—(1) *General rule.* Under the provisions of section 4221(c) of the Code, if an article subject to tax under Chapter 32 of the Code is sold free of tax by the manufacturer of the article for an exempt purpose referred to in section 4221(c) of the Code and paragraph (b)(2) of this section, the manufacturer shall be relieved of any tax liability under chapter 32 of the Code with respect to such sale if the manufacturer in good faith accepts a proper certification by the purchaser that the article or articles will be used by the purchaser in the stated exempt manner. See paragraph (b)(2) of this section for a list of the exempt purposes referred to in section 4221(c) of the Code.

(2) *Situations wherein section 4221(c) of the Code is applicable.* The following are situations wherein section 4221(c) of the Code is applicable with respect to sales made tax free on the assumption that one of the following sections of the Code provides exemption for such sales:

(i) Section 4221(a)(1) of the Code, to the extent that it relates to sales for further manufacture by a first purchaser (see § 53.132),

(ii) Section 4221(a)(3) of the Code, relating to supplies for vessels and aircraft (see § 53.134),

(iii) Section 4221(a)(4) of the Code, relating to sales to State or local governments (see § 53.135),

(iv) Section 4221(a)(5) of the Code, relating to sales to nonprofit educational organizations (see § 53.136).

(3) *Situations wherein section 4221(c) of the Code is not applicable.* The relief from liability for the payment of tax provided by section 4221(c) of the Code is not applicable with respect to sales made tax free on the assumption that one of the following sections of the Code provides exemption for such sales:

(i) Section 4221(a)(1) of the Code, to the extent that it relates to sales for resale to a second purchaser for use by the second purchaser in further manufacture (see § 53.132),

(ii) Section 4221(a)(2) of the Code, relating to sales for export (see § 53.133).

(4) *Duty of seller to ascertain validity of tax-free sale.* If the manufacturer at the time of its sale has reason to believe that the article sold by it is not intended for the exempt purpose indicated by the purchaser, or that the purchaser has failed to register as required, the manufacturer is not considered to have accepted certification from the purchaser in good faith, and is not relieved from liability under the provisions of section 4221(c) of the Code.

(5) *Information to be furnished to purchaser.* A manufacturer selling articles free of tax under this section shall indicate to the purchaser that:

(i) Certain articles normally subject to tax are being sold tax free, and

(ii) The purchaser is obtaining those articles tax free for an exempt purpose under an exemption certificate or its equivalent.

(6) The manufacturer may transmit this information by any convenient means, such as coding of sales invoices, provided that the information is presented with sufficient particularity so that the purchaser is informed that he has obtained the articles tax free and:

(i) The purchaser can compute and remit the tax due if an article sold tax free for further manufacture is diverted to a taxable use,

(ii) The manufacturer can remit the tax due with respect to an article purchased tax free for resale for use in further manufacture or for export if, within the 6-month period described in § 53.132(c) or § 53.133(c), the manufacturer does not receive proof that the article has been exported or resold for use in further manufacturer, or

(iii) The purchaser can notify the manufacturer if an article otherwise purchased tax free is diverted to a taxable use.

(c) *Evidence required in support of tax-free sales*—(1) *Purchasers required to be registered.* Every purchaser who is required to be registered (see § 53.140) shall furnish to the seller, as evidence in support of each tax-free sale made by the seller to such purchaser, the exempt purpose for which the article or articles are being purchased and the registration number of the purchaser. Such information must be in writing and may be noted on the purchase order or other document furnished by the purchaser to the seller in connection with each sale.

(2) *Purchasers not required to be registered.* For the evidence which purchasers not required to register must furnish to the seller in support of each tax-free sale made by the seller to such purchasers, see paragraph (b) of § 53.133 for sales or resales to a foreign purchaser for export, paragraph (d) of § 53.134 for sales of supplies to vessels or aircraft, paragraph (c) of § 53.135 for sales to State and local governments, and paragraph (c) of § 53.141 for sales and purchases by the United States.

§ 53.132 Tax-free sale of articles to be used for, or resold for, further manufacture.

(a) *Further manufacture*—(1) *In general.* Under prescribed conditions, an article subject to tax under Chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(1) of the Code, for use by the purchaser in further manufacture, or for resale by the purchaser to a second purchaser for use by the second purchaser in further manufacture. See section 4221(d) (6) of the Code and paragraph (b) of this section for the circumstances under which an article is considered to have been sold for use in further manufacture. See section 6416(b)(3) of the Code and § 53.180 for the circumstances under which credit or refund is available when tax-paid articles are used in further manufacture.

(2) *Proof of resale for use in further manufacture.* See section 4221(b)(1) of the Code and paragraph (c) of this section for provisions under which the exemption provided in section 4221(a)(1) of the Code shall cease to apply in the case of an article sold by the manufacturer to a purchaser for resale to a second purchaser for use in further manufacture unless the manufacturer receives timely proof of resale for further manufacture.

(b) *Circumstances under which an article is considered to have been sold for use in further manufacture.* (1) For purposes of the exemption from the manufacturers excise tax provided by section 4221(a)(1) of the Code, an article shall be treated as sold for use in further manufacture if the article is sold for use by the purchaser as material in the manufacture or production of, or as a component part of, another article taxable under chapter 32 of the Code;

(2) An article is used as material in the manufacture or production of, or as a component of, another article if it is incorporated in, or is a part or accessory of, the other article when the other article is sold by the manufacturer. In addition, an article is considered to be used as material in the manufacture of another article if it is consumed in whole or in part in testing such other article; for example, shells or cartridges that are used by the manufacturer of firearms to test new firearms. However, an article that is consumed in the manufacturing process other than in testing, so that it is not a physical part of the manufactured article, is not

considered to have been used as material in the manufacture of, or as a component part of, another article.

(c) *Proof of resale for further manufacture*—(1) *Cessation of exemption.* The exemption provided in section 4221(a)(1) of the Code and described in paragraph (a) of this section in respect of an article sold by the manufacturer to a purchaser for resale to a second purchaser for use by the second purchaser in further manufacture shall cease to apply on the first day following the close of the 6-month period which begins on the date of the sale of such article by the manufacturer, or the date of shipment of the article by the manufacturer, whichever is earlier, unless, within such 6-month period, the manufacturer receives proof, in the form prescribed by paragraph (c)(2) of this section, that the article was actually resold by the purchaser to a second purchaser for such use. If, on the first day following the close of the 6-month period, such proof has not been received, the manufacturer shall become liable for tax at that time at the rate in effect when the sale was made but otherwise in the same manner as if the article had been sold by it on such first day at a taxable price equivalent to that at which the article was actually sold. If the manufacturer later obtains such proof, it may file a claim for refund or credit of this tax. The payment of this tax by the manufacturer is not considered an overpayment by the subsequent manufacturer or producer for which the subsequent manufacturer or producer is entitled to a credit or refund under section 6416(b)(3) of the Code. See section 4221(d)(6) of the Code and paragraph (b) of this section for the circumstances under which an article is considered to have been sold for use in further manufacture.

(2) *Proof of resale.*—(i) *Certificate of purchaser.* The proof of resale to be received by the manufacturer, as required under section 4221(b)(1) of the Code, may consist of either a copy of the invoice of the manufacturer's vendee directed to his purchaser which discloses the certificate of registry number held by each party or a statement described below. In the case of an invoice of manufacturer's vendee, it must appear from such invoice (or by statement attached thereto) that the article was in fact resold for use in further manufacture. In lieu of such an invoice, proof of resale may consist of a statement, executed and signed by the manufacturer's vendee. Such statement shall be in substantially the following form:

Statement of Manufacturer's Vendee

(To support tax-free sales of taxable articles to a purchaser for resale to a second purchaser for use in further manufacture (section 4221(a)(1) of the Internal Revenue Code).)

(Date _____, 19____.

The undersigned, or the _____ (Name of manufacturer's vendee if other than undersigned), of which I am _____ (Title), holds certificate of registry No. _____ issued by the ATF Regional Director at _____.

The article or articles specified below or on the reverse side hereof were purchased tax free by me, or by _____ (Name of manufacturer's vendee if other than undersigned), on _____ (Date) and were thereafter resold to a purchaser who holds certificate of registry No. _____, issued by the ATF Regional Director at _____, for use by it as material in the manufacture or production of, or as a component part or parts of, an article or articles taxable under Chapter 32 of the Internal Revenue Code, for use by it as material in the manufacture or production of, or as a component part or parts of, any article or articles.

The undersigned, or _____ (Name of manufacturer's vendee other than undersigned), has in my/its possession proof of tax-free resale of such article or articles in the form of related purchase orders and sales invoices, and proof of tax-free resale will be retained by me or _____ (Name of manufacturer's vendee if other than undersigned), for at least 3 years from the date of this statement, and will be made readily available for inspection by ATF officers during such 3-year period.

I have not previously executed a statement in respect of such certificate of resale, and I understand that the fraudulent use of this statement may subject me and all parties making such fraudulent use of this statement to all applicable criminal penalties under the Internal Revenue Code.

_____

(Signature)

_____

(Address)

(ii) *Period covered.* Any statement executed and signed by the manufacturer's vendee, as provided in paragraph (c)(2)(i) of this section, may be executed with respect to any one or more articles purchased tax free from a manufacturer and resold for use in further manufacture within the 6-month period prescribed in section 4221(a)(1) of the Code and paragraph (c)(1) of this section. Such statement (or other prescribed proof of resale) must be retained for inspection by the regional director as provided in section 6001 of the Code.

§ 53.133 Tax-free sale of articles for export, or for resale by the purchaser to a second purchaser for export.

(a) *In general.* (1) An article subject to tax under chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(2) of the Code and this section, for export, or for resale by the purchaser to a second purchaser for export. See § 53.11 for the meaning of the term "exportation". An article may be sold tax free by the manufacturer under the provisions of this section only if the person to whom the manufacturer sells the article intends either to export the article or to resell it to a person who intends to export it. An article may not be sold tax free under the provisions of this section by a manufacturer to a purchaser for resale to a second purchaser which does not intend to export the article itself but plans to resell it to a third purchaser for export. See section 6416(b)(2)(A) of the Code and § 53.177 for the circumstances under which credit or refund of tax is available where tax-paid articles are exported from the United States.

(2) If an article, otherwise taxable under chapter 32 of the Code:

(i) Is sold tax free by the manufacturer pursuant to section 4221(a)(2) of the Code and this section, and

(ii) Is returned subsequently to the United States in an unused and undamaged condition,

then the importer is liable for the tax imposed by chapter 32 of the Code on the subsequent sale or use of the article in the United States.

(b) *Sales or resales to a foreign purchaser for export.* In the case of sales or resales to a foreign purchaser for export, if the first or the second purchaser is located in a foreign country or possession of the United States, such purchaser is not required to register as provided in section 4222(a) of the Code and § 53.140. To establish the right to sell articles tax free for export to a purchaser who is not registered and who is located in a foreign country or a possession of the United States, the manufacturer must obtain from such producer at the time title to the article passes or at the time of shipment, whichever is earlier, either:

(1) A written order or contract of sale showing that the manufacturer is to ship the article to a foreign destination; or

(2) Where delivery by the manufacturer is to be made within the United States, a statement from the purchaser showing:

(i) That the article is purchased either to fill existing or future orders for delivery to a foreign destination or for resale to another person engaged in the business of exporting who will export the article, and

(ii) That such article will be transported to its foreign destination in due course prior to use or further manufacture and prior to any resale except for export. See section 4221(b) of the Code and paragraphs (c) and (d) of this section for requirements as to timely proof of exportation and cessation of the exemption for export unless the evidence to show actual exportation has been received by the manufacturer.

(c) *Cessation of exemption.* The exemption provided in section 4221(a)(2) of the Code and paragraph (a) of this section for an article sold by the manufacturer for export or for resale by the purchaser to a second purchaser for export shall cease to apply on the first day following the close of the 6-month period which begins on the date of the sale of the article by the manufacturer, or the date of shipment of the article by the manufacturer, whichever is earlier, unless within the 6-month period the manufacturer receives proof, in the form prescribed by paragraph (d) of this section, that the article was actually exported. If, on the first day following the close of the 6-month period, the proof has not been received, the manufacturer shall become liable for tax at that time at the rate in effect when the sale was made but otherwise in the same manner as if the article had been sold by it on such first day at a taxable price equivalent to that at which the article was actually sold.

(d) *Proof of exportation.* (1) Exportation may be evidenced by:

(i) A copy of the export bill of lading issued by the delivering carrier,

(ii) A certificate by the agent or representative of the export carrier showing actual exportation of the article,

(iii) A certificate of landing signed by a customs officer of the foreign country to which the article is exported,

(iv) Where the foreign country has no customs administration, a statement of the foreign consignee showing receipt of the article, or

(v) Where a department or agency of the United States Government is unable to furnish any one of the foregoing four types of proof of exportation, a statement or certification on the department or agency stationery, executed by an authorized officer, that the listed or identified articles have, in fact, been exported.

(2) In any case where the manufacturer is not the exporter, the manufacturer must have in its possession a statement from the vendee to whom the manufacturer sold the article stating that the article was in fact exported in due course by the vendee or was sold to another person who in due course exported the article. The statement must state what evidence is available to establish that the article was in fact exported in due course prior to use or further manufacture and prior to resale in the United States other than for export. Such evidence must be that described in paragraph (d)(1) of this section, and the statement must show where such evidence is readily available for inspection by ATF officers, and should be in substantially the following form:

Statement of Manufacturer's Vendee

(To support tax-free sales of taxable articles to a purchaser for export or for resale to a second purchaser for export (section 4221(a)(2) of the Internal Revenue Code).)

The undersigned, or the _____ (Name of manufacturer's vendee if other than undersigned) of which I am _____ (Title) holds certificate of registry No. _____, issued by the ATF Regional Director at _____.

The article or articles specified below or on the reverse side hereof were purchased tax free by me or by _____ (Name of manufacturer's vendee if other than undersigned) on _____ (Date), and were thereafter exported.

The undersigned or _____ (Name of manufacturer's vendee if other than undersigned) has in my/its possession proof of exportation in respect of such article or articles. The evidence of export available is _____ and is located at _____ (If other than address below). Such proof of exportation will be retained by _____ (Name of manufacturer's vendee) for at least 3 years from the date of this statement and will be made readily available for inspection by ATF officers.

I have not previously executed a statement in respect of the article or articles covered by this statement, and I understand that the fraudulent use of this statement will subject me and all parties making such fraudulent use of this statement to all applicable criminal penalties under the Internal Revenue Code.

_____

(Signature)

_____

(Address)

_____

(Date)

(3) The statement executed and signed by the manufacturer's vendee, as provided in paragraph (d)(2) of this section, may be executed with respect to any one or more articles purchased tax free from a manufacturer and exported within the 6-month period prescribed in section 4221(b)(2) of the Code and paragraph (c) of this section. Such statement shall be kept for inspection by the regional director as provided in section 6001 of the Code.

§ 53.134 Tax-free sale of articles for use by the purchaser as supplies for vessels or aircraft.

(a) *Supplies for vessels or aircraft.*— (1) *In general.* An article subject to tax under chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(3) of the Code and this section, for use by the purchaser as supplies for vessels or aircraft. See paragraph (b) of this section for the meaning of the term "supplies for vessels or aircraft." An article may be sold tax free under the provisions of this section only in those cases where the sale of an article by the manufacturer is made directly to the owner, officer, charterer, or authorized agent of a vessel or aircraft for use as supplies for the vessel or aircraft. No sale may be made tax free to a dealer for resale for use as supplies for vessels or aircraft, even though it is known at the time of sale by the manufacturer that the article will be so resold. See section 6416(b)(2)(B) of the Code and paragraph (c) of § 53.178 for circumstances under which credit or refund of tax is available where tax-paid articles are used, or sold for use, as supplies for vessels or aircraft. An article may not be sold tax free under the provisions of this section by the manufacturer to passengers or members of the crew of a vessel or aircraft.

(2) *Civil aircraft of foreign registry.* In the case of any article sold by the manufacturer for use by the purchaser as supplies for civil aircraft of foreign registry employed in foreign trade or in trade between the United States and any of its possessions, the provisions of this paragraph apply only if the reciprocity requirements of section 4221(e)(1) of the Code are met. See paragraph (c) of this section.

(b) *Meaning of terms.*— (1) *Supplies for vessels or aircraft.* The term "supplies for vessels or aircraft" means fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or vessels actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions.

(2) *Fuel supplies, ships' stores, and legitimate equipment.* The terms "fuel

supplies", "ships' stores", and "legitimate equipment" include all articles, materials, supplies, and equipment necessary for the navigation, propulsion, and upkeep of vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or vessels actually engaged in foreign trade or in trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, even though such vessels may make intermediate stops in the United States. The term does not include supplies for vessels engaged in trade:

(i) Between domestic ports in the Atlantic Ocean and the Gulf of Mexico,

(ii) Between domestic ports on the Pacific Ocean,

(iii) Between domestic ports on the Great Lakes, or

(iv) On the inland waterways of the United States.

(3) *Sea stores.* The term "sea stores" includes any article purchased for use or consumption by the passengers or crew, or both, of a vessel during its voyage.

(4) *Vessel.* The term "vessel" includes:

(i) Every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water,

(ii) Civil aircraft registered in the United States and employed in foreign trade or in trade between the United States and any of its possessions, and

(iii) Civil aircraft registered in a foreign country and employed in foreign trade or trade between the U.S. and its possessions.

(5) *Vessels of war of the United States or of any foreign nation.* The term "vessels of war of the United States or of any foreign nation" includes:

(i) Every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water and constituting equipment of the armed forces (including the U.S. Coast Guard and U.S. National Guard) of the United States or of a foreign nation, and

(ii) Aircraft owned by the United States or by any foreign nation and constituting equipment of the armed forces thereof.

(iii) For purposes of this section, vessels or aircraft owned by armed forces are not considered to be equipment of such armed forces while on lease or loan to an organization that is not part of the armed forces.

(6) *Vessels used in fisheries or whaling business.* The exemption provided by section 4221(a)(3) of the Code and paragraph (a) of this section in the case of articles sold for the prescribed use on vessels employed in the fisheries or whaling business is limited to articles sold by the manufacturer for such use on vessels while employed, and to the extent employed, exclusively in the fisheries or in the whaling business. For purposes of this section, vessels engaged in sport fishing are not considered to be employed in the fisheries business.

(7) *Civil aircraft.* The exemption provided by section 4221(a)(3) of the Code and paragraph (a) of this section relating to supplies for vessels or aircraft, with respect to civil aircraft, extends only to civil aircraft when employed in foreign trade, or in trade between the United States and any of its possessions. Sales of supplies to civil aircraft when engaged in trade between the Atlantic and the Pacific ports of the United States are not exempt from the tax imposed under chapter 32 of the Code. See section 4221(e)(1) of the Code and paragraph (c) of this section for requirement of reciprocal exemption in the case of a civil aircraft registered in a foreign country.

(8) *Trade.* The term "trade" includes the transportation of persons or property for hire and the making of the necessary preparations for such transportation. The term "trade" also includes the transportation of property on a vessel or aircraft owned or chartered by the owner of the property in connection with the purchase, sale, or exchange of the property in a commercial business operation. However, a vessel owned or chartered by a company and used in the transportation of personnel or property of such company to or from its business properties located in a foreign country, or in a possession of the United States, is not engaged in "trade".

(c) *Reciprocity required in the case of civil aircraft.* The exemption provided by section 4221(a)(3) of the Code and paragraph (a) of this section with respect to the sales of supplies for civil aircraft registered in a foreign country is further limited in that the privilege of exemption may be granted only if the Secretary of Commerce advises the Secretary of the Treasury that the foreign country allows, or will allow, substantially the same reciprocal privileges. If a foreign country discontinues the allowance of such substantially reciprocal exemption, the exemption allowed by the United States will not apply after the Secretary of the Treasury is notified by the Secretary of Commerce of the discontinuance of the exemption allowed by the foreign country.

(d) *Evidence required to establish.*— (1) *In general.* The exemption provided in section 4221(a)(3) of the Code and paragraph (a) of this section for articles sold for use by the purchaser as supplies for vessels or aircraft applies only:

(i) If both the manufacturer and purchaser are registered under the provisions of section 4222 of the Code, or

(ii) The purchaser or both the manufacturer and the purchaser are not registered but have satisfied the provisions of paragraph (d)(2) of this section.

See paragraph (c) of § 53.131 for the evidence required to establish exemption where the purchaser is registered pursuant to section 4222 of the Code and § 53.140.

(2) *Exemption certificates for use in support of tax-free sales of supplies for vessels and aircraft.* (i) In order to establish exemption from tax under section 4221(a)(3) of the Code in those instances where the purchaser or both the manufacturer and purchaser are not registered under section 4222 of the Code, the manufacturer must obtain (prior to or at the time of the sale) from the owner, charterer, or authorized agent of the vessel or aircraft and retain in the manufacturer's possession a properly executed exemption certificate in the form prescribed by paragraph (d)(2)(iii) of this section. If articles are sold tax-free for use as supplies for civil aircraft employed in foreign trade or in trade between the United States and any of its possessions, the exemption certificate must show the name of the country in which the aircraft is registered.

(ii) Where only occasional sales of articles are made to a purchaser for use as supplies for vessels or aircraft, a separate exemption certificate shall be furnished for each order. However, where sales are regularly or frequently made to a purchaser for such exempt use, a certificate covering all orders for a specified period not to exceed 12 calendar quarters will be acceptable. Such certificates and proper records of invoices, orders, etc., relative to tax-free sales must be kept for inspection by the regional director as provided in section 6001 of the Code.

(iii) Acceptable form of exemption certificate. The following form of exemption certificate will be acceptable for the purposes of this section and must be adhered to in substance:

Exemption Certification

(For use by purchasers of articles for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on certain vessels or aircraft (sections 4221 and 4222 of the Internal Revenue Code).)

(Date) ___ _____, 19____.

I, the undersigned purchaser, hereby certify that I am the _____ (Owner, charterer, or authorized agent) of _____ (Name of company and vessel) and that (check applicable type of certificate):

☐ The article or articles specified in the accompanying order, or on the reverse side hereof, (or)

☐ All orders placed by the purchaser for the period commencing (Date) _____ and ending (Date) _____ (period not to exceed 12 calendar quarters), will be used only for fuel supplies, ships' stores, sea stores, or legitimate equipment on a vessel belonging to one of the following classes of vessels to which section 4221 of the Internal Revenue Code applies (check class to which vessel belongs):

☐ (1) Vessels engaged in foreign trade.

☐ (2) Vessels engaged in trade between the Atlantic and Pacific ports of the United States.

☐ (3) Vessels engaged in trade between the United States and any of its possessions.

☐ (4) Vessels employed in the fisheries or whaling business.

☐ (5) Vessels of war of the United States or a foreign nation.

If the articles are purchased for use on civil aircraft engaged in trade as specified in (1) or (3) above, state the name of the country in which the aircraft is registered:

I understand that if the articles are used for any purpose other than as stated in this certificate, or are resold or otherwise disposed of, I must report such fact to the manufacturer. I understand that this certificate may not be used in purchasing articles tax free for use as supplies, etc., on pleasure vessels, or on any type of aircraft except: (i) Civil aircraft employed in foreign trade or trade between the United States and any of its possessions, and (ii) Aircraft owned by the United States or any foreign country and constituting a part of the armed forces thereof.

I understand that the fraudulent use of this certificate to secure exemption will subject me and all parties making such fraudulent use of this certificate to all applicable criminal penalties under the Internal Revenue Code. I also understand that I must be prepared to establish by satisfactory evidence the purpose for which the article was used.

(Signature)

(Address)

§ 53.135 Tax-free sale of articles to State and local governments for their exclusive use.

(a) *In general.* An article subject to tax under Chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(4) of the code and this section, to a State or local government for the exclusive use of such State or local government. See paragraph (b) of this section for the meaning of the term "State or local government". An article may be sold tax free by the manufacturer under this paragraph only in those cases where the sale is made directly to a State or local government for its exclusive use. Accordingly, no sale may be made tax free to a dealer for resale to a State or local government for its exclusive use, even though it is known at the time of sale by the manufacturer that the article will be so resold. A sale of an article to a State or local government for resale is not considered to be a sale for the "exclusive use" of the State or local government, within the meaning of section 4221(a)(4) of the Code, and, therefore, such sales may not be made tax free. Such sales are not exempt regardless of whether the resales are made to government employees, or the fact that the article is an item of equipment the employee is required to possess in carrying out his duties. For example, pistols or revolvers may not be sold tax free to a State or local government for resale to its police officers. See section 6416(b)(2)(C) of the Code, and paragraph (d) of § 53.178, for the circumstances under which credit or refund of tax is available where tax-paid articles are sold for the exclusive use of a State or local government.

(b) *State or local government.* The term "State or local government" includes any State, the District of Columbia, and any political subdivision of any of the foregoing. *See,* section 7871(a)(2)(B) of the Code and 26 CFR 305.7701–1 et seq., which provide that an Indian tribal government shall be treated as a State for purposes of exemption from an excise tax imposed by chapter 32. Section 7871(b) of the Code provides that the exemption from tax applies only if the transaction involves the exercise of an essential governmental function of the Indian tribal government.

(c) *Evidence required in support of tax-free sales to State or local governments.* (1) In the case of a State or local government which is registered (see § 53.141 for provisions under which a State or local government may register if it so desires), the provisions of paragraph (c) of § 53.131 have application as to the evidence required in support of tax-free sales. If a State or local government is not registered, the evidence required in support of a tax-free sale to the State or local government shall, except as provided in paragraph (c)(2) of this section, consist of a certificate, executed and signed by an officer or employee authorized by the State or local government to execute and sign the certificate. If it is impracticable to furnish a separate certificate for each order or contract because of a frequency of purchases, a certificate covering all orders between given dates (such period not to exceed 12 calendar quarters) will be acceptable. The certificates and proper records of invoices, orders, etc., relative to tax-free sales must be retained by the manufacturer as provided in section 6001 of the Code. The certificate shall be in substantially the following form:

Exemption Certification

(For use by States and local governments (section 4221(a)(4) of the Internal Revenue Code).)

(Date) _____, 19____.

I, hereby certify that I am _____ (Title of Officer) of _____ (State or local government) that I am authorized to execute this certificate; and that (check applicable type of certificate):

☐ The article or articles specified in the accompanying order, or on the reverse side hereof, (or)

☐ All orders placed by the purchaser for the period commencing _____ (Date) and ending _____ (Date) (period not to exceed 12 calendar quarters), are, or will be, purchased from _____ (Name of manufacturer) for the exclusive use of _____ (Governmental unit) of _____ (State or local government).

I understand that the exemption from tax in the case of sales of articles under this exemption certificate to a State, etc., is limited to the sale of articles purchased for its exclusive use. I understand that fraudulent use of this certificate for the purpose of securing this exemption will subject me and all parties making such fraudulent use of this certificate to all applicable criminal penalties under the Internal Revenue Code.

(Signature)

(Address)

(2) A purchase order, provided that all of the information required by paragraph (c)(1) of this section is included therein, is acceptable in lieu of a separate exemption certificate.

(d) *Resale of articles purchased tax free by a State or local government.* If articles purchased tax free for the exclusive use of a State or local government (whether on the basis of a registration number or an exemption certificate) are, prior to use by the State or local government, resold under circumstances that do not amount to an exclusive use by the State or local government (such as pistols or revolvers that are resold by a police department to its police officers), the parties responsible in the State or local government are required to inform the manufacturer, producer, or importer from whom the articles were purchased that they were disposed of in a manner that did not amount to an exclusive use by the State or local government. A willful failure to supply the

manufacturer, producer, or importer with the information required by this subparagraph will subject responsible parties to the penalties provided by section 7203 of the Code.

§ 53.136 Tax-free sales of articles to nonprofit educational organizations.

(a) *In general.* An article subject to tax under chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(5) of the Code and this section, to a nonprofit educational organization for its exclusive use. See paragraph (b) of this section for the meaning of the term "nonprofit educational organization". An article may be sold tax free by the manufacturer under this paragraph only in those cases where the sale of an article by the manufacturer is made directly to a nonprofit educational organization for its exclusive use. Accordingly, no sale may be made tax free to a dealer for resale to a nonprofit educational organization for its exclusive use even though it is known at the time of sale by the manufacturer that the article will be so resold. See section 6416(b)(2)(D) of the Code, and paragraph (e) of § 53.178, for the circumstances under which credit or refund of tax is available where tax-paid articles are sold for the exclusive use of a nonprofit educational organization.

(b) *Nonprofit educational organization.* The term "nonprofit educational organization" means an organization described in section 170(b)(1)(A)(ii) of the Code that is exempt from income tax under section 501(a) of the Code. Section 170(b)(1)(A)(ii) describes an "educational organization" as one that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on. The term also includes a school operated as an activity of an organization described in section 501(c)(3) of the Code which is exempt from income tax under section 501(a) of the Code, provided the primary function of such school is the presentation of formal instruction and provided such school normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

(c) *Evidence required in support of tax-free sales to nonprofit educational organizations.* Every nonprofit educational organization purchasing tax free under section 4221(a)(5) of the Code must furnish the following information to the seller:

(1) The tax exempt purpose for which the article or articles are being purchased, and

(2) Its registration number, and the regional director's office that issued the registration number. Such information must be in writing and may be noted on the purchase order or other document furnished by the purchaser to the seller in connection with each sale "except that a single notification containing the information described in this paragraph may cover all sales by the seller to the purchaser made during a designated period not to exceed 12 successive calendar quarters.". See paragraph (c) of § 53.131 for the evidence required to establish exemption.

§§ 53.137—53.139 [Reserved]

§ 53.140 Registration.

(a) *General rule.* Except as provided in § 53.141, tax-free sales under section 4221 of the Code may be made only if the manufacturer, first purchaser, and second purchaser, as the case may be, have registered as required by this section. To secure a Certificate of Registry, the applicant must furnish the information required in paragraph (b) of this section.

(b) *Information to be submitted.* Except as provided in § 53.141, any person who is eligible to sell or purchase articles free of a tax imposed by section 4181 of the Code and who has not registered with the Commissioner of the Internal Revenue Service prior to January 1, 1991 or with ATF in accordance with the provisions of this section shall, prior to making a tax-free sale or purchase, file ATF Form 5300.28, in duplicate, executed in accordance with the instructions contained on the reverse of ATF Form 5300.28. This form shall be filed with the regional director of ATF for the region in which the principal place of business of the applicant is located (or the applicant has no principal place of business in the United States, with the Director, ATF). Copies of the ATF Form 5300.28 may be obtained from any regional office. The person who receives an approved Certificate of Registry shall be considered to be registered for purposes of selling or purchasing articles tax free as provided in this section. In the case of a nonprofit educational organization, information shall be furnished showing that the organization is an educational organization described in section 170(b)(1)(A)(ii) of the Code that is exempt from income tax under section 501(a) of the Code, or is a school operated as an activity of an organization described in section 501(c)(3) that is exempt from income tax under section 501(a).

(c) *Evidence required in support of tax-free sales.* See § 53.131(c)(1) for evidence required in support of tax-free sales to purchasers who are required to be registered.

(d) *Failure to register.* If either the seller or purchaser is not registered as required by this section of the regulations, tax-free sales may not be made, except as indicated in § 53.141.

(e) *Cross references.* (1) For exceptions to the requirement for registration, see section 4222(b) of the Code and § 53.141.

(2) For revocation or suspension of registration, see § 53.142.

§ 53.141 Exceptions to the requirement for registration.

(a) *State and local governments.* (1) A State or local government purchasing articles direct from the manufacturer for its exclusive use may, but is not required to, register as provided in § 53.140. To establish the right to sell articles tax free to a State or local government that is not registered, the manufacturer must obtain from an authorized official of the State or local government and retain in the manufacturer's possession either a properly executed exemption certificate, or a purchase order that contains the same information required to be furnished in an exemption certificate. See § 53.135(c) for the information necessary to substantiate a tax-free sale under such circumstances.

(2) Each State requesting registration will be assigned one Certificate of Registry. The registration number shown on this certificate may be used by all agencies, boards, and commissions of the State that are authorized by the State to make purchases for the exclusive use of the State. However, the registration number assigned to a State may not be used by any political subdivision of that State, such as a county or municipality. Each political subdivision of a State desiring to obtain a Certificate of Registry must obtain a separate registration number.

(b) *Sales or resales to foreign purchasers for export.* Persons whose principal place of business is not within the United States may, but are not required to, register in order to purchase articles tax free for export. To establish the right to sell articles tax free for export to a purchaser who is not registered and who is located in a foreign country or a possession of the United States, the manufacturer must

obtain the evidence required by § 53.133(b).

(c) *United States.* The registration requirements of the regulations in this part do not apply to purchases and sales by the United States or any of its agencies or instrumentalities. The evidence required in support of such tax-free purchases and sales is a notation on the purchase order or other document furnished to the seller clearly indicating that the article or articles are being purchased tax free as authorized by chapter 32 of the Code.

(d) *Supplies for vessels and aircraft.* An article subject to an excise tax imposed by chapter 32 of the Code may be sold tax free by the manufacturer under the provisions of § 53.134 for use by the purchaser as supplies for a vessel or aircraft if both the manufacturer and the purchaser are registered under the provisions of § 53.140.

§ 53.142 Revocation or suspension of registration.

(a) The regional director is authorized to revoke or temporarily suspend, upon written notice, the registration of any person and the right of such person to sell or purchase articles tax free under section 4221 of the Code in any case in which he finds that:

(1) The registrant is not a bona fide manufacturer, or a purchaser reselling direct to manufacturers or exporters;

(2) The registrant is for some other reason not eligible under these regulations to retain a Certificate of Registry; or

(3) The registrant has used his registration to avoid payment of the tax imposed by section 4181 of the Code, or to postpone or interfere in any manner with the collection of such tax;

(4) Such revocation or suspension is necessary to protect the revenue; or

(5) The registrant failed to comply with the requirements of paragraph (c) of § 53.140, relating to the evidence required to support a tax-free sale.

(b) The revocation or suspension of registration is in addition to any other penalty that may apply under the law for any act or failure to act.

§ 53.143 Special rules relating to further manufacture.

(a) *Purchasing manufacturer to be treated as the manufacturer.* For purposes of Chapter 32 of the Code, a manufacturer or producer to whom an article is sold or resold tax free under section 4221(a)(1) of the Code for use by it in further manufacture shall be treated as the manufacturer or producer of such article. If a manufacturer who purchases an article tax free for further manufacture does not use the article for further manufacture, the sale of the article by it, or its use of the article other than in further manufacture, shall, for purposes of the taxes imposed by chapter 32 of the Code, be treated as a sale or use of the article by the manufacturer thereof. See paragraphs (b) and (c) of this section for determination of taxable sale price where an article purchased tax free for further manufacture is resold, or used other than in further manufacture.

(b) *Computation of tax.* Except as provided in paragraph (c) of this section, the tax liability referred to in paragraph (a) of this section shall be based on the price for which the article was sold by the purchasing manufacturer, or, where the manufacturer uses the article for a purpose other than that for which it was purchased, the tax shall be based on the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof. See section 4218(e) of the Code and § 53.115.

(c) *Election.* (1) Instead of computing the tax as described under paragraph (b) of this section, the purchasing manufacturer who has incurred liability for tax on its sale or use of an article as provided by paragraph (a) of this section may compute the tax incurred under chapter 32 of the Code by using as the tax base either the price for which the article was sold to it by the first purchaser, if any, or the price for which such article was sold by the actual manufacturer, producer, or importer of such article. The purchasing manufacturer must have in its possession information upon which to substantiate such basis for tax. For purposes of this paragraph, the price for which the article was sold by the actual manufacturer or by the first purchaser shall be determined as provided in section 4216 of the Code and §§ 53.91–53.102. However, such price shall not be adjusted for any discount, rebate, allowance, return, or repossession of a container or covering, or otherwise.

(2) The election under this paragraph shall be in the form of a statement attached to the return reporting the tax applicable to the sale or use of the article which gave rise to such tax liability. Such election, once made, may not be revoked.

Subpart L—Refunds and Other Administrative Provisions of Special Application to Manufacturers Taxes

§ 53.151 Returns.

(a) *In general.* (1) Liability for tax imposed under chapter 32 of the Code shall be reported on ATF Form 5300.26, Federal Firearms and Ammunition Excise Tax Return. Except as provided in paragraph (b) of this section, a return on Form 5300.26 shall be filed for a period of one calendar quarter.

(2) Every person required to make a return on ATF Form 5300.26 shall make a return for each calendar quarter (whether or not liability was incurred for any tax reportable on the return for the return period) until the person has filed a final return in accordance with § 53.152.

(3) Every person not required to make a return on ATF Form 5300.26 for the return period ended March 31, 1991, shall make a return for the first calendar quarter thereafter in which he incurs liability for tax imposed under Chapter 32 of the Code, and shall make a return for each subsequent calendar quarter, month, or semimonthly period until the person has filed a final return in accordance with § 53.152.

(4) Each return required under the regulations in this part, together with any prescribed copies, records, or supporting data, shall be completed in accordance with the applicable forms, instructions, and regulations.

(b) *Monthly and semimonthly returns.*—(1) *Requirement.*, If the regional director determines that any taxpayer who is required to deposit taxes under the provisions of § 53.157 has failed to make deposits of those taxes, the taxpayer shall be required, if so notified in writing by the regional director, to file a monthly or semimonthly return on ATF Form 5300.26. Every person so notified by the regional director shall file a return for the calendar month or semimonthly period (as defined in § 53.157(d)) in which the notice is received and for each calendar month or semimonthly period thereafter until the person has filed a final return in accordance with § 53.152 or is required to file returns on the basis of a different return period pursuant to notification as provided in paragraph (b)(2) of this section.

(2) *Change of requirement.* The regional director may require the taxpayer, by notice in writing, to file a quarterly or monthly return, if the taxpayer has been filing returns for a semimonthly period, or may require the taxpayer to file a quarterly or semimonthly return, if the taxpayer has been filing monthly returns.

(3) *Return for period change takes effect.* (i) If a taxpayer who has been filing quarterly returns receives notice to file a monthly or semimonthly return, or a taxpayer who has been filing monthly returns receives notice to file a semimonthly return, the first return required pursuant to the notice shall be

filed for the month or semimonthly period in which the notice is received and all months or semimonthly periods which are not includable in an earlier period for which the taxpayer is required to file a return.

(ii) If a taxpayer who has been filing monthly or semimonthly returns receives notice to file a quarterly return, the last month or semimonthly period for which a return shall be filed is the last month or semimonthly period of the calendar quarter in which the notice is received.

(iii) If a taxpayer who has been filing semimonthly returns receives notice to file a monthly return, the last semimonthly period for which a return shall be made is the last semimonthly period of the month in which the notice is received.

§ 53.152 Final returns.

(a) *In general.* Any person who is required to make a return on ATF Form 5300.26 pursuant to § 53.151, and who in any return period ceases operations in respect of which the person is required to make a return on the form, shall make the return for that period as a final return. Each return made as a final return shall be marked "Final Return" by the person filing the return. A person who has only temporarily ceased to incur liability for tax required to be reported on ATF Form 5300.26 because of temporary or seasonal suspension of business or for other reasons, shall not make a final return but shall continue to file returns.

(b) *Statement to accompany final return.* Each final return shall have attached a statement showing the address at which the records required by the regulations in this part will be kept, the name of the person keeping the records, and, if the business of the taxpayer has been sold or otherwise transferred to another person, the name and address of that person and the date on which the sale or transfer took place. If no sale or transfer occurred or if the taxpayer does not know the name of the person to whom the business was sold or transferred, that fact should be included in the statement.

(c) *Signature authorization.* An individual's signature on a return, statement, or other document made by or for a corporation or a partnership shall be prima facie evidence that the individual is authorized to sign the return, statement, or other document.

§ 53.153 Time for filing returns.

(a) *Quarterly returns.* Each return required to be made under § 53.151(a)(2) for a return period of not less than one calendar quarter shall be filed on or before the last day of the first calendar month following the close of the period for which it is made. However, a return may be filed on or before the 10th day of the second calendar month following the close of the period if timely deposits under section 6302(c) of the Code and § 53.157 have been made in full payment of the taxes due for the period. For purposes of the preceding sentence, a deposit which is not required by regulations in respect of the return period may be made on or before the last day of the first calendar month following the close of the period.

(b) *Monthly and semimonthly returns.* (1) *Monthly returns.* Each return required to be made under § 53.151(b) for a monthly period shall be filed not later than the 15th day of the month following the close of the period for which it is made.

(2) *Semimonthly returns.* Each return required to be made under § 53.151(b) for a semimonthly period shall be filed not later than the 10th day of the semimonthly period following the close of the period for which it is made.

(c) *Last day for filing.* If the due date falls on a Saturday, Sunday, or legal holiday, the return and remittance shall be due on the next succeeding day which is not a Saturday, Sunday, or legal holiday. For purposes of this section, "legal holiday" is defined by section 7503 of the Code and 26 CFR 301.7503(b).

(d) *Late filing.* The taxpayer is subject to a penalty for failure to file a return or to pay tax within the prescribed time as imposed by section 6651 of the Code, if the return and remittance are not filed before the close of business on the prescribed last day of filing. For additions to the tax in the case of failure to file a return within the prescribed time, see 27 CFR 70.96.

§ 53.154 Manner of filing returns.

(a) Each return on ATF Form 5300.26 shall be filed with ATF, in accordance with the instructions on the form.

(b) When the taxpayer sends the return on ATF Form 5300.26 by U.S. Mail, the official postmark of the U.S. Postal Service stamped on the cover in which the return was mailed shall be considered the date of delivery of the remittance. When the postmark on the cover is illegible, the burden of proving when the postmark was made will be on the taxpayer. When the taxpayer sends the return with or without remittance by registered mail or by certified mail, the date of registry or the date of the postmark on the sender's receipt of certified mail, as the case may be, shall be treated as the date of delivery of the return and, if accompanied, of the remittance.

§ 53.155 Extension of time for filing returns.

(a) *In general.* Ordinarily, no extension of time will be granted for filing any return statement or other document required with respect to the taxes impose by chapter 32, because the information required for the filing of those documents is under normal circumstances readily available. However, if because of temporary conditions beyond the taxpayer's control, a taxpayer believes an extension of time for filing is justified, the taxpayer may apply to the regional director for an extension. An extension of time for filing a return does not operate to extend the time for payment of the tax or any part of the tax unless so specified in the extension. For extensions of time for payment of the tax, see § 53.156.

(b) *Application for extension of time.* The application for an extension of time for filing the return shall be addressed to the regional director with whom the return is to be filed and must contain a full recital of the causes for the delay. It should be made on or before the due date of the return, and failure to do so many indicate negligence and constitute sufficient cause for denial. It should, where possible, be made sufficiently early to permit consideration of the matter and reply before what otherwise would be the due date of the return.

(c) *Filing the return.* If an extension of time for filing the return is granted, a return shall be filed before the expiration of the period of extension.

§ 53.156 Extension of time for paying tax shown on return.

(a) *In general.* (1) Ordinarily, no extensions of time will be granted for payment of any tax imposed by Chapter 32 of the Code, and shown or required to be shown on any return. However, if because of temporary conditions beyond the taxpayer's control a taxpayer believes an extension of time for payment is justified, the taxpayer may apply to the regional director for an extension. The period of an extension shall not be in excess of 6 months from the date fixed for payment of the tax, except that if the taxpayer is abroad the period of the extension may be in excess of 6 months.

(2) The granting of an extension of time for filing a return does not operate to extend the time for the payment of the tax or any part of the tax unless so specified in the extension. See § 53.155.

(b) *Undue hardship required for extension.* An extension of the time for payment shall be granted only upon a satisfactory showing that payment on the due date of the amount with respect to which the extension is desired will result in an undue hardship. The extension will not be granted upon a general statement of hardship. The term "undue hardship" means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer from making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.

(c) *Application for extension.* An application for an extension of time for payment of the tax shown or required to be shown on any return shall be made on ATF Form 5300.29, Application for Extension of Time for Payment of Tax, and shall be accompanied by evidence showing the undue hardship that would result to the taxpayer if the extension were refused. The application shall also be accompanied by a statement of the assets and liabilities of the taxpayer and an itemized statement showing all receipts and disbursements for each of the 3 months immediately preceding the due date of the amount to which the application relates. The application, with supporting documents, must be filed on or before the date prescribed for payment of the amount with respect to which the extension is desired, with the regional director shown on the form. The application will be examined, and within 30 days, if possible, will be denied, granted, or tentatively granted subject to certain conditions of which the taxpayer will be notified. If an additional extension is desired, the request for it must be made on or before the expiration of the period for which the prior extension is granted.

(d) *Payment pursuant to extension.* If an extension of time for payment is granted, the payment shall be made on or before the expiration of the period of the extension without the necessity of notice and demand. The granting of an extension of time for payment of the tax does not relieve the taxpayer from liability for the payment of interest on the tax during the period of the extension. See section 6601 of the Code and 6 CFR 301.6601–1.

§ 53.157 Use of lockbox depositaries.

(a) *Monthly deposits.* Except as provided in paragraph (b) of this section, if for any calendar month (other than the last month of a calendar quarter) any person required to file a quarterly excise tax return on ATF Form 5300.26 has a total liability under this part of more than $100 for all excise taxes reportable on that form, the amount of liability for taxes shall be deposited by the person with the lockbox financial institution on or before the last day of the month following the calendar month.

(b) *Semimonthly deposits.* (1) If any person required to file an excise return on ATF Form 5300.26 for any calendar quarter has a total liability under this part of more than $2,000 for all excise taxes reportable on that form for any calendar month in the preceding calendar quarter, the amount of that liability for taxes under this part for any semimonthly period (as defined in paragraph (d)(1) of this section) in the succeeding calendar quarter shall be deposited by the person with the lockbox financial institution on or before the depositary date (as defined in paragraph (d)(2) of this section) applicable to the semimonthly period.

(2) A person will be considered to have complied with the requirements of paragraph (b)(1) of this section for a semimonthly period of—

(i)(A) The person's deposit for the semimonthly period is not less than 90 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the period, and

(B) If the semimonthly period occurs in a calendar month other than the last month in a calendar quarter, the person deposits any underpayment for the month by the 9th day of the second month following the calendar month; or

(ii)(A) The person's deposit for each semimonthly period in the calendar month is not less than 45 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the month, and

(B) If such month is other than the last month in a calendar quarter, the person deposits any underpayment for such month by the 9th day of the second month following the calendar month; or

(iii)(A) The person's deposit for each semimonthly period in the calendar month is not less than 50 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the second preceding calendar month, and

(B) If such month is other than the last month in a calendar quarter, the person deposits any underpayment for such month by the 9th day of the second month following the calendar month; or

(iv)(A) The requirements of paragraph (b)(2) (i)(A), (ii)(A), or (iii)(A) of this section are satisfied for the first semimonthly period of a calendar month after December 1990,

(B) If the person's deposit for the second semimonthly period of the calendar month is, when added to the deposit for the first semimonthly period, not less than 90 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the calendar month, and

(C) If the semimonthly periods occur in a calendar month other than the last month in a calendar quarter, the person deposits any underpayment for the month by the 9th day of the second month following the calendar month.

(3)(i) Paragraph (b)(2) (ii) and (iii) of this section shall not apply to any person who normally incurs in the first semimonthly period in each calendar month more than 75 percent of the person's total excise tax liability under this part for the month.

(ii) Persons who make their deposits in accordance with paragraph (b)(2) (ii), (iii), or (iv) of this section will find it unnecessary to keep their books and records on a semimonthly basis.

(c) *Deposit of certain excess undeposited amounts.* Notwithstanding paragraphs (a) and (b) of this section, if any person required to file an excise tax return on ATF Form 5300.26 for any calendar quarter beginning after December 31, 1990, has a total liability under this part for all excise taxes reportable on the form for the calendar quarter which exceeds by more than $100 the total amount of taxes deposited by the person pursuant to paragraph (a) or (b) of this section for the calendar quarter, the person shall, on or before the last day of the calendar month following the calendar quarter for which the return is required to be filed, deposit with the lockbox financial institution the full amount by which the person's liability for all excise taxes reportable on the form for that calendar quarter exceeds the amount of excise taxes previously deposited by the person for that calendar quarter.

(d) *Definitions*—(1) *Semimonthly period.* The term "semimonthly period" means the first 15 days of a calendar month or the portion of a calendar month following the 15th day of that month.

(2) *Depositary date.* The term "depositary date" means, in the case of deposits for semimonthly periods beginning after December 31, 1990, the 9th day of the semimonthly period following the semimonthly period for which the taxes are reportable.

(3) *Lockbox financial institution.* The term "lockbox financial institution" means the financial institution

designated as a depository for the payment of excise taxes on ATF Form 5300.27, Federal Firearms and Ammunition Excise Tax Deposit form.

(e) *Depositary forms and procedures*—(1) *In general.* Each remittance of amounts required to be deposited for periods beginning after December 31, 1990 shall be accompanied by an ATF Form 5300.27, Federal Firearms and Ammunition Excise Tax Deposit form, or ATF Form 5300.26, Federal Firearms and Ammunition Excise Tax Return, which shall be prepared in accordance with the applicable instructions. The remittance, together with the appropriate form shall be forwarded to the lockbox financial institution designated as a depositary for Federal taxes. The timeliness of the deposit will be determined by the date it is received (or is deemed received under section 7502(e) and 26 CFR 301.7502–1) by the lockbox financial institution or ATF officer designated on the ATF Form 5300.27 or ATF Form 5300.26 accompanying the deposit. Amounts deposited pursuant to this paragraph shall be considered to be paid on the last day prescribed for filing the return in respect of the tax (determined without regard to any extension of time for filing the returns), or at the time deposited, whichever is later.

(2) *Number of remittances.* A person required by this section to make deposits may make one or more remittances with respect to the amount required to be deposited. An amount of tax which is not otherwise required by this section to be deposited may, nevertheless, be deposited if the person liable for the tax so desires.

(3) *Information required.* Each person making deposits pursuant to this section shall report on the return for the period with respect to which the deposits are made information regarding the deposits in accordance with the instructions applicable to the return and pay (or deposits by the due date of the return) the balance, if any, of the taxes due for the period.

(4) *Procurement of prescribed forms.* Copies of the Federal Firearms and Ammunition Excise Tax Deposit form will be furnished, so far as possible, to persons required to make deposits under this section. Such a person will not be excused from making a deposit, however, by the fact that no form has been furnished. A person not supplied with the form is required to apply for it in ample time to make the required deposits within the time prescribed, supplying with the application the person's name, employer identification number, address, and the taxable period to which the deposits will relate. Copies of the Federal Firearms and Ammunition Excise Tax Deposit form may be obtained by applying for them with the regional director.

(f) *Nonapplication to certain taxes.* This section does not apply to taxes for:

(1) Any month or semimonthly period in which the taxpayer receives notice from the regional director pursuant to § 53.151(b) to file ATF Form 5300.26 or

(2) Any subsequent month or semimonthly period for which a return on ATF Form 5300.26 is required.

§ 53.161 Authority to make credits or refunds.

For provisions relating to credits and refunds of certain taxes on sales and services see section 6416 of the Code and §§ 53.171–53.186. For regulations under section 6402 of the Code of general application in respect of credits or refunds, see 27 CFR 70.122, 70.123, and 70.124 (Procedure and Administration).

§ 53.162 Abatements.

For regulations under section 6404 of the Code of general application in respect of abatements of assessments to tax, see 27 CFR 70.125 (Procedure and Administration).

§§53.163–53.170 [Reserved]

§ 53.171 Claims for credit or refund of overpayments of manufacturers taxes.

Any claims for credit or refund of an overpayment of a tax imposed by chapter 32 of the Code shall be made in accordance with the applicable provisions of this subpart and the applicable provisions of 27 CFR 70.123 (Procedure and Administration). A claim on ATF Form 2635 (5620.8) is not required in the case of a claim for credit, but the amount of the credit shall be claimed by entering that amount as a credit on a return of tax under this subpart filed by the person making the claim. In this regard, see § 53.185.

§ 53.172 Credit or refund of manufacturers tax under Chapter 32.

(a) *Overpayment not described in section 6416(b)(2) of the Code.*—(1) *Claims included.* This paragraph applies only to claims for credit or refund of an overpayment of manufacturers tax imposed by Chapter 32. It does not apply, however, to a claim for credit or refund on any overpayment described in paragraph (b) of this section which arises by reason of the application of section 6416(b)(2) of the Code.

(2) *Supporting evidence required.* No credit or refund of any overpayment to which this paragraph (a) applies shall be allowed unless the person who paid the tax submits with the claim a written consent of the ultimate purchaser to the allowance of the credit or refund, or submits with the claim a statement, supported by sufficient available evidence, asserting that:

(i) The person has neither included the tax in the price of the article with respect to which it was imposed nor collected the amount of the tax from a vendee, and identifying the nature of the evidence available to establish these facts, or

(ii) The person has repaid the amount of the tax to the ultimate purchaser of the article.

(3) *Ultimate purchaser.*—(i) *General rule.* The term "ultimate purchaser", as used in paragraph (a)(2) of this section, means the person who purchased the article for consumption, or for use in the manufacture of other articles and not for resale in the form in which purchased.

(ii) *Special rule under section 6416(a)(3).*—(A) *Conditions to be met.* If tax under chapter 32 of the Code is paid in respect of an article and the Director determines that the article is not subject to tax under chapter 32, that term "ultimate purchaser", as used in paragraph (a)(2) of this section, includes any wholesaler, jobber, distributor, or retailer who, on the 15th day after the date of the determination, holds for sale any such article with respect to which tax has been paid, if the claim for credit or refund of the overpayment in respect of the articles held for sale by the wholesaler, jobber, distributor, or retailer is filed on or before the date on which the person who paid the tax is required to file a return for the period ending with the first calendar quarter which begins more than 60 days after the date of the determination by the Director.

(B) *Supporting statement.* A claim for credit or refund of an overpayment of tax in respect of an article as to which a wholesaler, jobber, distributor, or retailer is the ultimate purchaser, as provided in this paragraph (a)(3)(ii), must be supported by a statement that the person filing the claim has a statement, by each wholesaler, jobber, distributor, or retailer whose articles are covered by the claim, showing total inventory, by model number and quantity, of all such articles purchases tax-paid and held for sale as of 12:01 a.m. of the 15th day after the date of the determination by the Director that the article is not subject to tax under chapter 32 of the Code.

(C) *Inventory requirement.* The inventory shall not include any such article, title to which, or possession of which, has previously been transferred to any person for purposes of

consumption unless the entire purchase price was repaid to the person or credited to the person's account and the sale was rescinded or any such article purchased by the wholesaler, jobber, distributor, or retailer as a component part of, or on or in connection with, another article. An article in transit at the first moment of the 15th day after the date of the determination is regarded as being held by the person to whom it was shipped, except tht if title to the article does not pass until delivered to the person the article is deemed to be held by the shipper.

(b) *Overpayments described in section 6416(b)(2) of the Code.* (1) *Claims included.* This paragraph applies only to claims for credit or refund of amounts paid as tax under chapter 32 of the Code that are determined to be overpayments by reason of section 6416(b)(2) of the Code (relating to tax payments in respect of certain uses, sales, or resales of a taxable article).

(2) *Supporting evidence required.* No credit or refund of an overpayment to which this paragraph (b) applies shall be allowed unless the person who paid the tax submits with the claim a statement, supported by sufficient available evidence, asserting that:

(i) The person neither included the tax in the price of the article with respect to which it was imposed nor collected the amount of the tax from a vendee, and identifying the nature of the evidence available to establish these facts, or

(ii) The person repaid, or agreed to repay, the amount of the tax to the ultimate vendor of the article, or

(iii) The person has secured, and will submit upon request of the Regional Director, the written consent of the ultimate vendor to the allowance of the credit or refund.

(3) *Ultimate vendor.—General rule.* The term "ultimate vendor", as used in paragraph (b)(2) of this section, means the seller making the sale which gives rise to the overpayment or which last precedes the exportation or use which has given rise to the overpayment.

(c) *Overpayments not included.* This section does not apply to any overpayment determined under section 6416(b)(1) of the Code (relating to price readjustments), section 6416(b)(3)(A) of the Code (relating to certain cases in which refund or credit is allowable to the manufacturer who uses, in the further manufacture of a second article, a taxable article purchased by the manufacturer taxpaid), or section 6416(b)(5) of the Code (relating to the return to the seller of certain installment accounts which the seller had previously sold). In this regard, see §§ 53.173, 53.180, and 53.183.

§ 53.173 Price readjustments causing overpayments of manufacturers tax.

In the case of any payment of tax under chapter 32 of the Code that is determined to be an overpayment by reason of a price readjustment within the meaning of section 6416(b)(1) of the Code and § 53.174 or § 53.175, the person who paid the tax may file a claim for refund of the overpayment or may claim credit for the overpayment on any return of tax under this subpart which the person subsequently files. Price readjustments may not be anticipated. However, if the readjustment has actually been made before the return is filed for the period in which the sale was made, the tax to be reported in respect of the sale may, at the election of the taxpayer, be based either:

(a) On the price as so readjusted, or

(b) On the original sale price and a credit or refund claimed in respect of the price readjustment.

A price readjustment will be deemed to have been made at the time when the amount of the readjustment has been refunded to the vendor or the vendor has been informed that the vendor's account has been credited with the amount. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund, see 27 CFR 70.123 (Procedure and Administration), 53.172(a)(2), and 53.176. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

§ 53.174 Determination of price readjustments.

(a) *In general.—*(1) *Rules of usual application.—*(i) *Amount treated as overpayment.* If the tax imposed by chapter 32 of the Code has been paid and thereafter the price of the article on which the tax was based is readjusted, that part of the tax which is proportionate to the part of the price which is repaid or credited to the purchaser is considered to be an overpayment. A readjustment of price to the purchaser may occur by reason of:

(A) The return of the article,

(B) The repossession of the article,

(C) The return or repossession of the covering or container of the article, or

(D) A bona fide discount, rebate, or allowance against the price at which the article was sold.

(ii) *Requirements of price readjustment.* A price readjustment will not be deemed to have been made unless the person who paid the tax either:

(A) Repays part or all of the purchase price in cash to the vendee,

(B) Credits the vendee's account for part or all of the purchase price, or

(C) Directly or indirectly reimburses a third party for part or all of the purchase price for the direct benefit of the vendee.

In addition, to be deemed a price readjustment, the payment or credit must be contractually or economically related to the taxable sale that the payment or credit purports to adjust. Thus, commissions or bonuses paid to a manufacturer's own agents or salesperson for selling the manufacturer's taxable products are not price readjustments for purposes of this section, since those commissions or bonuses are not paid or credited either to the manufacturer's vendee or to a third party for the vendee's benefit. On the other hand, a bonus paid by the manufacturer to a dealer's salesperson for negotiating the sale of a taxable article previously sold to the dealer by the manufacturer is considered to be a readjustment of the price on the original sale of the taxable article, regardless of whether the payment to the salesperson is made directly by the manufacturer or to the salesperson through the dealer. In such a case, the payment is related to the sale of a taxable article and is made for the benefit of the dealer because it is made to the dealer's salesperson to encourage the sale of a product owned by the dealer. Similarly, payments or credits made by a manufacturer to a vendee as reimbursement of interest expense incurred by the vendee in connection with a so-called "free flooring" arrangement for the purchase of taxable articles is a price readjustment, regardless of whether the payment or credit is made directly to the vendee or to the vendee's creditor on behalf of the vendee.

(iii) *Limitation on credit or refund.* The credit or refund allowable by reason of a price readjustment in respect of the sale of a taxable article may not exceed an amount which bears the same ratio to the total tax originally due and payable on the article as the amount of the tax-included readjustment bears to the original tax-included sale price of the article.

(2) *Rules of special application.—*(i) *Constructive sale price.* If, in the case of a taxable sale, the tax imposed by chapter 32 of the Code is based on a constructive sale price determined under any paragraph of section 4216(b) of the Code and §§ 53.94–53.97, as determined without reference to section 4218 of the Code, then any price readjustment made with respect to the sale may be taken into account under this section only to the extent that the price readjustment reduces the actual

sale price of the article below the constructive sale price.

Examples:

(A) A manufacturer sells a taxable article at retail for $110 tax included. Under section 4216(b)(1) of the Code the constructive sale price (tax included) of the article is determined to be $93. Thereafter, the manufacturer grants an allowance of $10 to the purchaser, which reduces the actual selling price (tax included) to $100. Since the readjustment price exceeds the amount of the constructive sale price, this readjustment is not recognized as a price readjustment under this section.

(B) Subsequently, the manufacturer extends to the purchaser an additional price allowance of $10, thereby reducing the actual sale price to $90. Since the actual sale price is now $3 less than the constructive sale price of $93, the manufacturer has overpaid by the amount of tax attributable to the $3. Assuming the tax rate involved is 10 percent, and the prices involved are tax-included, the overpayment of tax would be $0.27, determined as follows:

$$\frac{\text{tax rate}}{100+\text{tax rate}} \times \text{tax-included readjustment} = \text{tax overpayment}$$

$((10/110) \times \$3 = \$0.27)$

(ii) *Price determined under section 4223(b)(2) of the Code.* If a manufacturer (within the meaning of section 4223(a) of the Code) to whom an article is sold or resold free of tax in accordance with the provisions of section 4221(a)(1) of the Code for use in further manufacture diverts the article to a taxable use or sells it in a taxable sale, and pursuant to the provisions of section 4223(b)(2) of the Code computes the tax liability in respect of the use or sale on the price for which the article was sold to the manufacturer or on the price at which the article was sold by the actual manufacturer, a reduction of the price on which the tax was based does not result in an overpayment within the meaning of section 6416(b)(1) of the Code of this section. Moreover, if a manufacturer purchases an article tax free and computes the tax in respect of a subsequent sale of the article pursuant to the provisions of section 4223(b)(2) of the Code, an overpayment does not arise by reason of readjustment of the price for which the article was sold by the manufacturer except where the readjustment results from the return or repossession of the article by the manufacturer, and all of the purchase price is refunded by the manufacturer. See, however, paragraph (b)(4) of this section as to repurchased articles.

(b) *Return of an article.*—(1) *Price readjustment.* If a taxable article is returned to the manufacturer who paid the tax imposed by Chapter 32 of the Code on the sale of the article, a price readjustment giving rise to an overpayment results:

(i) If the article is returned before use, and all of the purchase price is repaid to the vendee or credited to the vendee's account, or

(ii) If the article is returned under an express or implied warranty as to quality or service, and all or a part of the purchase price is repaid to the vendee or credited to the vendee's account, or

(iii) If title is still in the seller, as, for example, in the case of certain installment sales contracts, and all or a part of the purchase price is repaid to the vendee or credited to the vendee's account.

(2) *Return of purchase price.* For purposes of paragraph (b)(1) of this section, if all of the purchase price of an article has been returned to the vendee, except for an amount retained by the manufacturer pursuant to contract as reimbursement of expense incurred in connection with the sale (such as a handling or restocking charge), all of the purchase price is considered to have been returned to the vendee.

(3) *Taxability of subsequent sale or use.* If, under any of the conditions described in paragraph (b)(1) of this section, an article is returned to the manufacturer who paid the tax and all of the purchase price is returned to the vendee, the sale is considered to have been rescinded. Any subsequent sale or use of the article by the manufacturer will be considered to be an original sale or use of the article by the manufacturer which is subject to tax under Chapter 32 of the Code unless otherwise exempt. If under any such condition an article is returned to the manufacturer who paid the tax and only part of the purchase price is returned to the vendee, a subsequent sale of the article by the manufacturer will be subject to tax to the extent that the sale price exceeds the adjusted sale price of the first taxable sale.

(4) *Treatment of other transactions as repurchases.* Except as provided in paragraph (b)(1) of this section, a price readjustment will not result when a taxable article is returned to the manufacturer who paid the tax on the sale of the article, even though all or a part of the purchase price is repaid to the vendee or credited to the vendee's account, since such a transaction will be considered to be a repurchase of the article by the manufacturer.

(c) *Repossession of an article.* If a taxable article is repossessed by the manufacturer who paid the tax imposed by chapter 32 of the Code on the sale of the article, and all or a part of the purchase price is repaid to the vendee or credited to the vendee's account, a price readjustment giving rise to an overpayment will result. However, if the manufacturer later resells the repossessed article for a price in excess of the original adjusted sale price, the manufacturer will be liable for tax under chapter 32 of the Code to the extent that the resale price exceeds the original adjusted sale price.

(d) *Return or repossession of covering or container.* If the covering or container of a taxable article is returned to, or repossessed by the manufacturer who paid the tax imposed by chapter 32 of the Code on the sale of the article, and all or a portion of the purchase price is repaid to the vendee or credited to the vendee's account by reason of the return or repossession of the covering or container, a price adjustment giving rise to an overpayment will result. If a taxable article is considered to have been repurchased, as provided in paragraph (b)(4) of this section, and the covering or container accompanies the taxable article as part of the transaction, the covering or container will also be considered to have been repurchased.

(e) *Bona fide discounts, rebates, or allowances.*—(1) *In general.* Except as provided in § 53.175 (relating to readjustments in respect of local advertising), the basic consideration in determining, for purposes of this section, whether a bona fide discount, rebate, or allowance has been made is whether the price actually by, or charged against, the purchaser has in fact been reduced by subsequent transactions between the parties. Generally, the price will be considered to have been readjusted by reason of a bona fide discount, rebate, or allowance, only if the manufacturer who made the taxable sale repays a part of the purchase price in cash to the vendee, or credits the vendee's account, or directly or indirectly reimburses a third party for part or all of the purchase

price for the direct benefit of the vendee, in consideration of factors which, if taken into account at the time of the original transaction, would have resulted at that time in a lower sale price. For example, a price readjustment will be considered to have been made when a bona fide discount, rebate, or allowance is given in consideration of such factors as prompt payment, quantity buying over a specified period, the vendee's inventory of an article when new models are introduced, or a general price reduction affecting articles held in stock by the vendee as of a certain date. On the other hand, repayments made to the vendee do not effectuate price readjustments if given in consideration of circumstances under which the vendee has incurred, or is required to incur, an expense which, if treated as a separate item in the original transaction, would have been incudable in the price of the article for purposes of computing the tax.

Examples. The provisions of paragraph (e)(1) of this section may be illustrated by the following examples:

Example (1). B, a manufacturer of shotguns, bills its distributors in a specified amount per shotgun purchased by them. Thereafter, B issues to each distributor a credit memorandum in the amount of X dollars for each demonstration by the distributor of the shotguns at a sporting goods exhibition. The credit which B allows the distributor for demonstration of B's product does not effect a readjustment of price.

Example (2). C, a manufacturer of firearms, bills its dealers in a specified amount per firearm purchased by them. Thereafter, C remits to the dealer X dollars of the original sale price for each firearm sold by the dealer. An additional amount of Y dollars is paid to the dealer upon a showing by the dealer that the dealer has paid Y dollars to the salesperson who made the sale. In this case, the X dollars paid to the dealer by C constitutes a bona fide discount, rebate, or allowance since payment of such amount is in the nature of a price reduction. In addition, the Y dollars paid to the dealer in reimbursement for the amount paid by the dealer to the salesperson who made the sale, also constitutes a bona fide discount, rebate, or allowance.

(2) *Inability to collect price.* A charge-off of an amount outstanding in an open account, due to inability to collect, is not a bona fide discount, rebate, or allowance and does not, in and of itself, give rise to a price readjustment within the meaning of this section.

(3) *Loss or damage in transit.* If title to an article has passed to the vendee, the subsequent loss, damage, or destruction of the article while in the possession of a carrier for delivery to the vendee does not, in and of itself, affect the price at which the article was sold. However, if the article was sold under a contract providing that, if the article was lost, damaged, or destroyed in transit, title would revert to the vendor and the vendor would reimburse the vendee in full for the sale price, then the original sale is considered to have been rescinded. The vendor is entitled to credit or refund of the tax paid upon reimbursement of the full tax-included sale price to the vendee.

§ 53.175 Readjustment for local advertising charges.

(a) *In general.* If a manufacturer has paid the tax imposed by chapter 32 of the Code on the price of any article sold by the manufacturer and thereafter has repaid a portion of the price to the purchaser or any subsequent vendee in reimbursement of expenses for local advertising of the article or any other article sold by the manufacturer which is taxable at the same rate under the same section of chapter 32 of the Code, the reimbursement will be considered a price readjustment constituting an overpayment which the manufacturer may claim as a credit or refund. The amount of the reimbursement may not, however, exceed the limitation provided by section 4216(e)(2) of the Code and § 53.101, determined as of the close of the calendar quarter in which the reimbursement is made or as of the close of any subsequent calendar quarter of the same calendar year in which it is made. The term "local advertising," as used in this section, has the same meaning as prescribed by section 4216(e)(4) of the Code and includes generally, advertising which is broadcast over a radio station or television station, or appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster.

(b) *Local advertising charges excluded from taxable price in one year but repaid in following year.*—(1) *Determination of price readjustments for year in which charge is repaid.* If the tax imposed by chapter 32 of the Code was paid with respect to local advertising charges that were excluded in computing the taxable price of an article sold in any calendar year but are not repaid to the manufacturer's purchaser or any subsequent vendee before May 1 of the following calendar year, the subsequent repayment of those charges by the manufacturer in reimbursement of expenses for local advertising will be considered a price readjustment constituting an overpayment which the manufacturer may claim as a credit or refund. The amount of the reimbursement may not, however, exceed the limitation provided by section 4216(e)(2) of the Code and § 53.101, determined as of the close of the calendar quarter in which the reimbursement is made or as of the close of any subsequent calendar quarter of the same calendar year in which it is made.

(2) *Redetermination of price readjustments for year in which charge was made.* If the tax imposed by chapter 32 of the Code was paid with respect to local advertising charges that were excluded in computing the taxable price of an article sold in any calendar year but are not repaid to the manufacturer's purchaser or any subsequent vendor before May 1 of the following calendar year, the manufacturer may make a redetermination, in respect of the calendar year in which the charge was made, of the price readjustments constituting an overpayment which the manufacturer may claim as a credit or refund. This redetermination may be made by excluding the local advertising charges made in the calendar year that became taxable as of May 1 of the following calendar year.

§ 53.176 Supporting evidence required in case of price readjustments.

No credit or refund of an overpayment arising by reason of a price readjustment described in § 53.174 or § 53.175 shall be allowed unless the manufacturer who paid the tax submits a statement, supported by sufficient available evidence:

(a) Describing the circumstances which gave rise to the price readjustment,

(b) Identifying the article in respect of which the price readjustment was allowed,

(c) Showing the price at which the article was sold, the amount of tax paid in respect of the article, and the date on which the tax was paid,

(d) Giving the name and address of the purchaser to whom the article was sold, and

(e) Showing the amount repaid to the purchaser or credited to the purchaser's account.

§ 53.177 Certain exportations, uses, sales, or resales causing overpayments of tax.

In the case of any payment of tax under chapter 32 of the Code that is determined to be an overpayment by reason of certain exportations, uses, sales, or resales described in section 6416(b)(2) of the Code and § 53.178, the person who paid the tax may file a claim for refund of the overpayment or, in the case of overpayments under chapter 32 of the Code, may claim credit for the overpayment on any return of tax under this subpart which the person

subsequently files. However, under the circumstances described in section 6416(c) of the Code and § 53.184, the overpayments under chapter 32 may be refunded to an exporter or shipper. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund under this section, see 27 CFR 70.123 (Procedure and Administration) and 53.179. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

§ 53.178 Exportations, uses, sales, and resales included.

(a) *In general.* The payment of tax imposed by chapter 32 of the Code on the sale of any article, will be considered to be an overpayment by reason of any exportation, use, sale, or resale described in any one of paragraphs (b) to (e), inclusive, of this section. This section applies only in those cases where the exportation, use, sale, or resale (or any combination thereof) referred to in any one or more of these paragraphs occurs before any other use. If any article is sold or resold for a use described in any one of these paragraphs and is not in fact so used, the paragraph is treated in all respects as inapplicable.

(b) *Exportation of tax-paid articles.* A payment of tax under chapter 32 of the Code on the sale of any article will be considered to be an overpayment under section 6416(b)(2)(A) of the Code if the article is by any person exported to a foreign country or shipped to a possession of the United States. It is immaterial for purposes of this paragraph, whether the person who made the taxable sale had knowledge at the time of the sale that the article was being purchased for export to a foreign country or shipment to a possession of the United States. See § 53.184 for the circumstances under which a claim for refund by reason of the exportation of an article may be claimed by the exporter or shipper, rather than by the person who paid the tax. For definition of the term "possession of the United States", see § 53.11.

(c) *Supplies for vessels or aircraft.* A payment of tax under chapter 32 of the Code on the sale of any article, will be considered to be an overpayment under section 6416(b)(2)(B) of the Code if the article is used by any person, or is sold by any person for use by the purchaser, as supplies for vessels or aircraft. The term "supplies for vessels or aircraft", as used in this paragraph, has the same meaning as when used in sections 4221(a)(3), 4221(d)(3), and 4221(e)(1) of the Code, and the regulations thereunder (§ 53.134(b)(1)).

(d) *Use by State or local government.* A payment of tax under chapter 32 of the Code on the sale of any article will be considered to be an overpayment under section 6416(b)(2)(C) of the Code if the article is sold by any person to a State, any political subdivision thereof, or the District of Columbia for the exclusive use of a State, any political subdivision thereof, or the District of Columbia. For provisions relating to tax-free sales to a State, any political subdivision thereof, or the District of Columbia, see section 4221(a)(4) of the Code and § 53.131.

(e) *Use by nonprofit educational organization.* A payment of tax under chapter 32 of the Code on the sale of any article will be considered to be an overpayment under section 6416(b)(2)(D) of the Code if the article is sold by any person to a nonprofit educational organization for its exclusive use. The term "nonprofit educational organization", as used in this paragraph (e), has the same meaning as when used in section 4221 (a)(5) or (d)(5) of the Code, whichever applies, and the regulations under § 53.136.

§ 53.179 Supporting evidence required in case of manufacturers tax involving exportations, uses, sales, or resales.

(a) *Evidence to be submitted by claimant.* No claim for credit or refund of an overpayment, within the meaning of section 6416(b)(2) of the Code and § 53.178, of tax under chapter 32 of the Code shall be allowed unless the person who paid the tax submits with the claim the evidence required by § 53.172(b)(2) and a statement, supported by sufficient available evidence:

(1) Showing the amount claimed in respect of each category of exportations, uses, sales, or resales on which the claim is based and which give rise to a right of credit or refund under section 6416(b)(2) of the Code and § 53.177,

(2) Identifying the article, both as to nature and quantity, in respect of which credit or refund is claimed,

(3) Showing the amount of tax paid in respect of the article or articles and the dates of payment, and

(4) Indicating that the person claiming a credit or refund possesses evidence (as set forth in paragraph (b)(1) of this section) that the article has been exported, or has been used, sold, or resold in a manner or for a purpose which gives rise to an overpayment within the meaning of section 6416(b)(2) of the Code and § 53.178.

(b) *Evidence required to be in possession of claimant*—(1) *Evidence required under paragraph (a)(4)*—(i) *In general.* The evidence required to be retained by the person who paid the tax, as provided in paragraph (a)(4) of this section, must, in the case of an article exported, consist of proof of exportation in the form prescribed in § 53.133 or must, in the case of other articles sold tax-paid by that person, consist of a certificate, executed and signed by the ultimate purchaser of the article, in the form prescribed in paragraph (b)(1)(ii) of this section. However, if the article to which the claim relates has passed through a chain of sales from the person who paid the tax to the ultimate purchaser, the evidence required to be retained by the person who paid the tax may consist of a certificate, executed and signed by the ultimate vendor of the article, in the form provided in paragraph (b)(1)(iii) of this section, rather than the proof of exportation itself or the certificate of the ultimate purchaser.

(ii) *Certificate of ultimate purchaser.* (A) The certificate executed and signed by the ultimate purchaser of the article to which the claim relates must identify the article, both as to nature and quantity; show the address of the ultimate purchaser of the article, and the name and address of the ultimate vendor of the article; and describe the use actually made of the article in sufficient detail to establish that credit or refund is due, except that the use to be made of the article must be described in lieu of actual use if the claim is made by reason of the sale or resale of an article for a specified use which gives rise to the overpayment.

(B) If the certificate sets forth the use to be made of any article, rather than its actual use, it must show that the ultimate purchaser has agreed to notify the claimant if the article is not in fact used as specified in the certificate.

(C) The certificate must also contain a statement that the ultimate purchaser understands that the ultimate purchaser and any other party may, for fraudulent use of the certificate, be subject to all applicable criminal penalties under the Internal Revenue Code.

(D) A purchase order will be acceptable in lieu of a separate certificate of the ultimate purchaser if it contains all the information required by this paragraph.

(iii) *Certificate of ultimate vendor.* Any certificate executed and signed by an ultimate vendor as evidence to be retained by the person who paid the tax, as provided in paragraph (a)(4) of this section, may be executed with respect to any one or more overpayments by the person which arose under section 6416(b)(2) and § 53.178 by reason of

exportations, uses, sales or resales, occurring within any period of not more than 12 consecutive calendar quarters, the beginning and ending dates of which are specified in the certificate. The certificate must be in substantially the following form:

Statement of Ultimate Vendor

(For use in claiming credit or refund of overpayment determined under section 6416(b)(2) of the Internal Revenue Code.)

The undersigned or the

_____

(Name of ultimate vendor if other than undersigned) of which the undersigned is (Title), is the ultimate vendor of the article specified below or on the reverse side hereof.

The article was purchased by the ultimate vendor tax-paid and was thereafter exported, used, sold, or resold (as indicated below or on the reverse side hereof).

The ultimate vendor possesses

_____

(Proof of exportation in respect of the article, or a certificate as to use executed by the ultimate purchaser of the article)

The _____

(Proof of exportation or certificate)

(1) is retained by the ultimate vendor, (2) will, upon request, be forwarded to

_____

(Name of person who paid tax)

at any time within 3 years from the date of this statement for use by that person to establish that credit or refund is due in respect of the article, and (3) will otherwise be held by the ultimate vendor for the required 3-year period.

According to the best knowledge and belief of the undersigned, no statement in respect of the

_____

(Proof of exportation or certificate)

has previously been executed, and the undersigned understands that the fraudulent use of this statement may subject the undersigned or any other party making such fraudulent use to all applicable criminal penalties under the Internal Revenue Code.

_____

(Signature)

_____

(Address)

_____

(Date)

Vendor's invoice	Articles	Date of resale	Quantity	Exported or use made or to be made (specify)

(2) *Repayment or consent of ultimate vendor.* If the person claiming credit or refund or an overpayment to which this section applies has repaid, or agreed to repay, the amount of the overpayment to the ultimate vendor or if the ultimate vendor consents to the allowance of the credit or refund, a statement to that effect, signed by the ultimate vendor, must be shown on, or made a part of, the supporting evidence required under this section to be retained by the person claiming the credit or refund. In this regard, see § 53.172(b)(2).

§ 53.180 Tax-paid articles used for further manufacture and causing overpayments of tax.

In the case of any payment of tax under chapter 32 of the Code that is determined to be an overpayment under section 6416(b)(3) of the Code and § 53.181 by reason of the sale of an article, directly or indirectly, by the manufacturer of the article to a subsequent manufacturer who uses the article in further manufacture of a second article or who sells the article with, or as a part of, the second article manufactured or produced by the subsequent manufacturer, the subsequent manufacturer may file claim for refund of the overpayment or may claim credit for the overpayment on any return of tax under this subpart subsequently filed. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund, see 27 CFR § 70.123 (Procedure and Administration), 53.172 and 53.182. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

§ 53.181 Further manufacture included.

(a) *In general.* The payment of tax imposed by chapter 32 of the Code on the sale of any article by a manufacturer of the article will be considered to be an overpayment by reason of any use in further manufacture, or sale as part of a second manufactured article, described in paragraph (b) of this section. This section applies in those cases where the exportation, use, or sale (or any combination of those activities) referred to in this paragraph occurs before any other use.

(b) *Use of tax-paid articles in further manufacture described in section 6416(b)(3)(A) of the Code.* A payment of tax under chapter 32 of the Code on the sale of any article, directly or indirectly, by the manufacturer of the article to a subsequent manufacturer will be considered to be an overpayment under section 6416(b)(3)(A) of the Code if the article is used by the subsequent manufacturer as material in the manufacture of production of, or as a component part of, a second article manufactured or produced by the subsequent manufacturer which is taxable under chapter 32 of the Code. For this purpose it is immaterial whether the second article is sold or otherwise disposed of, or if sold, whether the sale is a taxable sale. Any article to which this paragraph applies which would have been used in the manufacture or production of a second article, except for the fact that it was broken or rendered useless in the process of manufacturing or producing the second article, will be considered to have been used as a component part of the second article.

§ 53.182 Supporting evidence required in case of tax-paid articles used for further manufacture.

(a) *Evidence to be submitted by claimant.* No claim for credit or refund of an overpayment, within the meaning of section 6416(b)(3) of the Code and § 53.181 shall be allowed unless the subsequent manufacturer submits with the claim the evidence required by § 53.132 and a statement, supported by sufficient available evidence:

(1) Showing the amount claimed in respect of each category of exportations, uses, or sales on which the claim is based and which give rise to a right of credit or refund under section 6416(b)(3) of the Code and § 53.180,

(2) Showing the name and address of the manufacturer, producer, or importer of the article in respect of which credit or refund is claimed,

(3) Identifying the article, both as to nature and quantity, in respect of which credit or refund is claimed,

(4) Showing the amount of tax paid in respect of the article by the manufacturer or producer of the article and the date of payment.

(5) Indicating that the article was used by the claimant as material in the manufacture or production of, or as a component part of, a second article manufactured or produced by the manufacturer or was sold on or in connection with, or with the sale of, a second article manufactured or produced by the manufacturer, and

(6) Identifying the second article, both as to nature and quantity.

(b) *Evidence required to be in possession of claimant.*—(1) *Certificate or ultimate purchaser of second article.* The certificate executed and signed by the ultimate purchaser of the second article must contain the same information as that required in § 53.179(b)(1)(ii), except that the information must be furnished in respect of the second article, rather than the article to which the claim relates.

(2) *Certificate of ultimate vendor of second article.* Any certificate executed and signed by an ultimate vendor as evidence to be retained by the person claiming credit or refund must be executed in the same form and manner as that provided in § 53.179(b)(2)(iii).

(3) *Repayment or consent of ultimate vendor.* If the person claiming credit or refund of an overpayment to which this section applies has repaid, or agreed to repay, the amount of the overpayment to the ultimate vendor or if the ultimate vendor consents to the allowance of the credit or refund, a statement to that effect, signed by the ultimate vendor, must be shown on, or made a part of, the evidence required to be retained by the person claiming the credit or refund. In this regard, see § 53.172(b)(2).

§ 53.183 Return of installment accounts causing overpayments of tax.

(a) *In general.* In the case of any payment of tax under section 4216(d)(1) of the Code in respect of the sale of any installment account that is determined to be an overpayment under section 6416(b)(5) of the Code and paragraph (b) of this section upon return of the installment account, the person who paid the tax may file a claim for refund of the overpayment or may claim credit for the overpayment on any return of tax under this subpart which that person subsequently files. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund under this section, see 27 CFR 70.123 (Procedure and Administration) and paragraph (c) of this section. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

(b) *Overpayment of tax allocable to repaid consideration.* The payment of tax imposed by section 4216(d)(1) of the Code on the sale of an installment account by the manufacturer will be considered to be an overpayment under section 6416(b)(5) of the Code to the extent of the tax allocable to any consideration repaid or credited to the purchaser of the installment account upon the return of the account to the manufacturer pursuant to the agreement under which the account originally was sold, if the readjustment of the consideration occurs pursuant to the provisions of the agreement. The tax allocable to the repaid or credited consideration is the amount which bears the same ratio to the total tax paid under section 4216(d)(1) of the Code with respect to the installment account as the amount of consideration repaid or credited to the purchaser bears to the total consideration for which the account was sold. This paragraph (b) does not apply where an installment account is originally sold pursuant to the order of, or subject to the approval of, a court of competent jurisdiction in a bankruptcy or insolvency proceeding.

(c) *Evidence to be submitted by claimant.* No claim for credit or refund of an overpayment, within the meaning of section 6416(b)(5) of the Code and paragraph (b) of this section, of tax under section 4216(d)(1) of the Code shall be allowed unless the person who paid the tax submits with the claim a statement, supported by sufficient available evidence, indicating:

(1) The name and address of the person to whom the installment account was sold,

(2) The amount of tax due under section 4216(d)(1) of the Code by reason of the sale of the installment account, the amount of the tax paid under section 4216(d)(1) with respect to the sale, and the date of payment,

(3) The amount for which the installment account was sold,

(4) The amount which was repaid or credited to the purchaser of the account by reason of the return of the account to the person claiming the credit or refund, and

(5)(i) The fact that the amount repaid or credited to the purchaser of the account was so repaid or credited pursuant to the agreement under which the account was sold, and

(ii) The fact that the account was returned to the manufacturer pursuant to that agreement.

§ 53.184 Refund to exporter or shipper.

(a) *In general.* Any payment of tax imposed by chapter 32 of the Code that is determined to be an overpayment within the meaning of section 6416(b)(2)(A) of the Code and §§ 53.178 and 53.179, by reason of the exportation of any article may be refunded to the exporter or shipper of the article pursuant to section 6416(c) of the Code, if:

(1) The exporter or shipper files a claim for refund of the overpayment, and

(2) The person who paid the tax waives the right to claim credit or refund of the tax.

No interest shall be paid on any refund allowed under this section. For provisions relating to the evidence required in support of a claim under this paragraph, see 27 CFR 70.123 (Procedure and Administration) and paragraph (b) of this section.

(b) *Supporting evidence required.* No claim for refund of any overpayment of tax to which this section applies shall be allowed unless the exporter or shipper submits with that claim proof of exportation in the form prescribed by § 53.133, and a statement, signed by the person who paid the tax, showing:

(1) That the person who paid the tax waives the right to claim credit or refund of the tax, and

(2) The amount of tax paid on the sale of the article and the date of payment.

§ 53.185 Credit on returns.

Any person entitled to claim refund of any overpayment of tax imposed by chapter 32 of the Code may, in lieu of claiming refund of the overpayment, claim credit for the overpayment on any return of tax under this subpart subsequently filed. Any such credit claimed on a return must be supported by the evidence prescribed in the applicable regulations in this subpart and 27 CFR 70.123 (Procedure and Administration).

§ 53.186 Accounting procedures for like articles.

(a) *Identification of manufacturer.* In applying section 6416 of the Code and the regulations thereunder, a person who has purchased like articles from various manufacturers may determine the particular manufacturer from whom that person purchased any one of those articles by a first-in, first-out (FIFO) method, by a last-in, first-out (LIFO) method, or by any other consistent method approved by the regional director. For the first year for which a person makes a determination under this section, the person may adopt any one of the following methods without securing prior approval by the regional director.

(1) FIFO method.

(2) LIFO method.

(3) Any method by which the actual manufacturer of the article is in fact identified.

(4) Any other method of determining the manufacturer of a particular article must be approved by the regional director before its adoption. After any method for identifying the manufacturer has been properly adopted, it may not be changed without first securing the consent of the regional director.

(b) *Determining amount of tax paid.* In applying section 6416 and §§ 53.171–53.186, if the identity of the manufacturer of any article has been determined by a person pursuant to a method prescribed in paragraph (a) of this section, that manufacturer of the article must determine the tax paid

under Chapter 32 of the Code with respect to that article consistently with the method used in identifying the manufacturer.

§ 53.187 OMB control numbers.

(a) *Purpose.* This section collects and displays the control numbers assigned to collections of information in this part by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. ATF intends that this section comply with the requirements of §§ 1320.12, 1320.13, and 1320.14 of 5 CFR part 1320 (OMB regulations implementing the Paperwork Reduction Act), for the display of control numbers assigned by OMB to collections of information in the regulations in this part.

(b) *Display.*

27 CFR part 53 section number	OMB control number(s)
§ 53.1	1545–0723
§ 53.3	1545–0685
§ 53.11	1545–0723
§ 53.92	1545–0023
§ 53.93	1545–0023
§ 53.99	1545–0023
§ 53.131	1545–0023
§ 53.132	1545–0023
§ 53.133	1545–0023
§ 53.134	1545–0023
§ 53.136	1545–0023
§ 53.140	1545–0023
§ 53.141	1545–0023
§ 53.142	1545–0023
§ 53.143	1545–0023
§ 53.151	1545–0023, 1545–0723
§ 53.152	1545–0723
§ 53.153	1545–0257, 1545–0723
§ 53.155	1545–0723
§ 53.157	1545–0257
§ 53.171	1545–0023, 1545–0723
§ 53.172	1545–0723
§ 53.173	1545–0723
§ 53.174	1545–0723
§ 53.175	1545–0723
§ 53.176	1545–0723
§ 53.177	1545–0723
§ 53.178	1545–0723
§ 53.179	1545–0723
§ 53.180	1545–0723
§ 53.181	1545–0723
§ 53.182	1545–0723
§ 53.183	1545–0723
§ 53.184	1545–0023, 1545–0723
§ 53.185	1545–0023, 1545–0723
§ 53.186	1545–0723

Dated: November 23, 1990.

Stephen E. Higgins,

Director.

Approved: December 17, 1990.

John W. Mangels,

Acting Assistant Secretary (Enforcement).

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Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 170

Establishment and Discontinuance Criteria for Airport Traffic Control Tower Facilities; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 170

[Docket No. 26425]

RIN 2120-AC98

Establishment and Discontinuance Criteria for Airport Traffic Control Tower Facilities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment prescribes benefit-cost based criteria for establishment and discontinuance of visual flight rules (VFR) airport traffic control tower facilities. The FAA uses these criteria to assess the benefits and costs associated with establishing or decommissioning an airport traffic control tower as a part of its mission to maximize safety and efficiency throughout the airport and airway system consistent with available resources. This regulation implements the requirements of recent legislation requiring the publication of criteria for navigational aids and airport traffic control towers. The tower criteria prescribed by this rule will be followed by criteria for other navigational aids as they are developed and revised.

EFFECTIVE DATE: February 4, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. Evan Soffer, Office of Aviation Policy and Plans, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267-3286.

SUPPLEMENTARY INFORMATION:

Background

The FAA has the responsibility to establish or discontinue airport traffic control towers through the national airspace system when activity levels and safety considerations merit such action. Criteria for the installation of towers have historically been developed by the FAA and its predecessor organization, approved internally within the organization, and published since 1951. Current criteria, including the general qualifications necessary to become a candidate site for establishment or discontinuance of VFR airport traffic control towers, are published in "Airway Planning Standard Number One—Terminal Air Navigation Facilities and Air Traffic Control Services" (FAA Order No. 7031.2C) and detailed in " Establishment and Discontinuance Criteria for Airport Traffic Control Towers." (Report No. FAA-APO-83-2). Decisions to establish and operate airport traffic control towers have been and will continue to be based on benefits exceeding costs of such actions. The Airport and Airway Safety and Capacity Expansion Act of 1987, Public Law 100-223, section 308 (49 U.S.C. 1348), mandated that these criteria be revised and, for the first time, promulgated through Federal administrative regulation.

History

Criteria to establish airport traffic control towers have evolved over time. Initially applied in 1951, a minimum number of operations was required to qualify as a tower candidate. From 1951 through 1974, FAA established minimum qualifying levels of 24,000 annual itinerant operations at air carrier airports, and 50,000 annual itinerant operations at general aviation airports. Differential levels of operations were established under the theory that, at air carrier airports, a greater mix of traffic with a wider range of performance characteristics created a greater potential for accidents.

In 1975, the criteria were revised to incorporate benefit-cost analysis. To qualify for establishment of a tower, the ratio of benefits to costs had to equal or exceed one.

$$\frac{\text{Benefits}}{\text{Costs}} \geq 1$$

Forming the basis of current criteria, the 1975 criteria considered collision and other accident risk, reduction in flying time, mix of aircraft types, percent of passengers injured, and percent of aircraft damaged.

Criteria for discontinuing tower services have been employed since 1956. In 1977, the first economic-based discontinuance criteria were detailed in a draft report, "An Analysis of Continued Operation of Selected Airport Traffic Control Towers." The report provided a comprehensive benefit-cost approach to assess the merits of the continued funding of towers. Locations were identified as candidates for discontinuance whenever benefits from continued tower operation were less than operating and maintenance costs over a 15-year forecast period.

In 1983, the FAA revised the economic analysis for VFR airport traffic control towers and the corresponding establishment and discontinuance criteria. These criteria will remain in effect until the effective date of the rule contained herein.

Current Criteria

The criteria in effect today are divided into two phases. Phase I criteria were constructed as a simplified screening device to manually identify potential candidates for future benefit-cost analysis. They are in the form of a ratio test based on one year's activity for three consecutive one-year reporting periods. A site becomes a candidate for Phase II establishment analysis if the ratio sum of the following formula equals or exceeds 1:

AC		AT		GAI		GAL		MI		ML	
38,000	+	90,000	+	160,000	+	280,000	+	48,000	+	90,000	1>

A site becomes a candidate for Phase II discontinuance analysis if the ratio sum of the following formula is less than 1:

AC		AT		GAI		GAL		MI		ML	
15,000	+	40,000	+	75,000	+	125,000	+	20,000	+	35,000	1<

where:

AC = Air carrier operations
AT = Air taxi operations
GAI = General aviation itinerant operations
GAL = General aviation local operations
MI = Military itinerant operations
ML = Military local operations

The formula considers activity by user class and differentiates by aircraft size by evaluating air carrier and commuter activity, which are defined in part by aircraft size, in separate classes. Phase II criteria compare the present value of tower benefits with the present value of tower costs over a 15-year period. If the tower meets the initial benefit-cost screening for either establishment or discontinuance, then a site-specific analysis is performed.

The 1983 methodology to calculate benefits and costs for establishment and discontinuance criteria is still in effect today (see Report No. FAA-APO-83-2). Site-specific activity forecasts are used to estimate the benefits resulting from prevented aircraft collisions, from other prevented accidents, and from reduced flying time. Considered in the benefit analysis is the mix of aircraft types—air carrier, air taxi, general aviation, and military—and levels of local and itinerant traffic operating within the terminal area. Also considered are the number of enplaned passengers and crew members who might be fatally or nonfatally injured in a collision or other type of tower-preventable accident. Dollar values are assigned to prevented fatalities, injuries, reduced aircraft operating costs, and time savings for passengers to provide a common basis for comparing benefits and costs.

Recurring tower costs include annual costs of staffing, maintenance, equipment, supplies, and leased services. Establishment costs include nonrecurring investment costs, such as facilities, equipment, and operational startup. Tower discontinuance criteria use the same annual costs as establishment criteria. Discontinuance criteria also consider the costs of closing the tower.

Revised Criteria

As in past criteria, the revised criteria for VFR airport traffic control tower establishment require that candidate airports have life cycle benefits that exceed life-cycle costs.

$$\frac{\text{Present Discounted Value of Benefits}}{\text{Present Discounted Value of Costs}} > 1$$

Criteria for airport control tower discontinuance specify that the present value of benefits derived from continued tower operation compared to the present value cost of continued operation are less than one.

$$\frac{\text{Present Discounted Value of Benefits}}{\text{Present Discounted Value of Costs}} < 1$$

In compliance with Public Law 100–223, the FAA revised the establishment and discontinuance criteria for airport traffic control towers, the procedures to calculate benefits and costs, and the results when the criteria are applied to airports using current forecasts of activity (see Report No. FAA–APO–90–7, "Establishment and Discontinuance Criteria for Airport Traffic Control Towers"). The revised criteria methodology eliminate Phase I criteria, update accident rates, and update economic values used to calculate benefits. In addition, the statute requires that the criteria eliminate qualification distinctions based on aircraft size.

Distinctions according to classes of aircraft are eliminated in two ways. First, by eliminating Phase I criteria, the distinction based on aircraft size is removed ("air carrier" and "commuter" service is defined in part by aircraft size). Second, the methodology to calculate benefits contains no reference to aircraft size. Only three functional user groups are used in the benefit-cost calculation: scheduled commercial, nonscheduled commercial, and noncommercial. These user groups have been constructed to reflect differences in the nature of public transport in today's deregulated environment, operating requirements, and sources of data considered helpful in obtaining accurate estimates of potential tower benefits.

The elimination of Phase I criteria reduces confusion regarding the meaning of the formula result. Because of improved automation and the widespread availability of computer equipment, the need no longer exists for the preliminary screening provided by Phase I criteria. Detailed Phase II benefit-cost analysis can now be accomplished quickly and accurately.

Benefit-cost analyses of potential airport traffic control towers are based on two types of benefits (safety and efficiency) and two types of costs (annual and investment). Safety benefits derive from avoiding accidents and their associated fatalities, injuries and property damage. Efficiency benefits derive from the reduction in flying time—saving time of aircraft occupants and reducing variable operating costs of aircraft. Investment costs include the initial costs associated with installing and staffing a new tower. Annual costs are comprised of staffing costs for operation, maintenance, leased communications, and administrative overhead. Discontinuance criteria substitute decommissioning costs for investment costs.

Explicit values assigned to passenger time, life, injuries, aircraft replacement and restoration, and aircraft operating costs provide a basis for comparing benefits to costs across airports. Economic benefits are based on airport-specific aviation activity projected in the FAA's annual Terminal Area Forecasts. Benefits and costs are estimated for a 15-year life cycle and are discounted to their present value using a 10 percent discount rate as directed by the Office of Management and Budget.

How the Criteria Apply

The FAA uses the benefit-cost criteria to determine the eligibility of sites for establishment or discontinuance of VFR airport traffic control tower facilities. A site is eligible for the establishment of a facility or service when the ratio of the benefits to the costs of establishment equals or exceeds 1.0. A facility or service may be discontinued if the benefits expected to be realized over the remainder of its life cycle fall below its recurring operation, maintenance, and decommissioning costs. Additional factors, such as terrain, weather, operational requirements, or national security, may also be considered in the evaluation of sites as candidates for establishment or decommissioning.

Meeting the economic criteria is usually a necessary condition for facility establishment. However, meeting the criteria is not a guarantee that a tower will be established.

Criteria Results

All nonmilitary airports in the Terminal Area Forecasts were evaluated with the current and revised benefit-cost computer programs for establishment or discontinuance of an airport traffic control tower. Since the FAA issued the notice of proposed rulemaking (NPRM) for establishment and discontinuance criteria for VFR airport traffic control towers (54 FR 22698; May 25, 1989), it has finalized a separate and independent update of various standardized economic values used in FAA investment and regulatory analyses. In addition, aviation activity projections provided by the FAA's Terminal Area Forecasts data base have been updated since the issuance of the NPRM. The criteria and underlying benefit-cost analysis on which this rule is based have been changed to account for differences between the revised draft and final economic values. The FAA

believes that the resulting criteria will promote the efficient use of resources while satisfying air traffic control requirements.

Because of the changes, the results outlined below are different than those in the NPRM, resulting in four fewer establishment sites and five additional discontinuance sites. Approximately 3,500 nontowered airports, along with 20 FAA contract towered airports, 43 nonfederal contract towered airports, and 23 airports with decommissioned or temporarily closed towers were considered for tower establishment. Of these sites, 29 had benefit-cost ratios of 1.0 or greater and could be processed as candidates for tower establishment on a site-specific basis. An additional 400 airports have FAA control towers and were considered for discontinuance. Of the VFR towered airports, 31 had benefit-cost ratios less than 1 and could be evaluated for discontinuance on a site-specific basis.

Need for the Regulation

This rule is promulgated under the authority of Pub. L. 100–223 which requires the promulgation of regulations to establish criteria for the installation of airport control tower facilities and other navigational aids. The promulgation of this rule satisfies the requirement for airport traffic control tower criteria. Criteria for other navigational aids will be promulgated through future rulemakings as they are developed and revised.

Discussion of Comments

Introduction

Twenty-four parties responded to the NPRM. The comments were categorized as follows: concurrence without comment, site-specific concern over the proposed discontinuance criteria, applicability to contract towers, identification of and credit for all benefits, definitional problems, and other comments. The FAA has considered all the comments and has amended the rule and the underlying benefit-cost analysis, where appropriate.

Concurrence Without Comment

Three commenters concurred with the provisions of the proposed rule without further comment. These commenters included the Aircraft Owners and Pilots Association (AOPA), the Air Transport Association of America (ATA), and the Air Line Pilots Association (ALPA).

Site-Specific Concern over the Proposed Discontinuance Criteria

The most frequent comment pertained to site-specific concerns over the proposed discontinuance criteria. Of the 12 parties that so commented, 10 parties commented specifically on the Joplin Municipal Airport (Joplin, MO), including local officials of Joplin and surrounding communities, the Chamber of Commerce, the airport manager, a fixed-base operator, and a reservation travel service company. The two remaining parties were the airport director of Owensboro-Daviess County Regional Airport (Owensboro, KY) and the Director of Transportation of Jefferson City, MO.

Most of the parties expressing concern over Joplin Municipal vis-a-vis the discontinuance criteria stated that "the FAA plans to close air traffic control towers at smaller airports using arbitrary numbers" and that "such action will jeopardize the growth of business and economic development in the communities served by smaller airports."

In response, the FAA has no general policy or plans to close any specific tower or group of towers. The primary purpose of towers is to enhance the safety of aircraft operations. The FAA believes that the revised criteria will maximize safety for the aviation system as a whole, consistent with the finite resources available to provide air traffic control services. Tower operations will be continued where benefits are demonstrated as outweighing the costs.

The discontinuance criteria require an economic comparison of the safety and efficiency benefits with the net costs of continued tower operation (where net costs include operations and maintenance costs reduced by the termination costs associated with decommissioning or discontinuance). At sites where the benefits fall short of the costs, it is economically sensible to consider termination of tower services and divert these resources to other sites with greater accident prevention and efficiency benefit potential. Conversely, if the benefits outweigh the costs, continued operation of the tower is the preferred action.

While meeting the discontinuance criteria qualifies a site as a discontinuance candidate, decisions to actually discontinue a tower are made on a case-by-case basis. Before a final decision to discontinue a tower is made, the candidate site is subjected to close and highly detailed scrutiny, not only on the basic benefit algorithms within the benefit-cost analysis, but also on the basis of site-peculiar nonquantifiable factors and considerations.

Applicability to Contract Towers

Six parties, including the American Association of Airport Executives (AAAE), the Director of Transportation of Jefferson City (MO), and the airport managers of Enid Woodring Municipal, Paducah, Cuyahoga County, and Flagstaff Pulliam airports, commented on the uniqueness of contract towers vis-a-vis FAA-funded and -operated towers. The recurring theme in this comment category pertained to the lower cost structures of contract towers relative to the cost structure presented in the underlying benefit-cost report. In addition, the Director of Transportation of Jefferson City requested consideration of the FAA in funding his non-Federal tower and the manager of Twin Cities Airport/Ross Field (Benton Harbor, MI) requested that his tower be reopened.

In response, the illustrative costs presented in the benefit-cost analysis report (Report No. FAA-APO-90-7) are based on average costs for FAA-funded and -operated towers. The rule itself permits the use of site-specific costs. Hence, notwithstanding the cost illustration, tower costs will differ from case-to-case and are accommodated in the evaluation process. When sites are reviewed and evaluated as candidates for establishment or discontinuance in actual practice and application, site-specific cost data are used in the benefit-cost analysis performed. The cost data would be either actual/estimated FAA costs or the actual/estimated contract costs, as appropriate, and tailored to the extent possible to the site being evaluated.

The objective of the FAA's Contract Tower Program is to continue providing air traffic control (ATC) services at airports with low activity VFR control towers in the most economical manner. This will permit the FAA to make better use of its limited resources, to maintain an efficient network of control towers, and to provide effective and safe service in a cost effective manner. Construction of an airport traffic control tower (ATCT) structure is beyond the scope of the FAA's Contract Tower Program since the contracts are only for the provision of ATC services. The FAA plans to contract for the operation of its Level I VFR control towers as long as continued operation is cost beneficial under a contract operation. Site-specific data, including actual or projected contract costs, are and will be used in each benefit-cost analysis to determine if the ATCT meets criteria for continued

operation (i.e., above the discontinuance criteria) or if an ATCT that had been previously closed should be reopened.

The Contract Tower program also includes a process for the review and consideration of an airport with an operating non-Federal control tower if it meets the criteria for continued operation (i.e., above discontinuance criteria using actual or projected contract costs). Airports that do not have an operating non-Federal ATCT or a control tower structure available for occupancy that meets building standards would not be considered for inclusion in this program. As noted above, construction of an ATCT structure is beyond the scope of the FAA's Contract Tower Program since the contracts are only for the provision of ATC services.

Identification of and Credit for all Benefits

Three parties suggested that not all benefits are addressed by the underlying benefit-cost analysis. In response, and in addition to responses to specific comment outlined below, it should be noted that the rule itself doesn't specify the exact form of the benefits analysis. The benefit-cost analysis is illustrative and may include other benefit categories on a site-by-site basis.

The general manager of Mizzou Aviation Company, a fixed-based operator serving Joplin Municipal Airport, stated that the criteria do not seem to consider growth factors which can be immediate and phenomenal. This commenter also felt that air traffic occurring when the tower is closed had not been considered. In response, this commenter apparently overlooked the fact that the benefit-cost analysis program supporting the tower criteria can and should consider the forecast traffic activity for each and every year of the tower's life cycle. Also, the analysis does account for air traffic activity occurring when the tower is closed.

Among other comments discussed separately below, the airport manager of Paducah Airport Corporation (Paducah, KY) and the airport director of Owensboro-Daviess County Regional Airport (Owensboro, KY) stated that they were unable to determine whether any benefit recognition is given for firefighting, rescue and medical treatment supplies used as the result of an aircraft accident, and Aircraft Rescue and Fire Fighting (ARFF) response to an aircraft accident where there is a control tower to guide ARFF crews to the accident site. In response, although not directly apparent from the recommended benefit-cost approach, averted ARFF expenses are embodied and amortized within the value per life saved used by the analysis in quantifying the value of averted fatalities. ARFF response time, however, is not included in the quantified benefit methodology due to expected variability from site-to-site (e.g., presence of UNICOM, fixed-base operators, population density, etc.). In practice, these benefits may be expressly estimated on a site-specific basis or treated as a nonquantified benefit and acknowledged as such.

Both the Paducah airport manager and the Owensboro-Daviess airport director also commented that the FAA has not made benefit allowances for the value of lives and property when an off-airport accident occurs. In response, lives lost on the ground in tower-preventable accidents (i.e., other than aircraft occupants) are accounted for by virtue of drawing on the National Transportation Safety Board Data Base which distinguishes between aircraft occupants and other persons. Damage to property other than aircraft is not expressly quantified (due to extreme variability), but rather included with other "nonquantified" benefits and recognized as such.

In addition, the Owensboro-Daviess airport director states that: (1) It is not clear if military aircraft costs and values are included in the noncommercial functional category; and (2) there is no value placed on the effects of aviation liability insurance premiums. In response to (1), military aircraft operations are included in the noncommercial functional user category. In response to (2), aviation liability insurance premiums are, in effect, already captured in the benefits methodology by virtue of accounting for expected economic losses of destroyed and damaged aircraft (i.e., aggregate pooled insurance premiums simply represent the expected losses to be incurred by the parties insured, ignoring insurance company administrative expenses and profit margins). To further expressly add liability premiums would, therefore, constitute double counting.

In addition to the ARFF and off-airport loss comments, the Paducah airport director had other comments and questions in the category of benefit accountability. He commented that it is unclear what weight nonquantitative factors will bear as compared to quantitative analysis vis-a-vis evaluation of one site against another (e.g., will one airport's runway threshold's line-of-sight problems be evaluated in the same manner as another's; or what weight will heavily populated property located immediately off the end of a runway have on the level of benefits). He also felt that savings generated by towers in the sequencing of aircraft (which preclude the necessity of flying a traffic pattern) were not accounted for.

In response, nonquantitative factors by nature do not lend themselves to being quantified for across-the-board application. However, because the in-depth benefit-cost analyses are performed at a central location (FAA, Washington Headquarters), treatment of qualitative considerations is relatively consistent from case-to-case. The benefits generated by towers in minimizing or reducing overflights and traffic pattern flying are addressed in detail in the benefit-cost analysis guide.

Definitional Problems

Definitional problems were cited by the AAAE, the Regional Airline Association (RAA), and the airport manager of Paducah Airport Corporation.

The AAAE recommended a clarification in the Definitions Section of the rule (subpart A § 170.3). To avoid later confusion, the AAAE recommended that the definition of "scheduled commercial service" be changed to read "the carriage by aircraft in air commerce under parts 121 and 135 of persons or property for compensation or hire based on published flight schedules." In response, the FAA has accepted this definitional comment and has made the corresponding change in the final rule, also including the addition of part 127.

The RAA asked that if the point of the NPRM was to establish criteria for tower establishment or disestablishment using the three categories of scheduled commercial, nonscheduled commercial, and noncommercial, why are "air carrier," "commuter air carrier," "commuter/air taxi operations," and "air taxi" included in the Definitions Section? In response, the FAA has accepted this comment and deleted the questioned references.

The Paducah airport manager noted that the underlying benefit-cost analysis report states that, at towered airports, data are available on operations classified as scheduled commercial, nonscheduled commercial, and noncommercial traffic. The airport manager pointed out that FAA traffic recording procedures require identification by air carrier, air taxi, itinerant general aviation, itinerant military, local civil, and local military operations. In response, the functional categories of scheduled commercial, nonscheduled commercial, and

noncommercial traffic have been constructed and adopted by the revised tower criteria to reflect differences in the nature of public transport in today's deregulated environment, operating requirements, and sources of data considered helpful in obtaining accurate estimates of potential tower benefits. They are not inconsistent, however, with current traffic activity counting and recording procedures. Scheduled commercial operations encompass air carrier and air commuter operations; nonscheduled commercial operations encompass nonscheduled air taxi operations; and noncommercial operations encompass general aviation and military operations.

The Paducah airport manager cited formula references to "the number of user class 'i' aircraft." He concluded that the inference is that the FAA will use broad classes of aircraft data or values which may have no relationship to site-specific flight operations. Use of "averaged" user aircraft classes defeats the purpose of the benefit-cost calculation. In response, while section 308 of the Airport and Airway Safety and Capacity Expansion Act prohibits the FAA from differentiating between user classes based on aircraft size, it does permit consideration of passengers served. As such, site-specific estimates of passengers per aircraft operation are considered in development and application of the criteria.

The Paducah airport manager also indicated that there is a definition gap in applicability for part 121 aircraft with fewer than 60 seats, unless such operators are placed in the "air carrier" category. He contended that, regardless of the type and size of aircraft and regardless of whether the service is certified and operated under part 121 or 135, any scheduled passenger service operation should be considered and classified as an air carrier operation. In response, Part 121 aircraft with less than 60 seats are classified and counted within the scheduled commercial category. Section 308 of the Airport and Airway Safety and Capacity Expansion Act prohibits the FAA from differentiating between user classes based on aircraft size. The illustrative benefit-cost analysis includes all parts 121, 127 and 135 operations within the scheduled commercial service functional category. Therefore, this comment is embodied in the recommended benefit-cost analysis procedure.

The Paducah airport manager further stated that lumping military operations with general aviation activity (in the noncommercial traffic category) creates a problem because of differences in their respective sophistication and values. In response, the FAA acknowledges that, as a whole, a military aircraft is significantly different from an average general aviation aircraft. However, military traffic at actual and potential towered civil airports, toward which the criteria are aimed, is not representative of the overall military fleet, but rather is skewed toward smaller aircraft such as trainers, small transports, and rotorcraft.

Other Comments

The RAA believed that the procedures in the underlying benefit-cost report should be spelled out in the published regulations. In response, the benefit-cost analysis is purely illustrative and not hard and fast. Benefit parameters such as forecast activity, value per life saved, costs of injuries, etc., will change over time and the analysis needs to be flexible enough to accommodate unique site benefits. Further, the tower criteria being promulgated under this rule are the first of a number of facilities and equipment establishment and discontinuance criteria which will eventually make up the new part 170. It is not feasible or reasonable to include the underlying benefit-cost analyses in the Federal Aviation Regulations. Therefore, the FAA will cite the underlying benefit-cost procedures by reference only and make them available on request.

The airport manager of the Enid Woodring Municipal Airport, while acknowledging that the new criteria are a significant improvement over the previous criteria, stated that the "numbers are still unrealistically high * * * for tower candidate airports struggling to reach the magic criteria which will enable them to qualify for a Federal tower." In response, the establishment criteria, among other requirements, are based on an objective economic comparison of benefits and costs to assure that there are net positive benefits from tower establishment or discontinuance.

The Owensboro-Daviess County airport director had several miscellaneous comments. He stated that "there is a strong indication that the entire program is being developed as a means of meeting an end result relating to the Department budgetary concerns." In response, the FAA disagrees with this statement. The criteria are based on an objective assessment of tower benefits and costs and the generally accepted principles of benefit-cost analysis. The criteria are developed completely independent of the budgeting process. The criteria are intended to be a decisionmaking tool and include other considerations in addition to the benefit-cost assessment.

The Owensboro-Daviess airport director also felt that there must be some way of making the evaluation process simpler and that benefit-cost analysis programs involving aviation safety should be outweighed by practicality. In response, the FAA has found benefit-cost analysis to be a useful aid in the investment decisionmaking process, far outweighing the complexities inherent in their development. Once developed, cost benefit analysis programs are easy to apply since they are microcomputer based and capable of accommodating endless sensitivity (or "what-if") analyses.

Regulatory Evaluation Summary

The promulgation of this regulation is expected to have only minimal impact, if any, on the public. Since the new criteria are not expected to result in a significant change in the number of towers being established or discontinued, there is no new cost to the FAA resulting from the application of the revised criteria. As with current criteria, costs to establish an air traffic control tower are not incurred until a site-specific benefit-cost analysis is completed and the resulting benefit-cost ratio equals or exceeds 1. Under this initial screening where benefit-cost ratios are computed using national average costs, 29 sites are identified to be analyzed on a site-specific basis. This compares to a total 32 sites using existing criteria with accident rates and economic values which have not been updated.

The application of the revised criteria is part of the normal procedures in analyzing potential ATCT sites and the current rule further formalizes these procedures. The benefit of this rule is to inform the public of the benefit-cost criteria used by the FAA for the allocation of resources for establishment of air traffic control towers and further assure adequate consideration of the safety and efficiency effects of potential traffic control towers. Since this action has not identifiable cost impact to the public and has a positive, although unquantifiable benefit, a detailed regulatory evaluation is unnecessary.

Regulatory Flexibility Determination

This rule provides a guide for internal FAA management in the establishment and discontinuance of air traffic control towers; for this reason and for the reasons discussed under "Regulatory Evaluation Summary" above, it is certified that this rule will not have a

significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Federalism Implications

The regulation outlined 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 regulation does not have Federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed above, the FAA certifies that this rule will not have significant economic impact, positive or negative, on a substantial number of small entities, and a regulatory flexibility analysis is not required. In addition, and for the same reasons, the proposal is not major under Executive Order 12291 and is not significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). Since the rule will impose no additional administrative cost on the FAA, the estimated benefits are expected to exceed the estimated costs of implementation.

List of Subjects in 14 CFR Part 170

Air traffic control.

The Amendment

In consideration of the foregoing, the FAA is adding part 170 to chapter I of the Code of Federal Regulations to read as follows:

PART 170—ESTABLISHMENT AND DISCONTINUANCE CRITERIA FOR AIR TRAFFIC CONTROL SERVICES AND NAVIGATIONAL FACILITIES

Subpart A—General

Sec.

170.1 Scope.
170.3 Definitions.

Subpart B—Airport Traffic Control Tower

170.11 Scope.
170.13 Airport Traffic Control Tower (ATCT) Establishment Criteria.
170.15 ATCT Discontinuance Criteria.

Authority: 49 U.S.C. 1343, 1346, 1348, 1354(a), 1355, 1401, 12421, 1422 through 1430, 1472(c), 1502, and 1522; 49 U.S.C. 106(g).

Subpart A—General

§ 170.1 Scope.

This subpart sets forth establishment and discontinuance criteria for navigation aids operated and maintained by the United States.

§ 170.3 Definitions.

For purposes of this subpart—

Air navigation facility (NAVAID) means any facility used, available for use, or designated for use in the aid of air navigation. Included are landing areas; lights; signaling, radio direction-finding, or radio or other electronic communication; and any other structure or mechanism having a similar purpose of guiding or controlling flight or the landing or takeoff of aircraft.

Air traffic clearance means an authorization by air traffic control for an aircraft to proceed under specified traffic conditions within controlled airspace for the purpose of preventing collision between known aircraft.

Air traffic control (ATC) means a service that promotes the safe, orderly, and expeditious flow of air traffic, including airport, approach, departure, and en route air traffic control.

Air traffic controller means a person authorized to provide air traffic service, specifically en route and terminal control personnel.

Aircraft operations means the airborne movement of aircraft in controlled or noncontrolled airport terminal areas, and counts at en route fixes or other points where counts can be made. There are two types of operations: local and itinerant.

(1) *Local operations* mean operations performed by aircraft which:

(i) Operate in the local traffic pattern or within sight of the airport;

(ii) Are known to be departing for, or arriving from flight in local practice areas located within a 20-mile radius of the airport; or

(iii) Execute simulated instrument approaches or low passes at the airport.

(2) *Itinerant operations* mean all aircraft operations other than local operations.

Airport traffic control tower means a terminal facility, which through the use of air/ground communications, visual signaling, and other devices, provides ATC services to airborne aircraft operating in the vicinity of an airport and to aircraft operating on the airport area.

Alternate airport means an airport, specified on a flight plan, to which a flight may proceed when a landing at the point of first intended landing becomes inadvisable.

Approach means the flightpath established by the FAA to be used by aircraft landing on a runway.

Approach control facility means a terminal air traffic control facility providing approach control service.

Arrival means any aircraft arriving at an airport.

Benefit-cost ratio means the quotient of the discounted life cycle benefits of an air traffic control service or navigation aid facility (i.e., ATCT) divided by the discounted life cycle costs.

Ceiling means the vertical distance between the ground or water and the lowest layer of clouds or obscuring phenomena that is reported as "broken," "overcast," or "obstruction."

Control Tower—See Airport Traffic Control Tower.

Criteria means the standards used by the FAA for the determination of establishment or discontinuance of a service or facility at an airport.

Departure means any aircraft taking off from an airport.

Discontinuance means the withdrawal of a service and/or facility from an airport.

Establishment means the provision of a service or facility at a candidate airport.

Instrument approach means a series of predetermined maneuvers for the orderly transfer of an aircraft under instrument flight conditions from the beginning of the initial approach to a landing, or to a point from which a landing may be made visually. It is prescribed and approved for a specific airport by competent authority.

Instrument flight rules (IFR) means rules governing the procedures for conducting flight under instrument meteorological conditions (IMC) instrument flight.

Instrument landing system (ILS) means an instrument landing system whereby the pilot guides his approach to a runway solely by reference to instruments in the cockpit. In some instances, the signals received from the ground can be fed into the automatic pilot for automatically controlled approaches.

Instrument meteorological conditions (IMC) means weather conditions below the minimums prescribed for flight under Visual Flight Rules (VFR).

Instrument operation means an aircraft operation in accordance with an IFT flight plan or an operation where IFR separation between aircraft is provided by a terminal control facility or air route traffic control center (ARTCC).

Life cycle benefits means the value of services provided to aviation users over the life span of a facility or service.

Life cycle costs means the value of research and development costs, investment costs, operation costs, maintenance costs, and termination costs over the life span of a facility or service.

LORAN-C means an electronic navigational system by which hyperbolic lines of position are determined by measuring differences in

time of reception of synchronized pulse signals from two fixed transmitters.

Maintenance costs means the costs incurred in servicing and maintaining a facility after establishment.

Mean sea level (MSL) means the base commonly used in measuring altitudes.

Microwave landing system (MLS) means a landing system which enables equipped aircraft to make curved and closely spaced approaches to properly instrumented airports.

Noncommercial traffic means all aircraft operations that are conducted free of compensation.

Nonprecision approach procedure means an FAA standard for approaching an IFR runway where no electronic glide slope is available.

Nonscheduled commercial service means the carriage by aircraft in air commerce of persons or property for compensation or hire that are not operated in regularly scheduled service such as charter flights.

Present value (PV) means the value of a stream of future benefits or costs that are discounted to the present.

PVB or *BPV* means the discounted value of life cycle benefits.

PVC or *CPV* means the discounted value of life cycle benefits.

PVCM or *CMPV* means the discounted value of operations and maintenance costs less termination costs over a facility's remaining life cycle.

Runway means a defined rectangular area on a land airport prepared for the landing and takeoff of aircraft along its length.

Runway visual range means an instrumentally derived value based on standard calibrations that represent the horizontal distance a pilot will see down the runway from the approach end.

Scheduled commercial service means the carriage by aircraft in air commerce under Parts 121, 127, and 135 of persons or property for compensation or hire based on published flight schedules.

Separation means the spacing of aircraft in flight and while landing and taking off to achieve their safe and orderly movement.

Takeoff clearance means authorization by an airport traffic control tower for an aircraft to take off.

Tower cab means an ATC facility located at an airport. Controllers at these facilities direct ground traffic, takeoffs, and landings.

Traffic advisories means advisories issued to alert pilots to other known or observed air traffic which may be in such proximity to the position or intended route of flight of their aircraft to warrant attention.

Traffic pattern means the flow of aircraft operating on and in the vicinity of an airport during specified wind conditions as established by appropriate authority.

VFR traffic means aircraft operated solely in accordance with Visual Flight Rules.

Visual flight rules (VFR) means rules that govern the procedures for conducting flight under visual conditions. The term "VFR" is also used in the United States to indicate weather conditions that are equal to or greater than minimum VFR requirements. In addition, "VFR" is used by pilots and controllers to indicate the type of flight plan.

Visual meteorological conditions (VMC) means meteorological conditions expressed in terms of visibility, distance from clouds, and ceiling equal to or better than specified minima.

Subpart B—Airport Traffic Control Towers

§ 170.11 Scope.

This subpart sets forth establishment and discontinuance criteria for Airport Traffic Control Towers.

§ 170.13 Airport Traffic Control Tower (ATCT) Establishment Criteria.

(a) The following criteria along with general facility establishment standards must be met before an airport can qualify for an ATCT:

(1) The airport, whether publicly or privately owned, must be open to and available for use by the public as defined in the Airport and Airway Improvement Act of 1982;

(2) The airport must be recognized by and contained within the National Plan of Integrated Airport Systems;

(3) The airport owners/authorities must have entered into appropriate assurances and covenants to guarantee that the airport will continue in operation for a long enough period to permit the amortization of the ATCT investment;

(4) The FAA must be furnished appropriate land without cost for construction of the ATCT; and

(5) The airport must meet the benefit-cost ratio criteria specified herein utilizing three consecutive FAA annual counts and projections of future traffic during the expected life of the tower facility. (An FAA annual count is a fiscal year or a calendar year activity summary. Where actual traffic counts are unavailable or not recorded, adequately documented FAA estimates of the scheduled and nonscheduled activity may be used.)

(b) An airport meets the establishment criteria when it satisfies paragraphs (a)(1) through (a)(5) of this section and its benefit-cost ratio equals or exceeds one. As defined in § 170.3 of this part, the benefit-cost ratio is the ratio of the present value of the ATCT life cycle benefits (BPV) to the present value of ATCT life cycle costs (CPV).

$$BPV/CPV > 1.0$$

(c) The satisfaction of all the criteria listed in this section does not guarantee that the airport will receive an ATCT.

§ 170.15 ATCT Discontinuance Criteria.

An ATCT will be subject to discontinuance when the continued operation and maintenance costs less termination costs (CMPV) of the ATCT exceed the present value of its remaining life-cycle benefits (BPV):

$$BPV/CMPV < 1.0$$

Issued in Washington, DC on December 26, 1990.

James B. Busey,

Administrator.

[FR Doc. 91-29 Filed 1-2-91; 8:45 am]

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Part V

Department of Transportation

Federal Aviation Administration

14 CFR Parts 1 and 23
Small Airplane Airworthiness Review Program Amendment No. 2; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1 and 23

[Docket No. 25811; Amdt. Nos. 1-37 and 23-42]

RIN 2120-AC15

Small Airplane Airworthiness Review Program Amendment No. 2

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule upgrades the airworthiness standards for normal, utility, acrobatic, and commuter category airplanes. This amendment provides airworthiness standards for advancements in technology being incorporated in current designs, permits type certification of spin resistant airplanes, and reduces the regulatory burden in showing compliance with some of the requirements for the design and type certification of small airplanes. These new and amended airworthiness standards also result in the need for new definitions. As a result, new definitions are added.

DATES: February 4, 1991.

FOR FURTHER INFORMATION CONTACT: Ervin E. Dvorak, Standards Office (ACE-110), Aircraft Certification Division, Central Region, Federal Aviation Administration, room 1544, 601 East 12th Street, Kansas City, Missouri 64106; Telephone (816) 426-5688.

SUPPLEMENTARY INFORMATION:

Regulatory History

This amendment is based on Notice of Proposed Rulemaking (NPRM), Notice No. 89-5, (54 FR 9276, March 6, 1989). All comments received in response to Notice No. 89-5 have been addressed in the adoption of this amendment.

Related Activity

The FAA announced the Small Airplane Airworthiness Review Program on January 31, 1983 (48 FR 4290), and invited all interested persons to submit proposals for consideration. The goal of the review program was to provide an opportunity for the public to participate in improving, updating and developing the airworthiness standards applicable to small airplanes, as set forth in part 23 of the Federal Aviation Regulations (FAR). Where applicable, the review program was extended to the new commuter category requirements because the commuter category incorporated existing small airplane requirements as set forth in amendment 23-34 (52 FR 1806, January 15, 1987). Approximately 560 proposals were received in response to the request for proposals.

Following receipt of the proposals, the FAA published Notice No. CE-84-1 (49 FR 30053, July 25, 1984), containing the availability of agenda, compilation of proposals, and announcement of the Small Airworthiness Review Program conference. That conference was held on October 22-26, 1984, in St. Louis, Missouri. A copy of the transcript of all discussions held during the conference is filed in FAA Regulatory Docket 23494.

After reviewing the proposals and the public comments received at the conference, the FAA's first related rulemaking action concentrated on updating safety standards related to cabin safety and improved crashworthiness. On August 15, 1988 (53 FR 30802), in amendment 23-36, the FAA upgraded the standards for cabin safety and occupant protection during emergency landing conditions, which included dynamic testing requirements for the seat/restraint systems of small airplanes.

After further review of the conference proposals and the comments received at the conference, the FAA concluded that Small Airplane Airworthiness Review Program Notices No. 2 and 5 were next in priority. These two notices were published on the same date, March 6, 1989, as Notice No. 89-5 (54 FR 9276) and Notice No. 89-6 (54 FR 9338). Action on Notice No. 89-6 will be accomplished in a separate final rulemaking document. This final rulemaking action, resulting from Notice No. 89-5, considers all comments received on that notice.

Discussion of Comments

General

Interested persons were invited to participate in the development of these final rules by submitting written data, views, or arguments to the regulatory docket. Seven commenters responded to Notice No. 89-5. Substantive changes and editorial changes have been made to the proposed rules based on relevant comments received and on further review by the FAA. Two of these commenters strongly support the adoption of these proposals and commend the FAA for this needed upgrading of the regulations.

One commenter believes that the ongoing rulemaking actions have resulted in a continuing increase in the cost and complexity of certification requirements for general aviation airplanes. This commenter cites, as an example of this increased cost, the "dynamic testing of an airplane to prove it will meet the new certification requirements," and states that "For a small airplane, this test would mean the destruction of a minimum of 3 to 9 fuselages costing a total of from one to two million dollars." consequently, this commenter expresses support for the primary category rulemaking (54 FR 9738, March 7, 1989) and urges expeditious adoption of that rulemaking action.

Proposals in this rulemaking action respond to changes in design technology that were not envisioned in the current airworthiness standards and provide an acceptable level of safety for that new technology. Any additional airplane costs that may occur from these proposed new requirements are the result of an airplane manufacturer's selection of the technology for a new airplane design. In regard to the commenter's example of dynamic testing requirements that would require the destruction of several fuselages, the FAA has not been able to identify dynamic requirements that would require the destruction of a single fuselage. The FAA believes that this comment refers to the recently adopted dynamic seat testing requirements of amendment 23-36. The new seat design and dynamic testing needed to establish compliance may exceed the cost of the seat design and static test needed to show compliance with older requirements; however, the net benefits to be realized from the reduction in occupant fatalities and injuries are expected to exceed the increase in cost. Finally, this commenter's recommendation on the expeditious adoption of the proposed primary category aircraft rule is being addressed in a separate rulemaking action.

Discussion of Comments to Specific Sections of Part 23

The following comments and discussions are keyed to like-numbered proposals in Notice No. 89-5 with the exception of proposal 27-1 that was inadvertently omitted from the notice. Comments of an editorial nature are not included in the discussion.

Proposals 1, 3. These proposals contain the authority citations for parts 1 and 23. No comments were received on these proposals.

Proposal 2. This proposal would adopt generally accepted terminology into part 1, "Definitions and Abbreviations," to define airplane components and configurations that have come into use with new airplane designs and advanced technology. No substantive comments were received on this proposal and it is adopted as proposed.

Proposal 4. This proposal, which is applicable to normal, utility, and

acrobatic category airplanes, would establish a climb gradient in § 23.67 as the performance requirement for the one-engine-inoperative flight condition in place of the current rate of climb requirement. It is based upon the airplane's landing configuration stalling speed and would consolidate the airplane configuration requirements for determining climb gradients into one paragraph rather than three paragraphs, as currently stated.

One commenter states that presenting climb requirements as a climb gradient, instead of the rate of climb, is a step forward and that the climb gradient could be used directly to determine takeoff obstacle clearance performance. However, the commenter is concerned that all airplanes with a V_{s1} of 61 knots or less, and 6,000 pounds or less maximum weight, were excluded because of the retention of the words "rate of climb." The FAA agrees that the change would be consistent with the other climb requirements. Therefore, the word "rate" in § 23.67(b)(2) has been replaced with the word "gradient".

The same commenter states that, in § 23.67 (b)(1), (c)(2)(i), and (c)(2)(ii), the gradient should be expressed as a ratio of 1:67 instead of 1.5 percent (or 1:133 instead of .75 percent) for consistency with the other part 23 climb requirements. The FAA agrees with maintaining consistency, where possible, but the current expression of climb gradient for commuter category airplanes is expressed as a percentage, i.e., 1.2 percent rather than a ratio of 1:83. Therefore, the FAA is adopting this requirement as proposed to be consistent with commuter category airplane requirements. At some future date, a revision may be considered to change the ratios in §§ 23.65(a) and 23.77(a) to percentages.

One commenter states that, although there is explanatory language to the contrary, the one-engine-inoperative minimum climb requirements are being raised and no justification is given for this increase. Another commenter states that the change in minimum climb requirements for one-engine-inoperative reciprocating engine powered airplanes of more than 6,000 pounds is without foundation. This commenter refers to the NPRM discussion of one-engine-inoperative accidents and states that the FAA makes no correlation between the accidents and one-engine-inoperative performance. The commenter concludes that the regulatory increase is arbitrary.

While a perfect correlation between accidents and one-engine-inoperative performance does not exist, the FAA has determined that sufficient correlation exists to justify an increase in the minimum performance requirements of § 23.67. However, the increase is not significant when compared to the actual performance achieved by current type certificated designs. The proposal also would establish a uniform minimum performance standard for one-engine-inoperative climb for all multiengine airplanes with maximum weights of 6,000 pounds or more, or stall speeds in excess of 61 knots. This performance standard is unrelated to the landing configuration stall speed and requires a minimum climb gradient. Accordingly, the proposed gradients are adopted as proposed.

Contrary to one commenter's statement that the proposal would unnecessarily limit the payload capability of aircraft with stall speeds of 61 knots or less, the climb performance requirements for airplanes with a stall speed of less than 61 knots are not being changed by this proposal. This proposed regulation would change only the climb performance measurement from rate of climb to climb gradient.

One commenter does not believe that the phrase proposed in § 23.67(a) "* * * at each weight established as an operational limit * * *" should apply to the one-engine-inoperative climb performance of reciprocating multiengine airplanes. The FAA agrees with the commenter and § 23.67(a) is changed accordingly by removing this phrase. However, the weight, altitude, and temperature requirements for turbine-powered airplanes are retained in § 23.67(c)(1).

In the NPRM, the minimum speed requirement to maintain the steady climb gradient performance requirement was inadvertently omitted from the proposal. The last sentence of the explanation for this proposal in the NPRM demonstrates that the FAA's intent was to require compliance with the climb gradients of § 23.67 at a speed not less than 1.2 V_{s1}. No comments were received concerning this omission. Consequently, § 23.67 (b)(1), (b)(2), (c)(2)(i), (c)(2)(ii) has been changed to add the phrase "at a speed not less than 1.2 V_{s1}.

After further examination of this rulemaking action, it was noted that the references to § 23.67 in § 23.1047 were not addressed in the NPRM. With the changes to § 23.67, conforming revisions must also be made to § 23.1047 (d), (d)(1), (d)(5), and (e). This proposal is adopted with the aforementioned changes.

Proposal 5. This proposal would revise § 23.75 and require that landing distances be determined for all airplanes by using a steady approach at a gradient of descent of 5.2 percent. It also would require that landing distances for airplanes with short field landing features be determined at the maximum steady approach gradient selected by the applicant as an operating limitation. It would require that if any device used in determining the landing distance is dependent on the operation of any individual engine, the distance with that engine inoperative must be determined. If the use of other compensating means would result in a landing distance not more than that with all engines operating, then the all engine operating distance may be used. The landing should not require more than average piloting skills under the operating conditions expected in service.

One commenter states that it is impractical to eliminate idle power approaches for light, single-engine aircraft. The commenter maintains that, although acceptable for heavier single-engine airplanes and for most twin-engine airplanes, use of a steady, closed-throttle glide should continue to be permitted as a landing procedure for light, single-engine airplanes. The FAA agrees that idle power approaches should not be eliminated as an additional alternate approach condition if landing distance data is provided using a 5.2 percent gradient approach. This method will provide landing distance data for the normal approach and landing environment from a standard instrument landing system in which all airplanes may be required to operate. Section 23.75(a)(2) has been changed to clarify that the landing distance data, at other than a 5.2 percent gradient, is optional data in addition to the 5.2 percent gradient data. Section 23.75(a)(2) permits idle power approaches for all airplanes, including those with short field landing features, such as light, single-engine airplanes.

Two commenters state that, as proposed in the notice, § 23.75(a)(2) is not clear in which would be considered short field landing features. One of these commenters further states that additional clarification is needed on how a maximum steady approach gradient can be a defined operating limitation in a basic airplane. In consideration of these comments, and after further consideration of the explanation material in the NPRM, the words "short field landing features" have been removed from § 23.75(a)(2). In addition to approaches using the 5.2 percent gradient landing data, this section permits approaches at a gradient steeper than 5.2 percent, regardless of the airplane's landing features. The

applicant must demonstrate that these steeper approaches are safe and can be executed by pilots of average skill. A change to § 23.75(a)(2) has been made in response to the comment about defining an operating limitation. Any operating limitations that are required for the approach should be displayed to the pilot through the use of the cockpit instruments. When the approach gradient in steeper than 5.2 percent, a maximum rate of descent gradient must be used to provide an acceptable limitation, provided that an appropriate indication is available to the pilot.

One commenter is concerned about the increasing conservatism for determining landing distances, especially in regard to atmospheric conditions. The commenter states that an FAA advisory circular recommends procedures to be used for generation of landing performance data based on the most conservative atmospheric conditions; the commenter believes that these procedures are incorrect. Proposed § 23.75(b) states that "the landing may not require more than average piloting skill or conditions." The FAA agrees that the proposed change to § 23.75(b), as stated in the NPRM, needs clarification. Accordingly, § 23.75(b) has been changed to "the landing may not require more than average piloting skill when landing during the atmospheric conditions expected to be encountered in service, including crosswinds and turbulence."

Proposed § 23.75(h) has been adopted as § 23.75(g) and the present § 23.75(g), which contains additional requirements for commuter category airplanes, has been redesignated as § 23.75(h). This proposal is adopted with the aforementioned changes.

Proposal 6. The proposal would amend § 23.161 by establishing airworthiness standards for those airplanes for which a maximum operating limit speed, V_{MO}, has been established in accordance with § 23.1505(c). In addition, the proposal addresses additional flight conditions for which, as a minimum requirement, the airplanes need to be trimmed.

Concerning proposed § 23.161(c)(2)(ii), one commenter states that the current rule, which partially ties approach trim to the landing performance requirements of § 23.75, is preferred for safety reasons. The FAA agrees with the commenter that the current rule provides an approach trim requirement, which accounts for the landing flap setting(s) and speeds. After further consideration of the proposed change, the FAA recognizes that the proposed rule would not provide an approach trim requirement that is appropriate for those applicants who may wish to demonstrate landing distance at speeds greater than 1.3 V_{SO}. Therefore, the proposed change to § 23.161(c)(2)(ii) is withdrawn and the current rule is retained.

Concerning proposed § 23.161(c)(3)(i), one commenter states that V_H is not a typical "sustained cruise speed" for non-turbine-powered airplanes. The commenter recommends that .9V_H be used (rather than V_H), as in proposed § 23.161(b)(1). The FAA agrees that the maximum speed in level flight at maximum continuous power (V_H) is not a typical sustained cruise speed for reciprocating engine powered airplanes. However, after review of discussions conducted at the Small Airplane Airworthiness Review Conference, the FAA has determined that V_H can be a sustained cruise condition. Retention of the change to § 23.161(c)(3)(i) is essential, and this portion of the proposal is adopted without change.

One commenter states that one problem with the proposed change to § 23.161(d) is the requirement that the trim speed be "the speed used in complying with § 23.67." The commenter states that, before amendment 23–34, § 23.67 covered only the gear-up, flaps-up claim condition, and the speeds used in complying were close to the speed range called out in § 23.161. Amendment 23–34 added the commuter category one-engine-operative climb requirements to § 23.67, including the second segment climb requirements involving a flight condition at a speed of 1.2 V_{S1}, gear up, with takeoff flaps extended. This proposal, in conjunction with revised § 23.67, would cause the 3-axis trim requirement to be applied in a manner identical to the commuter category second segment climb condition. The proposed requirement for 3-axis trimmability at the second segment climb condition would be very difficult to achieve and is not a reasonable requirement. The FAA agrees that the proposed revision to § 23.161(d) was not intended to address trim requirements during the transitory commuter category second segment climb requirements. The FAA also agrees that it is not reasonable or necessary to achieve 3-axis trimmability during second segment climb. Therefore, proposed § 23.161(d) is revised to incorporate the commuter category longitudinal and directional trim requirements adopted in amendment 23–34.

The same commenter states that there are several possible climb speeds associated with current and proposed § 23.67 for all categories of airplanes. The commenter points out that current § 23.67(d) requires that, for all multiengine airplanes, the speed for best rate of climb with one-engine-inoperative must be determined; this requirement is common to all airplane categories and is the logical one-engine-inoperative trim speed to use. It is the same speed as V_Y in current § 23.161(d) and it provides some speed margin, which makes compliance somewhat easier. The commenter, therefore, recommends that the longitudinal and directional trim speed range be from V_Y to 1.4 V_{S1} with the critical engine inoperative and, if applicable, its propeller in the minimum drag position. The FAA does not agree with the commenter concerning normal, utility, and acrobatic category airplanes. As stated in the NPRM, testing at a trim speed more closely related to operational climb speeds is desirable. Accordingly, § 23.161(d) is adopted as proposed, except to specify its applicability only to normal, utility, and acrobatic category airplanes. Additionally, a review of the transcript of the Small Airplane Airworthiness Review Conference verifies that the FAA's intent with respect to the position of the inoperative propeller is that the propeller be in the minimum drag position. Therefore, § 23.161(d) has been changed to clarify the intent that the inoperative propeller be in the minimum drag position.

This commenter also states that clarification by an advisory circular is needed when the final rules are published with respect to the lateral trim force requirements not exceeding five pounds. The commenter states that this force is very small when compared to normal system friction and asks if this condition is for maximum lateral fuel imbalance. The FAA will revise Advisory Circular 23–8A, "Flight Test Guide for the Certification of Part 23 Airplanes," to describe an acceptable means of compliance with the lateral trim force requirements. Concerning the commenter's question on lateral fuel imbalance, § 23.21(a) would require that compliance with § 23.161(d) be shown with maximum lateral fuel imbalance. This proposal is adopted with the aforementioned changes.

Proposal 7. This proposal would amend § 23.221 to allow certification of single-engine, normal category airplanes as spin resistant, an alternative to the current requirement of being recoverable from a one turn spin.

One commenter states that spin treatment proposed in the notice would deprive the flying public of safety that has been available for over 50 years. Also, the technology that led to the proposal for a "spin-resistant" class of

airplanes would contribute to a genuine advance in safety if applied to eliminating spins. The commenter recommends that § 23.221(a) be changed to read, "Normal Category airplanes shall be incapable of spinning." The commenter's suggested change would require a significant change in the existing technology and is, therefore, not being considered by the FAA at this time. Accordingly, the proposal is adopted without change.

One commenter supports proposed § 23.221(a)(1)(iii), which states that any use of primary flight or engine power controls should not result in an irrecoverable spin situation. However, this commenter also advocates special consideration of the reversed spin recovery case, which is defined as applying elevator before rudder. In the commenter's experience, this is a situation that is likely to be abused and one that merits special attention by the pilot. The subject of reversed recovery was discussed in detail during the Small Airplane Airworthiness Review Conference. As concluded in the NPRM, the proposed rule concerning misuse of controls during spin recovery includes reversed spin recovery, and a specific requirement for reversed recovery is not necessary. The proposed rule on misuse of controls is changed only slightly from the existing rule, which has a long history of satisfactory airplane service experience. Accordingly, § 23.221(a)(1)(iii) is adopted as proposed.

Concerning § 23.221(c)(3), one commenter states that this proposal appears to require exploration of power effects throughout acrobatic spins and that previous guidance was to explore power only through the first turn. The commenter believes that the rule was expanded without justification. This commenter is correct that the proposal requires the exploration of power effects throughout the acrobatic spin. As discussed at the Small Airplane Airworthiness Review Conference, the intent of the proposal is to make it impossible to obtain irrecoverable spins with any use of flight controls or engine power controls. As noted in the NPRM, the inclusion of the reference to engine power controls was accepted without comment at the conference. Following the review of the conference proposals and comments offered at the conference, the FAA has determined that engine power controls should be considered and this proposal is adopted as proposed.

Proposal 8. This proposal would establish § 23.301 criteria for determining loan intensities and distributions for airplanes with canard and tandem wing configurations. No comments were received on this proposal and it is adopted as proposed.

Proposal 9. This proposal would establish a new § 23.302 to require that airplanes with canard or tandem wing configurations meet all requirements of subpart C and subpart D applicable to a wing. This proposal is necessary because the forward structure of a canard or a tandem wing configuration performs both a control function and a lifting surface function similar to a main wing, and, therefore, it should meet both the wing and control surface requirements.

In the NPRM, the requirements in § 23.302(a) refer only to subpart C. One commenter states there could be confusion and recommends that subpart D be added to § 23.302(a); that is, subpart D is implied indirectly through reference to subpart C. For example, a forward wing of a canard configuration should also meet the requirements in § 23.641, subpart D. The FAA agrees with the commenter and, for clarity, § 23.302(a) is revised to add subpart D as a requirement. This proposal is adopted with the aforementioned changes.

Proposal 10. this proposal would correct an error in § 23.331(a) by changing the reference to § 23.331 to § 23.333 in existing paragraph (a). Also, a new paragraph (c) would be added to § 23.331 to ensure that flight loads applicable to horizontal surfaces in canard and tandem wing configurations are evaluated during the type certification process. No comments were received on this proposal and it is adopted as proposed.

Proposal 11. This proposal would establish gust load requirements in § 23.341 that must be met by an airplane with canard or tandem wing configurations.

One commenter provides the following analysis in regard to gust loads requirements. It has been shown many times, on a wide range of conventional airplanes, that wing gust loads can be accurately or conservatively estimated from the results of the current load factor formula of § 23.341. The accuracy of this approximation is dependent upon well-proven assumptions concerning the nature of the response of a conventional airplane to a vertical gust. For a canard configured airplane, some of these basic assumptions are not valid. In particular, the forward wing can impart a considerable nose-up pitch to the airplane before the main wing becomes immersed in the gust. This condition is likely to nullify the assumption that the response can be considered to be adequately represented only by the plunge motion of the airplane. Also, the downwash influence of the forward wing on the main wing can lead to significant redistribution of the aerodynamic loading across the wing span.

The commenter also points out that the inertia load factor on the canard configured airplane can be underestimated by the formula in existing § 23.341. In addition to the difference in inertia factors, the aerodynamic loads occur at different times than the peak inertia factor. This condition could result in substantially underestimating the net load on the main and forward wing if the formula assumption in existing § 23.341 was that the peak aerodynamic load and peak inertia load occurred simultaneously. This assumption is valid only for conventional airplanes. For canard configured airplanes, for both the main wing and the forward wing, the inertia relief is significantly below the value that would be computed using the peak acceleration at the center of gravity of the airplane.

The FAA agrees with the commenter and § 23.341(a) is revised to address, for a canard or tandem wing configured airplane, the concern that the relieving inertia load is not in phase with the forward wing load or the main wing load. The words, "to develop the gust loading on each lifting surface," were added to clarify that the gust load analysis must be performed considering each surface separately. This proposal is adopted with the aforementioned changes.

Proposal 12. This proposal would extend the yawing requirements in § 23.351, currently limited to vertical tail surfaces, to all vertical surfaces, such as winglets, in new airplane designs. This change is considered necessary to provide structural integrity for all vertical surfaces equivalent to that required for conventional vertical tail surfaces. No comments were received on this proposal and it is adopted as proposed.

Proposal 13. The proposal would change the heading preceding § 23.421 of subpart C because the present heading implies the sections following it are limited to tail surfaces of conventional airplane designs. The sections under this heading, as amended, are also applicable to airplanes with canard and tandem wing configurations. No comments were received on this proposal and it is adopted as proposed.

Proposal 14. This proposal would extend the current horizontal tail balancing load requirements in § 23.421 for conventional configurations to airplanes with canard and tandem wing configurations and prohibit the use of figure B6 of appendix B for tail surface load distribution.

Two comments were received on the proposal to prohibit the use of figure B6 of appendix B. One of the commenters believes that the appendix B method provides inexpensive standardization and a proven method of compliance and recommends that it be retained. The other commenter agrees with prohibiting the use of the appendix B method since the criteria in appendix B are applicable only to a limited range of light airplane configurations and the technical capability of industry is now such that more realistic loads can be developed.

The FAA does not agree that the continued use of appendix B is appropriate for average load magnitudes and load distributions for control surfaces. Appendix B was provided originally to define loads information in the absence of a more rational analysis. The curves and distributions shown in appendix B represent average conditions that were considered conservative and, as such, are compromises based on typical airplanes and aeronautical knowledge available at that time. The information presented in appendix B has been part of the small airplane certification requirements since the early 1930's. Particular curves, for example the tail surface load distribution of figure B6, have remained unchanged. The FAA recognizes that the intent of appendix B is to provide conservative load information when more extensive analysis is beyond the technical capability of the applicant. The technical capability of the industry has increased such that more accurate and realistic loads can be readily developed for the specific airplane design under consideration without the compromises used in appendix B. In some cases, the use of appendix B does not provide the conservative results intended. Accordingly, the FAA is removing appendix B in its entirety from part 23.

Proposal 15. This proposal would extend the current maneuvering loads requirements of § 23.423 for conventional type airplanes to canard and tandem wing configurations and prohibit the use of appendix B methods for demonstrating compliance. Where the current requirements refer to control deflections and up and down loads, it is proposed to refer to the control movements as nose-up and nose-down pitching of the airplane. The reasons for prohibiting the use of appendix B are discussed in detail in the explanation for proposal 14.

One commenter provides the following analysis on the fundamental difference of a canard configured airplane and a conventional airplane in the response characteristics for pitching maneuvering loads. With a conventional airplane, nose-down pitching is achieved by producing an upload on the tail surface. This load tends to increase the airplane's normal overall acceleration. Wing aerodynamic loads can be reduced to avoid exceeding the limit maneuvering load factor, but the full maneuvering capability is ensured up to the prescribed level of normal acceleration. With a canard configured airplane, nose-down pitching will have a negative forward wing load, which will tend to decrease the airplane's normal acceleration. To allow the checked maneuver to reach the limit load factor, the main wing lift must be increased. This maneuver may lead to a critical loading condition of the rear wing. An equivalent level of safety between a canard configured airplane and a conventional airplane can be ensured if the main wing with pitch control is also designed to the checked pitching maneuver.

The FAA agrees with the comment that the proposal, as written in the NPRM, could be interpreted as not being applicable to the main wing of an airplane with a canard or tandem wing configuration. In the NPRM, the words "the main wing of a canard or tandem wing configuration" were added to the first sentence of § 23.423.

The commenter also states that the applicability of § 23.423 could be interpreted to exclude the supporting structure of the horizontal surface. The FAA agrees with this comment and the words "and its supporting structure" have been added to the first sentence of the proposal. The balance of this proposal addresses the maneuvering loads on the forward surface of a three-surface configuration airplane, such as a wing, canard configuration, with a conventional tail. This three-surface configuration could have a canard surface without pitch control. This proposal is adopted with the aforementioned changes.

Proposal 16. This proposal would amend § 23.425 by extending the current gust load requirements for the horizontal tail surface to airplanes with a canard and tandem wing configuration and prohibit the use of appendix B, as discussed in detail in proposal 14. No comments were received on this proposal and it is adopted as proposed.

Proposal 17. This proposal would extend the current § 23.427 unsymmetrical loads requirements for horizontal tail surfaces of conventional configurations to airplanes with canard and tandem wing configurations. No comments were received on this proposal and it is adopted as proposed.

Proposal 18. The proposal would remove the word "tail" from the heading preceding § 23.441 because the present heading implies that the sections following it are limited to tail surfaces of conventional airplane designs. The affected sections, as amended, would be applicable to design features of airplanes utilizing vertical surfaces at locations other than the tail of the airplane. No comments were received on this proposal and it is adopted as proposed.

Proposal 19. This proposal would extend the maneuvering loads requirements of § 23.441, which are currently limited to vertical tail surfaces, to all vertical surfaces, such as winglets, in new airplane designs. It also would prohibit the use of appendix B, as discussed in detail in proposal 14. No comments were received on this proposal and it is adopted as proposed.

Proposal 20. This proposal would extend the gust load requirements of § 23.443 for conventional airplanes to include the canard and tandem wing configuration and prohibit the use of appendix B, as discussed in detail in proposal 14. No comments were received on this proposal and it is adopted as proposed.

Proposal 21. This proposal would amend the outboard fin requirements in § 23.445 to include all loads that are likely to occur simultaneously. It would require that the rational analysis include all loads likely to be applied to horizontal surfaces, and the 1g unaccelerated normal horizontal surface loads during the maneuvering conditions specified in § 23.441. It also would extend the requirements to all vertical surfaces that are mounted on horizontal surfaces, including wings. No comments were received on this proposal and it is adopted as proposed.

Proposal 22. This proposal would prohibit the use of appendix B in § 23.455, as discussed in detail in proposal 14. No comments were received on this proposal and it is adopted as proposed.

Proposal 23. This proposal would extend the current requirements of § 23.677 for powered trim system runaways to all categories of part 23 airplanes. No comments were received

on this proposal and it is adopted as proposed.

Proposal 24. This proposal would update § 23.701 to include provisions for airplanes with a flap configuration other than one flap on each wing. Some airplanes currently being manufactured have two flaps on each side of the airplane and some are designed with flaps on canard and tandem wings. It also addresses the failure of any single element in the flap control system and would permit an equivalent alternate means to the mechanical interconnection of the flaps as required by the present rule. No comments were received on this proposal and it is adopted as proposed.

Proposal 25. This proposal would establish minimum airworthiness standards in § 23.735 for airplanes equipped with antiskid braking systems. No comments were received on this proposal and it is adopted as proposed.

Proposal 26. This proposal would extend the current § 23.831 requirements to provide for hazardous gas-free ventilating air and for smoke evacuation to all categories of part 23 pressurized airplanes. No comments were received on this proposal and it is adopted as proposed.

Proposal 27. This proposal would add a § 23.939 requirement for an in-flight investigation of turbocharged reciprocating engine operating characteristics. It also would make it clear that, for turbine engines, the airflow distortion must not cause vibration harmful to these engines.

One commenter questions why the proposal for § 23.939(b) is limited to turbocharged engines. The commenter does not provide a different proposal for extending the applicability to other engine types or provide any justification or recommendations to include other types of engines.

At the review conference, there was no recommendation to extend this requirement to other engine types. The existing paragraph § 23.939(a) provides in-flight investigation requirements for turbine engines. Proposed paragraph (b) would add similar requirements for turbocharged reciprocating engines. The FAA recognizes that there may be some merit to the comment, but the commenter does not suggest other engine types or offer supporting justification. The need to extend this requirement to other engine types was not discussed at the Small Airplane Airworthiness Review Conference. Adequate justification for changing the requirement from the proposal in the NPRM is not available at this time. The FAA will consider this comment in future rulemaking activities and § 23.969(b) is adopted as proposed.

In addition, based on further study by the FAA, it was determined that the references in § 23.1047(d), (d)(1), (d)(5), and (e) need to be changed to agree with the proposed changes to § 23.67.

Proposal 28. This proposal would add a new § 23.1109 that ensures clean air for the pressurized cabins of airplanes equipped with pressurization systems taking bleed air from turbocharger systems. This proposal would establish requirements similar to those required for bleed air from turbine engines, currently stated in § 23.1111.

A commenter requests guidance by asking two questions about the proposed rule: Whether the operating procedures for emergencies may be used to meet the rule, and whether the alternate induction air may still come from the engine compartment. Additional details on describing the entire system design are required to answer these questions. Since these questions are in the nature of seeking guidance, these issues will be addressed by a future policy letter or advisory circular after the rule is adopted. The proposal is adopted as proposed.

Proposal 29. This proposal would revise § 23.1163 to require that any accessory remotely driven by an engine of normal, utility, and acrobatic category airplanes must cease hazardous rotation following a malfunction. This requirement was adopted for commuter category airplanes in amendment 23–24. The proposal also would add torque limiting criteria for accessory drives of accessories mounted on engines and would add requirements for accessories driven by gearboxes. No comments were received on this proposal and it is adopted as proposed.

Proposal 30. This proposal would require a heated pitot tube, or an equivalent means of preventing malfunction due to icing, and would clarify the requirement that a heated pitot tube be part of the system approval for flight in icing conditions, pursuant to § 23.1419. No comments were received on this proposal and it is adopted as proposed.

Proposal 31. This proposal would revise § 23.1325 to allow airplanes that are prohibited from flight in instrument meteorological conditions (IMC) to be certificated without an alternate static air source. No comments were received on this proposal. However, since the reference to IMC includes icing conditions, the proposal has been modified to eliminate the unnecessary wording and is adopted as modified.

Proposal 32. This proposal would remove appendix B, as discussed in detail in proposal 14, and is adopted as proposed.

Regulatory Evaluation Summary

Introduction

This section summarizes the full regulatory evaluation prepared by the FAA that provides more detailed estimates of the economic consequences of this regulatory action. This summary and the full evaluation quantify, to the extent practicable, estimated costs to the private sector, consumers, Federal, State and local governments, as well as anticipated benefits.

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. The order also requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly defined exigencies. A "major" rule is one that is likely to result in an annual effect on the economy of $100 million or more, a major increase in consumer costs, a significant adverse effect on competition, or is highly controversial.

The FAA has determined that this rule is not "major" as defined in the executive order; therefore, a full regulatory analysis, which includes the identification and evaluation of cost reducing alternatives to this rule, has not been prepared. Instead, the agency has prepared a more concise document, termed a "regulatory evaluation," that analyzes only this rule without identifying alternatives. In addition to a summary of the regulatory evaluation, this section also contains a regulatory flexibility determination required by the 1980 Regulatory Flexibility Act (Pub. L. 96–354) and an international trade impact assessment. If more detailed economic information is desired than is contained in this summary, the reader is referred to the full regulatory evaluation in the docket.

Benefit/Cost Comparison

This rule amends several airworthiness standards for small airplanes. The amendments are based on discussions at the Small Airplane Airworthiness Review Conference held in October 1984 in St. Louis.

Most of the amendments within this rule are directed at developing uniform airworthiness standards in addressing the design and incorporation of advanced technology in small airplanes. Many of the airworthiness standards

have been applied previously as special conditions in specific type certification programs. The amendment also facilitates the type certification of new designs, canard or tandem wing configurations. These amendments are of a cost-relieving nature because they eliminate the need for special conditions processing, which often involves costly and unnecessary delays. In addition, most of these amendments are optional in the sense that the manufacturers are not being directed to incorporate the newest technology in their future models but are instead being afforded a set of regulations to follow should they choose the applicable new equipment.

Furthermore, it was determined that four of the amendments to part 23 involve quantifiable benefits in the form of the prevention of fatalities, injuries, and aircraft damage over the 20-year study period. The combined net present value of the benefits expected to accrue from these amendments is estimated to be $3.1 million.

Note: Fatalities prevented represent the majority of the estimated benefits. In order to provide the public and government officials with a benchmark comparison of the expected safety benefits of rulemaking actions over an extended period of time with estimated costs in dollars, the FAA currently uses a minimum value of $1.5 million to statistically represent a human fatality avoided (in accordance with guidelines issued by the Secretary of Transportation on June 22, 1990).

The following table summarizes the benefits and costs associated with the amendments having quantifiable economic impacts.

SUMMARY OF ESTIMATED BENEFITS AND COSTS

[000's 1989 dollars]

Amendments to the rule	Estimated benefits		Costs
	Nondiscounted	Discounted	
23.221-23.445 Spin Resistant and Canard Configured Airplanes	$8,618	$2,795	Relieving.
23.785 Antiskid Braking Systems	310	101	Negligible.
23.831 Ventilation	349	113	Relieving.
23.1163 Powerplant Accessories	179	58	Relieving.
Total	$9,456	$3,067	

International Trade Impact Statement

The provisions of this rule will have little or no impact on trade for both U.S. firms doing business in foreign countries and foreign firms doing business in the United States. In the United States, foreign manufacturers will have to meet U.S. requirements, and, thus, they will gain no competitive advantage. In foreign countries, U.S. manufacturers will not be bound by part 23 requirements and, therefore, could choose to implement or not to implement the rule solely on the basis of competitive considerations.

Regulatory Flexibility Determination

The FAA has also determined that the rule changes will not have a significant economic impact on a substantial number of small entities. The FAA's criteria for a small aircraft manufacturer is one employing fewer than 75 employees, a substantial number is a number that is not fewer than 11 and that is more than one-third of the small entities subject to the rule.

A review of domestic general aviation manufacturing companies indicates that only 2 companies meet the size threshold of 75 employees or fewer. The amendments to part 23 will, therefore, not affect a substantial number of small entities.

Federalism Implications

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.

Conclusion

This document amends the airworthiness standards to provide for advancements in technology, including: Type certification of spin resistant airplanes; structures requirements for canard or tandem wing configurations; and requirements for antiskid braking systems. These airworthiness standards provide design options to the manufacturer that are not available under existing regulations. This document concerns rules that do not impose a burden, but merely afford an alternative, and they will not result in a major increase in consumer costs or have an annual effect on the economy of $100 million or more. The FAA has determined that this amendment is not major as defined in Executive Order 12291. For the same reason, this amendment is not considered to be significant as defined in Department of Transportation Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). Since there are only two small entities affected by this rulemaking, it is certified that, under the criteria of the Regulatory Flexibility Act, this amendment will not have a significant economic impact, positive or negative, on a substantial number of small entities. In addition, this final rule will have little or no impact on trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States. A copy of the regulatory evaluation prepared for this project may be examined in the Rules Docket or obtained from the person identified under the caption "**FOR FURTHER INFORMATION CONTACT.**"

List of Subjects

14 CFR Part 1

Aircraft, Air transportation, Aviation safety, Safety.

14 CFR Part 23

Aircraft, Air transportation, Aviation safety, Safety.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends parts 1 and 23 of the Federal Aviation Regulations (14 CFR parts 1 and 23), as follows:

PART 1—DEFINITIONS AND ABBREVIATIONS

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

Authority: 49 U.S.C. 1347, 1348, 1354(a), 1357(d)(2), 1372, 1421 through 1430, 1432, 1442.

1443, 1472, 1510, 1522, 1652(e), 1655(c), 1657(f); 49 U.S.C. 106(g).

2. Section 1.1 is amended by adding the definitions "Canard" and "Canard configuration" after "Calibrated airspeed"; "Forward wing" after "Foreign air transportation"; "Tandem wing configuration" after "Takeoff thrust"; and "Winglet or tip fin" after "VFR over-the-top" to read as follows:

§ 1.1 General definitions.

* * * * *

Canard means the forward wing of a canard configuration and may be a fixed, movable, or variable geometry surface, with or without control surfaces.

Canard configuration means a configuration in which the span of the forward wing is substantially less than that of the main wing.

* * * * *

Forward wing means a forward lifting surface of a canard configuration or tandem-wing configuration airplane. The surface may be a fixed, movable, or variable geometry surface, with or without control surfaces.

* * * * *

Tandem wing configuration means a configuration having two wings of similar span, mounted in tandem.

* * * * *

Winglet or tip fin means an out-of-plane surface extending from a lifting surface. The surface may or may not have control surfaces.

* * * * *

PART 23—AIRWORTHINESS STANDARDS: NORMAL, UTILITY, ACROBATIC, AND COMMUTER CATEGORY AIRPLANES.

3. The authority citation for part 23 continues to read as follows:

Authority: 49 U.S.C. 1344, 1354(a), 1355, 1421, 1423, 1425, 1428, 1429, 1430; 49 U.S.C. 106(g).

4. Section 23.67 is amended by revising paragraphs (a) introductory text, (a)(2), (a)(5), (b), and (c) to read as follows:

§ 23.67 Climb: One engine inoperative.

(a) For normal, utility, and acrobatic category, reciprocating engine-powered multiengine airplanes, one-engine-inoperative climb gradients must be determined with the—

* * * * *

(2) Remaining engines at not more than maximum continuous power or thrust;

* * * * *

(5) Means for controlling the engine cooling air supply in the position used in the engine cooling tests required by §§ 23.1041 through 23.1047.

(b) For normal, utility, and acrobatic category reciprocating engine-powered multiengine airplanes, the following apply:

(1) Each airplane with a V_{S0} of more than 61 knots, or of more than 6,000 pounds maximum weight, must be able to maintain a steady climb gradient of at least 1.5 percent at a pressure altitude of 5,000 feet at a speed not less than 1.2 V_{S1} and at standard temperature (41 °F) with the airplane in the configuration prescribed in paragraph (a) of this section.

(2) Each airplane with a V_{S0} of 61 knots or less and of 6,000 pounds or less maximum weight must have its steady climb gradient at a pressure altitude of 5,000 feet at a speed not less than 1.2 V_{S1} and at standard temperature (41 °F) determined with the airplane in the configuration prescribed in paragraph (a) of this section.

(c) For normal, utility, and acrobatic category turbine engine-powered multiengine airplanes the following apply:

(1) The steady climb gradient must be determined at each weight, altitude, and ambient temperature within the operational limits established by the applicant, with the airplane in the configuration prescribed in paragraph (a) of this section.

(2) Each airplane must be able to maintain at least the following climb gradients with the airplane in the configuration prescribed in paragraph (a) of this section:

(i) 1.5 percent at a pressure altitude of 5,000 feet at a speed not less than 1.2 V_{S1}, and at standard temperature (41 °F); and

(ii) 0.75 percent at a pressure altitude of 5,000 feet at a speed not less than 1.2 V_{S1} and 81 °F (standard temperature plus 40 °F).

(3) The minimum climb gradient specified in paragraphs (c)(2) (i) and (ii) of this section must vary linearly between 41 °F and 81 °F and must change at the same rate up to the maximum operating temperature approved for the airplane.

* * * * *

5. Section 23.75 is amended by redesignating paragraph (g) as (h); by revising paragraphs (a), (b), and (f)(3); and by adding a new paragraph (g) to read as follows:

§ 23.75 Landing.

* * * * *

(a) A steady approach with a calibrated airspeed of not less than 1.3 V_{S1} must be maintained down to the 50-foot height and—

(1) The steady approach must be at a gradient of descent not greater than 5.2 percent (3 degrees) down to the 50-foot height.

(2) In addition, an applicant may demonstrate by tests that a maximum steady approach gradient steeper than 5.2 percent, down to the 50-foot height, is safe. The gradient must be established as an operating limitation and the information necessary to display the gradient must be available to the pilot by an appropriate instrument.

(b) The landing may not require more than average piloting skill when landing during the atmospheric conditions expected to be encountered in service, including crosswinds and turbulence.

* * * * *

(f) * * *

(3) Is such that no more than average skill is required to control the airplane.

* * * * *

(g) If any device is used that depends on the operation of any engine, and the landing distance would be increased when a landing is made with that engine inoperative, the landing distance must be determined with that engine inoperative unless the use of other compensating means will result in a landing distance not more than that with each engine operating.

* * * * *

6. Section 23.161 is amended by revising paragraphs (b)(1), (c)(1), (c)(2) introductory text, (c)(2)(i), (c)(3)(i), (d) introductory text, (d)(1), and (d)(4); and by adding a new paragraph (c)(4) to read as follows:

§ 23.161 Trim.

* * * * *

(b) * * *

(1) For normal, utility, and acrobatic category airplanes at a speed of 0.9 V_H, V_C, V_{M0}, whichever is the lower; and

* * * * *

(c) * * *

(1) A climb with maximum continuous power at—

(i) The speed used in determining the climb performance required by § 23.65 of this part with the landing gear retracted, and the flaps in the takeoff position; and

(ii) The recommended all-engines-operating climb speed specified in § 23.1585(a)(2)(i) of this part.

(2) An approach at a gradient of descent of 5.2 percent (3 degrees) with the landing gear extended, and with—

(i) Flaps retracted and at a speed of 1.4 V_{S1}; and

* * * * *

(3) * * *

(i) For normal, utility, and acrobatic category airplanes, at any speeds from

the lesser of V_H and V_{NO} or V_{MO}, as applicable, to 1.4 V_{S1}; and

* * * * *

(4) A descent at 0.9 V_{NO} or 0.9 V_{MO}, whichever is applicable, with power off and with the landing gear and flaps retracted.

(d) In addition, each multiengine airplane must maintain longitudinal and directional trim, and the lateral control force must not exceed 5 pounds, at the speed used in complying with § 23.67 for normal, utility, and acrobatic categories and at a speed between V_Y and 1.4 V_{S1} for commuter category with—

(1) The critical engine inoperative, and if applicable, its propeller in the minimum drag position;

* * * * *

(4) Wing flaps in the position selected for showing compliance with § 23.67 for normal, utility, and acrobatic category airplanes and wing flaps retracted for commuter category airplanes.

* * * * *

7. Section 23.221 is amended by revising paragraphs (a), (b), and (c)(3) to read as follows:

§ 23.221 Spinning.

(a) *Normal category.* Except as provided in paragraph (d) of this section, a single-engine, normal category airplane must demonstrate compliance with either the one-turn spin or the spin-resistant requirements of this paragraph.

(1) One-turn spin. The airplane must recover from a one-turn spin or a three-second spin, whichever takes longer, in not more than one additional turn after the controls have been applied for recovery. In addition—

(i) For both the flaps-retracted the flaps-extended conditions, the applicable airspeed limit and positive limit maneuvering load factor must not be exceeded;

(ii) There must be no excessive back pressure during the spin or recovery;

(iii) It must be impossible to obtain unrecoverable spins with any use of the flight or engine power controls either at the entry into or during the spin; and

(iv) For the flaps-extended condition, the flaps may be retracted during the recovery, but not before rotation has ceased.

(2) Spin resistant. The airplane must be demonstrated to be spin resistant by the following:

(i) During the stall maneuvers contained in § 23.201, the pitch control must be pulled back and held against the stop. Then, using ailerons and rudders in the proper direction, it must be possible to maintain wings-level flight within 15 degrees of bank and to roll the airplane from a 30-degree bank in one direction to a 30-degree bank in the other direction;

(ii) Reduce the airplane speed using pitch control at a rate of approximately 1 knot per second until the pitch control reaches the stop; then with the pitch control pulled back and held against the stop, apply full rudder control in a manner to promote spin entry, for a period of 7 seconds or through a 360-degree heading change, whichever occurs first. If the 360-degree heading change is reached first, it must have taken no fewer than 4 seconds. This maneuver must be performed first with the ailerons in the neutral position, and then with the ailerons deflected opposite the direction of turn in the most adverse manner. Power or thrust and airplane configuration must be set in accordance with § 23.201(f) without change during the maneuver. At the end of 7 seconds or a 360 degree heading change, the airplane must respond immediately and normally to primary flight controls applied to regain coordinated, unstalled flight without reversal of control effect and without exceeding the temporary control forces specified by § 23.143(c); and

(iii) Compliance with §§ 23.201 and 23.203 must be demonstrated with the airplane in uncoordinated flight, corresponding to one ball width displacement on a slip-skid indicator, unless one ball width displacement cannot be obtained with full rudder, in which case the demonstration must be with full rudder applied.

(b) *Utility category.* A utility category airplane must meet the requirements of paragraph (a) of this section or the requirements of paragraph (c) of this section if approval for spinning is requested.

(c) * * *

(3) It must be impossible to obtain unrecoverable spins with any use of the flight or engine power controls either at the entry into or during the spin.

* * * * *

8. Section 23.301 is amended by revising paragraph (b) to read as follows:

§ 23.301 Loads.

* * * * *

(b) Unless otherwise provided, the air, ground, and water loads must be placed in equilibrium with inertia forces, considering each item of mass in the airplane. These loads must be distributed to conservatively approximate or closely represent actual conditions. Methods used to determine load intensities and distribution on canard and tandem wing configurations must be validated by flight test measurement unless the methods used for determining those loading conditions are shown to be reliable or conservative on the configuration under consideration.

* * * * *

9. Part 23 is amended by adding a new § 23.302 after § 23.301 to read as follows:

§ 23.302 Canard or tandem wing configurations.

The forward structure of a canard or tandem wing configuration must:

(a) Meet all requirements of subpart C and subpart D of this part applicable to a wing; and

(b) Meet all requirements applicable to the function performed by these surfaces.

10. Section 23.331 is amended in paragraph (a) by replacing "§ 23.331" with "§ 23.333" and by adding a new paragraph (c) to read as follows:

§ 23.331 Symmetrical flight conditions.

* * * * *

(c) Mutual influence of the aerodynamic surfaces must be taken into account when determining flight loads.

11. Section 23.341 is amended by designating the existing text as paragraph (b); by adding the words "for conventional configurations" after the word "analysis" in newly designated paragraph (b); and by adding a new paragraph (a) to read as follows:

§ 23.341 Gust load factors.

(a) The gust load for a canard or tandem wing configuration must be computed using a rational analysis, considering the criteria of § 23.333(c), to develop the gust loading on each lifting surface or may be computed in accordance with paragraph (b) of this section provided that the resulting net loads are shown to be conservative with respect to the gust criteria of § 23.333(c).

* * * * *

§ 23.351 [Amended]

12. Section 23.351 is amended by removing the word "tail".

Subpart C—[Amended]

13. Subpart C is amended by revising the heading preceding § 23.421 to read as follows:

Horizontal Stabilizing and Balancing Surfaces

§ 23.421 [Amended]

14. Section 23.421 is amended by removing the word "tail" in paragraph (a) and inserting in its place the word "surface"; by removing the word "tail" in paragraph (b) and adding in its place

the word "balancing"; and by removing the last sentence of paragraph (b).

15. Section 23.423 is revised to read as follows:

§ 23.423 Maneuvering loads.

Each horizontal surface and its supporting structure, and the main wing of a canard or tandem wing configuration, if that surface has pitch control, must be designed for the maneuvering loads imposed by the following conditions:

(a) A sudden movement of the pitching control, at the speed V_A, to the maximum aft movement, and the maximum forward movement, as limited by the control stops, or pilot effort, whichever is critical.

(b) A sudden aft movement of the pitching control at speeds above V_A, followed by a forward movement of the pitching control resulting in the following combinations of normal and angular acceleration:

Condition	Normal acceleration (n)	Angular acceleration (radian/sec^2)
Nose-up pitching	1.0	$+39n_m \div V \times (n_m - 1.5)$
Nose-down pitching.	n_m	$-39n_m \div V \times (n_m - 1.5)$

where—

(1) n_m = positive limit maneuvering load factor used in the design of the airplane; and

(2) V = initial speed in knots.

The condition in this paragraph involve loads corresponding to the loads that may occur in a "checked maneuver" (a maneuver in which the pitching control is suddenly displaced in one direction and then suddenly moved in the opposite direction). The deflections and timing of the "checked maneuver" must avoid exceeding the limit maneuvering load factor. The total horizontal surface load for both nose-up and nose-down pitching conditions is the sum of the balancing loads at *V* and the specified value of the normal load factor *n*, plus the maneuvering load increment due to the specified value of the angular acceleration.

16. Section 23.425 is amended by removing the text of current paragraph (b) and marking it "[Reserved]"; by revising paragraphs (a), (c), and (d) introductory text to read as set forth below; and by revising definitions of a_{ht} and S_{ht} in the formula following paragraph (d) from "a_{ht} = Slope of horizontal tail lift curve (per-radian)" to "a_{ht} = Slope of aft horizontal lift curve (per radian)" and "S_{ht} = Area of horizontal tail (ft^2); and" to "S_{ht} = Area of aft horizontal lift surface (ft^2); and".

§ 23.425 Gust loads.

(a) Each horizontal surface, other than a main wing, must be designed for loads resulting from—

* * * * *

(c) When determining the total load on the horizontal surfaces for the conditions specified in paragraph (a) of this section, the initial balancing loads for steady unaccelerated flight at the pertinent design speeds V_F, V_C, and V_D must first be determined. The incremental load resulting from the gusts must be added to the initial balancing load to obtain the total load.

(d) In the absence of a more rational analysis, the incremental load due to the gust must be computed as follows only on airplane configurations with aft-mounted, horizontal surfaces, unless its use elsewhere is shown to be conservative:

* * * * *

§ 23.427 [Amended]

17. Section 23.427 is amended by removing the word "tail" in paragraph (a) and inserting the phrase "other than main wing" after the words "horizontal surfaces"; by removing the phrase "tail surfaces," in paragraph (b) and inserting the phrase "horizontal surfaces other than main wing," in its place; and by removing the word "tail" in paragraph (c) and inserting the phrase "other than main wing" after the phrase "horizontal surfaces".

Subpart C—[Amended]

18. Subpart C is amended by revising the heading preceding § 23.441 to read as follows:

Vertical Surfaces

§ 23.441 [Amended]

19. Section 23.441 is amended by removing the word "tail" in two places in paragraph (a); and by removing the text of paragraph (b) and designating paragraph (b) as "Reserved."

§ 23.443 [Amended]

20. Section 23.443 is amended by removing the word "tail" from paragraph (a); by removing in three places the word "tail" in the definitions in paragraph (c) and adding in its place the word "surface"; and by removing paragraph (d).

21. Section 23.445 is amended by revising the section heading; by revising paragraph (a); by adding the words "or winglets" after the words "outboard fins" in paragraphs (b) and (c); and by adding a new paragraph (d) to read as follows:

§ 23.445 Outboard fins or winglets.

(a) If outboard fins or winglets are included on the horizontal surfaces or wings, the horizontal surfaces or wings must be designed for their maximum load in combination with loads induced by the fins or winglets and moments or forces exerted on the horizontal surfaces or wings by the fins or winglets.

* * * * *

(d) When rational methods are used for computing loads, the maneuvering loads of § 23.441 on the vertical surfaces and the one-g horizontal surface load, including induced loads on the horizontal surface and moments or forces exerted on the horizontal surfaces by the vertical surfaces, must be applied simultaneously for the structural loading condition.

§ 23.455 [Amended]

22. Section 23.455 is amended by removing the text of paragraph (b) and marking it "[Reserved]".

23. Section 23.677 is amended by revising paragraph (d) to read as follows:

§ 23.677 Trim Systems.

* * * * *

(d) It must be demonstrated that the airplane is safely controllable and that the pilot can perform all maneuvers and operations necessary to effect a safe landing following any probable powered trim system runaway that reasonably might be expected in service, allowing for appropriate time delay after pilot recognition of the trim system runaway. The demonstration must be conducted at critical airplane weights and center of gravity positions.

24. Section 23.701 is amended by revising paragraph (a); by redesignating paragraph (b) as (c); and by adding a new paragraph (b) to read as follows:

§ 23.701 Flap interconnection.

(a) The main wing flaps and related movable surfaces as a system must—

(1) Be synchronized by mechanical connection; or

(2) Maintain synchronization so that the occurrence of an unsafe condition has been shown to be extremely improbable; or

(b) The airplane must be shown to have safe flight characteristics with any combination of extreme positions of individual movable surfaces (mechanically interconnected surfaces are to be considered as a single surface).

* * * * *

25. Section 23.735 is amended by adding a new paragraph (c) to read as follows:

§ 23.735 Brakes.

* * * * *

(c) If antiskid devices are installed, the devices and associated systems must be designed so that no single probable malfunction or failure will result in a hazardous loss of braking ability or directional control of the airplane.

§ 23.831 [Amended]

26. Section 23.831 is amended by removing the words, "In addition, for pressurized commuter category airplanes," in paragraph (b) and adding in their place the words, "For pressurized airplanes,".

27. Section 23.939 is amended by adding paragraph (b) and revising paragraph (c) to read as follows:

§ 23.939 Powerplant operating characteristics.

* * * * *

(b) Turbocharged reciprocating engine operating characteristics must be investigated in flight to assure that no adverse characteristics, as a result of an inadvertent overboost, surge, flooding, or vapor lock, are present during normal or emergency operation of the engine(s) throughout the range of operating limitations of both airplane and engine.

(c) For turbine engines, the air inlet system must not, as a result of airflow distortion during normal operation, cause vibration harmful to the engine.

§ 23.1047 [Amended]

27–1. Section 23.1047 is amended in paragraph (d) introductory text by removing the phrase "§ 23.67(a) or"; in paragraph (d)(1) by removing the phrase "or § 23.67(b)(1)"; in paragraph (d)(5) by removing the phrase "§ 23.67(a) or"; and in paragraph (e) by removing the phrase "§ 23.67(a) or".

28. Part 23 is amended by adding a new § 23.1109 after § 23.1105 to read as follows:

§ 23.1109 Turbocharger bleed air system.

The following applies to turbocharged bleed air systems used for cabin pressurization:

(a) The cabin air system may not be subject to hazardous contamination following any probable failure of the turbocharger or its lubrication system.

(b) The turbocharger supply air must be taken from a source where it cannot be contaminated by harmful or hazardous gases or vapors following any probable failure or malfunction of the engine exhaust, hydraulic, fuel, or oil system.

29. Section 23.1163 is amended by revising paragraphs (a)(1), (a)(2), and (a)(3); by removing the phrase "In addition, for commuter category airplanes, if" in paragraph (d) and inserting in its place the word "If"; and by adding a new paragraph (e) to read as follows:

§ 23.1163 Powerplant accessories.

(a) * * *

(1) Be approved for mounting on the engine involved and use the provisions on the engines for mounting; or

(2) Have torque limiting means on all accessory drives in order to prevent the torque limits established for those drives from being exceeded; and

(3) In addition to paragraphs (a)(1) or (a)(2) of this section, be sealed to prevent contamination of the engine oil system and the accessory system.

* * * * *

(e) Each accessory driven by a gearbox that is not approved as part of the powerplant driving the gearbox must—

(1) Have torque limiting means to prevent the torque limits established for the affected drive from being exceeded;

(2) Use the provisions on the gearbox for mounting; and

(3) Be sealed to prevent contamination of the gearbox oil system and the accessory system.

30. Section 23.1323 is amended by adding a new paragraph (e) to read as follows:

§ 23.1323 Airspeed indicating system.

* * * * *

(e) If certification for instrument flight rules or flight in icing conditions is requested, each airspeed system must have a heated pitot tube or an equivalent means of preventing malfunction due to icing.

31. Section 23.1325 is amended by adding a new paragraph (g) to read as follows:

§ 23.1325 Static pressure system.

* * * * *

(g) For airplanes prohibited from flight in instrument meteorological conditions, in accordance with § 23.1559(b), of this part, paragraph (b)(3) of this section does not apply.

Appendix B [Removed and Reserved]

32. Part 23 is amended by removing Appendix B and inserting the words "Appendix B [Reserved]" in its place.

Issued in Washington, DC, on December 21 1990.

James B. Busey,

Administrator.

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